

# **Study on obstacles to effective access of irregular migrants to minimum social rights**

Ryszard Cholewinski

French edition:

*Migrants irréguliers: accès aux droits sociaux minimaux*

ISBN 92-871-5878-9

*The opinions expressed in this work are the responsibility of the author(s) and do not necessarily reflect the official policy of the Council of Europe.*

All rights reserved. No part of this publication may be translated, reproduced or transmitted, in any form or by any means, electronic (CD-Rom, Internet, etc.) or mechanical, including photocopying, recording or any information storage or retrieval system, without prior permission in writing from the Publishing Division, Communication and Research Directorate (F-67075 Strasbourg or [publishing@coe.int](mailto:publishing@coe.int)).

Cover design: Graphic Design Workshop, Council of Europe  
Layout: Desktop Publishing Unit, Council of Europe

Edited by Council of Europe Publishing  
<http://book.coe.int>  
F-67075 Strasbourg Cedex

ISBN 92-871-5879-7

© Council of Europe, December 2005

Printed at the Council of Europe

# Contents

**Part I**

- 1. Introduction: recent Council of Europe activities ..... 7
  - 1.1 Terminology and categories of irregular migrants ..... 8
  - 1.2 Scope and methodology ..... 10

**Part II**

- 2. General context ..... 17
  - 2.1 The fight against social exclusion and racism and xenophobia ..... 17
  - 2.2 Migration management and human rights ..... 18
  - 2.3 Development issues and irregular migrants' remittances ..... 19
  - 2.4 Education of the public ..... 20
  - 2.5 EU developments ..... 20
  - 2.6 Changing attitudes ..... 22

**Part III**

- 3. Access to minimum rights ..... 27
  - 3.1 Housing ..... 31
  - 3.2 Education ..... 35
  - 3.3 Social security ..... 39
  - 3.4 Health ..... 47
  - 3.5 Social and welfare services ..... 52
  - 3.6 Fair employment conditions ..... 54
  - 3.7 Residence rights and regularisation ..... 57
- Conclusion ..... 73
- Appendix 1 – Recommendations ..... 75
- Appendix 2 – Ratification by Council of Europe member states of applicable international human rights instruments and international labour standards ..... 79
- Selected references ..... 81



# Part I



## 1. Introduction: recent Council of Europe activities

In the last few years, the Council of Europe has voiced considerable concern over the plight of irregular migrants. Given that irregular migrants constitute a particularly vulnerable group in society, such concern is in keeping with the social and human rights principles that underpin the Council of Europe's work.<sup>1</sup> In January 2000, the Committee of Ministers adopted Recommendation No. R (2000) 3 on the right to the satisfaction of basic material needs of persons in situations of extreme hardship, urging member state governments to put the following five principles into practice:

1. Member states should recognise, in their law and practice, a right to the satisfaction of basic material needs of any person in a situation of extreme hardship.
2. The right to the satisfaction of basic human material needs should contain as a minimum the right to food, clothing, shelter and basic medical care.
3. The right to the satisfaction of basic human material needs should be enforceable, every person in a situation of extreme hardship being able to invoke it directly before the authorities and, if need be, before the courts.
4. *The exercise of this right should be open to all citizens and foreigners, whatever the latter's position under national rules on the status of foreigners, and in the manner determined by national authorities.*
5. The member states should ensure that the information available on the existence of this right is sufficient.<sup>2</sup>

These principles identify a minimum threshold of treatment below which provision should not fall and which clearly cannot be denied to anyone for reason of their nationality or legal status. While the following study contends that irregular migrants should qualify for more substantial provision in certain areas, it is constructive to keep in mind the baseline identified in this recommendation.

In October 2001, the Council of Europe convened an international conference in Athens to discuss the human dignity of irregular migrants.<sup>3</sup> The 7th Conference of Ministers responsible for Migration Affairs, meeting in Helsinki in September 2002, adopted a declaration containing an indirect reference to irregular migration. While a number of the declaration's paragraphs focused on preventing irregular migration as well as smuggling and trafficking of human beings, it also recommended the investigation of issues affecting human dignity, including those issues relating to the effective enjoyment of minimum rights for persons in need,<sup>4</sup> a group encompassing

irregular migrants. The European Committee on Migration (CEMG) commissioned a report on preventing irregular migration,<sup>5</sup> which was a comprehensive overview of the principal features of irregular migration. It did not, however, elucidate to any significant degree how the human rights of irregular migrants should be promoted. The Parliamentary Assembly has also been active in promoting the rights of irregular migrants and, in September 2002, proposed that the Committee of Ministers elaborate a comprehensive international instrument addressing all the issues connected with clandestine migration, including the need to protect the basic minimum rights of irregular migrants.<sup>6</sup> Irregular migration movements were discussed by an expert seminar in Strasbourg in November 2002,<sup>7</sup> and the work and living conditions of migrants employed irregularly in the agricultural sector in southern European countries were the subject of a Parliamentary Assembly report in July 2003 and a subsequent recommendation in September 2003.<sup>8</sup> A further development concerns the establishment of a working group of the Council of Europe's Committee on Legal Affairs and Human Rights to discuss the expulsion of irregular migrants. The working group's terms of reference include the need to draft a good conduct guide to protect human rights in this area.<sup>9</sup>

In March 2003, the Secretariat of the Directorate General of Social Cohesion (the Secretariat) prepared a preliminary review for the CEMG with a view to identifying the principal categories of irregular migrants and the international provisions concerning their effective access to minimum rights.<sup>10</sup> The CEMG agreed to commission a study on the obstacles to effective access to minimum rights for "persons in need" and, with a view to assisting the consultant's research, in December 2003 convened an ad hoc working group on irregular migrants (ad hoc working group) to discuss the protection and promotion of the human rights of irregular migrants in the migration process, including during their travel; their economic and social conditions in the country of destination; and their treatment on their return to the country of origin or a third country. The report of the ad hoc working group was made available in March 2004.<sup>11</sup> The present study is based in part on the findings of the ad hoc working group and also draws from a parallel initiative undertaken by the Council of Europe's Committee of Experts on Standard-Setting Instruments in the Field of Social Security (CS-CO), which considered an *Exploratory Report on the Access to Social Protection for Illegal Labour Migrants (Exploratory Report)* in May 2004,<sup>12</sup> thus underscoring again the concern of Council of Europe organs for this vulnerable group.

## **1.1. Terminology and categories of irregular migrants**

This study uses the terms "irregular migrant" and "irregular migration". The use of the word "illegal" in this context has been criticised because of its connotations with criminality. Although those migrants who enter a country clandestinely, or those (in the majority) who overstay the period of validity of their visa or work permit breach immigration laws, which frequently carry criminal penalties, such persons are rarely perceived as "criminals" in the true sense of this term. This position is also recognised by the United Nations

Special Rapporteur on the rights of non-citizens, who emphasises that while states may remove persons who are in their territory without authorisation, this discretion is not unlimited:

There is significant scope for States to enforce their immigration policies and to require departure of unlawfully present persons. That discretion is, however, not unlimited and may not be exercised arbitrarily. A State might require, under its laws, the departure of persons who remain in its territory longer than the time allowed by limited-duration permits. Immigrants and asylum seekers, even those who are in a country illegally and whose claims are not considered valid by the authorities, should not be treated as criminals.<sup>13</sup>

Moreover, defining persons as “illegal” can also be regarded as denying their humanity. It can be easily forgotten that such migrants are human beings who have the right to recognition everywhere before the law, as reiterated in international human rights law,<sup>14</sup> and who possess fundamental rights despite their illegal or irregular status.<sup>15</sup> Consequently, the term “irregular” is preferable and applies generically to those non-nationals who have some irregularity in their status whether through their fault or the fault or negligence of the authorities in not regularising this status. The Council of Europe also supports this approach, which is reflected in the Secretariat memorandum prepared for the Athens conference in October 2001.<sup>16</sup> Moreover, other organisations such as the International Labour Organization (ILO), the International Organization for Migration (IOM) and the Organization for Security and Co-operation in Europe (OSCE), amongst others, are increasingly using the term “irregular” migration. Even the governmental Budapest Group, in adopting conclusions on this subject in Rhodes in June 2003, has started to use this more neutral terminology.<sup>17</sup> Indeed, of the significant international actors with a competence in migration, only the European Union (EU) persists in using the terminology “illegal” migration.

The categories of irregular migrants to which this study applies constitute a diverse group. In contrast with the report submitted to the CS-CO, this study is not concerned solely with labour migrants or migrant workers, although it recognises that in practice many irregular migrants will be in some form of employment. Indeed, some migrants may have been admitted for lawful employment and then moved into the informal labour market.<sup>18</sup> However, the study also encompasses long-term irregular migrants, who are tolerated by the authorities but are not afforded any legal status; children of irregular migrants (and possibly elderly dependants); children separated from their parents and/or guardians; irregular migrants who cannot be returned for legal, practical or health reasons; irregular migrants effectively integrated into the host community; destitute irregular migrants without any employment; and rejected asylum seekers or those migrants who might well be eligible for refugee status but who fail to lodge any application for asylum and therefore are not in any asylum procedure.

While the study encompasses irregular migrants as broadly defined and goes beyond traditional migrant workers, there are inevitable limitations in this research regarding the groups or areas that can be covered. For example, the

situation of irregular migrants in transit, which is a particular problem in central, eastern and southern Europe, is not the object of this study, although it should be noted that the Council of Europe is addressing the plight of this particular group and held a conference on transit migration in central and eastern Europe at the end of September 2004.<sup>19</sup> Moreover, irregular migration in central and eastern Europe has not been considered to any significant degree although some of the material drawn from the report to the CS-CO is based in part on the experiences of a number of countries in this region. Finally, the questions of return and readmission and the capacity of countries of origin to reintegrate irregular migrants have not been discussed in any depth, although the specific education concerns of migrants returned under readmission agreements are considered in Section 3.2 below.

## **1.2. Scope and methodology**

The purpose of the study is to identify the minimum level of rights to which irregular migrants should be entitled in law, with a focus on the protection of their social rights as opposed to their civil and political rights (which are easier to articulate as rights applicable to all persons without distinction of any kind, including legal status) and the practical obstacles to the enjoyment of these rights that exist in Council of Europe member states. While the study is mainly concerned with access to such rights in host countries, it should be remembered, as noted in Section 1.1 above, that these rights are also denied to irregular migrants in the whole migration continuum, in transit countries as well as on their return to the country of origin.

Part II of the study sets the general context by placing the discussion at the heart of the Council of Europe's concerns with promoting human rights, ensuring social cohesion and preventing racism and xenophobia. This section also identifies some of the political dilemmas experienced by governments in addressing this subject and underlines the important role the Council of Europe can play to counterbalance the more restrictive approach to irregular migration being taken at the EU level.

Part III focuses on the minimum rights of irregular migrants by outlining each right in the light of relevant international human rights law and Council of Europe instruments. An important priority of the study is to "clear the landscape" regarding the legal protection of irregular migrants (and to some extent regular migrants as well). It then considers obstacles to the access by irregular migrants to a minimum level of protection in respect of each right, with reference to examples of law and practice in some Council of Europe member states. These examples are by no means representative and serve merely to illustrate the kind of obstacles that exist. Many of these examples are drawn from the discussions of the ad hoc working group on irregular migrants and the information provided by governments to the researchers drafting the report for the CS-CO. Some updated information, however, has been added where appropriate. The "rights" sections of the report are followed by recommendations, which outline the key principles that should govern the access of irregular migrants to minimum social rights

and also highlight the major obstacles to such access, which should be the subject of further research. The recommendations are also all grouped together in Appendix 1.

### Notes

1. For a more contextual overview of the Council of Europe's concerns in this area, see S. Tonelli, 2004, p. 301.
2. Committee of Ministers, Recommendation No. R (2000) 3 of 19 January 2000 to member states on the right to the satisfaction of basic material needs of persons in situations of extreme hardship. Emphasis added.
3. Council of Europe, Conference on Irregular Migration and Dignity of Migrants: Co-operation in the Mediterranean Region, *Proceedings*, Athens, 3 and 4 October 2001, Doc. MG-FL (2002) 7.
4. Council of Europe, 7th Conference of Ministers responsible for Migration Affairs, Helsinki, 16-17 September 2002, Final Declaration, paragraph 36.
5. C.-V. Marie, 2004.
6. Parliamentary Assembly, Recommendation 1577 (2002) of 23 September 2002 on the creation of a charter of intent on clandestine migration. Paragraph 11.vi reads: "clandestine migrants should not be deprived of their rights, including the right to welfare for children, and particularly for vulnerable individuals, the right to emergency healthcare and the right not to be held in slavery or servitude".
7. See S. de Tapia, December 2003.
8. See respectively Council of Europe, Parliamentary Assembly Doc. 9883 (18 July 2003) and Recommendation 1618 (2003) of 8 September 2003 on migrants in irregular employment in the agricultural sector of southern European countries.
9. In this regard, see also the recommendation of the Commissioner for Human Rights of 19 September 2001 concerning the rights of aliens wishing to enter a Council of Europe member state and the enforcement of expulsion orders, Doc. CommDH/Rec(2001)1.
10. Council of Europe, European Committee on Migration (CDMG), 45th Meeting, 25-27 March 2003, Doc. CDMG (2003) 15 (Strasbourg, 19 March 2003).
11. Council of Europe, *Report of the Ad hoc Working Group on Irregular Migrants (MG-AD)*, rapporteur: Ryszard Cholewinski, 17-18 December 2003, Doc. MG-AD (2003) 3 (Strasbourg, 12 March 2004).
12. Council of Europe, Committee of Experts on Standard-Setting Instruments in the Field of Social Security (CS-CO), 6th Meeting, Limassol, 25-26 May 2004, *Exploratory Report on the Access to Social Protection for Illegal Labour Migrants*, prepared by P. Schoukens and D. Pieters, Doc. CS-CO (2004) 3rev (Strasbourg, 30 June 2004).
13. UN, ESCOR, CHR, Sub-Commission on the Promotion and Protection of Human Rights, 55th Session, Item 5 of the Provisional Agenda, *The rights of non-citizens*, Final report of the special rapporteur, Mr. David Weissbrodt, submitted in accordance with Sub-Commission decision 2000/103, Commission resolution 2000/104 and Economic and Social Council decision 2000/283, Doc. E/CN.4/Sub.2/2003/23 (26 May 2003) [hereinafter *The rights of non-citizens*], paragraph 29 (footnotes omitted).
14. See, for example, Universal Declaration of Human Rights (UDHR), GA Res. 217A (III) of 10 December 1948, Article 6; International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, UNTS 171 (entered into force 23 March 1976; ratified by 154 states), Article 16.
15. Patrick Taran, ILO Senior Migration Specialist, speaking at the Conference on Irregular Migration and Human Rights, University of Leicester, Leicester, United Kingdom, 28-29 June 2003.

16. See Council of Europe, Conference on "Irregular Migration and Dignity of Migrants: Co-operation in the Mediterranean Region", Doc. MG-FL (2001) 12, p. 5, paragraphs 15 (note 10) and 16 respectively: "The term 'illegal' is regarded as pejorative as it implies that the foreigner is a criminal"; [Irregular migrants'] common denominator is the fact that they are in an irregular situation from the standpoint of domestic law and as such are in a country in violation of the applicable legal rules governing the conditions of entry and residence of non-nationals. However, the mere fact of not complying with legislation does not make a migrant an 'outlaw'".
17. See Conference of Ministers on the Prevention of Irregular Migration in the Wider European Region, held in Rhodes on 25-26 June 2003 in the framework of the Budapest Process.
18. A report of the UK Trade Union Congress (TUC) describes the situation of Ukrainian migrant workers in the UK, some of who are admitted under the Seasonal Agricultural Workers Scheme (SAWS) and then move to informal jobs in the construction sector. See TUC, *Gone West: Ukrainians at work in the UK* (London: European Union and International Relations Department, TUC, March 2004).
19. Council of Europe, Regional Conference on Migrants in Transit Countries: Sharing Responsibility for Management and Protection, Istanbul, 30 September to 1 October 2004.



## **Part II**



## 2. General context

At its meeting in December 2003, the ad hoc working group identified and discussed a number of important contextual themes that need to be taken into account when considering the minimum rights to which irregular migrants should have access and the practical obstacles that exist in respect of this access. Indeed, there are strong arguments why securing such access is in line with a number of other important policy concerns, such as the fight against social exclusion, racism and xenophobia, attempts to successfully manage migration, the recognition and fostering of the link to development in the countries of origin, and education of the general public on the positive aspects of migration. Moreover, as noted in Section 1.2 above, a clearer role for the Council of Europe in protecting and promoting the access of irregular migrants to minimum rights can serve as an important counterbalance to the restrictive measures undertaken at the EU level to prevent irregular migration.

### 2.1. The fight against social exclusion, racism and xenophobia

Affording rights to migrants is an important feature of ensuring their integration in society, and the absence of rights inevitably risks their social exclusion. Given that one of the fundamental aims of the Council of Europe's work is to facilitate economic and social progress in member states,<sup>20</sup> and therefore includes the fight against social exclusion, securing access for irregular migrants to minimum rights is in keeping with such efforts. Unfortunately, the goal of integration is often treated as a misnomer when used in respect of irregular migrants because the official expectation is that they should be leaving the country rather than seeking integration there even though in practice certain irregular migrants, particularly those who have been residing and working in the territory for a considerable period of time, may actually be quite well integrated. Moreover, the trend in many countries has been to limit social rights for irregular migrants as an instrument of increasingly restrictive immigration policies:

Curtailments of social rights for irregular migrants in host countries have become essential components of restrictive immigration policies. By making life more difficult for those already present, these measures aim to deter potential candidates and promote voluntary returns to countries of origin or third countries while protecting the public purse. The threat of destitution as a deterrent against irregular migration generates acute tensions within host states between immigration laws and human rights protection.<sup>21</sup>

The dilemma inherent in deterring irregular migration and ensuring human rights protection is also evident in the context of anti-discrimination policies.

Preventing the marginalisation of all persons in Europe, including irregular migrants, should be an important component of the fight against racism and xenophobia. But restricting the access of irregular migrants to minimum social rights can only increase their marginalisation and stigmatisation in the eyes of the general population. Such negative policies, together with the growing political rhetoric that views irregular migrants as unworthy recipients of social protection, actually increase the risk of racism in society generally.

## **2.2. Migration management and human rights**

The ad hoc working group noted that the economic and political approach to migration in many European countries may easily undermine the human rights dimension of migration. The principal focus in many European countries and elsewhere is on effective migration management, which is not rooted in a human rights approach even though it may contain elements of human rights protection. For example, in the United Kingdom, the annual lawful entry of over 150 000 migrant workers is extolled as a virtue by the government. However, it has been argued that this managed labour migration system has resulted in a complicated civic stratification of migrants in terms of long-term settlement prospects, acquisition of citizenship, social security rights and family reunification.<sup>22</sup> Any access to rights and entitlements in this context is located in managed migration policies and not human rights principles. The ad hoc working group observed that there is no correlation necessarily between the acceptance of migrant workers and protecting their human rights, as reflected in the situation of migrant workers in the Gulf States and the Asia-Pacific region. There is also a real risk that European countries of employment are moving in a similar direction. Moreover, this increased complexity regarding the creation of numerous migrant statuses is likely also to increase irregular migration, as is evident from Claude-Valentin Marie's report on preventing illegal immigration<sup>23</sup> in the context of the complicated rules existing in EU member states. There is a general lack of political will in receiving countries to promote lawful labour migration to any significant degree, particularly the admission of low-skilled migrant workers for which there appears to be a growing demand in many countries. While it is necessary therefore to promote legal labour migration as one means of reducing irregular migration, there remains a reluctance to afford extensive rights to migrant workers who have been admitted lawfully into countries of employment, particularly those migrants resident on a temporary basis.

With regard to questions of migration management and the protection of the human rights of irregular migrants, it is important to focus on the migrants themselves rather than the migration processes if their rights are to be advanced. It should be underlined that the protection of irregular migrants is not necessarily inconsistent with the realisation of the political, economic and social interests of the state. It is vital to incorporate the position of irregular migrants in the principle of social inclusion and to engage the interests of member states in promoting labour migration for reasons of demography

and realisation of labour market needs. There is also the need to promote the positive aspect of managed legal migration to the economy and society at large (see Section 2.4 below), which is arguably not undertaken sufficiently in many countries, and to demonstrate to governments what they stand to lose if the rational needs of migrants are not taken into account in the formulation of their policies.

A human rights approach to migration management is taking shape at the level of prominent international organisations and actors. In June 2004, the tripartite ILO International Labour Conference adopted a plan of action for migrant workers, observing that “a fair deal for all migrant workers requires a rights-based approach” and including the “development of a non-binding multilateral framework for a rights-based approach to labour migration which takes account of labour market needs, proposing guidelines and principles for policies based on best practices and international standards”.<sup>24</sup> With specific regard to irregular migration, the special rapporteur on the human rights of migrants has underlined the need to address this phenomenon in the context of a new concept of migration management, which devotes particular attention to human rights issues and which involves all concerned actors, including civil society representatives.<sup>25</sup>

### **2.3. Development issues and irregular migrants’ remittances**

The links between rights’ protection for irregular migrants, successful migration management, and meeting development needs in countries of origin should not be understated. In the UK, for example, there is growing recognition that a poorly managed migration system has a negative impact on development in countries of origin. For example, the UK applies an ethical code of practice when employing foreign nursing staff in the public health care sector, which recommends that developing countries should not be targeted for the recruitment of health care professionals.<sup>26</sup> Similar concerns are also underlined in a recent publication of the International Organization for Migration (IOM) on the migration-development nexus.<sup>27</sup> Clearly, a successful migration policy, which benefits both countries of destination and origin, cannot be formulated properly without the adoption of a parallel or complementary development policy. Moreover, the value of a well-managed system of remittances for development has also been recognised, but in order for such a system to operate successfully, migrants need a degree of security in the country of employment. For their optimum development impact to be realised, remittances should be transferred through legal channels, which irregular migrants are unable to do if, for example, they are not permitted to open bank accounts. Consequently, one way of engaging the political interests of member states in the development field is to ensure that the protection of the human rights of migrants from developing countries forms part of the pragmatic policy agenda for managing labour migration.

## **2.4. Education of the public**

In order for the link between the above policy concerns and access to minimum rights for irregular migrants to be supported, it is essential that governments take steps to address the substantial ignorance in public opinion in many European countries on the subject of irregular migration and immigration generally. It should not be forgotten that it is often the citizens of countries of employment, who end up taking advantage of irregular migrants, for example as reflected in the use of migrant women for the purpose of sexual exploitation in particular and in the exploitation of the labour of all irregular migrants. The media, especially the right-wing press, can be hugely influential in the way irregular migrants are perceived by the general public as well as by governments. Frequently, considerable media interest is generated when irregular migrants are involved in criminal activity but there is limited reporting on their needs and interests.

## **2.5. EU developments**

The EU's primary concern with irregular migration focuses on preventing the phenomenon, detecting and punishing those who facilitate it, and returning irregular migrants to their countries of origin. While considerable space was devoted to rights and "near equality" for third-country nationals at the Tampere European Council in October 1999,<sup>28</sup> there has since been a clear shift in focus to the strengthening of external border controls and the adoption of further measures to prevent irregular migration, which can be traced to the conclusions of the Seville European Council in June 2002.<sup>29</sup> Moreover, the EU Council of Ministers adopted a comprehensive plan to prevent illegal immigration and human trafficking in February 2002,<sup>30</sup> which focuses on the management of irregular migration and bilateral co-operation, a return action programme in November 2002,<sup>31</sup> and a series of measures to combat illegal immigration across the maritime borders of EU member states in November 2003.<sup>32</sup> The European Commission recently assessed the implementation of these policy instruments as well as the legally binding measures relating to irregular migration.<sup>33</sup>

The principles espoused at the Tampere European Council with regard to fair treatment for third-country nationals (some of which have now been transferred to the EU Constitutional Treaty<sup>34</sup>) refer only to lawfully resident migrants. Given that arguments about the access of third-country nationals to rights in the EU have since become more difficult, it will now be more problematic still to discuss access to rights for those with no legal status. There appears to be little political will at the EU level to extend rights to irregular migrants, even though the language of the EC Treaty would appear to be sufficiently broad to encompass the adoption of positive measures in this area. An example of such a restrictive approach can be seen in the revised Association Agreement with Algeria, Morocco and Tunisia, which are important countries sending migrants to the EU. These agreements explicitly exclude irregular migrants from the provisions on equality of treatment in respect of working conditions and social security.<sup>35</sup> The EU Charter of

Fundamental Rights also restricts social security benefits and social advantages to those “residing and moving legally within the [EU]”.<sup>36</sup> One commentator argues that “such restrictions do little to improve the fate of illegal immigrants, but rather support the policies of exclusion”.<sup>37</sup> Indeed, there now appears to be a clear discrepancy between the protection afforded irregular migrants by international human rights treaties (considered below) and the making of laws and their implementation at the EU level. The United Nations and the Council of Europe cannot ignore these retrogressive developments affecting the rights of irregular migrants.

It would seem, however, that a recent softening of the harsh position towards irregular migrants is detectable, particularly in some of the recent documents issued by the European Commission. The Justice and Home Affairs and Employment and Social Affairs units of the European Commission worked together on the Communication on immigration, integration and employment, adopted in June 2003, which considered the position of irregular migrants, particularly those who cannot be removed, with a view to their possible regularisation and affording them social rights in the context of the fight against social exclusion:

Within the context of the common immigration policy the only coherent approach to dealing with illegal residents is to ensure that they return to their country of origin. However, in a considerable number of cases it is not possible to implement such a policy for legal, humanitarian or practical reasons. It is necessary to consider this group of people both from the point of view of their impact on the labour market and with respect to the objective of integration and social cohesion. On both counts the presence of large numbers of illegal residents has a negative influence – as a source of cheap labour, liable to exploitation and in the long-term preventing necessary structural reform and thereby contributing to the inefficiency of the labour market. As sectors of undeclared work and illegal immigration feed on one another there is a clear link with general policies to prevent and combat undeclared work, which must also be reinforced as part of a broad policy mix to transform undeclared work into regular employment. At the same time illegal immigrants are excluded from full participation in society, both as contributors and as beneficiaries, which contributes to their marginalisation and fuels negative attitudes to them from local people.

While policies to combat illegal immigration must remain vigorous, integration policies cannot be fully successful unless the issues arising from the presence of this group of people are adequately and reasonably addressed. Some member states have implemented regularisation measures for illegal residents. Such procedures may be seen as a factor which enables the integration process to develop but also as an encouragement to further illegal immigration. This must however be balanced against the problems arising when large numbers of illegal residents are present in Member States. It should be remembered that illegal immigrants are protected by universal human rights standards and should enjoy some basic rights e.g. emergency healthcare and primary school education for their children.<sup>38</sup>

While the general question of social exclusion is also addressed at the EU level by way of the “soft law” approach of the open method of co-ordination

where some progress has been possible in politically sensitive areas, the focus in the drafting of hard law remains on strengthening entry controls and returning irregular migrants to countries of origin. Moreover, no concrete legal rights have been afforded to irregular migrants. This position is continued in the European Council's next five-year plan to strengthen freedom, security and justice in the EU, known as the Hague Programme,<sup>39</sup> although one positive development is the recognition of a clear link between the informal economy in member states and irregular migration.<sup>40</sup>

The limitations of the EU Race Equality Directive,<sup>41</sup> which EU member states had been required to implement by July 2003, should also be highlighted. While irregular migrants are clearly covered by the race discrimination provisions of the directive, nationality discrimination is excluded from its scope. Moreover, the directive does not apply to discrimination by public authorities in the immigration field, which, broadly defined, might also encompass the employment and residence conditions of third-country nationals,<sup>42</sup> an interpretation that would place irregular migrants at a considerable disadvantage.

## **2.6. Changing attitudes**

The ad hoc working group underlined that attitudes to the problem of irregular migration appear to be changing, evident in a country such as the Netherlands, which in the last few years has embarked on a policy to exclude irregular migrants from most forms of social protection with a view to ensuring the irregular migrants leave its territory and deterring further irregular migration. Before 1998, social protection was available to irregular migrants on the grounds that denying such access would lead only to an increase in migrants' exploitation by their employers. Since July 1998, when the Dutch Linking Act (*Koppelingswet*) came into force,<sup>43</sup> the social protection system has been used to control immigration in order to make the country less attractive for migrants, although irregular migrant workers are also excluded from the payment of taxes and social security contributions. However, in response to the adoption of these harsh measures at national level, attitudes have become more flexible at municipal level, recognising that irregular migrants cannot be excluded from all services and that some minimum provision should be available.<sup>44</sup> This shift is also reflected in the Declaration of the Helsinki Council of Europe Conference of Ministers responsible for Migration Affairs of September 2002, discussed in Section 1 above, which called for the investigation of issues affecting human dignity, including those relating to the effective enjoyment of minimum rights for persons in need. Clearly, governments recognise that the marginalisation and exclusion of vulnerable groups in society, irrespective of their irregular status, is a concern that can only be addressed through positive state action.

## Notes

20. Statute of the Council of Europe (5 May 1949, *European Treaty Series* No. 1; entered into force 3 August 1949; ratified by 46 states) Article 1a: "The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress."
21. S. Da Lomba, 2004, p. 363.
22. See L. Morris, 2002 and id., *The Control of Rights: The Rights of Workers and Asylum Seekers under Managed Migration* (A Discussion Paper) (London: Joint Council for the Welfare of Immigrants (JCWI), Immigration Rights Project (IRP), May 2004).
23. See C.V. Marie, 2004.
24. See International Labour Conference, 92nd Session, 2004, *Report of the Committee on Migrant Workers*, Conclusions on a fair deal for migrant workers in a global economy (An ILO plan of action for migrant workers), paragraphs 20 and 21 respectively.
25. UN, ESCOR, CHR, 59th Session, Item 14 (a) of the provisional agenda, *Migrant Workers: Report of the Special Rapporteur, Ms. Gabriela Rodríguez Pizarro, submitted pursuant to Commission on Human Rights resolution 2002/62*, UN Doc. E/CN.4/2003/85 (30 December 2002), paragraph 65:  
"The Special Rapporteur would like to stress that the phenomenon of irregular migration should be addressed through a new concept of migration management with human rights as an integral part. Migration management is in fact an extremely complex series of processes which go well beyond unilateral punitive measures and control. States of origins, transit and destination, international and regional organizations, financial institutions, NGOs, the private sector and the civil society at large share responsibility in this regard".
26. N. Rollason, "Bilateral Agreements and Other Forms of Labour Recruitment: The United Kingdom Perspective", paper presented to the OECD, World Bank and IOM Seminar on Trade and Migration, Montreux, 19-20 June 2003, referring to the Code of Practice for NHS Employers involved in the International Recruitment of Healthcare Professionals, Department of Health, October 2001.
27. See N. Van Hear and N.N. Sørensen (eds), *The Migration-Development Nexus* (Geneva: IOM, 2003).
28. *Presidency Conclusions: Tampere European Council*, 15-16 October 1999, Bulletin EU 10-99, points I.2-I.16.
29. *Presidency Conclusions: Seville European Council*, 21-22 June 2002, Bulletin EU 6-2002, points I2-I33.
30. "Comprehensive Plan to Combat Illegal Immigration and Trafficking of Human Brings in the European Union" (28 February 2002), *OJ* 2002 C 142/23.
31. Proposal for a Return Action Programme, (Council doc. 14673/02, 25 November 2002), adopted at the JHA Council meeting on 28-29 November 2002 (Council doc. 14817/02).
32. Doc. 15445/03 (28 November 2003). See also EU Council, *Feasibility Study on the Control of the European Union's Maritime Borders – Final Report*, Doc. 11490/1/03 REV (19 September 2003).

33. See European Commission, *Annual Report on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders, and the return of illegal residents* (SEC (2004) 1349, 25 October 2004).
34. Treaty Establishing a Constitution for Europe, *OJ* 2004 C 310/1.
35. See, for example, Euro-Mediterranean Association Agreement with Morocco (*OJ* 2000 L 70/2), Article 66: "The provisions of this chapter [on Workers in Title VI of the Agreement on Cooperation in Social and Cultural Matters] shall not apply to nationals of the Parties residing or working illegally in the territory of their host countries." Identical provisions are found in the Euro-Mediterranean Agreements with Algeria (Doc. 6786/02 – 12 April 2002 – not yet in force), Article 69, and Tunisia, *OJ* 1998 L 97/2, Article 66.
36. Charter of Fundamental Rights of the European Union, *OJ* 2000 C 364/1, Article 34(2).
37. G. Vonk, "Migration, Social Security and the Law: Some European Dilemmas" (2002) 3/4 *European Journal of Social Security* 315, p. 330.
38. European Commission, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions on immigration, integration and employment* (COM (2003) 336 final, 3 June 2003), p. 26.
39. Presidency Conclusions, Brussels European Council, 4-5 November 2004, *Bulletin EU* 11-2004, Appendix I (The Hague Programme – Strengthening Freedom, Security and Justice in the European Union).
40. *Ibid.*, 1.4 (specific orientations), third paragraph:  
"As the informal economy and illegal employment can act as a pull factor for illegal immigration and can lead to exploitation, the European Council calls on Member States to reach the targets for reducing the informal economy set up in the European employment strategy".  
For an overview of recent EU activity in addressing undeclared work, see *Annual Report on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders, and the return of illegal residents*, note 33, above.
41. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *OJ* 2000 L 180/22.
42. See R. Cholewinski, *Borders and Discrimination in the European Union* (Immigration Law Practitioners' Association (ILPA) and Migration Policy Group (MPG): London/Brussels, January 2002), pp. 44-49.
43. See Minderhoud, 2000, p. 185; Pluymen, December 2002, p. 35.
44. Pluymen, *ibid.*, pp. 38-39.

## **Part III**



### 3. Access to minimum rights

This part is devoted to a structured thematic overview of the principal issues of rights affecting irregular migrants with a focus on the protection of their social rights.<sup>45</sup> It introduces the international and Council of Europe framework for protecting irregular migrants in each area, which is then followed by a consideration of the practical obstacles irregular migrants experience in accessing a minimum level of enjoyment of the right concerned.

The starting point to this discussion is that international human rights law does not generally make distinctions between nationals and non-nationals in respect of the rights afforded to them. This position is clear from the all-encompassing nature of the Universal Declaration of Human Rights (UDHR), which guarantees the civil and political rights and economic and social rights listed in the document to everyone without distinction of any kind.<sup>46</sup> The international community has since adopted a “soft law” instrument, which focuses on the rights of non-nationals. In December 1985, the UN General Assembly adopted the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live.<sup>47</sup> Unfortunately, this declaration appears to depart significantly from the principle of universal human rights protection by stipulating that only “aliens lawfully residing in the territory of a State” are to enjoy a whole range of social rights.<sup>48</sup> However, this declaration has not since been transformed into a legally binding instrument and has arguably been superseded by developments in understanding of social rights elsewhere. Nonetheless, the existence of this instrument reflects the tension between the principle of universal human rights protection and the practical delivery of such rights to non-nationals generally and particularly those residing in a country without authorisation. The Special Rapporteur on the rights of non-citizens has highlighted this principle of general equality in respect of the enjoyment of all human rights noting that it can only be departed from in exceptional situations:

Based on a review of international human rights law, the Special Rapporteur has concluded that all persons should by virtue of their essential humanity enjoy all human rights unless exceptional distinctions, for example, between citizens and non-citizens, serve a legitimate State objective and are proportional to the achievement of that objective.<sup>49</sup>

This conclusion applies to the enjoyment of “social, cultural, and economic rights in general [and] labour rights (for example, as to collective bargaining, workers’ compensation, social security, appropriate working conditions and environment, etc.)...”.<sup>50</sup> Further support for this approach is found in the Programme of Action of the 2001 World Conference against Racism, Racial

Discrimination, Xenophobia and Related Intolerance, held in Durban. South Africa, which calls upon states to ensure equal treatment to all migrants:

Requests States to promote and protect fully and effectively the human rights and fundamental freedoms of all migrants, in conformity with the Universal Declaration of Human Rights and their obligations under international human rights instruments, regardless of the migrants' immigration status...<sup>51</sup>

Social rights are clearly considered as forming part of the package of this equality principle.<sup>52</sup> While it might be possible, therefore, as argued by the Special Rapporteur on the rights of non-citizens, to permit distinctions between citizens and migrants in certain circumstances, which in the case of irregular migrants might be objectively justified on the basis of the unauthorised nature of their entry and stay,<sup>53</sup> it is clear that such differences would have to be very carefully drawn in accordance with the principle of proportionality and not be tantamount to a denial of rights altogether.

The International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>54</sup> is largely in keeping with the universal personal scope of the UDHR and is therefore particularly important. With the exception of Andorra, all the Council of Europe member states have ratified the ICESCR (see Appendix 2). The ICESCR is framed in all-embracing language and does not generally distinguish between persons in terms of their nationality or legal status.<sup>55</sup> While the non-discrimination provision (Article 2(2)) does not specifically refer to "nationality" as a prohibited ground of discrimination, the Committee for Economic, Social and Cultural Rights (ESC Committee), the body responsible for monitoring the implementation of the ICESCR, has considered the discriminatory treatment of non-nationals in its concluding observations on the reports of contracting parties, including the position of irregular migrants. For example, in its June 2004 concluding observations regarding Spain's fourth periodic report, one of the principal concerns identified by the ESC Committee related to the treatment of irregular migrants in that country:

While noting that undocumented immigrants residing in the State party enjoy a number of fundamental rights and freedoms, including the right to basic social services, health care and education, on the condition that they register with their local municipality, the Committee remains concerned about the precarious situation of the large number of those undocumented immigrants who only enjoy a limited protection of their economic, social and cultural rights.<sup>56</sup>

Consequently, the ESC Committee issued the following recommendation urging Spain to promote the regularisation of this group:

The Committee urges the State party to take measures to ensure the effective protection of fundamental economic, social and cultural rights of all persons residing within its territory, in accordance with article 2.2 of the Covenant. It further encourages the State party to promote the legalization of undocumented immigrants so as to enable them to enjoy fully their economic, social and cultural rights.<sup>57</sup>

Moreover, the ESC Committee has underlined that the duty of contracting parties "to take steps ... to the maximum of its available resources, with a

view to achieving progressively the full realisation of the rights recognised in the present Covenant..." (Article 2(1)) is of immediate application and that each contracting party must satisfy the rights contained in the ICESCR at least to a basic level of enjoyment unless it can demonstrate that it does not possess the resources to fulfil even such a minimum obligation.<sup>58</sup> Even though some of the new Council of Europe member states might well be able to argue, with some justification, that they do not possess sufficient resources to secure social rights for migrants, including irregular migrants, those countries that have ratified the ICESCR (see Appendix 2) are required nonetheless to seek such provision from the international community.<sup>59</sup> Most importantly, the ESC Committee has emphasised that "any deliberately retrogressive measures ... would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources".<sup>60</sup> Consequently, such justifications would have to be sought whenever contracting parties consider the removal of social assistance payments from irregular migrants, or a departure from the provision of cash support to support in kind.

Part III of the United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW),<sup>61</sup> which reiterates the human rights of all migrant workers and their families regardless of their legal status, confirms that irregular migrants should be entitled to a number of important economic and social rights. However, only three Council of Europe member states (Azerbaijan, Bosnia and Herzegovina, and Turkey), have ratified the ICMW (see Appendix 2). While less detailed on this question, ILO Convention No. 143 of 1975 on Migrant Workers (Supplementary Provisions) underlines in Article 1 that contracting parties are obliged to respect the "basic human rights of all migrant workers" and also contains a more detailed provision that guarantees equal treatment between irregular and regular migrant workers in respect of rights arising out of past employment with regard to remuneration, social security and other benefits (Article 9(1)). Eighteen states have ratified Convention No. 143, ten of which are Council of Europe member states (see Appendix 2). But Part II of the convention, which is concerned with equality of opportunity of treatment, applies only to migrant workers who are residing lawfully in the contracting party concerned. In principle, however, international labour standards underline that all persons in the working environment should be afforded equal treatment regardless of legal status. The recent ILO Plan of Action on Migrant Workers, adopted by the International Labour Conference in June 2004 is unequivocal in this respect:

Consistent with effective management of migration, due consideration should be given to the particular problems faced by irregular migrant workers and the vulnerability of such workers to abuse. It is important to ensure that the human rights of irregular migrant workers are protected. It should be recalled that ILO instruments apply to all workers, including irregular migrant workers, unless otherwise stated. Consideration should be given to the situation of irregular migrant workers, ensuring that their human rights and fundamental labour rights are effectively protected, and that they are not exploited or treated arbitrarily.<sup>62</sup>

This principle was also reinforced in September 2003, when the Inter-American Court of Human Rights issued a landmark Advisory Opinion on the legal status and rights of undocumented migrants in response to a request by Mexico. The Court ruled, *inter alia*, that:

Labor rights necessarily arise from the circumstance of being a worker, understood in the broadest sense. A person who is to be engaged, is engaged or has been engaged in a remunerated activity, immediately becomes a worker and, consequently, acquires the rights inherent in that condition. The right to work, whether regulated at the national or international level, is a protective system for workers; that is, it regulates the rights and obligations of the employee and the employer, regardless of any other consideration of an economic and social nature. A person who enters a State and assumes an employment relationship, acquires his labor human rights in the State of employment, irrespective of his migratory status, because respect and guarantee of the enjoyment and exercise of those rights must be made without any discrimination. ... In this way, the migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment. On assuming an employment relationship, the migrant acquires rights as a worker, which must be recognized and guaranteed, irrespective of his regular or irregular status in the State of employment. These rights are a consequence of the employment relationship.<sup>63</sup>

In contrast to international human rights law and international labour standards, Council of Europe instruments are more limited in their application to irregular migrants, with the exception of the European Convention on Human Rights (ECHR),<sup>64</sup> which applies to all persons within the jurisdiction of contracting parties (Article 1). However, the ECHR is mainly concerned with the protection of civil and political rights, although it does explicitly provide for two economic and social rights: the right to protection of property,<sup>65</sup> which has also been found to encompass social security payments,<sup>66</sup> and the right to education.<sup>67</sup> Although there have been some recent important developments in the health care field which are discussed in more detail below, the European Social Charter (and the revised Charter)<sup>68</sup> applies only to foreigners who are nationals of other contracting parties "lawfully resident and working regularly" within the territory of another contracting party.<sup>69</sup> Similarly, the European Convention on the Legal Status of Migrant Workers<sup>70</sup> defines a migrant worker as "a national of a Contracting Party who has been authorised by another Contracting Party to reside in its territory in order to take up paid employment" (Article 1(1)), and this excludes irregular migrants from its scope.

It should be underlined at this juncture that the recognition of minimum rights for irregular migrants does not mean that members of this vulnerable group are to be denied "fully fledged" rights or that rights should only be accessible to certain categories of irregular migrants. Clearly, however, the access of irregular migrants to the enjoyment of fundamental rights in a country is strongly influenced by a number of legal requirements and general practical considerations. For example, access of irregular migrants to important social rights, such as health care, should be viewed in the light of

the duty imposed on public authorities in certain countries, such as Germany, to denounce irregular migrants, whereas no such positive duty exists in other countries (for example, Belgium).<sup>71</sup> Moreover, in some countries, irregular migrants experience considerable legal and practical difficulties in accessing labour courts in order to obtain a remedy for a violation of their employment rights. Another general obstacle to the effective access of irregular migrants to a minimum level of social rights protection concerns the growing trend in Europe of criminalising migrants as well as those who afford them assistance, a position now supported in EU law. A further problem with granting rights to irregular migrants, identified by the ad hoc working group, relates to “chain reasoning”, which begins with the initial argument that members of this group have no right of access to the destination country. On this basis, other “goods” are then denied to them, such as employment, social security, accommodation, and the possibility to open a bank account. While not all countries deny rights to such an extent, the consensus in the ad hoc working group was that it is necessary to break this “chain reasoning” by not only recognising the dignity of irregular migrants but also by giving practical effect to the rights identified, which is an important theme of this study.

### **3.1. Housing**

The right to an adequate standard of living stipulated in the Universal Declaration of Human Rights (UDHR) and the International Covenant of Economic, Social and Cultural Rights (ICESCR) includes the right to housing and, in principle, is applicable to all persons regardless of nationality or legal status.<sup>72</sup> In its General Comment on the right to adequate housing, the ESC Committee stated:

The right to adequate housing applies to everyone ... [I]ndividuals, as well as families, are entitled to adequate housing regardless of age, economic status, group or other affiliation or status and other such factors. In particular, enjoyment of this right must, in accordance with article 2(2) of the Covenant, not be subject to any form of discrimination.<sup>73</sup>

The ESC Committee adopts a broad understanding of the right to housing stating that it “should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one’s head or views shelter exclusively as a commodity”, but that “it should be seen as the right to live somewhere in security, peace and dignity”.<sup>74</sup> Moreover, the ESC Committee identifies a number of aspects in the concept of adequacy, including accessibility, and in this regard has underlined that “disadvantaged groups must be accorded full and sustainable access to adequate housing resource”, that such groups “should be ensured some degree of priority consideration in the housing sphere”, and that “both housing law and policy should take fully into account the special housing needs of these groups”.<sup>75</sup>

The right to adequate housing is clearly interconnected closely with other social and economic rights. As the ESC Committee notes in its General

Comment: "The human right to adequate housing, which is thus derived from the right to an adequate standard of living, is of central importance for the enjoyment of all economic, social and cultural rights".<sup>76</sup> A clear example is the connection between access to employment and housing. Irregular migrants without shelter would be less likely to experience this problem if they were permitted to work. In a similar vein, the ESC Committee argues that the full enjoyment of civil and political rights is important for the realisation and maintenance of the right to adequate housing.<sup>77</sup> In revised guidelines on state reporting under the ICESCR, the ESC Committee also urges contracting parties to take steps "to ascertain the full extent of homelessness and inadequate housing within its jurisdiction" and that detailed information should be provided in state reports about "those groups within society that are vulnerable and disadvantaged with regard to housing".<sup>78</sup> In these guidelines, the ESC Committee's list of disadvantaged and vulnerable groups includes, *inter alia*, migrant workers and "other especially affected groups".<sup>79</sup> Since the adoption of the ESC Committee's General Comment, the United Nations Special Rapporteur on adequate housing as a component of the right to an adequate standard of living has welcomed the attention given to housing and discrimination issues in the Declaration and the Programme of Action of the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance.<sup>80</sup> The Programme of Action "recommends that host countries consider the provision to migrants of adequate social services, in particular in the areas of health, education and adequate housing, as a matter of priority" and urges all states to prohibit discriminatory treatment against foreigners and migrant workers, including in the field of housing.<sup>81</sup>

While a strong argument can therefore be presented for a general state obligation in international human rights law to house irregular migrants, comprehensive equal treatment between irregular migrants and nationals or regular migrants would be more difficult to support. Indeed, this position is reflected in the ICMW, which subjects states parties to the general obligation in Article 64 to "consult and co-operate with a view to promoting sound, equitable and humane conditions in connection with international migration of workers and members of their families", but which only affords equal treatment in respect of access to housing to regular migrant workers.<sup>82</sup>

As noted in Section 3, the position at the Council of Europe level is more restrictive because the revised European Social Charter and the European Convention on the Legal Status of Migrant Workers only protect the right to housing of nationals from other contracting state parties.<sup>83</sup> However, the obligation to provide "assistance" under the Council of Europe's Convention on Social and Medical Assistance would also apply to migrants of other contracting parties who entered a contracting party lawfully and then found themselves in an irregular situation.<sup>84</sup> As far as the ECHR is concerned, the jurisprudence of the European Commission and European Court of Human Rights suggests clearly that the right to be free from degrading treatment in Article 3 ECHR and the right to private and family life, home and correspondence in Article 8 ECHR might well be invoked to provide a positive obligation on the state to protect persons from particularly intolerable

housing conditions.<sup>85</sup> The European Commission of Human Rights has recognised the close association between the right to respect for family life and the right to adequate housing by stating that, even though there is no obligation to provide housing, the ECHR did not “discount the possibility that the right to respect for family life [can] be violated in a case where the authorities impose intolerable living conditions on a person or his family”.<sup>86</sup> Clearly, seeking reliance on Article 8 ECHR to avoid “intolerable living conditions” would, in line with the universal personal scope of the ECHR, be open to all persons within the state’s jurisdiction and thus includes irregular migrants.

In general, the housing situation of irregular migrants in Europe is characterised by a high level of mobility. The Platform for International Cooperation on Undocumented Migrants (PICUM) has undertaken a mapping exercise of housing in six European countries and identified five ways in which irregular migrants are housed:

1. By homeless organisations, such as FEANTSA<sup>87</sup> (although it is important to distinguish here between two groups: the homeless, who often find themselves without shelter for psychological reasons; and the houseless, who simply do not have a roof over their heads);
2. In private housing (although a legal status is not always necessary to sign a contract for rent, in practice papers are often requested from irregular migrants);<sup>88</sup>
3. In emergency shelters (which usually provide accommodation for one night only and in some places are not open to irregular migrants);
4. By NGOs working with irregular migrants; and
5. With the assistance of families and community networks.

The fifth solution is the most common, although this solution may place considerable pressures on the families concerned. Moreover, staying with family affects the power relations between the regular and irregular family members with the former sometimes exploiting the latter.

Recent EU measures criminalising the provision of assistance in connection with the residence of irregular migrants in the territory of EU member states are likely to exacerbate the already difficult housing situation of irregular migrants. Governments were required to transpose these instruments before 5 December 2004.<sup>89</sup> While these measures would only apply in the case of residence if the assistance is intentional and provided for “financial gain”,<sup>90</sup> often, of course, irregular migrants “pay” or make “a contribution” for their accommodation, particularly in private family situations.

A particular problem in some European countries concerns the provision of housing to asylum seekers whose claims are considered to be manifestly unfounded or where they have been rejected. As noted in Section 1.2 above, the latter group certainly falls into a category of irregular migrants of interest to this study. In the UK, section 55 of the Nationality, Immigration and Asylum Act 2002 deprives asylum seekers of all means of support if they are deemed to have made late applications (that is, if the claim is not made “as

soon as reasonably practicable after the person's arrival in the United Kingdom"). Clearly, the calculated effect of this draconian provision is to deter delayed asylum claims by placing people into situations of "near destitution". The application of this provision has given rise to considerable litigation given that an appeal against a negative decision on this ground is barred and only a limited form of challenge is available by way of judicial review to the courts, although a May 2004 judgment of the English Court of Appeal has resulted in the suspension of the operation of section 55 of the Act.<sup>91</sup> It is arguable that as far as rejected asylum seekers are concerned the state should be obliged to expel them effectively and to provide them with accommodation if removal is not possible for legal or practical reasons. In Austria, in September 2002, access to housing and welfare benefits were removed from asylum seekers whose claims were rejected at the first instance.<sup>92</sup> In the Netherlands, rejected asylum seekers have to vacate their accommodation within 28 days and thereafter have no access to official shelter or other reception provisions.<sup>93</sup> But an obligation to house in such a situation should not be considered as synonymous with the detention of rejected asylum seekers. PICUM's research has revealed that rejected asylum seekers, who are likely to be more familiar with the availability of assistance in the charities' sector, often approach NGOs for assistance with shelter, while persons not in the asylum process tend to rely on the support of community networks and families.<sup>94</sup>

The ad hoc working group noted that it was important to distinguish between vulnerable persons and excluded persons in the housing context. Irregular migrants are normally excluded and therefore often denied housing resources. Should irregular migrants therefore be "included" or is it necessary to promote special provision for irregular migrants? It was argued that special resources should not be established for irregular migrants, since positive discrimination in this field does not encourage integration, but nor is it worth sending irregular migrants to organisations housing excluded persons. With regard to the question of integration, it was noted that the provision of benefits to persons in the fields of social security and housing would not by itself assist their integration. Another question relates to whether such integration should be provisional or permanent, although it was recognised that this was a false problem because the intention of migrants cannot be established at the outset. Indeed, many migrants on arrival intend to return to their country of origin, but then decide to stay. Clearly, therefore, integration and combating social exclusion in this field are also connected with the question of regularisation. Moreover, granting rights to irregular migrants in respect of housing is in the interests of the state because it assists with social cohesion. It was also underlined that affording housing rights to irregular migrants should not mean reducing the content of rights protection in this sphere. In fact, the principal problem with housing in Europe concerns the availability of generally poor social housing. Inadequate living conditions of irregular migrants are therefore closely connected with problems of supply in social housing. Indeed, it is not unusual for public authorities to spend a lot of money on the provision of hotel accommodation to undocumented or irregular migrants when these funds would be better spent on constructing social housing.

The NGO members of the ad hoc working group also noted that a further significant obstacle to irregular migrants obtaining proper assistance with housing concerns the absence of the necessary professionalism in those NGOs providing assistance in this field. The experience of PICUM is that organisations with limited resources frequently select irregular migrants for assistance with accommodation on a “first come first served” basis or on the basis of their “prospects” or “perspective”, which in the Belgian context normally means whether such migrants are married to a Belgian national or whether their children attend local schools (namely, whether these migrants have good prospects for regularisation). Such decisions are often made subjectively by the NGOs concerned, although formal criteria do exist and PICUM has drawn up an ethical code for organisations concerning the question of prioritising assistance.<sup>95</sup> FEANTSA has also encountered problems with expertise. As an organisation providing shelter for homeless people generally, its workers are not trained to assist asylum seekers or irregular migrants in legal matters. For example, the head of the former asylum seekers’ centre at Sangatte in Northern France<sup>96</sup> only possessed experience of managing facilities for homeless people but not for irregular migrants. A further problem related to the lack of English language training for the workers who were involved in providing assistance to the residents of Sangatte, many of whom were unable to speak French. Moreover, social workers working at Sangatte did not possess the specific training necessary to deal with the groups of persons concerned.

Taking account of the preceding discussion, the following minimum guarantees for irregular migrants in the field of housing and protection can be advanced:

1. Housing provision should not be denied to irregular migrants on the grounds of their unauthorised status, particularly given the importance of the right to adequate housing for the enjoyment of other civil, political, economic and social rights.
2. While states might be justified in denying long-term housing provision to those irregular migrants who can be removed from the country or rejected asylum seekers who have exhausted their rights of appeal, such migrants must nevertheless be afforded a minimum level of housing assistance commensurate with conditions of human dignity. The provision of assistance in such circumstances should not be interpreted in a way that is tantamount to the detention of irregular migrants.

### **3.2. Education**

Universal human rights standards proclaim that everyone has the right to education and that, at a minimum, access to primary or elementary education should be free to all children without any distinction whatsoever.<sup>97</sup> In practice, however, most Council of Europe member states also apply this latter obligation in respect of secondary school children because of legal compulsory schooling requirements. The ESC Committee underscores the

role of education as a human right and its integral connection with the enjoyment of other human rights:

Education is both a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.<sup>98</sup>

Article 13 ICESCR stipulates that the right to education is to be enjoyed by “everyone”. There are no qualifications preventing non-nationals from benefiting from this right.<sup>99</sup> In its General Comment on the right to education, the ESC Committee confirms that “the principle of non-discrimination extends to all persons of school age residing in the territory of a State party, *including non-nationals, and irrespective of legal status*”.<sup>100</sup> Although mainly concerned with civil and political rights, the ECHR, as noted in Section 3 above, also provides for a right to education. The first sentence of Article 2 of the First Protocol to the ECHR stipulates unequivocally that “[n]o person shall be denied the right to education”. When read in conjunction with Article 14 ECHR (the non-discrimination clause), this provision clearly applies on a non-discriminatory basis to both nationals and non-nationals who are within the territory of a contracting party unless there is an objective and reasonable justification for the differential treatment. Prominent commentators on the ECHR have argued that no children of non-nationals present within the jurisdiction of Council of Europe member states, which have ratified this protocol, may be denied their right to receive an education, even if their parents are unlawfully resident in the country.

[Denying to] foreigners who, although not legally residing ... are likely to stay [in a Contracting State] for an indefinite period of time (for instance because they cannot be expelled for humanitarian reasons) the possibility to receive primary education has such far-reaching consequences, that the fact that they do not legally reside [in a Contracting State] is not a reasonable justification for this differential treatment, which therefore is contrary to Article 2 (independently or in conjunction with Article 14).<sup>101</sup>

Despite the existence of these unequivocal international human rights provisions guaranteeing education to all persons irrespective of nationality and legal status, the children of irregular migrants face legal, administrative and practical obstacles in accessing education in their country of residence. These obstacles were discussed in some depth at the meeting of the ad hoc working group.

During the discussions in the ad hoc working group, it was observed that in Greece, in late 2003, the ombudsman discovered that the Interior Ministry had advised the Ministry of Education not to allow the enrolment of children of irregular migrants into primary and secondary schools. This administrative instruction is contrary to, *inter alia*, current Greek immigration law, which does not condition the primary and secondary education of minor non-nationals on their legal status. In Germany, as noted in Section 3 above, official institutions are under a federal duty to denounce irregular migrants, but because education in Germany is constitutionally

the responsibility of the *Länder*, it remains for the regional authorities to decide whether this duty applies.<sup>102</sup> While in principle, the duty should normally also apply to teachers, in practice there have been no known cases of denunciation. In the Netherlands, the Dutch Parliament discussed whether teachers should be required to report the children of irregular migrants, but decided not to introduce such an obligation. In the Netherlands education remains freely accessible to all up to the age of 18 without a check of the residence permit.<sup>103</sup> In the United Kingdom, parents and guardians are under a legal obligation to ensure that all children under the age of 16 attend school. Although the government discussed whether to introduce reporting obligations on teachers, it did not initiate such a step. Instead, it adopted a scheme whereby teachers can seek advice about the education of the children of irregular migrants. It would appear that the reason for the government's reluctance to impose such requirements on teachers is connected to the existence of a network of locally-based anti-deportation campaigns, which adopt whole families, and teachers often constitute a core group of persons in such organisations. But the UK Government has included provisions in the Nationality, Immigration and Asylum Act 2002,<sup>104</sup> whereby accommodation centres (which are not closed detention centres) for asylum seekers, including families, are to be established, and the education legislation has been amended enabling the provision of alternate forms of education to children in such centres for a limited period of six months. Although these centres have not yet been set up, these amendments have been severely criticised by educationalists.<sup>105</sup>

Another obstacle relates to the recognition of the education afforded to the children of irregular migrants. In Spain, access to education is free up to the age of 18, although no certificate is awarded to irregular migrant children demonstrating that they have completed their education. According to research conducted by PICUM, there is no formal right of education for irregular migrant children in Denmark and Sweden, although enrolment is possible on a case-by-case basis.<sup>106</sup> However, where school principals permit such children to enrol in classes, no certificate or degree is awarded. This approach contrasts with the position in Belgium where both the Flemish and Walloon Governments have issued circulars underlining positively the right of irregular migrant children to attend school and clarifying that headmasters and teachers are not required to report the status of such children to the authorities.<sup>107</sup>

The children of irregular migrants are also hampered by a number of practical obstacles in obtaining a decent education in the host country, *inter alia*, by: the higher mobility of irregular migrants, which precludes their children from settling in schools for a useful period of time so as not to disrupt their educational development; their greater overall vulnerability; and their poorer living conditions. The latter reason suggests a correlation between the poor quality of housing and educational achievement, although this is not always borne out in practice and other factors must also be taken into account.<sup>108</sup>

Another issue connected with the access of migrant children, including the children of irregular migrants, to a holistic right to education concerns the possibility of providing intercultural education to such children. In order for the fundamental right to education to be meaningful for migrant children, it should be tailored to their specific needs so as to facilitate their integration into society and to ensure that they are not placed at an educational disadvantage vis-à-vis the children of nationals. Indeed, such an approach is in line with the general objectives of a right to education, which, according to the ICESCR, are to promote the full development of individual personality and facilitate effective participation in society.<sup>109</sup> Although intercultural education is supposed to be available in a number of countries, it is rarely provided in practice. Clearly, the provision of language classes is a key issue and vital for the integration of migrant children.

A further problem concerns the education of separated or unaccompanied minors as well as homeless irregular migrants. In some countries, however, such as the UK, it is not really possible for children to be homeless because of the existence of child welfare legislation. In the Netherlands, pilot accommodation centres have been established for unaccompanied minors with the provision of education oriented towards the return of such children.<sup>110</sup>

The problems connected with the education of the children of irregular migrants on their return to their country of origin under readmission agreements are often overlooked. During the meeting of the ad hoc working group, the Secretariat described a fact-finding mission to Serbia and Montenegro to monitor the return of long-term migrants from Germany. The mission discovered two difficulties with the educational reintegration of the children of such migrants in schools in Belgrade. Firstly, some children had left Germany without certificates demonstrating the level of education obtained in German schools or with certificates that had not been translated because of a lack of resources. Secondly, appropriate classes in Belgrade schools could not be found to match the level of education attained by the children in Germany.

The following recommendations can be advanced to identify the minimum standards that states ought to realise regarding the right of irregular migrants to education:

1. The children of irregular migrants must not be denied access to education in Council of Europe member states, both in law and administrative practice. While international legal standards provide that access to primary education should be free of charge to all children, given the existence of compulsory schooling requirements in member states, free access to secondary schooling for all children, including those of lawfully resident and irregular migrants, should also be secured in law and practice.
2. Given that access to education is considered a universal right irrespective of legal status, this right should also include formal recognition of this education. Irregular migrant children should therefore be able to obtain certificates in the host country indicating the level to which they have completed their education.

3. Migrant children, including those of irregular migrants, should be entitled to intercultural education, particularly language classes, which assist their participation and integration in the host society and their reintegration in the event that they return to their country of origin.

4. Education and its recognition are important factors to be taken into account in the context of the return of migrant children to their countries of origin, whether return occurs through the operation of readmission agreements or other return procedures.

### 3.3. Social security

Rigid exclusions from social security also apply to illegal immigrants. In some countries access to social assistance is fully denied, while other countries only recognise entitlement to certain forms of minimal aid. In practice, this state of affairs often means that local communities or charitable institutions take over the role of providing some form of care and protection.<sup>111</sup>

This section of the study draws substantially on the *Exploratory Report on the Access to Social Protection for Illegal Labour Migrants*, prepared by Professors Paul Schoukens and Danny Pieters from the European Institute of Social Security in Leuven, Belgium for the Council of Europe's Committee of Experts on Standard-Setting Instruments in the Field of Social Security (CS-CO) and presented to the 6th CS-CO meeting in Limassol, Cyprus on 25 and 26 May 2004.<sup>112</sup>

The personal scope of the report encompasses irregular migrant workers, defined as "non-nationals who are working in the country without them being allowed to stay in the country and/or without them being allowed to work in the country".<sup>113</sup> Consequently, those migrants who have entered lawfully but who are working without authorisation, such as tourists and students, are included. With regard to its substantive scope, the report goes beyond accessing *minimum* social security rights, which is the limited inquiry of the present study. The areas of social security covered by the report relate to the nine traditional branches of social security, including access to health care (considered separately in Section 3.4 below) and social assistance in the sense of Articles 12 and 13 of the (revised) European Social Charter. Social assistance encompasses the whole range of support, such as cash payments, assistance in kind, and emergency assistance. The social assistance entitlements of migrant workers' families, such as family benefits, are also covered. The report distinguishes between social assistance and social insurance, which is concerned with contributory benefits and repayment of those contributions. In the discussions of the ad hoc working group, Professor Schoukens stressed that social security is a "balanced" system, which encompasses a range of rights associated with work (social insurance/contributory benefits) and social assistance for those in need. It is necessary therefore to distinguish between the provision of minimum social assistance, which can be identified as one single category of social security, and social insurance, which does not focus on subsistence and ensuring a minimum standard of living, but is based on previous contributions, and

which comprises a number of different categories of benefits. It is strongly arguable that if irregular migrants make such contributions, they should be entitled to social security benefits or at least a repayment of the contributions made. Another important issue relates to the concept of equal treatment. Should irregular migrants be compared with legal migrant workers or national workers who are also in an "irregular" situation in the sense that they work in the informal or "black" economy? In some areas of social security it is important to focus on the position of national workers who are working irregularly and not just on the migrants. In other areas, such as health care or social assistance, it is not always possible to assume comparisons with irregular national workers. It should also be remembered that a certain number of irregular migrants continue to make contributions in their country of origin and therefore have access to the social security protection system of that country.<sup>114</sup>

The *Exploratory Report* is divided into three main parts: (i) an overview of relevant international and regional human rights instruments as well as those instruments specifically concerned with minimum standards of social protection and, more specifically, the protection of migrant workers; (ii) an appraisal of the measures governments actually take in practice regarding the social protection of irregular migrant workers compiled on the basis of a questionnaire sent to the competent authorities in Council of Europe member states;<sup>115</sup> and (iii) a set of coherent proposals on the access of irregular migrant workers to social protection.

The study's conclusions regarding the first part are that international human rights standards clearly apply to nationals and lawfully resident non-nationals, but are less explicit in so far as their application to irregular migrants is concerned. The possible application of these standards to irregular migrants, however, can be supported by the broad terminology used in the various instruments, for example the frequent references to "all persons", "all women", etc. As noted in Section 3 above, the only explicitly restrictive instrument is the UN Declaration on the human rights of non-nationals, which limits social protection to lawfully resident non-nationals, although a soft-law instrument cannot contradict the more expansive position recognised subsequently under legally binding general human rights treaties. While ILO international labour standards concerned with setting minimum standards of social protection are generally silent on this question, they should apply unequivocally to all workers without distinction of any kind such as irregular status.<sup>116</sup> However, a number of other instruments refer to the concept of "ordinary residence", which raises the question whether this should imply a condition of legality.<sup>117</sup> It is submitted, however, that a broad interpretation of this concept is possible in that it is concerned merely with the factual situation of residence rather than with the question whether this residence is lawful. There are also ILO instruments, which guarantee equality of treatment to migrant workers and their dependants, without any condition as to residence in respect of work accident compensation and employment injury benefits.<sup>118</sup> On the other hand, as noted in Section 3 above, the (revised) European Social Charter, which provides for equal treatment between nationals and nationals of other contracting parties in respect of

social security provision and social and medical assistance,<sup>119</sup> applies only to those migrants who are lawfully resident and working regularly in the contracting party concerned.<sup>120</sup> Similarly, while the European Convention on the Legal Status of Migrant Workers includes provisions relating to their social protection, this instrument excludes irregular migrants from its personal scope.

International instruments aimed at the protection of migrant workers and their families specifically provide for some social protection for irregular migrants. As also noted in Section 3 above, Article 9(1) of the ILO Convention No. 143, which ten Council of Europe member states have ratified (see Appendix 2), guarantees equal treatment between irregular and regular migrant workers in respect of rights arising out of past employment as regards remuneration, social security and other benefits. Similarly, Article 27(1) ICMW (ratified by only three Council of Europe member states – see Appendix 2) stipulates that all migrant workers and their families shall enjoy equal treatment with nationals in respect of social security provided that they fulfil the requirements provided for by the applicable legislation of the state concerned and the applicable bilateral and multilateral treaties. The reference here to national law as well as bilateral and multilateral instruments makes the application of this principle to irregular migrants rather a remote prospect, although there is nothing preventing states of origin and employment from deciding to include irregular migrants, for example, within the scope of bilateral social security agreements. In addition, Article 27(2) ICMW contains an instruction to states parties to look into the possibility for reimbursing the social security contributions of migrant workers and their families, including irregular migrants:

Where the applicable legislation does not allow migrant workers and members of their families a benefit, the States concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances.

Professors Schoukens and Pieters contend that the equal treatment to be maintained in the social security field is not between legal national workers and irregular migrant workers, but between legal national workers and regular migrant workers and between irregular national workers employed in the informal economy and irregular migrant workers.<sup>121</sup> The *travaux préparatoires* relating to Article 27 ICMW shed little light on this question, although it appears that the intention was to extend some social security protection to irregular migrants, at least those benefits to which they have contributed. However, this provision is weakly worded on the whole, indicated by the references to the applicable national legislation in both paragraphs, to bilateral and multilateral agreements in the former and by what is in effect only a recommendation in the latter.<sup>122</sup>

With regard to the national approaches in the second part of the *Exploratory Report*, while there is little explicit provision in the law, it is clear that in practice social security rights are granted to irregular migrants in a number of countries, particularly in the form of emergency health care, which is

discussed in more detail in Section 3.4 on health. The findings in the report are rather different regarding access to social assistance. Some countries deny irregular migrants all access to social assistance while one country grants benefits to those irregular migrants tolerated for humanitarian reasons on similar terms to lawful residents. Most countries, however, grant irregular migrants, including minors, access to some basic assistance, often in the form of non-financial services or benefits in kind, such as food, clothing and housing, through the discretion of local authorities. As far as social insurance or contributory benefits are concerned, many countries do not explicitly link access to these benefits with lawfully performed work because employers are normally under an obligation to make social insurance contributions even if they employ irregular migrant workers. This principle applies to all contributory benefits in some countries with the exception of unemployment insurance, whereas in others it is limited to defined benefits such as those for work accidents and occupational diseases.<sup>123</sup>

The *Exploratory Report* discusses a number of recommendations, which would advance the social protection of irregular migrants, while ensuring that the legal approach closely follows the situation in practice. It takes the view that extreme positions to this question are unhelpful. On the one hand, a restrictive legislative framework denying social protection to irregular migrants but supplemented by an informal approach affording irregular migrants some protection in practice, is counter-productive because it risks antagonising xenophobic tendencies among some sections of the general population when they are informed officially that irregular migrants are denied access to benefits but then learn that such benefits are being granted in some instances.<sup>124</sup> Moreover, this state of affairs leads to an unacceptable degree of discretion being exercised by administrative authorities with the result that it undermines important rule of law principles. In this regard, the ad hoc working group observed that such a situation exists in Belgium where services are provided “unofficially” (that is, not through the social assistance offices), particularly medical care for which there is even a separate budget line providing payments to selected hospitals treating irregular migrants. While this situation provides a pragmatic solution for the actors involved (namely, public authorities, migrants and employers), the absence of clarity is counter-productive. On the other hand, a more liberal approach promising social protection to irregular migrants but which does not deliver it in reality is equally inappropriate because such an approach also weakens rule of law principles and serves to increase the frustrations of all migrants (irregular and regular alike).<sup>125</sup>

The *Exploratory Report's* recommendations are rooted in five framework principles with the purpose of gauging the degree of social protection that should be provided to irregular migrant workers as human beings, de facto residents and workers.<sup>126</sup> The first principle is grounded in the basic premise of international law that states have a sovereign right to regulate the admission and residence of non-nationals to and in their territories, although it also recognises that there may well be categories of irregular migrants who cannot be removed in practice and whose residence is tolerated by the

authorities. Persons in these categories, therefore, should be entitled to social protection, a position that is recognised in the Council of Europe's Convention on Social and Medical Assistance, which applies to persons who are regularly in a country but working unlawfully until an expulsion order is issued.<sup>127</sup> The second principle relates to the equivalent sovereign right of states to regulate employment in the country. The study contends that once migrant workers are granted access to the labour market, the prohibition of discrimination on the basis of nationality in respect of their work, including social protection, is now a universally accepted standard and therefore, by analogy, irregular migrants should not receive different treatment to nationals employed in the informal economy. While this argument is defensible in the field of social protection, it is rather questionable in the context of general working conditions, where the equal treatment of all persons, regardless of nationality and residence status, is underscored by a number of the general international human rights instruments and international labour standards discussed in Section 3 above. Moreover, the principle that states have the sovereign right to regulate employment within their territories is challenged in many developed countries in the era of globalisation where, in practice, economic labour market forces, employers and employment intermediaries or agents play a very important and influential role in matching labour demand with supply in the context of an overall regulatory framework set by the state.<sup>128</sup> The third principle espoused by the *Exploratory Report* concerns the need to retain the intrinsic equilibrium of the social insurance system. The essence of this approach is that:

... one cannot build a decent social protection system when major groups of workers are only taken into account for paying in contributions, but never for receiving any benefit; or when a group of workers would benefit from a system without ever having to show financial solidarity with others.<sup>129</sup>

Consequently, irregular migrants should not be refused benefits if they have paid contributions into the social insurance system or at least they should be able to obtain reimbursement of contributions they have paid in, which is recognised in Article 9(1) of the ILO Convention No. 143 and Article 27(2) ICMW as discussed earlier.<sup>130</sup> On the same basis, they should not be entitled to such benefits if they have not contributed to the social insurance system. The third and fourth principles are framed in the context of the discussion in Section 3 above, which underscores that no person should be denied any form of social protection regardless of their status in the country, as recognised by general international human rights standards, and that irregular migrant workers constitute a particularly vulnerable segment of the population deserving of special attention in this field.

In light of these principles, the *Exploratory Report* advances a number of practical recommendations for the social protection of irregular migrants,<sup>131</sup> which are laid out below with additional commentary.

(i) As far as their basic human rights to health and social protection are concerned, irregular migrants (and in particular pregnant women and children) should not be denied urgent or emergency medical treatment (see Section 3.4 below). This is also necessary from both the preventive and public health

care perspectives. They should also be entitled to access basic social assistance available to the general population to alleviate poverty in the country concerned. In order to counteract arguments that such assistance might attract further irregular migration, the *Exploratory Report* qualifies this recommendation by stipulating that basic social assistance should not be available to those migrants who have been ordered to leave the country and who are in a position to do so. One problem here concerns the level of social assistance to be provided. The report recognises that social assistance and welfare benefits are often provided to facilitate and/or promote integration in society. Given that irregular migrant workers often face the prospect of expulsion, the *Exploratory Report* notes that a number of countries distinguish between categories of irregular migrants in terms of the social assistance provided and are more inclined to provide benefits in kind to certain groups.

While, on one level, such an approach can be commended because it does not leave the migrants in a situation of destitution, it can also be argued that the provision of benefits in kind makes it very difficult, if not impossible, for this group of irregular migrants to develop relations with others in their surrounding community and thus risks constituting a disproportionate interference with their right to private life which is protected by Article 8 ECHR.<sup>132</sup> In this regard, the ad hoc working group noted that in Belgium social assistance offices were initially providing refugees as well as irregular migrants with social assistance benefits in cash. However, after information about the availability of such assistance was circulated in certain central and eastern European countries, the cash payments were withdrawn and only services and assistance in kind, such as accommodation and food, were made available.

(ii) With regard to irregular migrant children, the *Exploratory Report* recommends that they must enjoy social and other protection on equal terms with national children, this should also include a right to child benefits.

(iii) Where the competent administrative authorities find themselves under a legal duty to denounce or report irregular migrants seeking their assistance to the immigration service, the *Exploratory Report* contends that such policies are counter-productive since the strict application of such policies would destroy any prospect of irregular migrants enjoying the right to basic social protection in practice. The primary duty of such authorities should be to promote preventive health care measures with a view to safeguarding public health as well as the provision of basic social assistance to ensure the survival of irregular migrants and others in dignified conditions, which are very different objectives from those of internal ministries.

In addition to any legal duty to denounce irregular migrants, it is arguable that the possibility of voluntary denunciation might have the same effect. As noted in Section 3 above, there is a legal obligation on official institutions in Germany to denounce the presence of irregular migrants, which is provided in Article 76 of the Foreigners' Law.<sup>133</sup> There is no such duty to denounce in the Netherlands, although the Linking Act excludes irregular migrants from all benefits with the exception of access to emergency health care (in respect of which there is also no duty to denounce). In Spain, a duty to denounce

does not exist, although, as from 21 December 2003, public authorities are under an obligation “to collaborate” by providing the Ministry of the Interior with information about immigrants who are registered in several services provided by such authorities. Similarly, in the United Kingdom, while there is no duty to denounce, legislation permits the exchange of information between such public authorities as the social security and tax (Inland Revenue) offices as well as marriage registrars. Telephone hotlines have also been set up in order to enable members of the public to report abuses but their principal purpose is to apprehend lawfully resident persons, who have restricted access to public funds,<sup>134</sup> and not irregular migrants, who will not normally approach public authorities.<sup>135</sup> However, even if there is no duty to denounce in a particular country, by seeking access to social benefits the irregular migrant starts a relationship with the public authorities. For example, the police become aware which housing estates are likely to accommodate irregular migrants.

(iv) As far as irregular migrants in employment are concerned, the *Exploratory Report* recommends their equal treatment in respect of social protection with those nationals working in the informal economy. This principle is particularly important regarding compensation for work accidents, whether payable through social security or by the employer, which is usually afforded to unregistered national workers. Moreover, the *Exploratory Report* observes that there is no reason why such benefits cannot be exported to the migrant worker’s country of origin in the event that they are eventually removed there.

During the meeting of the ad hoc working group, the Secretariat underlined the importance of access to accident compensation, given that most irregular migrants are in employment and also frequently work in dangerous jobs. It was also noted in this regard that many persons working *lawfully* often do not complain about poor working conditions until their employment has finished and, in such cases, the traditional trade unions normally provide assistance. Those working in the informal economy, however, do not report such conditions unless an accident occurs or the employer is subjected to a workplace inspection. Reporting poor working conditions and seeking compensation for an accident at work are also closely tied to the question of access to the labour courts and whether irregular migrant workers can access such courts in the country concerned. In this regard, it is argued in Section 3.6 below that fair working conditions should encompass the possibility of claiming compensation for industrial accidents, access to the labour courts and the right to fair wages (including the payment of unpaid wages).

(v) With regard to the rather atypical position of migrants who are staying without authorisation in the country concerned but who are nonetheless employed “lawfully” in the sense that they have been registered for social security contributions without any checks having been carried out to see whether they can reside or work in that country, the *Exploratory Report* recommends that the period during which contributions have been paid should be recognised as a formal period of social insurance. Consequently, in the event of such migrants facing expulsion from the country and if the benefits

cannot be exported, these contributions should be reimbursed, preferably before the actual removal from the territory takes place.

(vi) The *Exploratory Report* recommends that the periods during which contributions are made by a migrant while in an irregular situation should also be recognised as formal periods for social insurance purposes in the event of the migrant's regularisation.

(vii) The final recommendation concerns the status of irregular migrants whose stay or employment is tolerated in the country concerned. For example, this situation may occur for humanitarian reasons when it is too dangerous for migrants to return to their own country or if they are too ill to travel. Here, the *Exploratory Report* calls for greater harmonisation at the European level to avoid contradictory situations where such migrants are considered to be in an irregular situation in some countries, though tolerated in practice, and where they are afforded a formal legal status elsewhere.

The above possibilities of irregular migrants accessing social security and social protection presents a complex picture both in terms of the applicable international and regional standards and current state practices. The *Exploratory Report* illustrates these complexities very well. Moreover, as already demonstrated, there is a clear overlap with other areas of social protection, such as health and fair working conditions. These are considered separately in Sections 3.4 and 3.6 below. A further issue concerns the prospect of regularisation for the irregular migrant concerned. If a migrant is considered a potential candidate for regularisation then he or she will likely qualify for more favourable social protection.

With the above proposals and issues in mind, the following minimum guarantees for irregular migrants in the field of social security and social protection can be advanced.

1. In accordance with general international human rights standards, no person (nationals or migrants regardless of legal status) should be denied access to a minimum level of social protection, which is usually defined in terms of basic or emergency medical treatment and the provision of social assistance to prevent destitution and to enable the person concerned to live in dignity.
2. Because irregular migrants often work in dangerous jobs, accident compensation should also be available to them in accordance with international labour standards and be on equal terms with national workers irrespective of whether the employment concerned is formal or informal.
3. With regard to those irregular migrants who are in employment and making contributions to the social insurance system, they should be entitled to receive the resultant benefits or reimbursement of these contributions, preferably before they are required to leave the country.
4. In the event of the regularisation of the migrant's situation in the host state, the period during which social security contributions were paid should be recognised as the legally valid period for social insurance purposes.

### 3.4. Health

General international human rights instruments provide for the right to medical care without any distinction based on nationality or legal status. For example, Article 12(1) ICESCR reads: “The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”.<sup>136</sup> In General Comment No. 14 on the right to the highest attainable standard of health, under the heading “specific legal obligations”, the ESC Committee underscores that “[i]n particular, States are under the obligation to *respect* the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy...”.<sup>137</sup> The reference to “preventive care” here is important because it underlines that the right to health is a more holistic concept, which goes beyond the provision of mere medical treatment. Indeed, in this regard, it has been asserted that “[t]he concept of a right to health emphasizes the social and ethical aspects of health care and health status. A rights approach to health issues must be based on fundamental human rights principles, particularly the dignity of persons and non-discrimination”.<sup>138</sup> Limited health provision disregards any notion of preventive health care and cannot be cost-effective.<sup>139</sup> Moreover, delays in health provision to irregular migrants are particularly problematic in this respect:

Any injury or illness that [occurs] in this socially marginalized population [of irregular migrants] may be associated with a delay in access or health services delivery or a refusal to access or provide required care. The result may be poorer clinical outcome for the individual but also a greater risk of transmissible disease for the host population or higher health services costs associated with a delay in diagnosis and management.<sup>140</sup>

Moreover, the continued availability of medical treatment to irregular migrants is arguably insufficient alone to satisfy their right to health in the absence of other concomitant measures to safeguard their human dignity. The ESC Committee draws attention to the inextricable connection between the right to health and the enjoyment of human rights generally, especially social rights.<sup>141</sup> In particular, a right to health care is meaningless if irregular migrants are not guaranteed a corresponding right to adequate housing.<sup>142</sup> The problems experienced by hospitals when discharging patients who are homeless and the potential risks to their recovery and health as a result of an early discharge are self-evident. Clearly, this broader understanding of the right to health is more in keeping with the health guarantee in the ICESCR.<sup>143</sup> Moreover, while Article 12 ICESCR itself does not identify, with the exception of children, any specific vulnerable groups in need of special health protection, the ESC Committee’s General Comment refers to the specific position of women, children, the elderly, disabled persons, and indigenous peoples.<sup>144</sup> Universal human rights standards specifically aimed at securing the rights of women and children explicitly sanction the adoption of special measures in respect of the right to health.<sup>145</sup> Consequently, it would

be consistent with this protective framework to devote special attention to the health concerns of irregular migrants falling within these vulnerable categories. Finally, while the right to health is an obligation to be realised progressively, as indeed is the case with most of the other social rights in the ICESCR, the ESC Committee has emphasised that non-discrimination in this field constitutes an immediate obligation for states parties and, furthermore, that regressive measures are generally not permissible.<sup>146</sup>

With regard to those international instruments specifically concerned with migrant workers, particular attention should be given to the UN convention on migrant workers, which stipulates explicitly in Article 28 ICMW that emergency medical treatment must be available to all migrant workers and their families on equal terms with nationals and cannot be denied to those in an irregular situation.<sup>147</sup> While this provision is clearly an important addition to international human rights standards in this area, because of the explicit recognition that irregular migrants should not be denied health care, its emphasis on emergency medical treatment falls short of the more holistic approach defined above which guarantees access to preventive care.<sup>148</sup>

As with other social rights, specific Council of Europe instruments protecting migrant workers, including their health, are limited to those migrants from contracting parties and lawfully resident in the territory of another contracting party. However, a recent decision of the European Committee of Social Rights under the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints<sup>149</sup> found that restrictions on the access of the children of irregular migrants to health care were contrary to the Charter despite the wording in the appendix that limits the personal scope of the instrument to lawfully resident nationals of other contracting parties.<sup>150</sup> With a view to safeguarding the access of children and young persons to health care regardless of their status, the committee decided to interpret the first paragraph of the appendix to the Charter very restrictively:

29. [T]he Charter must be interpreted so as to give life and meaning to fundamental social rights. It follows *inter alia* that restrictions on rights are to be read restrictively, i.e. understood in such a manner as to preserve intact the essence of the right and to achieve the overall purpose of the Charter.

30. As concerns the present complaint, the Committee has to decide how the restriction in the Appendix ought to be read given the primary purpose of the Charter as defined above. The restriction attaches to a wide variety of social rights in Articles 1-17 and impacts on them differently. In the circumstances of this particular case, it treads on a right of fundamental importance to the individual since it is connected to the right to life itself and goes to the very dignity of the human being. Furthermore, the restriction in this instance impacts adversely on children who are exposed to the risk of no medical treatment.

31. Human dignity is the fundamental value and indeed the core of positive European human rights law – whether under the European Social Charter or under the European Convention on Human Rights and health care is a prerequisite for the preservation of human dignity.

32. The Committee holds that legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter.<sup>151</sup>

While this is a controversial decision, as reflected by the fact that four committee members disagreed with the majority's narrow interpretation of the appendix to the (revised) Charter,<sup>152</sup> the tenor of the decision accords with the recognition in general international human rights law that the provision of health care is a fundamental human right. The decision is also bound to be significant in terms of the (revised) Charter's future application.<sup>153</sup>

In certain circumstances, the denial of health care to irregular migrants may also amount to an infringement of the right to be free from degrading and inhuman treatment in Article 3 ECHR, although the threshold for breaching this right is set very high, as is evident from the recent judgment of the European Court of Human Rights in *Pretty v. United Kingdom*:

As regards the types of treatment which fall within the scope of Article 3..., the Court's case law refers to "ill-treatment" that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual showing lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3. *The suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible.*<sup>154</sup>

It has been argued on the basis of English case law addressing the denial of state support to asylum seekers that this threshold may well be reached where "irregular migrants cannot afford health care and do not benefit from other sources of support", and, consequently, "the state's refusal to provide free health care could engage Article 3 where the consequences for the irregular migrant's health, dignity and/or feelings satisfy the level of severity set out in *Pretty*".<sup>155</sup> Migrants who are ill, including irregular migrants, may also invoke Article 3 ECHR to prevent their expulsion to countries of origin or third countries with inadequate health care facilities.<sup>156</sup> However, the most recent jurisprudence of the European Court of Human Rights suggests that this principle will only apply exceptionally.<sup>157</sup> According to the Strasbourg case law, the rights to life (Article 2 ECHR) and to respect for family and private life (Article 8 ECHR) may also be engaged in those situations where the state fails to afford effective access to health care for irregular migrants, although, as with Article 3 ECHR, the threshold for infringement of the right is set at a high level. In the former instance there must be "a real and immediate" threat to life, while in the latter case the determining question is whether the person's private life is infringed in terms of there being "sufficiently adverse effects on [his or her] physical and moral integrity".<sup>158</sup>

The *Exploratory Report* by Professors Schoukens and Pieters, discussed above in Section 3.3 on social security, concludes that in those Council of Europe

member states submitting responses to the questionnaire “the bottom line with regard to access to social benefits for illegal migrant workers seems to be emergency health care”.<sup>159</sup> However, there is no uniform definition of what is to be understood by “urgent or emergency health care” and there are differences in the way access to health care is guaranteed.<sup>160</sup>

With regard to the absence of a uniform understanding of the concept of urgent or emergency health care, the ad hoc working group noted that this concept is defined more broadly in Belgium and the Netherlands, while in Germany a narrower definition is applied. The *Exploratory Report* also refers to the positive development in a number of countries where a strict notion of emergency or urgent health care (namely. “essential treatment, which cannot be reasonably delayed until the patient returns to [his or her] home country”)<sup>161</sup> is being replaced by a more flexible notion of “necessary care”, which would enable treatment, such as regular follow-ups with the doctor and vaccinations, to be considered as part of the concept of urgent care. Furthermore, preventive care in the sense of protecting public health is also increasingly considered as included in this notion.<sup>162</sup> The *Exploratory Report* refers expressly to the Italian immigration law, which lists a number of relatively broad circumstances where access to the national health care system is guaranteed for persons without a residence permit.<sup>163</sup>

Both the ad hoc working group and the *Exploratory Report* identify different ways in which access to health care for irregular migrants is guaranteed. These range from general to more qualified access. In the UK, the rules are silent on whether irregular migrants can access health care. The basic legislation allows the National Health Service (NHS) to be applied to anyone ordinarily resident within the country and questions of nationality, the payment of taxes or national insurance contributions are irrelevant for the purposes of health care provision. However, ordinary residence is defined restrictively to effectively exclude unlawful residence and therefore irregular migrants can only access free “essential” medical treatment if they are classed as overseas visitors. It is possible to recover some hospital expenses from overseas visitors and they are also required to pay for medical prescriptions. As far as non-urgent treatment is concerned, General Practitioners (GPs) possess a broad discretion as to whether to accept patients. They are encouraged to register a person as a private patient if it can be determined that he or she entered the country with the sole purpose of obtaining free treatment. It has been argued that the uncertainty of the rules in the UK on access to health care for irregular migrants makes its availability difficult in practice.<sup>164</sup> In France, health care is in principle supposed to be available to everyone irrespective of nationality or legal status. However, since 1999, this universal provision (*Couverture maladie universelle* (CMU)) has been conditional upon stable and regular residence with the result that irregular migrants are excluded from its scope. However, free access to health care for irregular migrants is maintained by the *Aide médicale de l'Etat* (AME), which provides free hospital treatment for an initial period of one year. After three years residence, irregular migrants also become eligible for other treatment, which includes consultation with GPs.<sup>165</sup> While the explicit recognition in French law that irregular migrants have a right to health care is to be welcomed, this

approach has also been criticised because it stigmatises irregular migrants by separating them out from other beneficiaries of health care and because of the practical obstacles identified in securing treatment under the scheme. These obstacles include insufficient financial resources, complex bureaucratic procedures, language difficulties and the shortage of interpreters, the evidence required to prove residence and the failure to promote migrants' awareness of the availability of health care.<sup>166</sup> Irregular migrants' access to health care in France under the AME will be restricted further if reforms requiring beneficiaries of the scheme to contribute to the costs of their care are implemented.<sup>167</sup> Both the Czech Republic and Switzerland require resident migrant workers to take out public health insurance, but they do not link this insurance to lawful residence or employment authorisation in the country. Consequently, irregular migrants can in theory enjoy the benefits of full health care, although in practice few are likely to register because of the unwillingness to disclose their identity or the lack of sufficient means to pay for the health insurance. Nevertheless, both countries guarantee emergency medical treatment to irregular migrants and the competent local authorities cover the costs.<sup>168</sup> In Greece, emergency health care is also available to all migrants regardless of legal status. In the Netherlands, irregular migrants can access necessary medical care but only if the requisite financial conditions are present. In this regard, "linking funds" have been established to assist GPs in providing treatment to irregular migrants. Dutch hospitals may also "write off" unpaid bills for which they can be refunded. In this way, therefore, the costs expended in treating irregular migrants can be reimbursed, although such an approach is very different to the transparent provision of health care from collective funds. In Belgium, the Social Welfare Centre provides funds to hospitals for the treatment of irregular migrants, although not all hospitals are willing to co-operate with the authorities. According to the *Exploratory Report*, the position seems rather restrictive in Portugal, Sweden and Turkey, where subsidised care is generally unavailable to irregular migrants if they are not covered by the social protection system and patients are therefore required to refund the costs. However, Turkey is considering revisions to its law to provide some basic care for irregular migrants whereas no charges are forthcoming in Portugal when medical treatment is considered necessary to safeguard public health.<sup>169</sup>

These examples illustrate that despite the general availability of necessary or urgent medical treatment to irregular migrants in principle, problems exist in accessing such treatment in practice. Another particular practical problem referred to above in relation to France and identified by the ad hoc working group, concerns the lack of information about the availability of such health care, both for irregular migrants and those responsible for its provision. For example, in Belgium, hospitals often do not know how to deal with migrants generally (both lawfully resident and irregular migrants) and the government is not always forthcoming with the necessary information. Moreover, GPs will frequently refuse to treat irregular migrants and refer them to a specific hospital where such treatment is normally available thus delaying access to important treatment in practice. In Belgium, this problem is also compounded by cumbersome bureaucratic procedures. Other practical problems

exist in Germany where carriers' liability applies to ambulances with the result that they have to pay for transporting uninsured persons.<sup>170</sup>

In arguing for equal treatment between nationals and migrants in respect of health care provision, it should also be underlined that in some countries, such as Belgium and Germany, access to comprehensive health care services is not necessarily available to all citizens, which is the position, for example, with self-employed persons. Furthermore, lawfully resident and employed migrants do not always have full access to health care provision where no co-ordination treaty is applicable or even in those cases where a co-ordination agreement is applied.<sup>171</sup>

The following recommendations can be advanced regarding the degree to which irregular migrants should be able to access health rights.

1. In keeping with the earlier recommendation concerning social security, the provision of urgent or emergency medical treatment to irregular migrants is the minimum requirement and states should take measures to ensure that this right is recognised formally in their laws, to eliminate the practical obstacles to its enjoyment by irregular migrants, and to provide information about its availability.
2. States should nonetheless strive to provide holistic health care to irregular migrants, including preventive treatment, in conformity with the broader understanding of the right to health in the ICESCR. Moreover, certain vulnerable groups of irregular migrants, such as children, disabled persons, pregnant women and the elderly, should be granted health care on equal terms with comparable national groups.

### **3.5. Social and welfare services**

The provision of (personal) social and welfare services to irregular migrants is not covered by the *Exploratory Report* prepared for the CS-CO, although these services are clearly important in filling in gaps in social provision. They were discussed by the ad hoc working group and include care services for particularly vulnerable groups, such as disabled persons and juveniles, and the provision of specific cross-sectoral services in the housing, social assistance and health areas.

In the UK, local authorities provide services to persons deemed to be vulnerable. These services have evolved on the basis of an assessment of the needs of the individual. However, such services have been gradually removed from migrants generally. When access to social security benefits was taken away from certain groups of asylum seekers in the mid-1990s, they were still able to receive social services by virtue of the National Assistance Act 1948, which imposed obligations on local authorities to provide assistance to persons in need. However, national assistance has since been removed from all persons "subject to immigration control"<sup>172</sup> and a separate support system has been established for asylum seekers under the auspices of the National Asylum Support Service (NASS). Access to NASS has now been removed by s. 55 of the 2002 Act in respect of those asylum

seekers who are deemed not to have lodged a claim within a reasonable period of time after arriving in the UK,<sup>173</sup> although families with dependent children under 18 and unaccompanied asylum-seeking children are exempt from this provision by virtue of the legislation providing for the welfare of the child.<sup>174</sup> However, as far as rejected asylum seekers with dependent children are concerned, the most recent legislation enables the Secretary of State to remove asylum support from those he or she certifies have failed, without reasonable excuse, to take reasonable steps to leave the UK voluntarily, although such persons may still qualify for support provided by local authorities.<sup>175</sup> In the Netherlands, access to social services has not been removed by the Linking Act and remains an option of “last resort” for irregular migrants.

While NGOs also provide social services to irregular migrants, it is strongly arguable that NGOs can only supplement government provision rather than replace it altogether.<sup>176</sup> The ad hoc working group noted that NGOs are frequently required to operate on a contradictory basis and an ambiguous relationship thus exists between governments and NGOs. Governments are willing to praise NGOs for undertaking these activities, but NGOs are also criminalised for providing assistance to irregular migrants. The problems with criminalisation and the existence of a duty to denounce irregular migrants have already been referred to in Sections 3 and 3.3 above. Moreover, it is often unclear whether the relevant provisions apply to social or humanitarian assistance. In Germany, where a duty to denounce is also in place, there used to be a tendency to ignore or tolerate the assistance provided to irregular or undocumented migrants, although recently there have been an increasing number of cases, particularly involving ministers of religion who provide “church asylum”.<sup>177</sup> While many of these cases are resolved before trial, the mere possibility that prosecution in such circumstances is possible, acts as a deterrent to those who might be contemplating the provision of assistance to irregular migrants in need. In France, the law only exempts family members of irregular migrants from prosecution. The criminalisation provisions have been used against other persons who provided accommodation to irregular migrants, a controversial measure in a number of high-profile cases which led to many protests.<sup>178</sup> In contrast, Article 77 of the Belgian Foreigners’ Law permits the provision of assistance to irregular migrants for humanitarian reasons, although the notion of “humanitarian reasons” has been defined restrictively.<sup>179</sup> EU law criminalising the facilitation of irregular migration also leaves it to the discretion of member states whether to include a “humanitarian defence” in the offence of intentionally facilitating the entry of irregular migrants.<sup>180</sup> While legislation criminalising the provision of assistance to irregular migrants does not necessarily discourage NGOs from undertaking activities in this area, it can lead to further practical problems. For example, NGOs may experience difficulties in obtaining funds for their activities with the result that it becomes difficult to “professionalise” the organisations concerned. Moreover, the threat of criminalisation can result in the creation of a “shadow network of helpers”, which should be discouraged. NGOs providing help to irregular migrants are less prepared to operate in a transparent manner and consequently risk becoming involved in other “illegal” activities, which, according to PICUM,

has been the case for some NGOs in Germany. This is also problematic from the standpoint of social security provision because if NGOs become “employers” by providing jobs for irregular migrants, they are also liable for the payment of minimum wages and social security contributions.

Where the provision of social services does not fall within the traditional meaning of social security discussed in Section 3.3 above, or is supplementary to other social benefits, the following recommendations can be advanced with a view to ensuring that irregular migrants, particularly those who are especially vulnerable, are not denied access to such services.

1. States are in the best position given their possession of more extensive resources to provide social and welfare services to all those in need of such services within their jurisdiction, including irregular migrants. The responsibility for the provision of these services in practice should not fall wholly on civil society actors and NGOs.
2. Where NGOs provide social and welfare services to irregular migrants, a significant obstacle to their enjoyment are national provisions that criminalise the provision of this assistance. It is essential therefore that no criminal sanctions are imposed on charitable or non-profit organisations providing social and welfare assistance to vulnerable groups of irregular migrants.

### **3.6. Fair employment conditions**

In general, the relevant international human rights instruments provide for the principle of equal treatment in respect of fair employment conditions between nationals and non-nationals irrespective of legal status.<sup>181</sup> This position is supported by ILO international labour standards, which generally do not distinguish between workers for reasons of their nationality or residence status, the UN convention on migrant workers, which provides for equal treatment between irregular migrant workers and national workers in respect of a whole range of employment-related rights,<sup>182</sup> and the advisory opinion of the Inter-American Court of Human Rights discussed in Section 3 above.

According to PICUM, the four most important aspects of fair employment conditions for irregular migrants relate to the following rights: right to a fair wage; right to compensation for work accidents; the right to defend these rights in the labour courts of the country of employment; and the right to organise. The importance of providing compensation or social benefits in respect of work accidents to irregular migrant workers on an equal basis with nationals, notwithstanding the absence of social insurance contributions on the part of the former, was emphasised in Section 3.3 above on social security. But it should be underlined that work accidents may be avoided altogether or minimised considerably if migrants are given proper training, which is often neglected in respect of those undertaking temporary jobs. Such training should also include information on their rights in the workplace.<sup>183</sup>

While most countries' laws do not contain any explicit distinctions between regular and irregular migrants in respect of conditions in the workplace,<sup>184</sup> restrictions exist with regard to trade union rights. While such restrictions might well fall, under certain circumstances, within the permissible limitations on such rights foreseen in Article 16 ECHR, which stipulates bluntly that "[n]othing in Articles 10 [freedom of expression], 11 [freedom of assembly and association] and 14 [prohibition of discrimination] shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens", it should be recalled that the European Court of Human Rights has interpreted this provision restrictively.<sup>185</sup> Moreover, Article 16 ECHR remains controversial vis-à-vis the expansive protection afforded by international labour standards and more general human rights instruments. In March 2001, the Spanish Foreigners' Law was the subject of a complaint to the ILO Supervisory Committee on Freedom of Association,<sup>186</sup> which draws its mandate from the ILO Constitution. As noted in Section 3 above, in Spain irregular migrants may access basic social rights, but only if they register with their local municipality. The committee concluded that the Spanish Foreigners' Law, which restricted migrants' trade union rights by making their exercise dependent on authorisation of their presence or status in Spain, was not in conformity with the broad scope of Article 2 of the ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organize.<sup>187</sup> The committee stated that Article 2 covers all workers with the only permissible exceptions relating to the army and the police.<sup>188</sup> While the opinion of this committee is of less weight than that of the ILO Committee of Experts on the Application of Conventions and Recommendations, which is the principal ILO body responsible for supervising states parties' implementation of ratified conventions, including Convention No. 87, and the rulings of the European Court of Human Rights, which are binding on Council of Europe member states, the explicit recognition that trade union rights are also applicable to workers in an unauthorised situation should be welcomed and is indeed in conformity with the Advisory Opinion of the Inter-American Court of Human Rights on the legal status and rights of undocumented migrants discussed above.

The role of trade unions with regard to encouraging irregular migrants to take action to safeguard their access to minimum rights and the provision of assistance and representation in this connection is particularly important. While trade unions used to be very protective of national workers and considered the presence of irregular migrants in the workplace to be a threat to the interests of the former, today they recognise that the exploitation of irregular migrants undercuts the position of all workers, both nationals and lawfully resident migrants. It is not uncommon for trade unions in some Council of Europe member states to support the organisation of irregular migrant workers. A good example is the organising activity undertaken by the Swiss construction workers trade union (Syndicat Industrie et Bâtiment (SIB)). The statute of the trade union now includes an explicit provision stipulating that all workers have the right to organise regardless of status. The trade union supported irregular migrant workers in the formation of their own union (Collectif des travailleurs sans statut légal) and then invited them

to affiliate with the main trade union for a very low monthly fee. The union also assists irregular migrants by making a number of official office hours available to them and defends their rights in the labour courts on the basis of a power of attorney with the result that irregular migrants are not required to appear in court themselves and thus avoid the risk of expulsion. The union has also submitted demands to public authorities for the collective regularisation of irregular migrants who are in employment.<sup>189</sup> Similar advice and legal support activities on behalf of irregular migrant workers are undertaken by one of the largest Dutch trade unions, *Federatie Nederlandse Vakbeweging (FNV)*.<sup>190</sup>

Given this unequivocal position supporting equal treatment between irregular migrants, nationals and lawfully resident migrants in respect of rights in the workplace, it is particularly disconcerting, as noted in Section 2.5 above, that a number of EU Association Agreements with significant migrant-sending countries explicitly exclude irregular migrant workers from aspects of this protection.

Clearly, the application of the principle of equal treatment in respect of fair employment conditions prevents employers from taking advantage of the unauthorised situation of irregular migrants by avoiding their responsibilities,<sup>191</sup> for example the non-payment of wages. Indeed, many countries apply this principle in their laws. While the Dutch Linking Act denies such benefits to irregular migrants, they may still bring a civil action against the individual employer. In the UK, however, the situation remains problematic because it is not possible to bring civil action on the basis of an illegal employment contract, although it has been observed that the illegality of a contract has not precluded the application of anti-discrimination law.<sup>192</sup> Moreover, even in those countries where irregular migrants are able to start such actions, they are less likely to do so in practice given that this would identify them to the authorities and would thus increase the risk of their expulsion or removal from the country concerned.

The possibility of irregular migrants defending their rights in the labour courts of the country of employment is also closely tied with access to legal aid, the denial of which can constitute a major obstacle to the enjoyment and exercise of their rights generally. In the Netherlands, for example, the Linking Act does not apply to legal aid because of the protection provided by Article 6 ECHR. In Greece, however, legal aid is provided only to migrants lawfully resident in the EU. The Greek National Commission for Human Rights opposed the original bill, introduced into Parliament by the Ministry of Justice, on the grounds that it is contrary to European human rights standards.<sup>193</sup>

Ensuring fair employment conditions for irregular migrants means adherence to and implementation of the following principles.

1. Irregular migrant workers as workers should not be denied the right to fair employment conditions, as reflected in rights to a fair wage, compensation for work accidents, access to the labour courts of the country of employment, and the right to organise. The application of these rights to all workers without distinction of any kind is clearly supported by international human

rights law and international labour standards. Therefore, any formal legal obstacles preventing migrant workers from claiming unpaid wages, work accident compensation or from accessing the labour courts because of the illegality of the employer-employee contractual relationship should be removed in the countries concerned.

2. States should also refrain from creating or omitting to remove practical obstacles that make it very difficult for irregular migrants to enjoy these rights. Given that the detection of poor employment conditions as well as exploitative employers is also in the interest of states in the context of combating the informal labour market, legal challenges by irregular migrants against their employers should be facilitated by the provision of legal aid and without exposing them to the risk of expulsion for bringing such actions.

3. Trade unions have an important role to play in including irregular migrant workers in their membership structures and assisting them to organise themselves in the protection of their interests, and trade unions should facilitate such activities and recognise them as part of their core work.

### **3.7. Residence rights and regularisation**

Clearly, the regularisation of irregular migrants can complement labour migration management policies. As noted in Section 3.1 above, the prospect of regularisation also facilitates the access of irregular migrants to minimum rights and social protection. The Council of Europe is in a very good position to establish basic principles or rules on regularisation schemes, which are presently lacking, in consultation with its member states, civil society representatives, including the social partners, regional and local authorities and NGOs. While it would be difficult to argue for a European-wide approach to regularisation, there is arguably nothing to prevent governments adopting national schemes.<sup>194</sup> However, the ad hoc working group identified a number of problems with national approaches to regularisation. Firstly, national regularisation projects frequently lead to different outcomes for the irregular migrants concerned. For example, the recent regularisation process in Portugal, aimed largely at Moldavian and Ukrainian irregular migrants, was problematic because migrants lost the tolerated status as soon as they left the country. It is therefore necessary to avoid situations where migrants move between irregular and regularised statuses. Secondly, it should be remembered that regularisations may have different purposes. While some are conducted to assist individual migrants with a view to avoiding their marginalisation and strengthening social cohesion in the country concerned, others are often used strategically by governments to ensure a flexible supply of labour and for public order reasons.

Should a right of residence or “a right to stay” be afforded to irregular migrants, particularly those who have resided in a country for a considerable period of time? For example, in the UK, irregular migrants are effectively afforded an individual right to regularisation if they can demonstrate to the immigration authorities that they have resided in the country continuously for a period of fourteen years.<sup>195</sup> In Belgium, the Foreigners’ Law also provides

for “permanent regularisation” for humanitarian reasons, which is applied with discretion by the authorities. The ILO has argued in favour of “a right to earned adjustment” for those irregular migrant workers who cannot be removed and who have demonstrated that they have a prospect of settling successfully in the country concerned:

Countries would be better off regularizing the status of workers whom they cannot send back home. This benefits not only the migrants but the country as a whole. In this connection, a principle that seems to have wide implicit resonance in the regularization policies of many countries is that of earned adjustment. Migrant workers with irregular status may be said to earn a right to legal status if they meet certain minimum conditions: they must be gainfully employed, they must not have violated any laws other than those relating to illegal or clandestine entry, and they must have made an effort to integrate by (for example) learning the local language.<sup>196</sup>

However, “permanent regularisation” also raises a number of difficult issues. Firstly, what rules should apply in respect of the social protection of those irregular migrants who have been regularised, particularly in respect of the provision of long-term social security benefits? Should such protection cover the period (often years) spent as an irregular migrant? While contributions paid during this period of irregularity should be recognised for social insurance purposes, as noted in Section 3.3 above, it would be difficult to consider such a period in terms of regular employment for other purposes. Secondly, persons often drift in and out of regularisation, which is particularly the case in those southern European countries that have undertaken relatively frequent regularisation programmes, which have been mainly triggered by the need to fill labour shortages. Consequently, it is important to distinguish between regularisation of the work situation and permanent regularisation measures relating to residence. PICUM has identified a number of equitable regularisation standards, which might serve as useful guidance for action in this area. For example, regularisation schemes should be devised in collaboration with all interested parties, such as trade unions and NGOs; regularisation procedures should not be arbitrary in application; irregular migrants who have lodged a claim should not be at risk of expulsion during the procedure; employment and the provision of social benefits should be available to claimants; the application should be considered by an independent body rather than the competent ministry; and the law should provide a remedy to migrants whose applications have been rejected under the procedures.<sup>197</sup>

The following recommendations can be advanced in respect of regularisation and residence rights.

1. States should consider the possibility of regularising irregular migrants, particularly those who cannot be removed from their territory for legal or practical reasons as well as those who have resided in the country for a considerable period of time. Particular attention should be devoted to the regularisation of those irregular migrants who are in a stable employment situation with a view to discouraging employers and labour intermediaries from gaining unfairly from their irregular labour and in the overall context of combating the informal work economy.

2. Regularisation procedures should be conducted in accordance with equitable standards, which comply with basic rule of law safeguards.
3. Regularisation should provide a secure residence status for the migrant and situations where migrants drift in and out of legal status should be avoided.
4. European-wide regularisation measures should not be contemplated with a view to restricting regularisation overall but in the context of recognising that regularisation can be a valuable tool in facilitating social cohesion, particularly in countries with a significant population of irregular migrants.

### Notes

45. At its meeting in December 2003, the ad hoc working group noted the work of other organisations in this field. The Platform for International Cooperation on Undocumented Migrants (PICUM) has drawn up a list of priority areas based on the experiences of PICUM's members. These areas concern rights to shelter, health care, education for minors and the right to fair working conditions. PICUM has assessed the position of irregular migrants in a number of European countries (to date: Austria, Belgium, Denmark, France, Germany, Italy, the Netherlands, Spain, Sweden and the UK) on the basis of in-depth interviews with representatives of grass-roots organisations and researchers with reference to nine basic social rights as part of an ongoing project entitled the *Book of Solidarity*, Vols 1-3.
46. Article 2(1) UDHR:  
"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."
47. UNGA Res. 40/144 of 13 December 1985, Appendix [hereinafter UN Declaration on the Human Rights of Non-Nationals],
48. *Ibid.*, Article 8. The rights listed in Articles 8(1)(a)-(c) are:  
"the right to safe and healthy working conditions, to fair wages and equal remuneration for work of equal value without distinction of any kind, in particular, women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work";  
"the right to join trade unions and other organisations or associations of their choice and to participate in their activities"; and  
"the right to health protection, medical care, social security, social services, education, rest and leisure, provided that [non-nationals] fulfil the requirements under the relevant regulations for participation and that undue strain is not placed on the resources of the State".
49. *The rights of non-citizens*, note 13 above, p. 2 (executive summary).
50. *Ibid.*, p. 2 (executive summary) and p. 5, paragraph 7.
51. *Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, Durban, 31 August-8 September 2001, UN Doc. A/CONF.189/12 (25 January 2002), Programme of Action, paragraph 27.
52. *Ibid.*, paragraph 30(g), which urges states:  
"to take all possible measures to promote the full enjoyment by all migrants of all human rights, including those related to fair wages and equal remuneration for work of equal value without distinction of any kind, and to the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond their control, social security, including social insurance, access to education, health care, social services...".
53. See also Da Lomba, 2004, p. 365.
54. International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 [hereinafter ICESCR] (entered into force 3 January 1976; ratified by 151 states).
55. However, Article 2(3) ICESCR stipulates that:  
"[d]eveloping countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals".

56. UN, ESCOR, ESC Committee, 32nd Session, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Spain*, UN Doc. E/C.12/1/Add.99 (7 June 2004), paragraph 7.
57. *Ibid.*, paragraph 24. See also UN, ESCOR, ESC Committee, 32nd Session, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Greece*, UN Doc. E/C.12/1/Add.97 (7 June 2004), paragraph 15: "The Committee is concerned that low income persons, the Roma, and documented and undocumented immigrants and their families may not have access to social services"
58. UN, ESCOR, ESC Committee, 5th Session, *General Comment 3, The Nature of States Parties Obligations (Art. 2, paragraph 1 of the Covenant)*, UN Doc. E/1991/23 (1991), paragraph 2:

"[T]he Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each State party to take the necessary steps 'to the maximum of its available resources'. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations".
59. *Ibid.*, paragraph 13.
60. *Ibid.*, paragraph 9.
61. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, GA Res. 48/158 of 18 December 1990 [hereinafter ICMW] (entered into force 1 July 2003; ratified by 33 states).
62. Conclusions on a fair deal for migrant workers in a global economy (An ILO plan of action for migrant workers), note 24 above, paragraph 27.
63. Advisory Opinion OC-18/03 of 17 September 2003 requested by the United Mexican States, *Juridical Condition and Rights of the Undocumented Migrants*, Series A No. 18, paragraphs 133-134 (available from the Court's website at [http://www.corteidh.or.cr/serieapdf\\_ing/seriea\\_18\\_ing.pdf](http://www.corteidh.or.cr/serieapdf_ing/seriea_18_ing.pdf)).
64. Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS No. 5 (entered into force 3 September 1953; ratified by 45 states), as amended by Protocol No. 11, 11 May 1994, ETS No. 155.
65. See Article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, ETS No. 9 (entry into force 18 May 1954; ratified by 43 states).
66. *Gaygusuz v. Austria* (1996) 23 EHRR 364.
67. Protocol No. 1 to the ECHR, note 65 above, Article 2.

68. See respectively European Social Charter, 18 October 1961, ETS No. 35 (entered into force 26 February 1965; ratified by 27 states) and European Social Charter (revised), 3 May 1996, ETS No. 163 (entered into force 1 July 1999; ratified by 21 states).
69. Appendix to the European Social Charter and the revised European Social Charter, paragraph 1.
70. European Convention on the Legal Status of Migrant Workers, 24 November 1977, ETS No. 93 (entered into force 1 May 1983; ratified by 8 states).
71. See PICUM, *Book of Solidarity*, Vol. 1, pp. 44-45 (discussing the German Foreigners' Law (BGBl. I S. 1354), Article 76) and p. 48 respectively.
72. UDHR, Article 25(1) and ICESCR, Article 11(1). The latter provision reads: "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."
73. UN, ESCOR, ESC Committee, 6th Session, *General Comment 4, The right to adequate housing (Art. 11(1) of the Covenant)*, UN Doc. E/1992/23 (1991), paragraph 6.
74. *Ibid.*, paragraph 7.
75. *Ibid.*, paragraph 8(e). The disadvantaged groups listed are: "the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups". Clearly, this is not an exhaustive list and the words "other groups" would encompass other vulnerable groups in terms of adequate housing, such as asylum-seekers, refugees and irregular migrants.
76. *Ibid.*, paragraph 1.
77. *Ibid.*, paragraph 9: "[T]he full enjoyment of other rights – such as the right to freedom of expression, the right to freedom of association (such as for tenants and other community-based groups), the right to freedom of residence and the right to participate in public decision-making – is indispensable if the right to adequate housing is to be realized and maintained by all groups in society. Similarly, the right not to be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondence constitutes a very important dimension in defining the right to adequate housing".
78. *Ibid.*, paragraph 13, citing UN, ESCOR, ESC Committee, 5th Session, Supp. No. 3, Appendix IV, *Revised guidelines regarding the form and contents of reports to be submitted by States Parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights*, UN Doc. E/1991/23 (1991), p. 88.
79. *Ibid.*, p. 100.
80. UN, ESCOR, CHR, 58th Session, Provisional Agenda Item 10, *Report of the special rapporteur on adequate housing as a component of the right to an adequate standard of living*, Mr Miloon Kothari, UN Doc. E/CN.4/2002/59 (March 2002), paragraph 40.
81. Conference against Racism Programme of Action, note 51 above, paragraphs 33 and 81 respectively.

82. See Article 43(1)(d) ICMW:  
"Migrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to ... (d) Access to housing, including social housing schemes, and protection against exploitation in respect of rents".
83. Articles 31 and 13 respectively.
84. European Convention on Social and Medical Assistance, 11 December 1953, ETS No. 14 (entry into force 1 July 1954; ratified by 18 states). The personal scope of the convention applies to nationals of contracting parties who are "lawfully present" in the territory of another contracting party, a notion that would, for example, encompass those persons working without authorisation but who nonetheless possess a residence permit.
85. Similar arguments can also be gauged from the equivalent provisions (Articles 7 and 17 respectively) in the ICCPR.
86. *Guzzardi v. Italy*, App. No. 7367/76, Commission Report, EurCtHR 1995, (ser. B, No. 35) (1978). This position has been affirmed by the Court in respect of severe environmental pollution in *Lopez Ostra v. Spain*, App. No. 16798/90, (1994) 20 EHRR 277, paragraph 51 and *Guerra and Others v. Italy*, App. No. 14967/89, (1998) 26 EHRR 357, paragraph 60. See also S. Leckie, "The Right to Housing" in A. Eide, et al. (eds), *Economic, Social and Cultural Rights: A Textbook* (Dordrecht: Martinus Nijhoff, 1994) 107, p. 117.
87. La Fédération Européenne d'Associations Nationales Travaillant avec les Sans-Abri (European Federation of National Organisations working with the Homeless). See <http://www.feantsa.org/index.htm>.
88. PICUM, *Book of Solidarity*, Vol. 1, p. 55.
89. See Council Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (*OJ* 2002 L 328/1) and Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (*OJ* 2002 L 328/17).
90. The criminal offence in Article 1(1)(b) of Council Directive 2002/90/EC, *ibid.*, relates to: "any person who, *for financial gain*, intentionally assists a person who is not a national of a member state *to reside* within the territory of a member state in breach of the laws of the state concerned on the residence of aliens". Emphasis added.
91. See respectively Nationality, Immigration and Asylum Act 2002, s. 55(10) and *R (Limbuela) v. Secretary of State for the Home Department*, Court of Appeal (judgment of 21 May 2004) [2004] EWCA Civ 540.
92. The Council of Europe's Commissioner for Human Rights raised concerns in this regard on the grounds that it would then be difficult for the asylum seekers to mount an effective challenge to the decision if they did not possess an official address. See Commissioner for Human Rights, *3rd Annual Report January to December 2002, to the Committee of Ministers and the Parliamentary Assembly*, Doc. CommDH(2003) 7 (19 June 2003) at p. 30. See [http://www.coe.int/T/E/Commissioner\\_H.R/Communication\\_Unit/Documents/BCommDH%282003%297\\_E.pdf](http://www.coe.int/T/E/Commissioner_H.R/Communication_Unit/Documents/BCommDH%282003%297_E.pdf).
93. Pluymen, December 2002, p. 37.
94. PICUM, *Book of Solidarity*, Vol. 1, p. 55.
95. *Ibid.*, pp. 95-99, paragraphs 11-14.
96. For an overview of the background to the issues and controversies surrounding the Sangatte centre, see L. Schuster, "Asylum Seekers: Sangatte and the Tunnel" (2003) 56 *Parliamentary Affairs*, p. 506.

97. For example, see UDHR, Article 26; ICESCR, Article 13; UN Convention on the Rights of the Child (20 November 1989; UN Doc. A/RES/44/25; ratified by 192 states parties) Articles 2 and 28(1)(a); UNESCO Convention against Discrimination in Education (14 December 1960; 429 UNTS 93; ratified by 91 states parties), Article 4(a); UN Convention on Migrant Workers, Article 30.
98. UN, ESCOR, ESC Committee, 21st Session, *General Comment No. 13, The right to education (Art. 13)*, UN Doc. E/C.12/1999/10 (1999), paragraph 1.
99. In this regard, see also Article 3(e) UNESCO Convention against Discrimination in Education, which explicitly requires states parties "[t]o give foreign nationals resident within their territory the same access to education as that given to their own nationals".
100. See note 98 above, paragraph 34. Emphasis added.
101. P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 3rd ed. (The Hague: Kluwer, 1998), p. 654.
102. PICUM, *Book of Solidarity*, Vol. 1, p. 45.
103. Pluymen, December 2002, p. 35.
104. Nationality, Immigration and Asylum Act 2002, c. 41, s. 36.
105. The EU Council Directive on the reception of asylum seekers, which was supposed to have been transposed into member states' laws by 6 February 2005, also provides for the possibility of educating children of asylum seekers as well as minor asylum seekers in separate accommodation centres. Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (*OJ* 2003 L 31/18), Article 10(1).
106. PICUM, *Book of Solidarity*, Vol. 3, p. 40.
107. PICUM, *Book of Solidarity*, Vol. 1, p. 48.
108. For example, the ad hoc working group observed that the UK Inspectorate of Education has found that refugee children and the children of asylum seekers, who come from "aspirant cultures", are likely to perform better at school. Such children are more likely to overcome low income and other disadvantages. This conclusion is applicable to the education of such children in the London Borough of Hackney (one of the most socially deprived localities in the UK) where refugee children were found to perform more strongly than home children. Indeed, it was noted in the ad hoc working group that schoolteachers often prefer to have such children in their classrooms because they are more likely to avoid disruptive behaviour.
109. Article 13(1) ICESCR:  
"The States Parties . . . agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society...".
110. The negative implications of the recently adopted EU Council Directive on the right to family reunification (Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, *OJ* 2003 L 251/12) for the education of all migrant children should also be considered. One of the most controversial provisions of this directive concerns the possibility for member states to prevent children as young as 12 years of age from joining their family because of the absence of integration (Article 4(1), final indent). The European Parliament has commenced an action for annulment of this and other provisions in the directive before

the European Court of Justice on the grounds that they are inconsistent with fundamental rights and particularly the rights of minors, including the right to respect for family life and the right not to be discriminated against, as guaranteed by the ECHR and as these rights result from the constitutional traditions common to EU member states as general principles of Community law, as established by Article 6(2) of the Treaty on European Union. See Case C-540/03, *European Parliament v. Council*, OJ 2004 C 47/21. The other provisions subject to challenge concern the optional clauses in Article 4(6), which gives the option to a member state to require that applications concerning family reunification of minor children are submitted before the age of 15 as provided in its existing legislation on the date of the directive's implementation, and Article 8, which permits a member state to introduce a two-year waiting period before the sponsor can be joined by his or her family members, and which, by way of derogation, can be extended to three years where the member state's legislation in force on the date of the directive's adoption takes into account the country's reception capacity.

111. Vonk, 2002, p. 329.
112. *Exploratory Report*, note 12 above. This report was also presented earlier to the International Social Security Association (ISSA)'s European Regional Meeting on Migrants and Social Protection in Oslo on 21-23 April 2004 (available from <http://www.issa.int/engl/homef.htm>).
113. *Exploratory Report*, note 12 above, p. 2.
114. However, as G. Vonk (2002) observes at p. 328, in respect of seconded migrant workers who continue to contribute to the social security system in their country of origin, such arrangements may result in inequitable situations depending on the country from which the migrant worker comes:

“When the level of social security protection between states is comparable, the secondment rules for social security may work out very well. But when workers migrate from poor countries to rich Western-European states with highly developed social security systems, the secondment regime seems to operate as a shield against the equal social protection of seconded workers”.
115. Only a small number of member states provided a response to this questionnaire: Albania, Bulgaria, Czech Republic, Greece, Portugal, Sweden, Switzerland, Turkey, and the United Kingdom. *Exploratory Report*, note 12 above, p. 10.
116. See, for example, Convention No. 156 of 1981 on Workers with Family Responsibilities, Article 2: “This Convention applies to all branches of economic activity and all categories of workers”. See also Convention No. 183 of 2000 on Maternity Protection, Article 1: “For the purposes of this Convention, the term *woman* applies to any female person without discrimination whatsoever and the term *child* applies to any child without discrimination whatsoever”.
117. See, for example, Convention No. 102 of 1952 on Social Security (Minimum Standards), Article 1(1)(b); Convention No. 128 of 1967 on Invalidity, Old-Age and Survivors' Benefits, Article 1(d); Convention No. 118 of 1962 on Equality of Treatment (Social Security), Article 1(e); Convention No. 130 of 1969 on Medical Care and Sickness Benefits, Article 1(d).
118. *Exploratory Report*, note 12 above, p. 6. See respectively Convention No. 19 of 1925 on Equality of Treatment (Accident Compensation), Article 1 (“(1) Each Member of the International Labour Organization

- which ratifies this Convention undertakes to grant to the nationals of any other Member which shall have ratified the Convention, who suffer personal injury due to industrial accidents happening in its territory, or to their dependants, the same treatment in respect of workmen's compensation as it grants to its own nationals. ... (2) This equality of treatment shall be guaranteed to foreign workers and their dependants without any condition as to residence. ..."); and Convention No. 121 of 1964 on Employment Injury Benefits, Article 27 ("Each Member shall within its territory assure to non-nationals equality of treatment with its own nationals as regards employment injury benefits").
119. See (revised) European Social Charter, Articles 12(4) and 13(4) respectively. See also Article 19 in both instruments, which affords the right of migrant workers and their families to protection and assistance.
120. (Revised) European Social Charter, Appendix, paragraph 1.
121. *Exploratory Report*, note 12 above, p. 9.
122. See the discussion in R. Cholewinski, 1997, pp. 165-167.
123. *Exploratory Report*, note 12 above, p. 11.
124. *Ibid.*, p. 12.
125. *Ibid.*
126. *Ibid.*, pp. 12-14.
127. Article 11(b): "Lawful residence shall become unlawful from the date of any deportation order made out against the person concerned, unless a stay of execution is granted." A more conventional definition of an "irregular migrant worker" is provided in the UN convention on migrant workers, which refers to national law. Article 5 reads: "For the purposes of the present Convention, migrant workers and members of their families: (a) are considered as documented or in a regular situation if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party; (b) are considered as non-documented or in an irregular situation if they do not comply with the conditions provided for in subparagraph (a) of the present article."
128. For the various labour migration models, see E. Guild and H. Staples, "Labour Migration in the European Union" in P. De Bruycker (ed.), *The Emergence of a European Immigration Policy* (Brussels: Bruylant, 2003), p. 171.
129. *Exploratory Report*, note 12 above, p. 13.
130. It cannot be assumed, however, that lawfully resident migrants are automatically entitled to benefits in the country of residence. For example, in the UK, most injury, sickness or disability benefits, which are found on the list of "public funds", are not available to migrants (who include not just irregular migrants, but also students, etc.). Moreover, some migrants in the UK fail to take advantage of contributory social security benefits to which they are entitled because they fear becoming disadvantaged if at some point in the future they were to switch their status to ordinary work permit employment (for example, working holidaymakers, who are not covered by the ordinary work permit scheme).
131. *Exploratory Report*, note 12 above, pp. 15-18.
132. In *Niemietz v. Germany* (1993) 16 EHRR 97, the European Court of Human Rights held that "private life" in Article 8 ECHR goes beyond the notion of an "inner circle" of family and friends, and includes a right to develop one's own personality and to create and maintain relationships with others.

133. PICUM, *Book of Solidarity*, Vol. 1, pp. 44-45.
134. With regard to social security abuse, it is important to underline that not only irregular migrants might be involved, but also lawfully resident migrants as well as nationals. For example, the latter may receive unemployment benefits and work at the same time in the informal labour market.
135. The Home Office has also set up an “immigration-related crime hotline”, which encourages people to report human traffickers and smugglers, employers who use irregular labour and facilitators of bogus marriages, although civil society organisations, while welcoming this initiative, also recognise that this hotline can be abused to exploit irregular migrants even further. See *Book of Solidarity*, Vol. 1, note 43 above, p. 47.
136. See also Article 25(1) UDHR: “Everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services.”
137. See UN, ESCOR, ESC Committee, 22nd Session, Geneva, 25 April-12 May 2000, *General Comment No. 14 (2000). The right to the highest attainable standard of health*, UN Doc. E/C.12/2000/4 (11 August 2000), paragraph 34. Original emphasis.
138. Leary, 1995, p. 109. For a more complete analysis of the concept of the right to health in international human rights law, see also Leary, 1994, and Toebes, 1999.
139. Leary, 1994, pp. 44 and 48 respectively (footnotes omitted).
140. MacPherson and Gushulak, October 2004, p. 9 (available from the website of the Global Commission on International Migration at [http://www.gcim.org/ir\\_gmp.htm](http://www.gcim.org/ir_gmp.htm)).
141. See *General Comment No. 14 (2000)*, note 137 above, paragraphs 1, 3: “Health is a fundamental human right indispensable for the exercise of other human rights... The right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health”.
142. The “indivisible relationship between the right to health and the right to housing” is recognised expressly by the United Nations Special Rapporteur on the right to adequate housing, Mr Rajindar Sachar. See UN, ESCOR, CHR, 47th Session, Item 8 on the provisional agenda, *The Realization of Economic, Social and Cultural Rights: The Right to Adequate Housing, Final Report Submitted by Mr Rajindar Sachar, Special Rapporteur*, UN Doc. E/CN.4/Sub.2/1995/12 (12 July 1995), paragraph 58. See also Da Lomba, 2004, p. 366 (footnote omitted): “The link between health and socio-economic circumstances is well established and the adverse impact of poor living conditions on health is well documented.”
143. Cf. Leary, 1994, pp. 40-41, referring to presentations made at the general discussion on the right to health as recognised in Article 12 ICESCR, organised by the ESC Committee on 6 December 1993. See UN, ESCOR, ESC Committee, 9th Session, 41st meeting, *General discussion on the right to health (Minimum core content and non-discrimination dimensions) as recognized in article 12 of the Covenant*, UN Doc. E/C.12/1993/SR.41 (1993).

144. See *General Comment No. 14 (2000)*, note 137 above, paragraphs 21-27.
145. Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, 1249 UNTS 13 (ratified by 180 states), Article 12; Convention on the Rights of the Child, Articles 23 (disabled children) and 24.
146. See *General Comment No. 14 (2000)*, note 137 above, paragraphs 30 and 32 respectively.
147. Article 28 ICMW reads in full:

“Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment”.
148. See also Da Lomba, 2004, p. 379, who argues that the right to health care in Article 28 ICMW “remains imperfect as it is confined to access to emergency medical care, thus failing to secure that irregular migrants benefit from disease prevention measures such as early diagnosis and medical follow-up.”
149. 9 November 1995, ETS No. 158; entered into force 1 July 1998; ratified by 11 states).
150. Complaint No. 14/2003, *International Federation of Human Rights (FIDH) v. France* [http://www.coe.int/T/E/Human\\_Rights/Esc/4\\_Collective\\_complaints/List\\_of\\_collective\\_complaints/RC14\\_on\\_merits.pdf](http://www.coe.int/T/E/Human_Rights/Esc/4_Collective_complaints/List_of_collective_complaints/RC14_on_merits.pdf). The Committee found a violation of Article 17 of the revised European Social Charter, which is concerned with the protection and provision of assistance to children and young persons and obliges contracting parties, *inter alia*, to ensure that children and young persons have the care and assistance that they need, in particular by providing for the establishment or maintenance of institutions and services sufficient for this purpose, and to protect them from negligence, violence and exploitation. Medical assistance to migrants without an authorised status was limited to situations that involved an immediate threat to life and children of irregular migrants were only admitted to the medical assistance scheme after a certain period of time. *Ibid.*, paragraphs 33-37.
151. *Ibid.*, paragraphs 29-32.
152. *Ibid.* (Dissenting opinion of Mr Stein Evju joined by Mrs Polonca Koncar and Mr Lucien François; dissenting opinion of Mr Rolf Birk).
153. In May 2005, the Committee of Ministers adopted a resolution, which “takes note of the circular DHOS/DSS/DGAS No. 141 of 16 March 2005 on the implementation of urgent care delivered to foreigners resident in France in an illegal manner and non-beneficiaries of State Medical Assistance”. See Committee of Ministers Resolution ResChS(2005)6 – Collective complaint No. 14/2003 by the International Federation of Human Rights Leagues (FIDH) against France (4 May 2005). See [http://wcd.coe.int/rsi/common/renderers/source\\_file.jsp?id=856639&SourceFile=1](http://wcd.coe.int/rsi/common/renderers/source_file.jsp?id=856639&SourceFile=1).
154. *Pretty v. United Kingdom*, EurCtHR, judgment of 29 April 2002 (Application No. 2346/02), paragraph 52. Emphasis added.
155. Da Lomba, 2004, p. 283, referring to the judgment of the English Court of Appeal in *R (on the application of Q and Others) v. Secretary of State for the Home Department* [2003] EWCA Civ 364.
156. *D. v. United Kingdom* (1997) 24 EHRR 423.

157. See the admissibility decision in *Arcila Henao v. The Netherlands*, Application No. 13669/03 of 24 June 2003. This case concerned the return of a Colombian national to his country of origin after conviction for a drugs-related offence in the Netherlands. The applicant was HIV-positive and claimed that his return to Colombia would put him at a real risk of degrading treatment contrary to Article 3 ECHR because of the practical difficulties he would experience in obtaining medical treatment for his condition. The Court dismissed his application for the following reason: "the Court considers that, unlike the situation in the ... case of *D. v. the United Kingdom* ..., it does not appear that the applicant's illness has attained an advanced or terminal stage, or that he has no prospect of medical care or family support in his country of origin. The fact that the applicant's circumstances in Colombia would be less favourable than those he enjoys in the Netherlands cannot be regarded as decisive from the point of view of Article 3 of the Convention."
158. See Da Lomba, 2004, pp. 384-385, citing respectively from *Osman v. United Kingdom* (1998) 26 EHRR 357, paragraph 116 ("For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case") and *Bensaid v. United Kingdom* (2001) 33 EHRR 205, paragraph 46 ("Not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect to private life guaranteed by Article 8. However, the Court's case law does not exclude that treatment which does not reach the severity of Article 3 treatment may nonetheless breach Article 8 in its private-life aspect where there are sufficiently adverse effects on physical and moral integrity.") It should also be recalled that, unlike Articles 2 and 3 ECHR, the second paragraph of Article 8 ECHR enables contracting parties to justify restrictions on the right to respect for family and private life.
159. *Exploratory Report*, note 12 above, p. 10.
160. *Ibid.*
161. This is the position for overseas visitors in the UK, who may well include irregular migrants. See *Overseas Visitors' Eligibility to Receive Free Primary Care*, HSC 1999/018, paragraph 6, cited by Da Lomba, 2004, p. 374.
162. *Exploratory Report*, note 12 above, p. 11.
163. *Ibid.* This access covers outpatient and hospital care which is urgent or otherwise (and includes continuous care); medical programmes which are preventive or which safeguard individual or collective health; maternity care; treatment of minors; vaccinations required under public health law; diagnosis, treatment and prevention of infectious diseases; and international prevention activities.
164. Da Lomba, 2004, pp. 373-377.
165. *Ibid.*, pp. 368-369.
166. *Ibid.*, pp. 369, 377.
167. *Ibid.*, pp. 370-373. Implementation of these reforms was put on hold because of strong criticism and opposition on the grounds that the reforms, *inter alia*, undermined the principle of universal health care and threatened public health. *Ibid.*, pp. 370-371.
168. *Exploratory Report*, note 12 above, pp. 10-11.

169. *Ibid.*, p. 10.
170. It has also been documented by NGOs that some hospitals in Germany, in order to save costs, have been known to organise “private deportations” of irregular migrant patients to Poland and the Ukraine. PICUM, June 2001, p. 40.
171. With regard to the latter situation, see the co-ordination on health care applicable in EU Council Regulation 1408/71/EEC (*OJ* 1971 L 149/2), as amended, and the Council of Europe (co-ordination) Convention on Social Security (Paris, 14 December 1972: ETS No. 78; ratified by 8 states). Council Regulation 1408/71/EEC has recently been extended to encompass third-country nationals lawfully resident in EU member states. See Council Regulation 859/2003/EC, *OJ* 2003 L 124/1.
172. Nationality, Immigration and Asylum Act 2002, s. 54 and Schedule 3.
173. *Ibid.*, s. 55.
174. Children Act 1989, c. 41.
175. Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, c.19, s. 9.
176. See Da Lomba, 2004, p. 367 writing in relation to health-related services:  
“The voluntary sector is often called upon by government as an alternative provider of services. However, the resources available to charitable bodies are inevitably limited. Consequently, they can only realistically provide supplementary, rather than alternative, health-related services”.
177. See also PICUM, *Book of Solidarity*, Vol. 1, p. 44.
178. PICUM, *Book of Solidarity*, Vol. 2, pp. 45-46, with reference to Article 21 of Ordinance No. 45-2658 of 2 November 1945 relating to the conditions of the entry and stay of foreigners in France (*Ordonnance relative aux conditions d'entrée et de séjour des étrangers en France*) as amended.
179. *Ibid.*, pp. 47-48. Belgian Foreigners' Law of 15 October 1980, Article 77 (as amended) reads: “Each person knowingly helping or assisting a foreigner, either in the actions preparing or facilitating his illegal entry or illegal residence, or in actions accomplished, can be punished. ... In case the help to the foreigner is provided on mainly humanitarian grounds, the previous paragraph does not apply”. The ad hoc working group discussed one case where a woman was prosecuted for providing accommodation to an irregular migrant with whom she had conducted a relationship and it was argued by the prosecuting authorities that this situation could not constitute “humanitarian” assistance. Although she was eventually acquitted on appeal, this case evoked a serious discussion in the society at large on the correct interpretation of the provision.
180. Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence, note 89 above, Article 1(2).
181. For example, see Article 7 ICESCR: “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work...”
182. Article 25 ICMW (conditions of work – for example, working time, rest periods, holidays with pay, health and safety, protection from termination of the employment relationship; terms of employment – for example, minimum working age, restrictions on home work) and Article 26 ICMW (to join and take part in trade unions). While there is no explicit right to form trade unions in Article 26 ICMW, the right to form and join trade unions in general international human rights instruments, such as Article 22(1) ICCPR and Article 8(1)(a) ICESCR, applies to “everyone” without any reference to legal status.

183. Cf. presentation by G. Saliba of the Spanish Trade Union Comisiones Obreras (CCOO) at the Dialogue on Employment and Sustainability, World Congress on Human Movements and Immigration: A Challenge for the 21st Century, Barcelona, 2-5 September 2004.
184. For example, in Greek labour case law, the enjoyment of certain conditions of work, such as holidays with pay and compensation for termination of the employment relationship, does not depend on the legal status of migrant workers.
185. *Piermont v. France* (1995) 20 EHRR 301. In *Piermont*, a German MEP was expelled from French Polynesia for participating in peaceful protests supporting independence for the colony and opposing the holding of nuclear tests in the area. The Court ruled that the right to freedom of expression in Article 10(1) ECHR had been violated and interpreted the terms "aliens" in Article 16 ECHR restrictively by concluding that this provision could not be used against the applicant because she was an EU national and a Member of the European Parliament in which persons living in overseas territories could also participate through elections. *Ibid.*, paragraph 64.
186. See Case No. 2121 (23 March 2001): Complaint by the General Union of Workers of Spain (UGT) – Denial of the right to organize and strike, freedom of assembly and association, the right to demonstrate and collective bargaining rights to "irregular" foreign workers (regarding the alleged violation of ILO Convention No. 87 of 1948 on Freedom of Association and Collective Bargaining). ILO, Committee on Freedom of Association, *Report No. 327*, Vol. LXXXV, 2002, Series B, No. 1, paragraph 561 (also available from <http://webfusion.ilo.org/public/db/standards/normes/libsynd/index.cfm?hdroff=1>).
187. Article 2 of Convention No. 87 is unequivocal: "Workers and employers, *without distinction whatsoever*, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization". Emphasis added.
188. *Ibid.*, Article 9. The committee, note 186 above, paragraph 562, invited the ILO Governing Body to recommend that the Spanish Government "as concerns the legislation in cause, to take into account the terms of Article 2 of Convention No. 87 according to which workers, without distinction whatsoever, have the right to join organizations of their own choosing".
189. Presentation by Murad Akincilar (SIB representative from the Geneva section) to the workshop on "Protecting Migrant Workers' Rights through Non-governmental Action". Metropolis Conference on Migration Management: International, National and Local Answers, University of Geneva, 27 September-1 October 2004. The representative noted that there were 12 000 workers in an undocumented situation in Geneva alone.
190. PICUM, *Book of Solidarity*, Vol. 1, p. 60.
191. See in particular Article 25(3) ICMW: "States Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from [the equality of treatment] principle by reason of any irregularity in their stay or employment. *In particular, employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of such irregularity.*" Emphasis added.
192. Bell, 2004, p. 357.

193. Hellenic Republic, National Commission for Human Rights, *Report 2003. Summary in English* (February 2004), p. 22 with reference to the Bill regarding the provision of legal aid to persons with low income (30 October 2003). See now Law 3226/2004. This summary is available from <http://www.nchr.gr/downloads/NCHR%202004%20OFFPRINT.doc>.
194. In this regard, see ILO Convention No. 143, Article 9(4): "Nothing in this Convention shall prevent Members from giving persons who are illegally residing or working within the country the right to stay and to take up legal employment." However, the opposite emphasis is found in Article 35 ICMW: "Nothing in [Part III] of the Convention shall be interpreted as implying the regularization of the situation of migrant workers or members of their families who are non-documented or in an irregular situation or any right to such regularization of their situation..." In its June 2004 *Study on the links between legal and illegal migration* (COM (2004) 410, 4 June 2004), p. 17, the European Commission indicated a possible move towards a more uniform approach to regularisation at the EU level. The Commission suggested that member states contemplating a significant regularisation exercise could notify other member states and consult on the details of the proposed measures with a view to preventing the adverse effects of such measures across the EU that are arguably exacerbated by the abolition of internal borders in those countries participating in the Schengen zone.
195. See Immigration Directorates' Instructions, c.18 (The Long Residence Concession) (September 2004), available from the Immigration and Nationality Department's website at [http://www.ind.homeoffice.gov.uk/ind/en/home/laws\\_\\_policy/policy\\_instructions/table\\_of\\_contents/chapter\\_18\\_-\\_the\\_long.html](http://www.ind.homeoffice.gov.uk/ind/en/home/laws__policy/policy_instructions/table_of_contents/chapter_18_-_the_long.html).
196. International Labour Conference, 92nd Session, 2004, Report VI, *Towards a fair deal for migrant workers in the global economy* (Geneva: International Labour Office, 2004), p. 120, paragraph 399.
197. See the standpoint on regularisation, available from PICUM's website at <http://www.picum.org/> (Information and Documentation).

## Conclusion

This study has analysed the international and regional legal rules of relevance governing irregular migrants' access to minimum social rights. Some of these rights, such as those concerning the provision of education and health care, are clearer in their application to irregular migrants while others, such as social security and housing, raise more complex issues. To varying degrees, however, national laws in member states make access to many of these rights very difficult if not impossible. Moreover, even where such access is not prohibited by the law and should be available, the very illegality of the migrants' stay creates further legal and practical obstacles to the enjoyment of these rights.

During the deliberations of the ad hoc working group on irregular migrants in December 2003, it was observed that arguments based on social cohesion and solidarity are politically less persuasive today in promoting migrants' human rights in the context of a weakened welfare state. While arguments promoting the protection of human rights relating to welfare, social security and housing generally are becoming less attractive to politicians, the issue of human rights is acquiring a new salience in the context of the process of globalisation. Migration is an important feature of globalisation and, as noted in Section 2.3 above, the migration-development nexus has recently been underlined in research commissioned by the IOM and the World Bank (particularly in respect of the transfer of migrant savings or remittances).<sup>198</sup> Given the growing importance of this dimension of migration, it is necessary to consider the question of irregular migrants' access to minimum rights in developed countries of employment in the broader context of North-South relations. As one commentator has pertinently argued:

Policies of exclusion from basic social rights rest upon and convey the idea that irregular migrants themselves are primarily responsible for their precarious situation. Such policies tend to overlook national and international macro-economic factors that give rise to irregular migration such as demand for a cheap and flexible workforce within "black markets" of host countries combined with extreme poverty in countries of origin.<sup>199</sup>

This broader context in which irregular migration takes place must not be ignored in seeking the difficult solutions required to ensure that Council of Europe member states provide access to minimum social rights for this vulnerable group of persons.

**Notes**

198. See respectively The Migration-Development Nexus, note 27 above; and D. Ellerman, Policy Research on Migration and Development, Policy Research Working Paper WPS 3117 (The World Bank, August 2003) and R.H. Adams, Jr., International Migration, Remittances and the Brain Drain: A Study of 24 Labor-Exporting Countries, Policy Research Working Paper WPS 3069 (The World Bank, June 2003).
199. Da Lomba, 2004, p. 365.

# Appendix 1 – Recommendations

## Housing

1. Housing provision should not be denied to irregular migrants on the grounds of their unauthorised status, particularly given the importance of the right to adequate housing for the enjoyment of other civil, political, economic and social rights.
2. While states might be justified in denying long-term housing provision to those irregular migrants who can be removed from the country or rejected asylum seekers who have exhausted their rights of appeal, such migrants must nevertheless be afforded a minimum level of housing assistance commensurate with conditions of human dignity. The provision of assistance in such circumstances should not be interpreted in a way that is tantamount to the detention of irregular migrants.

## Education

1. The children of irregular migrants must not be denied access to education in Council of Europe member states, both in law and administrative practice. While international legal standards provide that access to primary education should be free of charge to all children, given the existence of compulsory schooling requirements in member states, free access to secondary schooling for all children, including those of lawfully resident and irregular migrants, should also be secured in law and practice.
2. Given that access to education is considered a universal right irrespective of legal status, this right should also include formal recognition of this education. Irregular migrant children should therefore be able to obtain certificates in the host country indicating the level to which they have completed their education.
3. Migrant children, including those of irregular migrants, should be entitled to intercultural education, particularly language classes, which assist their participation and integration in the host society and their reintegration in the event that they return to their country of origin.
4. Education and its recognition are important factors to be taken into account in the context of the return of migrant children to their countries of origin, whether return occurs through the operation of readmission agreements or other return procedures.

## **Social security**

1. In accordance with general international human rights standards, no person (nationals or migrants regardless of legal status) should be denied access to a minimum level of social protection, which is usually defined in terms of basic or emergency medical treatment and the provision of social assistance to prevent destitution and to enable the person concerned to live in dignity.
2. Because irregular migrants often work in dangerous jobs, accident compensation should also be available to them in accordance with international labour standards on equal terms with national workers irrespective of whether the employment concerned is formal or informal.
3. With regard to those irregular migrants who are in employment and making contributions to the social insurance system, they should be entitled to receive the resultant benefits or reimbursement of these contributions, preferably before they are required to leave the country.
4. In the event of the regularisation of the migrant's situation in the host state, the period during which social security contributions were paid should be recognised as the legally valid period for social insurance purposes.

## **Health**

1. In keeping with the earlier recommendation concerning social security, the provision of urgent or emergency medical treatment to irregular migrants is the minimum requirement and states should take measures to ensure that this right is recognised formally in their laws, to eliminate the practical obstacles to its enjoyment by irregular migrants, and to provide information about its availability.
2. States should nonetheless strive to provide holistic health care to irregular migrants, including preventive treatment, in conformity with the broader understanding of the right to health in the ICESCR. Moreover, certain vulnerable groups of irregular migrants, such as children, disabled persons, pregnant women and the elderly, should be granted health care on equal terms with comparable national groups.

## **Social and welfare services**

1. States are in the best position given their possession of more extensive resources to provide social and welfare services to all those in need of such services within their jurisdiction, including irregular migrants. The responsibility for the provision of these services in practice should not fall wholly on civil society actors and NGOs.
2. Where NGOs provide social and welfare services to irregular migrants, a significant obstacle to their enjoyment are national provisions that criminalise the provision of this assistance. It is essential therefore that no criminal sanctions are imposed on charitable or non-profit organisations

providing social and welfare assistance to vulnerable groups of irregular migrants.

### **Fair employment conditions**

1. Irregular migrant workers as workers should not be denied the right to fair employment conditions, as reflected in rights to a fair wage, compensation for work accidents, access to the labour courts of the country of employment, and the right to organise. The application of these rights to all workers without distinction of any kind is clearly supported by international human rights law and international labour standards. Therefore, any formal legal obstacles preventing migrant workers from claiming unpaid wages, work accident compensation or from accessing the labour courts because of the illegality of the employer-employee contractual relationship should be removed in the countries concerned.

2. States should also refrain from creating or omitting to remove practical obstacles that make it very difficult for irregular migrants to enjoy these rights. Given that the detection of poor employment conditions as well as exploitative employers is also in the interest of states in the context of combating the informal labour market, legal challenges by irregular migrants against their employers should be facilitated by the provision of legal aid and without exposing them to the risk of expulsion for bringing such actions.

3. Trade unions have an important role to play in including irregular migrant workers in their membership structures and assisting them to organise themselves in the protection of their interests, and trade unions should facilitate such activities and recognise them as part of their core work.

### **Residence rights and regularisation**

1. States should consider the possibility of regularising irregular migrants, particularly those who cannot be removed from their territory for legal or practical reasons as well as those who have resided in the country for a considerable period of time. Particular attention should be devoted to the regularisation of those irregular migrants who are in a stable employment situation with a view to discouraging employers and labour intermediaries from gaining unfairly from their irregular labour and in the overall context of combating the informal work economy.

2. Regularisation procedures should be conducted in accordance with equitable standards, which comply with basic rule of law safeguards.

3. Regularisation should provide a secure residence status for the migrant and situations where migrants drift in and out of legal status should be avoided.

4. European-wide regularisation measures should not be contemplated with a view to restricting regularisation overall but in the context of recognising that regularisation can be a valuable tool in facilitating social cohesion, particularly in countries with a significant population of irregular migrants.



## Appendix 2 – Ratification by Council of Europe member states of applicable international human rights instruments and international labour standards

Council of Europe Member State'	International Covenant on Economic, Social and Cultural Rights	UN convention on migrant workers (ICMW)	ILO Convention No. 143 of 1975 on Migrant Workers (Supplementary Provisions)
Albania	X		
Andorra			
Armenia	X		
Austria	X		
Azerbaijan	X	X	
Belgium	X		
Bosnia and Herzegovina	X	X	X
Bulgaria	X		
Croatia	X		
Cyprus	X		X
Czech Republic	X		
Denmark	X		
Estonia	X		
Finland	X		
France	X		
Georgia	X		
Germany	X		
Greece	X		
Hungary	X		
Iceland	X		
Ireland	X		
Italy	X		X
Latvia	X		

*Irregular migrants: access to minimum social rights*

Council of Europe Member State'	International Covenant on Economic, Social and Cultural Rights	UN convention on migrant workers (ICMW)	ILO Convention No. 143 of 1975 on Migrant Workers (Supplementary Provisions)
Liechtenstein	X		
Lithuania	X		
Luxembourg	X		
Malta	X		
Moldova	X		
Monaco	X		
Netherlands	X		
Norway	X		X
Poland	X		
Portugal	X		X
Romania	X		
Russian Federation	X		
San Marino	X		X
Serbia and Montenegro	X		X
Slovakia	X		
Slovenia	X		X
Spain	X		
Sweden	X		X
Switzerland	X		
"The former Yugoslav Republic of Macedonia"	X		X
Turkey	X	X	
Ukraine	X		
United Kingdom	X		
<b>Total Ratifications</b>	<b>45</b>	<b>3</b>	<b>10</b>

\* With the exception of Monaco, which only became a member state of the Council of Europe in October 2004, all the other Council of Europe member states have ratified the European Convention on Human Rights.

## Selected references

Bell, M., "Invisible Actors?: Irregular Migrants and Discrimination" in B. Bogusz et al. (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Leiden: Martinus Nijhoff, 2004), p. 345.

Cholewinski, R., *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (Oxford: Clarendon Press, 1997).

Commission of the European Communities, *Study on the links between legal and illegal migration* (COM (2004) 410, 4 June 2004).

Council of Europe, Committee of Experts on Standard-Setting Instruments in the Field of Social Security (CS-CO), 6th Meeting, Limassol, 25-26 May 2004, *Exploratory Report on the Access to Social Protection for Illegal Labour Migrants*, prepared by P. Schoukens and D. Pieters, Doc. CS-CO (2004) 3 rev (Strasbourg, 30 June 2004).

Council of Europe, *Report of the Ad hoc Working Group on Irregular Migrants (MG-AD)*, rapporteur: Ryszard Cholewinski, 17-18 December 2003, Doc. MG-AD (2003) 3 (Strasbourg, 12 March 2004).

Council of Europe, Parliamentary Assembly, *Migrants in irregular employment in the agricultural sector of southern European countries*, Report of the Committee on Migration, Refugees and Demography (rapporteur: Mrs Tana de Zulueta, Italy, Socialist Group) Doc. 9883 (18 July 2003).

Council of Europe, European Committee on Migration (CDMG), 45th Meeting, 25-27 March 2003, Memorandum prepared by the Secretariat (DG III – Social Cohesion), *Preliminary review of relevant international provisions relating to the effective access to minimum social rights for persons in need*, Doc. CDMG (2003) 15 (Strasbourg, 19 March 2003).

Council of Europe, Conference on "Irregular Migration and Dignity of Migrants: Co-operation in the Mediterranean Region", *Irregular Migration: Secretariat Memorandum*, Doc. MG-FL (2001) 12, (Strasbourg, 17 September 2001).

Da Lomba, S., "Fundamental Social Rights for Irregular Migrants: The Right to Health Care in France and England" in B. Bogusz et al. (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Leiden: Martinus Nijhoff, 2004), p. 363.

International Labour Conference, 92nd Session, 2004, *Report of the Committee on Migrant Workers*, Conclusions on a fair deal for migrant workers in a global economy, (an ILO plan of action for migrant workers).

International Labour Conference, 92nd Session, 2004, Report VI, *Towards a fair deal for migrant workers in the global economy* (Geneva: International Labour Office, 2004).

Leary, V.A., "Justiciability and Beyond: Complaint Procedures and the Right to Health" (1995) *Review of the International Commission of Jurists* 105.

Leary, V.A., "The Right to Health in International Human Rights Law" (1994) 1 *Health and Human Rights* 25.

MacPherson, D.W. and Gushulak, B.D., "Irregular Migration and Health" *Global Migration Perspectives*, No. 7 (Geneva: Global Commission on International Migration, October 2004).

Marie, C.-V., *Preventing Illegal Immigration: Juggling Economic Imperatives, Political Risks and Individual Rights* (Strasbourg: Council of Europe, Directorate of Social Affairs and Health, January 2004).

Minderhoud, P., "The Dutch Linking Act and the Violation of Various International Non-Discrimination Clauses" (2000) 2 *European Journal of Migration and Law* 185.

Morris, L., *Managing Migration: Civil Stratification and Migrants' Rights* (London: Routledge, 2002).

PICUM, *Book of Solidarity. Providing Assistance to Undocumented Migrants in Sweden, Denmark and Austria*, Vol. 3 (Brussels, PICUM, July 2003).

PICUM, *Book of Solidarity. Providing Assistance to Undocumented Migrants in France, Spain and Italy*, Vol. 2 (Brussels: PICUM, April 2003).

PICUM, *Book of Solidarity. Providing Assistance to Undocumented Migrants in Belgium, Germany, the Netherlands and the UK*, Vol. 1 (Brussels: PICUM, December 2002).

PICUM, *Health Care for Undocumented Migrants. Germany, the Netherlands, United Kingdom* (Brussels: PICUM, June 2001).

Pluymen, M., "Undocumented Migrants in the Netherlands" in PICUM, *Book of Solidarity. Providing Assistance to Undocumented Migrants in Belgium, Germany, the Netherlands and the UK*, Vol. 1 (Brussels: PICUM, December 2002) 35.

*Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, Durban, 31 August - 8 September 2001, UN Doc. A/CONF.189/12 (25 January 2002), Programme of Action.

De Tapia, S., *New Patterns of Irregular Migration in Europe*, Seminar Report, 12 and 13 November 2002 (Strasbourg: Council of Europe, December 2003).

Toebes, B., *The Right to Health as a Human Right in International Human Rights Law* (Oxford: Hart-Intersentia, 1999).

Tonelli, S., "Irregular Migration and Human Rights: A Council of Europe Perspective" in B. Bogusz et al. (eds), *Irregular Migration and Human Rights*:

*Theoretical, European and International Perspectives* (Leiden: Martinus Nijhoff, 2004), p. 301.

UN, ESCOR, CHR, Sub-Commission on the Promotion and Protection of Human Rights, 55th Session, Item 5 of the Provisional Agenda, *The rights of non-citizens*, Final report of the special rapporteur, Mr David Weissbrodt, submitted in accordance with Sub-Commission decision 2000/103, Commission resolution 2000/104 and Economic and Social Council decision 2000/283, Doc. E/CN.4/Sub.2/2003/23 (26 May 2003).

UN, ESCOR, CHR, 59th Session, Item 14 (a) of the provisional agenda, *Migrant Workers: Report of the Special Rapporteur, Ms Gabriela Rodríguez Pizarro*, submitted pursuant to Commission on Human Rights resolution 2002/62, UN Doc. E/CN.4/2003/85 (30 December 2002).

Vonk, G., "Migration, Social Security and the Law: Some European Dilemmas" (2002) 3/4 *European Journal of Social Security* 315.

## Sales agents for publications of the Council of Europe Agents de vente des publications du Conseil de l'Europe

### **BELGIUM/BELGIQUE**

La Librairie européenne SA  
50, avenue A. Jonnart  
B-1200 BRUXELLES 20  
Tel.: (32) 2 734 0281  
Fax: (32) 2 735 0860  
E-mail: [info@libeurop.be](mailto:info@libeurop.be)  
<http://www.libeurop.be>

Jean de Lannoy  
202, avenue du Roi  
B-1190 BRUXELLES  
Tel.: (32) 2 538 4308  
Fax: (32) 2 538 0841  
E-mail: [jean.de.lannoy@euronet.be](mailto:jean.de.lannoy@euronet.be)  
<http://www.jean-de-lannoy.be>

### **CANADA**

Renouf Publishing Company Limited  
5369 Chemin Canotek Road  
CDN-OTTAWA, Ontario, K1J 9J3  
Tel.: (1) 613 745 2665  
Fax: (1) 613 745 7660  
E-mail: [order.dept@renoufbooks.com](mailto:order.dept@renoufbooks.com)  
<http://www.renoufbooks.com>

### **CZECH REPUBLIC/ RÉPUBLIQUE TCHÈQUE**

Suweco Cz Dovož Tisku Praha  
Ceskomoravska 21  
CZ-18021 PRAHA 9  
Tel.: (420) 2 660 35 364  
Fax: (420) 2 683 30 42  
E-mail: [import@suweco.cz](mailto:import@suweco.cz)

### **DENMARK/DANEMARK**

GAD Direct  
Fiolstaede 31-33  
DK-1171 COPENHAGEN K  
Tel.: (45) 33 13 72 33  
Fax: (45) 33 12 54 94  
E-mail: [info@gaddirect.dk](mailto:info@gaddirect.dk)

### **FINLAND/FINLANDE**

Akateeminen Kirjakauppa  
Keskuskatu 1, PO Box 218  
FIN-00381 HELSINKI  
Tel.: (358) 9 121 41  
Fax: (358) 9 121 4450  
E-mail: [akatilauk@stockmann.fi](mailto:akatilauk@stockmann.fi)  
<http://www.akatilauk.akateeminen.com>

### **FRANCE**

La Documentation française  
(Diffusion/Vente France entière)  
124, rue H. Barbusse  
F-93308 AUBERVILLIERS Cedex  
Tel.: (33) 01 40 15 70 00  
Fax: (33) 01 40 15 68 00  
E-mail: [commandes.vel@ladocfrancaise.gouv.fr](mailto:commandes.vel@ladocfrancaise.gouv.fr)  
<http://www.ladocfrancaise.gouv.fr>

Librairie Kléber (Vente Strasbourg)  
Palais de l'Europe  
F-67075 STRASBOURG Cedex  
Fax: (33) 03 88 52 91 21  
E-mail: [librairie.kleber@coe.int](mailto:librairie.kleber@coe.int)

### **GERMANY/ALLEMAGNE AUSTRIA/AUTRICHE**

UNO Verlag  
August-Bebel-Allee 6  
D-53175 BONN  
Tel.: (49) 2 28 94 90 20  
Fax: (49) 2 28 94 90 222  
E-mail: [bestellung@uno-verlag.de](mailto:bestellung@uno-verlag.de)  
<http://www.uno-verlag.de>

### **GREECE/GRÈCE**

Librairie Kauffmann  
28, rue Stadiou  
GR-ATHINAI 10564  
Tel.: (30) 1 32 22 160  
Fax: (30) 1 32 30 320  
E-mail: [ord@otenet.gr](mailto:ord@otenet.gr)

### **HUNGARY/HONGRIE**

Euro Info Service  
Hungexpo Europa Kozpont ter 1  
H-1101 BUDAPEST  
Tel.: (361) 264 8270  
Fax: (361) 264 8271  
E-mail: [euroinfo@euroinfo.hu](mailto:euroinfo@euroinfo.hu)  
<http://www.euroinfo.hu>

### **ITALY/ITALIE**

Libreria Commissionaria Sansoni  
Via Duca di Calabria 1/1, CP 552  
I-50125 FIRENZE  
Tel.: (39) 556 4831  
Fax: (39) 556 41257  
E-mail: [licos@licos.com](mailto:licos@licos.com)  
<http://www.licos.com>

### **NETHERLANDS/PAYS-BAS**

De Lindeboom Internationale  
Publikaties  
PO Box 202, MA de Ruyterstraat 20 A  
NL-7480 AE HAAKSBERGEN  
Tel.: (31) 53 574 0004  
Fax: (31) 53 572 9296  
E-mail: [books@delindeboom.com](mailto:books@delindeboom.com)  
<http://www.delindeboom.com>

### **NORWAY/NORVÈGE**

Akademika, A/S Universitetsbokhandel  
PO Box 84, Blindern  
N-0314 OSLO  
Tel.: (47) 22 85 30 30  
Fax: (47) 23 12 24 20

### **POLAND/POLOGNE**

Główna Księgarnia Naukowa  
im. B. Prusa  
Krakowskie Przedmieście 7  
PL-00-068 WARSZAWA  
Tel.: (48) 29 22 66  
Fax: (48) 22 26 64 49  
E-mail: [inter@internews.com.pl](mailto:inter@internews.com.pl)  
<http://www.internews.com.pl>

### **PORTUGAL**

Livraria Portugal  
Rua do Carmo, 70  
P-1200 LISBOA  
Tel.: (351) 13 47 49 82  
Fax: (351) 13 47 02 64  
E-mail: [liv.portugal@mail.telepac.pt](mailto:liv.portugal@mail.telepac.pt)

### **SPAIN/ESPAGNE**

Mundi-Prensa Libros SA  
Castelló 37  
E-28001 MADRID  
Tel.: (34) 914 36 37 00  
Fax: (34) 915 75 39 98  
E-mail: [libreria@mundiprensa.es](mailto:libreria@mundiprensa.es)  
<http://www.mundiprensa.com>

### **SWITZERLAND/SUISSE**

Adeco – Van Diermen  
Chemin du Lacuz 41  
CH-1807 BLONAY  
Tel.: (41) 21 943 26 73  
Fax: (41) 21 943 36 05  
E-mail: [info@adeco.org](mailto:info@adeco.org)

### **UNITED KINGDOM/ROYAUME-UNI**

TSO (formerly HMSO)  
51 Nine Elms Lane  
GB-LONDON SW8 5DR  
Tel.: (44) 207 873 8372  
Fax: (44) 207 873 8200  
E-mail: [customer.services@theso.co.uk](mailto:customer.services@theso.co.uk)  
<http://www.the-stationery-office.co.uk>  
<http://www.itsofficial.net>

### **UNITED STATES and CANADA/ ÉTATS-UNIS et CANADA**

Manhattan Publishing Company  
2036 Albany Post Road  
CROTON-ON-HUDSON,  
NY 10520, USA  
Tel.: (1) 914 271 5194  
Fax: (1) 914 271 5856  
E-mail: [Info@manhattanpublishing.com](mailto:Info@manhattanpublishing.com)  
<http://www.manhattanpublishing.com>

**Council of Europe Publishing/Editions du Conseil de l'Europe**

F-67075 Strasbourg Cedex

Tel.: (33) 03 88 41 25 81 – Fax: (33) 03 88 41 39 10 – E-mail: [publishing@coe.int](mailto:publishing@coe.int) – Website: <http://book.coe.int>