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Criminalisation of irregular migrants: a crime without a victim

Report[1]
Committee on Migration, Refugees and Displaced Persons
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Summary

Migration is increasingly associated with threats to public order. In addition, inappropriate use of the terminology relating to migration plays a large part in fuelling xenophobic and racist attitudes and heightening the fear of migrants.

Increasing incrimination of migrants undoubtedly has repercussions on their living conditions, whether they are regular or irregular migrants, affecting them in the employment field as well as in their everyday lives.

This criminalisation of migrants facilitates and even to some extent legitimises the adoption of migration policies which are more and more under the sway of a security-dominated rationale.

Governments should adopt a more objective approach towards migrants, observe fundamental rights standards, in particular by combating disinformation and negative stereotypes concerning migrants, and condemn the exploitation of migrants for political purposes.

1. Reference to committee: Doc. 13165, Reference 3955 of 26 April 2013.

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A. Draft resolution[2]

1. Increasingly restrictive migration policies, increased social exclusion and limited access to human and social rights for migrants are all aspects of a situation which the Parliamentary Assembly has been condemning for many years.

2. The term “migrant” retains a degree of stigmatisation vis-à-vis the group or person to whom it is applied, especially when it is associated with illegality.

3. The Assembly also notes that the external border control policy of the European Union is framed on the basis of designations that associate migration and crime-causing attributes, making migration an internal security matter and associating migration with a threat to public order and the social system.

4. In this context, the Assembly underlines the importance of the proper use of terms, namely “irregular” as opposed to “illegal” or “undeclared” migrants. Inappropriate use of the terminology relating to migration plays a part in increasing xenophobic and racist attitudes and heightens fear of migrants, which is already being fed by the economic crisis and political instability, in particular in the countries of the southern Mediterranean.

5. Noting that, contrary to Directive 2002/90 (the Reception Directive), some European Union member States sanction humanitarian assistance, thereby creating an “offence of solidarity”, the Assembly underlines the need to end the threat of prosecution on charges of aiding and abetting irregular migration.

6. The Assembly condemns the widespread practice of courts being more severe when trying cases where migrants are arrested, imprisoned and convicted as perpetrators of criminal offences.

7. It also proposes that detention only be used as a last resort, in particular for asylum seekers, when it should be as short as possible, and that alternatives to detention should be used wherever possible.

8. The Assembly recalls that asylum seekers are entitled to receive international protection and to enjoy freedom of movement.

9. Given this trend and in breach of the spirit of the Universal Declaration of Human Rights and the European Convention on Human Rights (ETS No. 5), irregular migrants are deprived of the minimum level of social rights and live in conditions far removed from the principles of protection and human dignity, and in order to survive, they sometimes have to engage in illegal activities to meet their basic needs.

10. The Assembly underlines the need to adopt a more objective approach based on consideration of the human being, which would discourage any discriminatory or degrading practices towards migrants, including irregular migrants in Europe.

11. Accordingly, the Assembly calls on the member States to:

11.1. promote and observe fundamental rights standards for migrants, including irregular migrants;

11.2. promote the use of neutral terminology and replace the term “illegal migrants” with “irregular migrants” in speeches and official documents;

11.3. combat misinformation and negative stereotypes concerning migrants; unreservedly condemn the exploitation of migrants for political purposes in populist discourse;

11.4. apply *stricto sensu* to migrants the standards concerning entry, transit and residence in the territory of European Union countries;

11.5. ensure that asylum seekers have access to a fair procedure;

11.6. give access to the essential rights for human dignity (medical care, education) to irregular migrants;

11.7. develop best practice guides on the arrest and detention of irregular migrants;

11.8. put in place alternatives to detention wherever possible;

11.9. apply the principles governing administrative detention in migrant detention centres;

11.10. take measures to step up the fight against migrant trafficking and smuggling;

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2. Draft resolution adopted by the committee on 23 April 2015.

11.11. continue to consider, when appropriate, the definition of maritime boundaries and ensure that people rescued are allowed to land.

B. Explanatory memorandum by Mr Stroe, rapporteur

1. Introduction

1. Migration policy has become more and more restrictive and, concurrently, anti-migration rhetoric has emerged, spreading a false image of migrants in the population by accusing them in particular of posing a serious threat to the internal security of States. This has brought about, firstly, an attitude of distrust towards migrants, thereby making it more and more difficult to grant them asylum requests, and secondly, has led to the setting up of migration control systems either side of the border.

2. Over the last few years, in nearly all European countries, the process of hedging migration with security measures has been underpinned by symbolic policies that are generally built around four pillars: one socio-economic, in which migration is linked with unemployment and the crisis of the welfare State, one security related in which it is linked with the issues of sovereignty, internal security and public health, one pertaining to identity, in which it is associated with fears of demographic alienation and loss of national identity, and one political, in which electoral tactics are increasingly determined by racist and xenophobic agendas.

3. European external border control policy is framed firstly on the basis of designations that associate migration and crime-causing attributes (illegal migrant, drug trafficking, trafficking in human beings, offenders, etc.), making migration an internal security matter because migration is fundamentally associated with a threat to public order and the social system.

4. Resolution 1509 (2006) and Recommendation 1755 (2006) of the Parliamentary Assembly on the human rights of irregular migrants already emphasised the importance of using the term “irregular migrant” in common parlance rather than the expression “undeclared” or “illegal migrant” as these contribute to building up a negative image of migrants.

5. This report is intended to ascertain the extent to which criminalisation of migrants constitutes a tool for the security policy of European States and arouses racist reactions, and what powers the media and political parties have over the perception of migrants. These negative attitudes have of course repercussions on the daily life of migrants, and this report sets out in particular to highlight these consequences and to single out possible solutions in order to guarantee migrants living conditions in accordance with the principles of the Council of Europe.

2. Migrants, victims of a security policy?

6. As the Council of Europe Commissioner for Human Rights pointed out: “While discrimination on the basis of nationality is the basis of border controls on persons – some persons, i.e. citizens have a right to enter the territory of a State while others, non-citizens do not – nonetheless, the treatment of non-citizens at the borders does not escape human rights law.” (Criminalisation of Migration in Europe: Human Rights Implications, 2009)

7. The process of incriminating migrants has tended to grow in recent years, with the aim of achieving a unified and safer Europe with easily controllable frontiers.

8. As regards the legal instruments put in place to guarantee and enhance security in Europe, the European Union has developed a system of agreements and institutions to advance internal freedom through stricter control of the external borders.

9. The first such instrument was the codification of the Schengen area, now incorporated into the Treaty of Amsterdam (1996), which came into force on 1 May 1999 and which comprises 26 signatory States since 2013. It states that any individual (whether a European or a third-country national), once having entered the territory of one of the member countries, can cross the borders of the other countries without undergoing any controls.

10. A State may only restore controls in the event of a breach of public order or national security (for a maximum of six months, or two years in exceptional circumstances), and after consulting the other States in the Schengen group. Use was made of this possibility, for example, by France after 11 September 2001, or in Germany at the time of the football world cup in 2006.

11. However, proposals for changes widening the possibility of reintroducing temporary controls in the event of a member State's serious failure in its obligations regarding control at the external borders were put forward by the European Commission in September 2011 and adopted in 2013, after the "Arab Spring" and the ensuing influx of migrants.

12. Unauthorised migration led to the emergence of players and agencies for managing migration movements. The most important is the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), in charge of the European Union's external frontiers since October 2004.

13. In fact Frontex is not so much the actuator as the most visible manifestation of the change in European migration policies, whose most marked effect is the increasing differentiation between the frontier of rights (which may be invoked by persons wishing to enter the European Union) and the frontier of controls (which are intended to regulate and, if appropriate, to prevent entry).

14. Finally, the new Global Approach to Migration and the Mobility Partnerships emphasises the need for the European Union to work with the non-member States on the questions of right of asylum, combating irregular migration (defined as "unauthorised" by the European Union) particularly through agreements on readmission, promotion of lawful migration and protection of victims of human trafficking. However, a distinction has been drawn between the countries which can be granted Mobility Partnership and those which are not yet ready.

15. But even though the European States ever more frequently carry out collective expulsions to certain countries of emigration, particularly by concluding readmission agreements,[3] this practice apparently corresponds less to a way of reducing the presence of foreigners in an irregular situation than to a will to curb fresh departures from these countries.

16. This mechanism of "chosen" migration denotes the political will to have more and more qualified migrants, more amenable to integration, and able to contribute to growth of the national and European economy, as opposed to "imposed" migration, rejected by most States.

2.1. A more and more divided Mediterranean

17. The crisis of the unauthorised migration flows towards the coasts of the southern European States has tripled the number of migrants saved at sea by the Italian police in 2014, with some 160 000 rescues.

18. The problem of defining maritime boundaries is one of the questions which remains open on the agenda of the European Union, however. Indeed, when speaking of maritime boundaries, it should be recalled that the limit to the powers of a State is not immediately established like land boundaries; the role of States diminishes with distance from the shore.

19. In 1982, the general provisions of the third Convention on the Law of the Sea redefined the limits of two new zones over which States can exercise certain functions of their sovereignty, in addition to their territorial sea: the contiguous zone, an area in which the State may apply the "necessary control" to irregular migrants, and the exclusive economic zone (EEZ). In the contiguous zone, the European countries' controls to prevent or punish any offence against customs and current migration laws and regulations are more and more significant.

20. Accordingly, European policy on suppression of migration has intensified police and military presence at the external frontiers of the Union. The *Triton* operation, whose aim is to tighten controls at the southern boundary of the European Union, does not conduct rescues in international waters and testifies to the policy.

2.2. The Reception Directive and the Return Directive

21. According to European Union Directive 2002/90 defining the facilitation of unauthorised entry, transit and residence (Reception Directive), any citizen is subject to criminal sanctions for "aiding" an illegal migrant. The directive makes it punishable to facilitate entry, transit and residence in the territory of a member State by any national of a third State whether in breach of the legislation or for financial gain or as an accomplice in any of these acts.

3. Albania, Algeria, China, Egypt, Georgia, Israel, Jordan, Lebanon, Republic of Moldova, Morocco, Montenegro, Russian Federation, Serbia, Sri Lanka and Tunisia.

22. Moreover, the Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (2002/946/JHA) provides for deportation among the applicable sanctions.

23. By including deportation among the possible sanctions, the text refers rather to "criminals" who are foreign nationals, underlining the drafters' discriminatory opinion of these offenders. The message received is a warning against being in any way involved in the migrants' acts, for they may lead to criminal proceedings.

24. Moreover, European Union Directive 2008/115 on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive) sets out provisions governing the ending of illegal stays and provides for the possibility of resorting to confinement of migrants awaiting removal from the territory for up to eighteen months and a ban on return for up to five years throughout the Schengen area.

25. But while this Directive encourages preference for "other sufficient but less coercive measures" and avoidance of the migrant's detention except "to prepare the return or carry out the removal process", a study on the implementation of the Directive condemns the mandatory transit of migrants through detention centres without this being justified by the state of progress of the removal procedure.

2.3. The offence of solidarity

26. European Union Directive 2002/90 and Framework Decision 2002/946/JHA, which prescribe penalties for facilitating migrants' entry, transit and illegal residence, provide for the punishment of persons rendering humanitarian assistance to irregular migrants if it is done for financial gain.

27. Indeed, some States of the Union sanction humanitarian assistance, deemed a means of facilitating the entry and residence of irregular migrants. The implementation of this measure, however, leaves room for ambiguity. For example, Belgium prescribes penalties for all those who assist entry to, residence in or transit through the country "except where assistance is offered for chiefly humanitarian reasons", but the text does not explain how to assess this "chiefly humanitarian" character. In Italy, on 8 August 2007, seven Tunisian fishermen were imprisoned for having rescued and landed 44 shipwrecked migrants. Moroccan law, for its part, punishes any act aimed at unauthorised departure from the country.

28. This practice entails an "offence of solidarity" on the part of those helping undocumented persons, whether by providing material assistance for illegal entry, transit or residence, medical aid, accommodation or food, or by helping a migrant without a permit by providing undeclared employment.

29. This question was addressed in the report "The 'left-to-die boat': actions and reactions",[4] in which the Assembly recommends that its member States "abolish factors which dissuade private vessels from carrying out rescues, by ensuring that the people rescued will be allowed to land quickly and by ending the threat of prosecution on charges of aiding and abetting irregular migration which give rise to moral and financial damages".

30. Considering that international law notably enshrines the right for everyone "to participate in peaceful activities against violations of human rights and fundamental freedoms" (United Nations General Assembly Resolution 53/144), charging people with "offences of solidarity" does not represent the right solution to the problem of migration movements in Europe.

2.4. Administrative detention as a migration control device

31. Over the past few years, the administrative detention of migrants has become one of the main instruments for controlling migration movements and at the same time one of the worst sources of violations of migrants' rights. In 2012, the operation "OpenAccessNow" certified the existence of 473 detention centres for migrants in Europe with the presence of some 600 000 migrants in detention each year.[5]

32. Faced with this constantly growing phenomenon, States have sought new means of exercising control over migration movements both at and within their borders. Criminal law has become a new instrument of control where the laws and policies on migration have shown their limitations.

4. Doc. 13532, Resolution 1999 (2014) and Recommendation 2046 (2014).
5. http://en.closethecamps.org/open-access-now/.

33. Thus it is no longer a matter of punishing unlawful acts really committed by individuals, but the potential behaviour of members of outsider groups known as groups at risk; nor are individuals to be dealt with according to the dangerousness of their acts, but rather entire populations are to be supervised according to the severity of the risks they might pose to the communities concerned.

34. The feeling that migrants are systematically involved in acts of delinquency and criminal conduct is more and more widespread. As a result, courts are more severe in trying cases where migrants are arrested, imprisoned and convicted as perpetrators of criminal offences even though, under the instruments protecting human rights, detention should only be used as a last resort.

35. In detention centres there has been a gradual inversion of the position, with more migrants today than nationals, particularly young irregular migrants arrested for petty offences.

3. The importance of words

36. This false perception of the migration phenomenon also arises from the conflation as regards confusion between the different migrant typologies. There are several forms of migration: migrants whose situation is in order, irregular migrants, forced migrants (including asylum seekers and refugees), migrants through family reunion, migrant workers (temporary/seasonal), victims of trafficking in human beings, and students.

37. Nowadays, the expression “illegal emigration” is spreading, thus turning the mere fact of setting out into a reprehensible act. However, neither the concept which makes the emigrant a criminal nor the practices which it purports to permit has any legitimacy in relation to the Universal Declaration of Human Rights (UDHR) of 1948 and the European Convention on Human Rights (ETS No. 5) of 1950.

38. Indeed, Article 13.2 of the UDHR states that “[e]veryone has the right to leave any country, including his own, and to return to his country” and Article 2 of Protocol No. 4 to the Convention confirms that “[e]veryone shall be free to leave any country, including his own” (except, among others, persons to whom the status of minor applies).

39. Thus only migration may not be legal since entry to the territory of a State is subject to its sovereign will. The idea of “illegal emigration” was of course generated by spurious symmetrical reasoning: if no country is willing to admit a migrant, then he forfeits the right to emigrate.

40. During the 20th century, almost all migration movements were largely “undeclared”, but up to the 1970s the vast majority of migrants had access to a lawful status which was hardly ever challenged. Today, migrants are no longer to be kept in an integrated albeit subordinate position as was the case during the 1960s and 1970s.

41. On the contrary, in a context of economic recession, the conventional notion of “immigrant workers” gives way to that of “illegals” or “refugees”, implying that the former were productive whereas the latter two are parasitic.

42. While for a long time the social paradigm of the migrant was systematically associated with work and specifically with unskilled work, economic recession and growing insecurity have gradually transformed this image, and the migrant’s consignment to his function as a worker seems less cogent; rather, he is present as a “non-national” element in what is “national”, the migrant having become someone who has left his country to settle in the territory.

43. Yet the term “migrant” retains a degree of stigmatisation vis-à-vis the group or person to whom it is applied. Diploma and length of stay are not all that distinguish between a “foreigner” and an “migrant”; what does is primarily the unequal relationship (political, economic, cultural, etc.), the power relationship between the two countries, the two societies, the two cultures.

44. The ongoing use of the term “illegal” indicates that criminalisation predominates and has repercussions on perception by the public and on the framing of policies. Moreover, the Assembly, in Resolution 1509 (2006), showed its preference for the expression “irregular migrants” over others such as “illegal” or “clandestine migrants”, as the latter are more stigmatising and less neutral.

3.1. The importance of the image of migrants conveyed by the media

45. The media shapes a reality which ends up influencing to varying degrees the formation of public opinion. Admittedly, there is no direct causal link between media coverage of crime and the fear of crime since, although the media is the main source of information, the public does not form its opinion solely though that channel.

46. But it must be acknowledged that the immediate effects of broadcast messages about individuals are considerable in specific circumstances and still greater where, as in the case of criminality among foreigners, the public has no other sources of information at its disposal.

47. As emphasised by Mr François Crépeau, a United Nations specialist on human rights and migrants, improper use of terminology helps fuel the negative discourse on migration and reinforces the stereotypes portraying migrants as offenders (Declaration by the United Nations Special Rapporteur on the Human Rights of Migrants, New York, 2 October 2013).

48. In the European media, the expression "illegal migrant" is often used in statements on migration.[6] This expression has the effect of making migrants suspect in the eyes of the population and defining the act of border-crossing as a threat, whereas these border-crossing offences claim no victims. Moreover, the media gives prominence to the nationality of the presumed perpetrators of the acts, so that it becomes an absolute constant in defining migrants apprehended for any offence whatsoever.

49. This depersonalised presentation, pertaining to ethnic groups rather than to individuals, heightens the sense of menace while suggesting that immorality is an intrinsic feature of some foreign cultures since unlawful behaviour or acts are no longer blamed on individuals but on the entire culture of a given country of origin, leading to the creation of stereotypes.

50. In the dual context of a protracted economic crisis and current political crisis in the Mediterranean, a dispassionate and productive debate on migration policies calls for objective, penetrating media treatment of migration issues.

51. The question is not so much to try and arrive at a consensus in public opinion on migration issues as to improve knowledge and understanding by public opinion of this phenomenon and especially of its economic, social and cultural impacts, in order to stem the rising tide of racist and xenophobic discourse.

3.2. The rise of populist sentiments in Europe

52. Relations between nationals and migrants are often perceived as a "zero-sum game" in a context of competition for scarce resources: if the migrants get more, the nationals inevitably have less. This strongly entrenched belief can account for a significant proportion of the hostile attitudes to migration and to any form of solidarity with migrants: any official policy of support to the integration and economic success of migrants is in fact perceived by nationals as dispossession.

53. In this framework, the populist label denotes parties seeking to take advantage of the crisis by developing a discourse opposed to "elites", to migrants, to the euro, to Europe, to globalisation, to budgetary economies, etc. In this bundle of causes, migration is obviously one of the most important.

54. Several factors contribute to the rise of this populist sentiment in Europe: fear of losing the social well-being won over the years (the "zero-sum game" mentioned above), defence of Christian origins especially as regards "anti-Islamic" sentiments, and loss of confidence in the State vis-à-vis the "foreign invasion". Finally, populism largely stems from an accumulation of fears.

55. The pressure of the populist and xenophobic parties pervading the European political scene from North to South – the FN in France, the UKIP in the United Kingdom, the Austrian FPÖ, the AFD in Germany, the PVV in the Netherlands, the Northern League in Italy, the Hungarian Jobbik or the UDC in Switzerland – also fortifies the process of criminalising migrants.

56. Moreover, these new populist and anti-migration movements gained extensive support in the last European elections of May 2014. The Europe of Freedom and Direct Democracy (EFDD) Group coalition – including political parties like the British UKIP or the Lithuanian Order and Justice and political personalities

6. "'Immigrant crime wave' warning: foreign nationals were accused of a QUARTER of all crimes in London", *Daily Mail,* 18 February 2012; "L'ondata di immigrati rischia di far collassare il Paese", *Il Giornale*, 30 March 2014; "Immigration clandestine: la France sous pression", *Le Figaro*, 17 December 2013; "Illegal Immigration: Is Europe Losing Control Of Its Borders?", *The Post Eagle*, 2 February 2015; "Rutas de inmigración ilegal hacia España", *El Pais*, 17 March 2014.

like Joëlle Bergeron for France and Robert Iwaszkiewicz for Poland – gained 6.39% of votes and is represented in the European Parliament with 48 MEPs. What is more, the coalition of independents, comprising the political parties of the Austrian FPÖ, the Dutch PVV, the Italian Northern League, the Hungarian Jobbik and the French National Front, won 6.92% of votes with a representation of 52 members.

3.3. Criminalisation of migrants as an obstacle to obtaining right of asylum

57. Asylum seekers are entitled to receive international protection with no discrimination. But when aspiring migrants are still in the sending countries or outside European boundaries, they are defined as "irregular migrants" even when they are refugees or persons risking their lives to migrate.

58. The fact that irregular migrants are commonly considered lawbreakers is a source of problems when it comes to their right to asylum: visa requirements, sanctions imposed on people-smugglers, interception at sea to deny access to the territory, criminal sanctions for using forged papers, etc.

59. Once they have entered Europe, asylum seekers often incur other criminal sanctions: criminal proceedings concerning the conditions of their entry to the territory, prohibition of employment, etc.

60. Another problem is detention of asylum seekers. As is recalled by Assembly Resolution 1707 (2010) on detention of asylum seekers and irregular migrants in Europe, a distinction should be drawn in respect of detention between irregular migrants and asylum seekers because, for the latter, detention, designed to determine their status, should be as short as possible and be carried out in specialised centres.

61. Furthermore, Article 31 of the Geneva Convention relating to the Status of Refugees (1951) provides that States shall not impose penalties, on account of their illegal entry or presence, on asylum seekers who come directly from a territory where their life or freedom was threatened and if they present themselves without delay to the authorities.

62. It should be noted, however, that criminalisation and racism often serve as arguments to justify keeping these migrants in a lawless zone.

63. I should like to recall that in many Council of Europe member States, parliamentarians are entitled to make visits to detention centres for irregular migrants and asylum seekers, and that the Committee on Migration, Refugees and Displaced Persons has long been working on this issue and in particular has produced a guide aimed at encouraging and assisting parliamentarians in the exercise of this right.[7]

4. The particular situation of irregular migrants

64. In the broad sense, and as defined by the International Organization for Migration, the category of irregular migrants encompasses all migrants who contravene the regulations of the country of origin, transit or destination, whether by unauthorised entry to the territory of a State, by remaining there beyond the term of validity of the residence permit, or by evading the enforcement of an expulsion measure.

65. A breach of migration regulations ("délit de migration") refers to the fact that these migrants infringe the national regulations on the crossing of borders and that consequently they are guilty of an offence usually punishable under the criminal law of European States by a prison sentence and/or a fine, and also removal, in accordance with the Return Directive.

66. Moreover, according to this Directive, the imprisonment of a migrant on the ground of having unlawfully crossed the borders or stayed in the territory of a member State should not take precedence over the application of the Directive, which otherwise provides for the protection of migrants' fundamental rights.

67. I am convinced that the right to full enjoyment of human rights is not founded on authorisation by the State authorities of an individual's presence in the territory. However, an irregular migrant cannot usually claim rights since he does not have the primary right, that of residence.

4.1. How loss of social rights relates to illegal activities

68. Policy on the residence of foreigners is no longer a policy of conferment of rights but a policy of sufferance: the grant of a residence permit is no longer a right, it has become a State indulgence.

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7. See https://pace.coe.int/documents/10704/109544/20130924-GuideDetentionCentres-EN.pdf/f896709f-cc33-4427-83dc-aeacb3f825d7.

69. This policy is pursued in a context of intolerance. The practices of sufferance which presuppose making new migrants "invisible" are compounded by discourses which criminalise migration, serving to legitimise repression and the policy of expulsion, as well as refusal to grant migrants access to social rights.

70. While migrants whose situation is in order (who have income and/or a "legal" status) can accede to the protection of the revised European Social Charter (ETS No. 163) and to the host country's welfare benefits, those in an irregular situation must cope with a total or near-total absence of rights. That is why their social situation is based on survival strategies, and why by force of circumstance they sometimes have to resort to illegal activities enabling them to provide for their basic needs.

71. But international law, and especially the Universal Declaration of Human Rights (UDHR, 1948), generally does not draw any distinction between nationals and non-nationals from the standpoint of the rights secured to individuals, and social rights are clearly considered one of the elements to which the principle of equality applies.

72. The International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966), ratified by all Council of Europe member States (except Andorra), also emphasises the absence of discrimination in the full exercise of the rights recognised and secured by the UDHR and the ICESCR.

4.2. Social rights

73. The increasingly widespread tendency in Europe to penalise migrants and people assisting them, an approach now supported by the legislation of the European Union, forms a general obstacle to irregular migrants' effective access to a minimum standard of protection of social rights.

74. Access to social rights such as housing, health care, education and free participation in civic and religious life is prescribed in the European Convention on Human Rights. Indeed, the Convention applies "to everyone within their [the member States'] jurisdiction" and "without discrimination on any ground such as … national or social origin" (Articles 1 and 14).

75. Fear of being put in preventive detention usually makes irregular migrants avoid any public institution, including medical institutions, and they are afraid to enrol their children in school and to have them recorded in the population register.

76. The right to housing, interpreted as the right to a place where one may live in safety, peace and dignity, is recognised by the UDHR and the ICESCR and applies in principle to everyone irrespective of nationality or legal status.

77. Decent housing thus permits enjoyment of other rights such as the right not to be subjected to degrading treatment, the right to respect for private and family life and the prohibition of discriminatory treatment.

78. Furthermore, the right to health care becomes meaningless in the absence of the right to decent housing, itself not completely fulfilled unless the person has access to income, that is to the right to employment.

79. Universally recognised, even today the right to education presents obstacles to its full enjoyment by the children of irregular migrants.

80. Despite the fact that all member States espouse the idea of universal education, legal, administrative or practical obstacles are raised to prevent access to instruction for non-nationals whose parents are in an irregular situation (viz. obligation for teachers to report irregular migrants or withholding of the school leaving certificate for pupils who are irregular migrants, or the lack of school syllabi suited to their specific situation).

81. The right to medical care is universally recognised as a fundamental human right and secured by the international instruments. However, there is no common consensus on its definition: emergency medical care (according to a restrictive or a broad interpretation); necessary or prophylactic care, since the member States do not allow access to this right in the same way.

82. Thus, where free, anonymous access to medical care for irregular migrants is concerned, in practice certain European States set up informal systems *de facto* barring access to this care. Lack of financial means, language problems, fear of being reported (in view of the obligation for doctors to report undocumented persons), the complexity of the administrative procedures, care being subject to a fixed abode, or lack of information (for migrants as much as for health providers) represent real obstacles to enjoyment of the right to medical care for these people.

83. Irregular migrants, and anyone who employs someone in this situation, risk prosecution and administrative fines. European Union Directive 2009/52/EC, which provides for minimum common standards on sanctions and other measures against employers of illegally staying third-country nationals, is very clear in that regard.

84. Thus it can be said that the complete closure of frontiers to lawful migration, which has resulted in the challenging or heavy restriction of migration for humanitarian or political reasons, ensures regeneration of a very useful illegal workforce to the advantage of the underground economy. The sectors in need of great flexibility, which must weather significant cyclical and seasonal fluctuations and are highly labour-intensive for unskilled and poorly paid manpower, are especially partial to these new victims of exploitation.

85. Undeclared workers though they may be, these migrants must enjoy certain rights granted to all migrant workers in the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICPMW, Article 25.3, 1990). Unfortunately, to date only three of the Council of Europe member States (Azerbaijan, Bosnia and Herzegovina and Turkey) have ratified this convention.

86. A vicious circle is forming as migrants who remain in an irregular situation tend to consider themselves “illegal” and deprived of their rights: their irregular status often pushes them into illegal activities, of which they are usually the prime victims (exploitation on the labour market), and as a result they are caught up in a process of unlawful and criminal activities which worsens their situation.

87. Nor do these migrants readily have access to housing: the illegal market, or accommodation made available by the community (family or “ethnic” network) are the sole possibilities available to them. But anyone providing help “for financial gain” by way of housing for an irregular migrant is liable to criminal prosecution under European Union Framework Decision 2002/946/JHA.

88. Deprived of basic health care and elementary education, irregular migrants live far outside the principles of protection and human dignity.

5. Conclusions

89. It has become difficult to emigrate and immigrate lawfully or freely: the rule against migration breeds crime by making migration a crime which quite often leads to the deaths of many migrants and creates the opportunity for lawbreakers or criminals to benefit from the offence.

90. Constant and increasing incrimination of migrants unarguably has repercussions on their living conditions, whether their situation is authorised or unauthorised and whichever category they belong to.

91. These people are the first to undergo discrimination in access to employment and are offered essentially atypical and poorly paid jobs. They are affected by the negative stigmatisation which, in the daily urban reality, often makes them prime targets of police scrutiny.

92. This process of criminalisation also generates self-criminalisation as an outcome of the ban on free, lawful migration, the ethnic characterisation of informal and illegal activities and the deterioration of the sending societies.

93. Moreover, the growth in the number of irregular migrants arrested and detained leads to toughening of the legislation and restrictions on migration. Closure of borders and limits imposed by the European countries only increase the flows of unauthorised migration, smuggling of migrants and human trafficking.

94. Criminalisation of migrants facilitates, even legitimises, the adoption of migration policies more and more under the sway of a security-dominated rationale. However, the dangers arising from the actuation of this process seem far more serious than the threats attributed to migrants, in so far as this process undermines the foundations and the very values of European societies.