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Human rights challenges of migration in Europe

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When the UN 'Refugee Convention' was signed in 1951 there seemed to be a common recognition among European nations that people fleeing persecution required international protection and that states had the responsibility of providing them with a safe haven. Now, sixty years later, this understanding appears to have been lost. Even those fleeing from brutal repression are no longer welcome when arriving at European borders.

Migrants trying to access this fortress continent have drowned in the seas or while crossing rivers, have been struck by anti-personnel mines, suffocated or died of hunger during their journey. A number of them have disappeared without a trace, there is no record of their death, and their families have never learned what happened to them. These many individual tragedies have caused only limited concern in the countries which the victims had dreamt of reaching. The absence of empathy has been striking.

Still, there are those who do not give up but continue their attempts to join us here in Europe in spite of restrictive immigration policies and increased border controls. One side effect of the measures taken is that migrants have been directed to the services of smugglers.

During my travels to members states of the Council of Europe I have come across a number of dilemmas concerning migration and the human rights protection of immigrants and refugees, which I feel necessitate reflection and a new policy direction.

Increased border surveillance and forced returns

European states have in recent years adopted a series of measures that make migrants' access to Europe extremely difficult, such as the introduction of strict visa requirements, extensive border patrols and the application of administrative or criminal sanctions to migrants who enter Europe irregularly. One consequence is that asylum seekers may not be able to apply for protection.

European states have signed readmission agreements with countries which do not respect international refugee law and human rights standards. 'Migration management' has been 'outsourced'. European states bound by the European Convention on Human Rights seek in this way to divert migration flows to third states, thereby trying to avoid responsibility for any violations of the human rights of migrants returned to those countries.

The European Union has strongly contributed to the advancement and homogenisation of immigration and asylum law and practice, though serious gaps of course still exist. Of particular importance has been the role of the EU in the efforts of border management and the prevention of irregular migration. EU policies also affect non-EU countries, which are often inspired by EU state practices and take on the task of deterring migration flows into the EU area.

The actions of the EU's border control-related agency, FRONTEX, which assists member states in the management of their external borders, have a direct impact on migrants attempting to enter Europe, including asylum seekers. It is absolutely essential that the agency's border management strategies be sufficiently 'protection-sensitive' and that respect for human rights, including the right to apply for and to enjoy asylum, is fully safeguarded during border control operations.

In this context, the recent deployment of Rapid Border Intervention Teams to the Greek-Turkish land border has raised concerns. It is important that the intervention teams are not only composed of national enforcement authorities specialising in strengthening border controls but also of officials trained to distinguish asylum seekers from irregular immigrants.

Rise of xenophobia in Europe and its effects on migrants

The increasingly restrictive migration policies of European states go hand in hand with a xenophobic, anti-migrant rhetoric which is on the rise. Extreme political parties have gained popular support in several European countries by promoting prejudices and advocating stricter rules on immigration.

The current debate on migration mainly focuses on issues such as border control, the ban on the burqa or the prohibition of the construction of minarets. Migrants are blamed for not 'integrating', while there is little debate on how real integration can be fostered.

The roots of this xenophobia must be discussed with more clarity. The high unemployment rates and other consequences of the economic crisis have certainly contributed – and these problems have been exploited by extreme nationalists in their hate speech.

This sad trend must be reversed. What Europe needs is wise leadership, which will not seek to gain ground through populist rhetoric, but rather search for fair, durable solutions, with due respect for the human rights of migrants.

Criminalisation of migration

Migrants arriving in European countries are increasingly perceived as "transgressors" – persons who have violated national legislation on border crossing. Several European countries have introduced criminal sanctions for irregular entry or residence. The sanctions applied include fines, imprisonment and expulsion.

The criminalisation of persons seeking international protection is a matter of substantial concern. Such stigmatisation violates basic principles of human rights. In respect of refugees, the UN 'Refugee Convention' specifically provides that 'states shall not impose penalties, on account of their irregular entry or presence, on refugees who ... enter or are present in their territory without authorisation.'

Several European states also impose criminal or administrative sanctions on smuggled migrants on account of their irregular entry. This is wrong; migrants should not be held criminally liable for being the object of smuggling, as laid down in the UN 'Smuggling Protocol', but should rather be treated as victims and provided with special care.

Assisting irregular entry is also treated as a criminal offence in several countries. Although such measures are frequently justified as a means to fight human trafficking and migrant smuggling, there have been incidents where sanctions were imposed on vessels that had rescued persons at sea and brought them to the shore.

In certain states persons who employ or in some form aid foreigners who are already present in the territory and whose status is irregular are punished. In Italy, for instance, the letting of accommodation to irregular migrants is a criminal offence. Such policies frequently target the migrants' family members. They put migrants in a much more vulnerable position and facilitate their exploitation and marginalisation.

Unjustified detention of migrants

Detention of migrants, falling within the current trend to criminalise migration, is now a common practice in almost all Council of Europe member states. Without having committed any crimes, migrants are locked up in detention, at times in appalling conditions. Children, including unaccompanied migrant minors, are frequently among them. I have stressed on several occasions that migrant children should not automatically be detained.

Particularly troublesome is the detention of asylum seekers, which is increasingly applied by states, in spite of the obligation under international law to guarantee freedom of movement to refugees. The 'Dublin Regulation' has had the effect of further detentions, with some states detaining asylum seekers when their transfers are underway to the state responsible for examining their application.

Irregular migrants are detained on a regular basis, particularly prior to expulsion, often automatically. However, such deprivation of liberty can only be defended if there is an objective risk that the individuals would otherwise abscond, and that alternative measures such as regular reporting do not exist. Such detention, if necessary, should be limited in time, and open to challenge before a judicial authority.

In this context, I find the 18 months time limit for detention prior to return, as permitted under the 'Return Directive', particularly unfortunate. Lengthy detention is not only inhumane but also unnecessary. The return procedure can usually be completed in a much shorter period than 18 months.

Protection needs of asylum seekers

The 'right to seek and to enjoy asylum from persecution', as guaranteed in the Universal Declaration of Human Rights, is not fully protected in Europe today.

Asylum seekers have to overcome ever more obstacles to be able to file their asylum claims.

In Turkey, the application of the UN 'Refugee Convention' is limited 'to persons who have become refugees as a result of events occurring in Europe'. Thus, non-European asylum seekers are excluded from protection under the Convention. On this occasion, I would once again like to encourage the Turkish authorities to withdraw the geographic limitation to the 'Refugee Convention'.

Although in some states there has been a downward trend in the number of applications filed annually, in recent years the recognition rates have dropped dramatically throughout Europe, with large discrepancies between countries. The burden of proof has been shifted onto the individual and it is increasingly difficult for many asylum seekers to prove their protection needs.

Many European states have developed lists of countries that are presumed to be safe places of origin. Asylum seekers originating from these states are deported almost automatically, often to some of the most dangerous parts of the world, and against the advice given by UNHCR. Upon return to their home country many of them are targeted, and their lives and health are at risk. We have seen this recently for instance in the case of Iraqi Christians, who are forcibly returned by some states without a thorough examination of the individuals' situation.

The standards of the asylum procedure also differ significantly between states, in spite of EU attempts at harmonising state practice in this respect and setting certain minimum requirements. Legal assistance and interpretation are not always available and asylum officers are in many cases not sufficiently aware of the vulnerable position of asylum seekers, particularly as regards children, victims of trafficking or smuggling, or persons persecuted on grounds of their sexual orientation or gender identity. Moreover, pending the appeal procedure, the guarantees provided are frequently insufficient, including protection against expulsion.

In this context, I am also concerned by the application by some states, such as the Netherlands and France, of accelerated procedures for the consideration of asylum applications. Such procedures are by their very nature bound to be less thorough than regular ones, and may undermine the right to seek asylum.

The recent judgment of the European Court of Human Rights in the case of *M.S.S. v. Belgium and Greece* has clearly demonstrated that asylum systems in European states do not always meet the minimum standards. The Strasbourg Court has also markedly exposed the weaknesses of the 'Dublin mechanism' by confirming that the assumption that all EU countries respect fundamental rights and may thus automatically transfer asylum seekers to the member state of first entry cannot be maintained. I would like to reiterate here my position that the 'Dublin mechanism' clearly requires rethinking, and should be replaced by a safer and more humane system.

Migrants' right to family reunification

The restrictive migration policies in European states have also had a negative impact on the principle that separated families should be reunited. Authorities are now reluctant to admit even the closest family members of migrants – even when the so-called 'sponsor' has permanent residence status or has acquired the nationality of the host state.

Applicants for family reunification often have to fulfil unreasonable requirements before being allowed to enter the receiving state. In some states applicants are required to pass language and integration exams before obtaining an entry visa – a requirement that for many may be difficult or even impossible to meet. This is particularly the case for illiterate persons, individuals living in war-torn countries or remote areas where there are no possibilities of learning the language of the state of destination.

In several states the sponsor is required to demonstrate that he or she has a safe income of a certain level, and in the case of reunification of spouses or family formation frequently the sponsor must have attained a certain age to be able to be joined by a loved one. With respect to children and parents, DNA testing may be applied to verify if they are genuinely related to the resident family member.

As a result of such excessively strict requirements families are frequently separated for years, and the only possibility for being reunited may be the migrant's return to the country he or she had fled. Being alone in the host state, without one's next of kin, is burdensome and negatively affects the migrant's ability to integrate into society. Moreover, it is an infringement of a migrant's right to respect for family life.

Human rights of irregular migrants

European countries often seem to forget the fact that even if the right of irregular migrants to remain in the host state is not protected, they do enjoy certain human rights. They should not be refouled, and should have access to basic health and education.

This is not well respected today. The focus is instead on getting these migrants out of the country. Some governments even set annual quotas for the number of people that are to be pursued and returned to their country of origin. Migrants who have lived in the host states for many years and are well integrated into society may be deported, as is the case for example with Roma families that are sent back to Kosovo* by a number of European states without due regard being paid to their private and family life. There have been reports of migrants being chased down and arrested by authorities in public spaces – actions that not only harm the individuals themselves but also foster xenophobic attitudes.

Despite such measures there will be irregular migrants present in Europe and many of them will remain there. Indeed many states are dependent on their labour, as these persons work in various sectors, such as agriculture or construction, in which nationals often do not wish to be employed. However, the irregular status of these migrants makes them prone to exploitation by employers. In this context, it is worth noting that regrettably no EU member state is so far a party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, while for the other Council of Europe countries this is currently only the case for Albania, Azerbaijan, Bosnia and Herzegovina and Turkey.

The possibility of regularising the stay of migrants should be seriously considered by European states. Some governments are hesitant to apply such measures for fear of attracting further immigration. However, regularisation may be the only means of safeguarding the dignity and human rights of a group of persons that are de facto

* All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 (1999) and without prejudice to the status of Kosovo.

residents and are particularly vulnerable on account of their irregular status. States should face up to reality.

Migration laws and policies have long-term effects on democratic societies in Europe and go to the heart of the question of Europe's pluralistic identity and values. Over-restrictive migration law and practice have not and will not manage to deter flows of migrants who seek protection or decent living conditions. They can only put more lives and human rights at risk.

European states need to reflect more upon the challenges of migration and tackle them in accordance with the human rights principles by which they are bound. The Council of Europe can provide leadership in this domain and its human rights standards give valuable guidance.

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