

Issue Paper

CRIMINALISATION OF MIGRATION IN EUROPE:



HUMAN RIGHTS IMPLICATIONS



COMMISSIONER FOR HUMAN RIGHTS
COMMISSAIRE AUX DROITS DE L'HOMME



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HUMAN RIGHTS IMPLICATIONS**

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Table of Contents

I. Introduction	
II. An overview of international responses to the trend of criminalisation of migration	5
III. Criminal law and implications of its use in the field of migration	7
a. Criminal law and victims	7
b. Implications of the language of criminalisation	8
IV. European migration law and policy developments towards criminalisation	10
a. External border crossing	10
b. Immigrants' residence and employment	15
c. Asylum	18
d. Detention	22
e. Implications for social rights	25
V. Implications of current European migration law and policy	27
a. External border crossing	29
b. Immigrants' residence and employment	32
c. Asylum	35
d. Detention	37
VI. Conclusions and Recommendations	38

I. Introduction

On 29 September 2008, the Council of Europe Commissioner for Human Rights (the Commissioner) issued a Viewpoint expressing his concern regarding the trend to criminalize the irregular entry and presence of migrants in Europe presented as part of a policy of migration management. He stated that ‘such a method of controlling international movement corrodes established international law principles; it also causes many human tragedies without achieving its purpose of genuine control.’¹

This Issue Paper builds on the concern of the Commissioner by examining, systematically, the human rights issues which arise from the phenomenon in Council of Europe member states of criminalisation of border crossing by people and of their presence on the territory of a state.

II. An overview of international responses to the trend of criminalisation of migration

Concern regarding the use of criminal sanctions, or administrative sanctions which mimic criminal ones (such as detention), in respect of border and immigration control issues has been rising for some time.² The consequences for refugees of hardening access to European borders backed up by criminal sanctions, has been questioned by academics, non-

1. http://www.coe.int/t/commissioner/Viewpoints/080929_en.asp.

2. M. Lee, ‘Human Trade and the criminalisation of irregular migration’ *International Journal of the Sociology of Law* 33 (2005) 1 – 15. E. Guild & P. Minderhoud ‘Immigration and Criminal Law in the European Union: The Legal Measures and Social Consequences of Criminal Law in Member states on Trafficking and Smuggling in Human Beings’ Martinus Nijhoff, Leiden, 2006. R. Cholewinski ‘The Criminalisation of Migration in EU Law and Policy’ in A. Baldaccini, E. Guild & H. Toner, ‘Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy Hart’, Oxford, 2007 pp 301 – 336.

governmental organisations and international organisations.³ In July 2008, ten independent human rights experts of the Special Procedures of the United Nations Human Rights Council criticised the EU's directive on the return of irregular migrants also on grounds of the intersection of criminal sanctions and immigration control. They stated that "irregular immigrants are not criminals. As a rule they should not be subjected to detention at all. Member states are obliged to explore the availability of alternatives to detention and detention must only be for the shortest possible period of time."⁴ On the treatment of foreigners in detention more generally, already in 2009, the European Committee for the Prevention of Torture (CPT), Council of Europe, raised questions about the practices in Finland, the Netherlands and Portugal. In 2008, the Committee expressed concern about the treatment of foreigners seven times, including a highly critical report on facilities in Greece. A parallel move, which also causes substantial concern, is the use of criminal law sanctions to punish individuals and businesses which engage with individuals whose immigration status is either uncertain or unauthorised.

The issue revolves around the consequences of two quite distinct fields of law – criminal law and administrative law in the area of borders, immigration and asylum and how they become woven together. One of the key challenges of this intersection is the commitment and ability of states to comply with their human rights obligations. The adoption of criminal

3. 'Oxfam, Foreign territory : the internationalisation of EU asylum policy', Oxfam, Oxford, 2005. R. Cholewinski, 'Study on obstacles to effective access of irregular migrants to minimum social rights', Council of Europe, Strasbourg, 2005; Médecins sans Frontières 'Not Criminals: Médecins sans Frontières Exposes Conditions for Undocumented Migrants and Asylum Seekers in Maltese Detention Centres' April 2009; S. Palidda, 'Criminalisation and Victimization of Migrants in Europe' University of Genoa, 2009.

4. <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/227C3A187C0BDB81C125748A0037A405?opendocument>.

laws establishing offences which can only be committed by or in respect of foreigners presents important challenges for human rights norms. First and most centrally is that of non-discrimination. While discrimination on the basis of nationality is the basis of border controls on persons – some persons, i.e. citizens have a right to enter the territory of a state while others, non-citizens do not – nonetheless, the treatment of non-citizens at the borders does not escape human rights law. Indeed, the treatment of persons beyond the state's physical borders where the state's agents are in control of the individual is also subject to states' human rights obligations.⁵ Discrimination on the basis of nationality in fields tangential to border crossing can be contrary to European human right standards as the European Court of Human Rights has held.⁶ Member states cannot park their human rights obligations in their constitutional settlements as engaging only their own citizens.

III. Criminal law and implications of its use in the field of migration

a. Criminal law and victims

Criminal law has a very different place in democratic societies from that of administrative law. Criminal law is designed to punish individuals who harm other individuals or the society at large. There are two quite different streams of criminal law: (a) the criminalisation of acts against individuals, who as a result of the act, become victims and (b) crimes which do not

5. For instance, the acts of visa and consular officials in countries of origin of individuals etc. See also E. Guild, 'Security and European Human Rights: protecting individual rights in times of exception and military action', Wolf, Nijmegen, 2006.

6. See for instance *Gaygusuz v Austria*, judgment of 16 September 1996 ; *Koua Poirrez v France*, judgment of 30 September 2003; see also UN CERD, General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system, 2005, available at: www.ohchr.org.

have a concrete victim but are rather against society at large. In liberal democracies, crimes against individuals attract the most concern and attention of the public. The punishment of individuals who harm other individuals is the most obviously legitimate task of the criminal justice systems. Crimes against the general good as defined by the state tend to be more contested. For instance, approaches to the consumption of drugs across the EU member states varies substantially on account of the lack of consensus among populations and the governments which represent them whether such consumption should be a criminal act where there is no victim or the victim is the individual making the choice of consumption. Crimes of border crossing are similarly victimless crimes. Leaving aside the issue of trafficking in human beings, an individual who irregularly crosses a border or stays on the territory of a state beyond his or her permitted period does not harm a specific individual. To the extent that harm is done at all, it is to the integrity of the state's border and immigration control laws.

b. Implications of the language of criminalisation

Before moving to the specific issues which are giving rise to concern, it is important to take stock of the language which is used. Most international organisations, including the Council of Europe,⁷ and non-governmental organisations use a fairly neutral terminology when addressing the question of non-nationals whose presence on the territory of a state has not been authorised by the state authorities or is no longer so authorised. The Council of Europe Parliamentary Assembly highlighted the importance of the language used in its Resolution 1509(2006): “the Assembly prefers to use the term ‘irregular migrant’ to other terms such as ‘illegal migrant’

7. For instance Recommendation 1755 (2006) on the human rights of irregular migrants of the Parliamentary Assembly.

or ‘migrant without papers’. This term is more neutral and does not carry, for example, the stigmatisation of the term ‘illegal’. It is also the term increasingly favoured by international organisations working on migration issues.” However, all the EU institutions and member state governments use the expression ‘illegal immigrants’ and ‘illegal immigration’ to describe this category.⁸

Sadly, these terms are used even in situations where the individuals concerned have not even approached the EU territory where, for all the knowledge of EU officials, they may still be in their country of nationality.⁹ This use of the term ‘illegal immigrant’ and ‘illegal immigration’ is erroneous as neither have the individuals necessarily committed a criminal offence under the laws of any member state nor is the term immigration legitimate when the individual is a national within his or her own territory and may or may not be considering travelling abroad.

The choice of language is very important to the image which the authorities project to their population and the world. Being an immigrant becomes associated, through the use of language, with illegal acts under the criminal law. All immigrants become tainted by suspicion. Illegal immigration as a concept has the effect of rendering suspicious in the eyes of the

8. See for instance: Decision of the JHA Council of 27-28 April 2006 to step up joint flights for the expulsion of illegal immigrants, Council Document 11185/06; or Meeting of the Working Party of Senior Officials and Experts from Greece, Pakistan, Turkey and Iran concerning the combating of trafficking in illegal immigrants and trafficking in human beings, held in Islamabad on 5 and 6 September 2006, Council Document 16872/06. From the European Parliament an example is ‘Illegal immigration, external action of the EU and Frontex’, Document number RSP/2008/2562; or the European Commission’s ‘Development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders, and the return of illegal residents. Third annual report’ SEC (2009) 320 final.

9. See, for instance, the European Commission’s ‘Development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders, and the return of illegal residents. Third annual report’ SEC (2009) 320 final where illegal immigration is discussed as a phenomenon which occurs beyond EU borders altogether.

population (including public officials) the movement of persons across international borders. The suspicion is linked to criminal law – the measure of legality as opposed to illegality. Other international organisations and governments have chosen to use terms such as undocumented migrants and migration, or irregular migrants or immigration. This political choice about the language to use focuses attention on the relationship of the individual with the mechanisms of the state to document or regularize status rather than conjuring up images of police and the criminal justice system.

IV. European migration law and policy developments towards criminalisation

a. External border crossing

The crossing of external borders of member states of the Council of Europe is regulated by national law as modified by human rights and EU obligations. States are under a duty to admit their own nationals. This is an obligation under Article 3(2) of Protocol No. 4 to the European Convention on Human Rights (ECHR).¹⁰ Membership of the EU obliges states to admit nationals of any other member state (and their family members of any nationality) for a period of three months without formalities unless exclusion can be justified on the basis of public policy, public security or public health.¹¹ Nationals of other states may be permitted to enter the state (or not) in accordance with national and EU law, depending on which applies. For those EU member states which participate in the Schengen free movement area (i.e. an area

10. 'No one shall be deprived of the right to enter the territory of the state of which he is a national.'

11. Article 18 EC and Directive 2004/38; this right is also extended to the non-EU national family members of the citizen exercising the right.

without internal controls on the movement of persons),¹² any third country national (i.e. not a national of any of the participating states) who holds a document which the issuing state has notified to the European Commission as valid for the purposes of movement, is entitled to move for three months within the territory of the states.¹³

Irregular entry and the individual

Where foreigners who are subject to immigration control, cross external borders into European states otherwise than in accordance with the national law on border crossing, in many states an administrative sanction applies. For instance, this has long been the case in the UK where so-called ‘illegal entry’ has included not only clandestine entry onto the territory avoiding any immigration control but also entry obtained by deceiving an immigration officer who, if in full knowledge of the facts, would not have permitted the individual entry onto the territory. However, irregular entry is also a criminal offence punishable by a fine and/or up to six month imprisonment and expulsion.¹⁴ In Germany, irregular entry (and residence) is an offence under the criminal law.¹⁵ The sanction for the least severe form is imprisonment up to one year or a fine in addition to expulsion. Similar criminal law sanctions are provided for irregular entry in Greek immigration law.¹⁶ In 2008 Italian law was changed to make the irregular status of aliens who commit a criminal offence

12. This includes all member states except Bulgaria, Cyprus and Romania which have not yet been able to join and Ireland and the UK which have chosen to stay out of the system. Iceland, Norway and Switzerland also participate in the Schengen free movement area.

13. See the list of residence permits on the European Commission’s website: http://ec.europa.eu/justice_home/doc_centre/freetravel/rights/doc_freetravel_rights_en.htm. This included until 30 October 2007, Italian Special Post Office receipts. There is a public policy and security exception.

14. S24 Immigration Act 1971 as amended by the Asylum and Immigration Act 1996.

15. §94 AufenthG.

16. Article 83 of Immigration Law 3386/2005.

an aggravating circumstance for the purposes of punishment on conviction. Further, the letting of accommodation to irregular migrants became a criminal act conviction of which carries a sentence ranging from 6 months to three years' imprisonment.¹⁷ In 2009 irregular entry became a criminal offence, subject to financial penalties, in Italy.

Irregular entry and third parties

Activity in the international community has been an important factor for some member states in adopting criminal laws both in respect of irregular entry onto the territory and assisting such activities. The UN Convention against transnational organised crime (2000) and its Protocols (commonly called the Palermo Protocols) includes the Protocol against the Smuggling of Migrants by Land, Air and Sea and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. The Protocols call for sanctions against persons who assist individual foreigners to cross borders without authorisation, the smuggling Protocol requires signatories to take action where the activity is for profit and the trafficking Protocol requires sanctions specifically where exploitation in various forms is present. The Council of Europe Convention on Action against Trafficking in Human Beings (2005) also provides for the criminalisation of human trafficking, of the use of services of a victim and of acts relating to travel or identity documents. It is to be noted that in none of these international treaties is there a provision concerning criminalisation of irregular entry by the migrant victims of trafficking. In particular, Article 5 of the 2000 UN Protocol against the Smuggling of Migrants expressly proscribes the criminal liability of migrants who have been the object of conduct relating to their being

17. See section III of Commissioner's Report of 16/04/2009, CommDH(2009)16.

smuggled into a country.¹⁸

Assisting irregular entry and the smuggling of foreigners is also commonly a criminal offence. This offence can be carried out by both citizens and foreigners but must be in respect of a foreigner who does not have a right of entry onto the territory of a state. For example in Germany, the offence of people smuggling has been the subject of substantial modification with important changes being introduced to crack down on those committing it in 1992 and 1994.¹⁹ On 13 May 2009, the Italian lower chamber passed a law which is aimed at curbing boats run by smuggling rings.²⁰ This is intended to criminalize the owners or captains of boats bringing foreigners who are undocumented to Italy.²¹ In general the ‘security package’ in Italy presents a number of difficult challenges regarding the criminalisation of foreigners.²²

The Human Rights Challenges

While the European Court of Human Rights has been careful to affirm the right of states to control their borders, the actions of states at borders on many occasions may have human rights

18. In 2003, the Executive Committee of UNHCR recommended that “Intercepted asylum-seekers and refugees should not become liable to criminal prosecution under the Protocol Against the Smuggling of Migrants by Land, Sea or Air for the fact of having been the object of conduct set forth in article 6 of the Protocol; nor should any intercepted person incur any penalty for illegal entry or presence in a State in cases where the terms of Article 31 of the 1951 Convention are met” (*Conclusion on Protection Safeguards in Interception Measures*, 10 October 2003, No. 97 (LIV) - 2003, para. (a) vi).

19. §§96, 97 AufenthG. See K. Ziegler ‘The Legal framework of Trafficking and Smuggling in Germany: victims protection emerging from witness protection?’ in E. Guild & P. Minderhoud, op.cit. pp 69 – 111.

20. <http://www.guardian.co.uk/world/2009/may/13/italy-illegal-migration-bill-berlusconi/print>.

21. In August 2007, the Italian authorities arrested and charged seven Tunisian fishermen with facilitating irregular immigration, after having rescued 44 migrants at sea and brought them to Italy. A judgment, issued by a court in Argento, Sicily in November 2009, acquitted these fishermen.

22. M. Merlino, ‘The Italian (In)Security Package: Security vs Rule of Law and Fundamental Rights in the EU’ CEPS, Brussels 2009; Commissioner Hammarberg’s *Memorandum following his visit to Italy*, 19-20 June 2008, Strasbourg, 28 July 2008, *Report following his visit to Italy*, 13-15 January 2009, Strasbourg, 16 April 2009.

consequences. First, Article 2 of Protocol No. 4 to the ECHR provides that everyone shall be free to leave any country, including his own.²³ While there is no right of entry into another country, where member states collude or incite third countries to prevent their nationals from leaving their states of origin (or current residence) out of fear that the individuals might become ‘illegal’ immigrants in a European state, there is certainly a question of liability under this Article. Further, the way in which border controls are applied may engage a duty not to discriminate against one foreigner in comparison with another unless this can be justified. Protocol No. 12 to the ECHR contains a general duty on member states not to discriminate on grounds set out therein.²⁴

Secondly, the conditions under which individuals are refused access to states or admission may give rise to questions under Article 3 ECHR – the prohibition on torture, inhuman or degrading treatment or punishment. Thirdly, where the individual arrives irregularly as a result of flight from torture inhuman or degrading treatment or punishment, then his or her treatment as a criminal may also contravene Article 3 ECHR. In respect of refugees, the UN Convention Relating to the Status of Refugees (1951) and its 1967 Protocol specifically provides, at Article 31(1), that “states shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened... enter or are present in their territory without authorisation.” Fourthly, the fact that a person never arrived regularly on the territory of a state does not exclude the fact that his or her family life in the state may preclude expulsion. In a case regarding the Netherlands, the

23. The European Court of Human Rights considered the refusal to issue a passport to a citizen as a breach of Article 2 of Protocol No. 4, *Sissanis v Romania*, judgment of 25 January 2007.

24. R. Cholewinski, ‘Borders and Discrimination in the European Union’ ILPA, London, 2002.

European Court of Human Rights found that the family life interest of a foreigner who had arrived clandestinely was more important than the state's claim to an interest in her expulsion.²⁵ Fifthly, as regards persons who assist foreigners to enter the territory, the criminalisation of their activities may have human rights consequences. For instance, a UK court was not satisfied that an automatic fine against a transporter for carrying persons who were refused admission was consistent with the transporter's interest in private life under Article 8 ECHR.²⁶ Sixthly, any criminal charge whether it is related to border crossing or not must fulfill the fair trial obligations of Article 6 ECHR.

b. Immigrants' residence and employment

Leaving the issue of entry onto the territory, the next area in which one can see an increasing criminalisation of immigration is regarding presence on the territory and exercise of economic activities. Here, the individual foreigner may have arrived lawfully but then overstayed his or her permitted period of residence or entered into activities which are not permitted under national law such as working. Increasingly, states make continued presence on the territory a criminal offence and in many cases a continuing criminal offence. In practice, it appears that as long as there is no obstacle to the expulsion of the individual, many member states continue to use administrative law measures even though they have at their disposal criminal law sanctions for overstaying which could be used against foreigners.

Individuals who assist the foreigner whose status is irregular may also be subject to criminal law sanctions. The case of Jennifer Chary in France is an example. In April 2009, she was charged with giving aid and assistance to a person irregularly

25. *Rodrigues da Silva and Hoogkamer v. the Netherlands*, judgment of 31 January 2006.

26. *International Transport Roth GmbH & Ors v Secretary of State For the Home Department* [2002] EWCA Civ 158.

present in France – the man she was about to marry. The couple had been living together for over five months. When they applied to marry they were questioned, the groom was expelled for irregularity in France and Jennifer Chary was charged with the offence which carries a penalty of five years in prison and a € 30 000 fine. Following substantial publicity about the case, the prosecutor decided to drop the charges.²⁷ In Italy, a proposed amendment to the ‘security package’ attempted to repeal the protection for doctors treating patients with an irregular immigration from prosecution.²⁸ Businesses which employ foreigners without permission to reside are the subject of criminalisation as well. While many member states fine companies for failing to check the residence documents of their employees, the inclusion of criminal sanctions and sanctions which carry criminal law consequences is increasingly common. Often this legislation has been put into place under the aegis of anti-trafficking measures.²⁹ The UK has recently included on its website the names of all businesses subjected to administrative fines for employing persons irregularly present on the territory.³⁰ It is quite surprising that the vast majority of businesses fined have names which indicate ethnic minority owners.

The Human Rights Challenges

The right to effectively enjoy human rights is not predicated on the authorisation by the state authorities of the presence of an individual on the territory. As Article 1 ECHR states, it applies

27. http://www.lemonde.fr/societe/article/2009/05/11/renvoi-du-proces-d-une-francaise-pour-suivie-pour-aide-au-sejour-irregulier-de-son-concubin_1191708_3224.html.

28. See proposed legislative decree 286/1998 amendment of the Northern League which was withdrawn on 27 April 2009. Irregular immigration and stay is still criminalised under article 10bis of the Draft Law 2180.

29. B. Pieters, ‘Dutch Criminal and Administrative Law Concerning Trafficking in and Smuggling of Human Beings: The Blurred Legal Position of Smuggled and trafficked Persons: Victims, Instigators or Illegals?’ in E. Guild & P. Minderhoud, op.cit. pp 201 – 239.

30. <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/lis-employerspenalties/>

to everyone within the jurisdiction of the Council of Europe member states – this is not limited to those whom the state has authorised to be there, it means exactly what it says – everyone. Two human rights are of particular significance here – the right to enjoy private and family life contained in Article 8 ECHR, the right not to be subject to torture or inhuman and degrading treatment contained in Article 3 ECHR.

In respect of the first, the fact that an individual is irregularly present on the territory of a state is only one consideration in the assessment of whether his or her private and family life obliges the member state to provide the individual with a residence permit.³¹ Thus the criminalisation of foreigners' presence on the territory does not displace the obligation of states to ensure that they respect the individual's right to private and family life. Secondly, Article 3 ECHR requires states to ensure that all persons are protected from torture, inhuman and degrading treatment or punishment. The way in which an individual is treated on account of being classified as a potential criminal (or convicted) must fulfill the Article 3 requirements irrespective of the immigration status of the individual.³² The denial of food, shelter, medical treatment etc are all potential breaches of Article 3 ECHR as they may reduce the individual to a circumstance which is inhuman and/or degrading.³³

Third parties, including family members such as Jennifer Chary hoped to be, are also entitled to rely on Article 8 ECHR to protect their family life. The most famous case on this issue in which the European Court of Human Rights set out the threshold for expulsion of foreigners revolves around facts similar to those of Ms Chary except that this woman and her

31. D. Thym, 'Respect for private and family life under article 8 ECHR in immigration cases: a human right to regularize illegal stay?' *International and Comparative Law Quarterly* Vol 57, Issue 1, January 2008 pp 87 – 112.

32. *Slawomir Musial v Poland* Application number 28300/06.

33. *R v Secretary of State for the Home Department ex p Adam, Limbuela and Tesema* [2005] UKHL 66.

husband had managed to marry and thus establish family life.³⁴ The action of the French government which by expelling Chary's fiancé on the eve of the wedding effectively prevented her marrying him in France (though not in Morocco where they subsequently married) may be questioned as to its consistency with Article 12 ECHR, the right to marry. Companies and businesses may have a right to work permits for their employees and most certainly have a right to fair procedures under Article 6 ECHR in the consideration of their applications.³⁵ Businesses are also entitled to privacy under Article 8 ECHR. The publication of their names and details of fines made against them in respect of the status of their employees may be contrary to that right.³⁶

c. Asylum

The criminalisation of persons seeking international protection is a matter of substantial concern in Europe.³⁷ This takes place in a number of ways – measures which make access to European territory extremely difficult for refugees, such as visa requirements, carriers sanctions, interdiction at sea, criminal sanctions on the using of false documents etc. Secondly, when asylum seekers manage to arrive in Europe,

34. *Boutif v Switzerland*, judgment of 2 August 2001.

35. *Juriscic & Collegium Mehrerau v Austria*, judgment of 27 July 2006.

36. When the EU adopted a measure on sanctions for employing persons irregularly on the territory which I will examine briefly below, the German Government included in the notes a Statement "With regard both to the publication of the judicial decision in Article 10(2) and the list of employers held liable in Article 12(2) of this Directive, Germany would point to the consequences of Article 6(2) of the Treaty on European Union [the duty to protect fundamental rights] for the institutions, and for the Member states when they come to transpose this Directive into national law."

37. Remarks by George Okoth-Obbo, UNHCR Director for International Protection Services at the Symposium Advancing the Implementation of the United Nations Global Counter-Terrorism Strategy, Vienna 17 – 18 May 2007: "Fifth, as we have heard throughout this Symposium yesterday and today of the imperative to combat incitement and stigmatization, so also does UNHCR urge for priority to be assigned to stemming the vilification, criminalisation or stereotyping of asylum-seekers and refugees. Rather, that they are themselves escaping persecution and danger, and need the empathy and support of the States and people among whom they find themselves, needs to be given fulsome recognition and prominence."

they often face further criminal sanctions – criminal charges in respect of the manner of their arrival, prohibition on employment and criminalisation of unauthorised employment when there is no functioning reception system which will permit asylum seekers to eat and have shelter.³⁸ Criminal penalties for changing address without authorisation, failing to notify state authorities of changes of circumstances and detention are all increasingly common and permitted in the EU *acquis*.

The treatment of asylum seekers and those whose asylum applications have been rejected in Europe has been comprehensively documented by a number of non-governmental organisations in reports which raise serious questions about human rights compliance.³⁹ Again, the criminalisation of third parties here too constitutes part of the problem. Transporters are fined and increasingly subject to criminal sanctions if they bring to EU member states persons who are not admissible or who have forged documents. But refugees are often unable to get genuine documents as they fear persecution from their authorities. Thus carriers' sanctions may result in refugees being obliged to use the services of smugglers who provide them with false or forged documents in order to get around the vigilance of the carriers. The result, however, may be that the refugee commits a criminal offence the moment he or she arrives on the territory of the state by having false documents.⁴⁰ The carriers are fined for carrying the individuals. Third parties, often family

38. See e.g. Commissioner Hammarberg's 'Report following his visit to Turkey', 28 June -3 July 2009, Strasbourg, 1 October 2009, CommDH(2009)31.

39. Amnesty International 'Seeking Asylum is not a Crime' June 2005 http://www.amnesty.org.uk/uploads/documents/doc_16178.pdf; Human Rights Watch 'Fleeting Refuge: The Triumph of Efficiency over Protection in Dutch Asylum Policy', April 2003.

40. The UK's House of Lords narrowly overturned the conviction of an Ethiopian woman who was recognised as a refugee but had used a false document to arrive in the UK. She had been convicted of the criminal offence of using false documents notwithstanding her refugee status. *R v Asfaw* [2008] UKHL 31.

members of the asylum seeker, who facilitated the entry of the individual into the state, are often the objects of criminal charges of smuggling human beings.⁴¹

The Commissioner believes that of all the areas of criminalisation of migration, the fate of asylum seekers is indeed the most problematic at the moment in Europe. Governments appear to have invested too much political capital in ‘being tough’ on asylum seekers. This has resulted in the use of criminal laws against persons seeking protection and highly unsatisfactory and contradictory protection rates in different EU countries. For example, of Afghan asylum seekers in Europe in 2008, according to UNHCR, 67% who sought protection in Italy received it; 80% seeking protection in Austria received a status; 95% in Finland and 0% of those Afghans seeking protection in Greece received any protection at all.⁴² Those whose applications are refused, in other words 100% of those seeking protection in Greece risk committing the criminal offence of staying without authorisation while 95% of them might, had they managed to apply in Finland, have received protection.⁴³

The detention of asylum seekers in Europe has also raised deep concern in the international community. The European Court of Human Rights found Greece in violation not only of Article 3 as regards the detention of a Turkish asylum seeker because the conditions of detention were so poor, but also of Article 5(1)(f) ECHR (the power to detain at all) on two key grounds: first, the attempted prosecution of the asylum seeker on the basis of irregular entry into the country (he swam

41. K. Ziegler, ‘The Legal framework of Trafficking and Smuggling in Germany: victims protection emerging from witness protection?’ in E. Guild & P. Minderhoud, *op.cit.* pp 69 – 111.
42. <http://www.unhcr.org/statistics/45c063a82.html> 2007 Table 12.

43. UNHCR, 2008 Global Trends: Refugees, Asylum Seekers, Returnees, Internally Displaced and Stateless Persons, Country Data Sheets 16 June 2009 <http://www.unhcr.org/4a375c426.html>.

across the border from Turkey); secondly, the authorities failed to take into account the fact that he was an asylum seeker and therefore could not be expelled until a consideration of his application had been completed. The Court noted that the Greek authorities had not justified the detention of the man on the grounds of public order or security and thus it constituted a human rights breach.⁴⁴ As the Commissioner has said “The conclusion of [Council of Europe and international] standards is that detention upon entry of asylum seekers should be allowed only on grounds defined by law, for the shortest possible time and only for the following purposes:

- To verify the identity of the refugees;
- To determine the elements on which the claim to refugee status is based;
- To deal with cases where refugees have destroyed their travel and/or identity documents or have used fraudulent documents to mislead the authorities of the country of refuge;
- To protect national security or public order.”⁴⁵

The Human Rights Challenges

The UN Convention Relating to the Status of Refugees (1951) and its 1967 Protocol require states not to refoule⁴⁶ to persecution anyone who has a well found fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion (Article 1A). Article 3 of the UN Convention against torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and Article 3 ECHR prohibit the forced return of any person to a country where there is a substantial risk that he or she would

44. *S. D. v Greece* application, judgment of 11 June 2009.

45. Commissioner’s Viewpoint, “States should not impose penalties on arriving asylum-seekers”, 17 March 2008, http://www.coe.int/t/commissioner/Viewpoints/080317_en.asp.

46. The obligation of States not to refoule a person to territories where his or her life or freedom would be threatened is enshrined in Article 33 of the 1951 Convention and has become a rule of international customary law.

suffer torture (and in the case of the ECHR, also inhuman or degrading treatment or punishment). The criminalisation of the means of arrival, within the asylum determination procedure and of presence once an application has been rejected, all have a cumulative effect (with all too common popular media depiction of asylum seekers as ‘criminals’) of rendering the position of refugees and asylum seekers particularly fragile and exposed to criminal sanctions.

d. Detention

Lengthy detention of migrants has been a major facet of the phenomenon of criminalisation of migration in Europe. The Council of Europe Parliamentary Assembly has paid particular attention to this and has invited member states to ‘progressively proscribe administrative detention of irregular migrants and asylum seekers, drawing a clear distinction between the two groups, and in the meantime allow detention only if it is absolutely necessary to prevent unauthorised entry into the country or to ensure deportation or extradition, in accordance with the European Convention on Human Rights’, as well as to ‘ensure that detention is authorised by the judiciary’.⁴⁷

The use of detention as a pre-expulsion mechanism has blossomed across Europe over the past ten years. The non-governmental organization, Migreurop, has kept and updates a map of all the detention camps for foreigners in Europe.⁴⁸ A quick look at that map indicates that there are hundreds of such camps, dotted across the European landscape. The French NGO, Cimade, published a report on administrative detention in France over 400 pages long signaling serious problems. UNHCR highlighted another problem regarding the detention of

47. Resolution 1637 (2008), *Europe’s boat people: mixed migration flows by sea into southern Europe*, paragraphs 9.3 and 9.4; see also Chapter III of Committee of Ministers, *Twenty Guidelines on Forced Return*, Council of Europe, September 2005.

48. <http://www.migreurop.org/IMG/pdf/carte-en.pdf>.

foreigners – the appalling conditions of detention which foreigners are all too frequently subjected to in detention.⁴⁹

As the CPT has stated on many occasions, persons in detention are at higher risk than the non detained of suffering human rights abuses. The concern of the CPT regarding the detention of foreigners is well evidenced in its compilation of standards which includes a specific section on the treatment of foreigners detained under aliens legislation.⁵⁰ The CPT has made clear that it does not accept the argument that foreigners held in detention are not detainees because they can leave the state whenever they wish. The Committee has expressed its grave concern that foreigners are detained in prisons, a practice it considers fundamentally flawed.⁵¹ Further, the use of coercion in the context of expulsion procedures has been addressed by the CPT which states “Law enforcement officials may on occasion have to use force in order to effect [such] a removal. However, the force used should be no more than is reasonably necessary. It would, in particular, be entirely unacceptable for persons subject to an expulsion order to be physically assaulted as a form of persuasion to board a means of transport or as a punishment for not having done so.”⁵² The separation of the individual from the community in circumstances which permit the guards very substantial power over the well being of the individual puts such persons at special risk and as such in need of particular attention. The increasing use of detention against foreigners is a matter of grave concern to the CPT.

49. ‘UNHCR delegation visits detention centre on Greek island, urges closure’ UNHCR, 23 October 2009, www.unhcr.org/4ae1af146.html.

50. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment *The CPT standards – ‘substantive’ sections of the CPT’s General Reports* Strasbourg CPT/Inf/E(2002) 1 – Rev 2006; chapter IV; CPT, *19th General Report*, 2009, section on safeguards for irregular migrants deprived of their liberty, pp 37-44, <http://www.cpt.coe.int/en/annual/rep-19.pdf>.

51. *Ibid* para 28.

52. *Ibid* para 36.

The Human Rights Challenges

Lawful detention, under Article 5 ECHR, is an exception to the right to personal liberty and security. That exception is strictly delineated and permitted in respect of persons convicted by a court, for the purpose of bringing a person before a court, in respect of minors, persons with illnesses and foreigners. For foreigners, the exception must be justified on the grounds that “the lawful arrest or detention of a person [is] to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”

The European Court of Human Rights had to consider the lawfulness of the detention of a foreigner for administrative purposes when his expulsion was not contemplated.⁵³ The Court stated that it had “regard to the importance of Article 5 in the Convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty” (paragraph 63). However, it considered that “until a State has ‘authorised’ entry to the country, any entry is ‘unauthorised’ and the detention of a person who wishes to effect entry and who needs but does not yet have authorisation to do so, can be, without any distortion of language, to ‘prevent his effecting an unauthorised entry.’” However, the Court went on to state that “to avoid being branded as arbitrary...such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that ‘the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country’ (see *Amuur*, § 43); and the length of the detention

53. *Saadi v United Kingdom*, judgment of 29 January 2008.

should not exceed that reasonably required for the purpose pursued” (paragraph 74). In view of the serious consequences of detention for the individual, the guidelines for legality set out by the Court are very important. States must not just lock up foreigners because of their status as such (i.e. without authorisation) and throw away the key.

e. Implications for social rights

Access to social rights such as health care or accommodation is fundamentally affected by the criminalisation of foreigners. When state authorities make a decision that an individual is no longer regularly on the territory the consequences for his or her access to social rights is essentially changed. While foreigners who are lawfully present on the territory and working lawfully enjoy protection under the European Social Charter, those who are in an irregular status in practice generally do not.⁵⁴ Thus at the stroke of an administrative pen, authorities can extinguish foreigners’ rights and access to social benefits and housing notwithstanding the fact that the foreigners may be working, paying social insurance contributions or have a long record of contributions in the past.

The Human Rights Challenges

The European Court of Human Rights has held that social benefits come within the scope of Article 1 of the first Protocol to the ECHR, as a property right, even in circumstances where there is no longer a contributory element to the social benefit or where the individual has never worked and made contributions.⁵⁵ Similarly, they may come within the scope of Article 8 ECHR where the state makes them available to

54. Council of Europe, Digest of the Case Law of the European Committee of Social Rights, Strasbourg, 2008.

55. *Gaygusuz v Austria*, judgment of 16 September 1996.; *Koua Poirrez v France*, judgment of 30 September 2003.

families of their nationals and thus the non-discrimination duty in Article 14 (and potentially Protocol No. 12) requires such benefits also to be made available to foreigners with family members who meet the criteria.⁵⁶ Further, the European Committee of Social Rights, the body charged with supervising the application of the European Social Charter, has held 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.”⁵⁷ The Commissioner has expressed his human rights concerns in the specific case of Italy where in 2008 a law has been passed which makes it a criminal offence to let accommodation to persons irregularly present (and allows for the seizure of property and income from it on this ground), while in 2009 there was a government proposal to lift the ban on medical personnel notifying the authorities regarding access to medical services by persons irregularly present on the territory.⁵⁸ A particularly vulnerable group of migrants in need of effective access to health care are those who become disabled while trying to cross borders, as in the case of maimed migrants who attempt to cross the mined areas of the Greek-Turkish borders in Evros.⁵⁹ It is to be noted that treatment accorded by states to this group of persons may raise very serious issues with regard to their right to life (Article 2 ECHR) and their freedom from inhuman or degrading treatment (Article 3 ECHR).

56. *Niedzwiecki v Germany*, judgment of 25 October 2005.

57. Council of Europe ‘Digest of the Case Law of the European Committee of Social Rights’ Strasbourg, 2008 para 183.

58. Commissioner for Human Rights, ‘Report following his visit to Italy, 13 – 15 January 2009’, Strasbourg, 16 April 2009.

59. Commissioner for Human Rights, ‘Report following his visit to Greece, 8-10 December 2008’, Strasbourg, 4 February 2009.

V. Implications of current European migration law and policy

This section focuses on the measures which have been adopted by the European Union, a major actor in the field of European immigration and asylum, which touch on the question of criminalisation. Most of the measures discussed below set minimum standards. Thus it is in the transposition of the measures that member states are at risk of failing to comply with their obligations under international or European human rights treaties.

On 1 December 2009 the Lisbon Treaty entered into force and made the EU's Charter of Fundamental Rights legally binding. Also in December the EU adopted the new five year programme for the development of its Area of Freedom, Security and Justice within which the law and policy of the EU regarding border controls on persons, immigration and asylum are found (the Stockholm Programme). In this context, the question of human rights compliance is central to the legitimacy and the legality of the existing and forthcoming EU legislative programme in these areas. Already the European Commission undertakes impact assessments of proposed legislation which include fundamental rights however the comprehensiveness of these assessments is somewhat disputed.⁶⁰

The EU's Charter on Fundamental Rights is an internal EU Charter which repeats the key provisions of the ECHR and adds rights which derive from EU law. As it takes a legally binding form, any failure to meet the standards set out in the ECHR will also result in a breach of the EU's internal Charter. The EU Charter will make the justiciability of human rights

60. H. Toner (2006), 'Impact Assessments and Fundamental Rights Protection in EU Law' *European Law Review* (3), 316 – 341.

standards included in it simpler within the EU system without diminishing the responsibility of the EU Member States within the Council of Europe human rights system.

The EU's new five year programme for border controls on persons, immigration and asylum (and other related areas of AFSJ) calls for the EU to accede to the ECHR. Should this be achieved there will be a more coherent and comprehensive system whereby the EU participates in the ECHR directly rather than indirectly through its member states. Sadly, the Stockholm Programme continues to use the language of "illegal immigration" calling for effective policies to combat it. On a more positive note, the Programme calls for these policies to be implemented with full respect for the principle of "non-refoulement" and for the fundamental rights and dignity of the individual.

Until 2003, it was generally believed that EU hard law (directives and regulations) could not include criminal sanctions. A series of decisions by the European Court of Justice clarified that such hard law measures could include criminal sanctions in the pursuit of objectives of the European Community. The first hard law measure to be adopted in the EU's Area of Freedom, Security and Justice which includes such criminal sanctions is the Directive providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals (adopted on 25 May 2009). Earlier EU measures in the field either permit and encourage the use of criminal sanctions or are adopted in the EU's so-called Third Pillar, in the form of Framework Decisions, which while binding on the member states are subject to less rigorous implementation obligations. Each part of this section will be divided into two: (a) direct and (b) indirect criminalisation measures.

a. External border crossing

Direct measures

The EU adopted Regulation 562/2006, the Schengen Borders Code, on 15 March 2006. It entered into force in the member states on 13 October 2006.⁶¹ This Regulation sets out the circumstances under which a non-EU national (or his or her family members) may enter the EU and the basis on which he or she may cross the internal borders of the member states. The objective is, among other things, crime related. The policing aspect of border controls is apparent in particular in actions required around the identification of stolen, misappropriated, lost and invalid documents and the presence of signs of falsification or counterfeiting (Article 7(2)).

On 28 November 2002, the EU adopted Directive 2002/90 defining the facilitation of unauthorised entry, transit and residence. Member states were required to transpose it into national law by 5 December 2004.⁶² This directive requires member states to adopt appropriate sanctions for intentionally assisting a person who is not a national of a member state, to enter, or transit across the territory of a member state in breach of the laws of the state concerned with the entry or transit of aliens or assisting for financial gain, a person (similarly qualified as above) to reside within the territory of a member state in breach of the laws of the state concerned on the residence of aliens (Article 1(a) and (b)). The sanctions must be effective, proportionate and dissuasive (Article 3).

61. For the purposes of this Regulation, the Member states include all 27 EU Member states, exception: Denmark (which applies it as a matter of international law), Ireland and the UK. The provisions on abolition of intra-member state border controls do not yet apply to Bulgaria, Cyprus and Romania. But Iceland, Norway and Switzerland are participating.

62. The European Commission gave a contract to the Odysseus Network of Academic Experts on Immigration and Asylum Law to prepare an analysis of the implementation of 10 Directives in this field, including this one, in the 27 Member states. The study was completed in 2008 but the Commission has chosen to keep all information, including the report, the research on which it was based and the analysis confidential.

In the so-called Third Pillar of the EU, a Framework Decision on facilitating unauthorised entry, transit and residence, 2002/20/EC, was adopted on 28 November 2002 to be transposed by the member states at the latest by 5 December 2004. This measure is tied to Directive 2002/90 in that it provides that the sanctions which can be applied to those who help foreigners include deportation and a prohibition on practicing directly or through an intermediary the occupational activity in the exercise of which the offence was committed. Member states are required to take “measures necessary to ensure that a legal person held liable for an offence is punished by effective, proportionate and dissuasive sanctions.” The inclusion of deportation as a sanction indicates that the drafters certainly contemplated that the offence would be committed by foreigners rather than or in addition to nationals. A discretionary humanitarian exception is included.

Directive 2001/51 strengthens the sanctions on assisting foreigners through its express extension to carriers. This directive had to be transposed into national law by 11 February 2003. Article 4 of the directive provides that member states shall take “necessary measures to ensure that the penalties applicable to carriers... are dissuasive, effective and proportionate” and sets out minimum sums which must be applied.

Framework Decision 2002/629 adopted on 19 July 2002 creates criminal offences around the trafficking in human beings. The decision requires each member state to take effective, proportionate and dissuasive sanctions, including criminal or non-criminal fines in respect of the recruitment, transport, transfer, harbouring, subsequent reception of persons, including exchange of control. The objective must be for the purpose of exploitation of the person’s labour or services, including forced or compulsory labour or services, slavery or practices similar to slavery or exploitation of the

prostitution of others or other forms of sexual exploitation including pornography (Article 1(1) & (2)).

Indirect measures

There are three main databases which the EU has at its disposal in respect of foreigners. The first is the Schengen Information System. While this database also holds information on EU nationals in relation to criminal justice issues, the vast majority of information held on it is in relation to foreigners. It is the list of those people whose entry onto EU territory has been prohibited by one of the member states.⁶³ For the moment, the SIS does not contain biometric data, though it does perform a stigmatization function which it tantamount to criminalisation.⁶⁴

The second database is EURODAC which contains the fingerprints of all persons who have applied for asylum or have been apprehended when irregularly crossing an external frontier. The European Commission proposed in September 2009 that this database be made available to all EU law enforcement agents. This places asylum seekers at further risk of stigmatization as ‘criminals’.

The third is the Visa Information System (VIS) which is under construction and according to the EU Presidency should be operational within two years. The VIS will contain information on every person who applies for a visa to enter the EU. It will include all the information required on a standard visa application form as well as biometric data in the form of facial images and ten fingerprints (unless the person has fewer than ten fingers). Regulation 767/2008 which establishes the VIS

63. E. Brouwer, ‘Digital Borders and Real Rights: Effective Remedies for Third Country nationals in the Schengen Information System’ Martinus Nijhoff, Leiden, 2008. The author’s analysis of controls carried out by national data protection authorities on the accuracy of data contained in the SIS on foreigners indicates problems in up to 40% of cases reviewed see pp 329 – 510.

64. *Ibid* p 514.

states among its purposes: “to contribute to the prevention of threats to the internal security of any of the Member States.”⁶⁵ Article 3(1) states “The designated authorities of the Member States may in a specific case and following a reasoned written or electronic request access the data kept in the VIS referred to in Articles 9 to 14 if there are reasonable grounds to consider that consultation of VIS data will substantially contribute to the prevention, detection or investigation of terrorist offences and of other serious criminal offences”. ‘Designated authorities’ are those designated by member states and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences. Thus visa applicants find themselves classed together with persons suspected of committing terrorist or other serious crimes. Of course, not all foreigners are visa nationals. Only those persons whose countries of nationality are contained on the black list attached to Regulation 539/2001 (as amended) must obtain visas to enter the EU for short stays. An examination of the countries on that black list indicates that their most striking common characteristics are that most of their nationals are (a) not white; (b) Muslim and/or (c) poor (in relation to the EU average).⁶⁶

b. Immigrants’ residence, employment and return

Above reference was made to Directive 2002/90 defining the facilitation of unauthorised entry, transit and residence which applies equally to residence on the territory. Most of the measures in this section which have criminalizing effects relate to expulsion.

65. The primary purpose of the database is to collect information on visa applications, not to support law enforcement agencies.

66. D. Bigo & E. Guild, “La mise a l’écart des étrangers: la logique du visa Schengen” Cultures et Conflits, l’Harmattan, Paris, Spring 2003.

Direct Measures

Directive 2001/40 on mutual recognition of expulsion decisions provides a mechanism whereby a decision adopted against a foreigner in one member state may be automatically treated as equivalent in another member state for the legality of expulsion of the individual. The language of illegality is not used in the Directive (with the exception of preamble (1)). Article 3(1) of the Directive provides that it applies to decisions taken against foreigners on the basis of a serious and present threat to public order or to national security where: a) there has been a conviction for an offence punishable by a penalty involving deprivation of liberty for at least one year; b) there are serious grounds for believing that the foreigner has committed serious criminal offences or the existence of solid evidence of his/her intention to commit such offences within the territory of a member state (Article 3(1)(a) & (b)).

The threshold in respect of which a foreigner becomes categorized as an unacceptable criminal risk (ie a threat to public order or national security) is surprisingly low. Taking into account the variations among the member states of penalties for different types of offences, this includes, in some member states, very minor crimes. Further, the ground of suspicion is somewhat problematic.

Directive 2009/52, providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, is the first hard law measure in this area which explicitly includes criminal sanctions. The preamble states that member states should strengthen their activities in the fight against illegal immigration (preamble (1)). Further “[a] key factor for illegal immigration into the EU” according to the preamble “is the possibility of obtaining work...” (preamble (2)). Two definitions are central to the

directive: first an illegally staying third-country national is a foreigner who does not fulfil or no longer fulfils, the conditions for stay or residence in that member state. Secondly, ‘illegal employment’ is defined as the employment of an illegally staying third-country national. The offences created in the Directive all revolved around the employment of ‘illegally staying’ foreigners. Member states are required to prohibit the employment of ‘illegally staying’ foreigners. Employers are obliged to document their efforts to ensure they have not employed a prohibited person in a variety of ways set out in the directive (Articles 4 et seq). The employer who is found to have breached the duty is subject to civil law penalties, repayment of wages and social contributions where appropriate and criminal sanctions (Article 9). The criminal offence must be punishable by effective, proportionate and dissuasive criminal penalties (Article 10).

Directive 2008/115 on common standards and procedures in member states for returning illegally staying third-country nationals has incurred substantial criticism not least from a number of UN Special Rapporteurs (see above). The language of the directive is very much couched in terms of illegal immigrants – for instance preamble (8) states “it is recognised that it is legitimate for Member States to return illegally staying third-country nationals...” The Directive provides at Article 6(1) that “Member States shall issue a return decision to any third-country national staying illegally on their territory,” without prejudice to a number of exceptions contained in the provision. The use of the terminology of illegality renders a certain legitimacy to the provisions on use of coercive force by the state. Article 8(4) provides “Where Member States use – as a last resort – coercive measures to carry out the removal of a third-country national who resists removal, such measures shall be proportionate and shall not exceed reasonable force.” That a state should use coercive force against an individual outside of the criminal justice

system and the strict controls on the police in such circumstances, is a matter of some contention, particularly in light of findings in various member states of the ill treatment of third country nationals in expulsion procedures.⁶⁷ If the foreigners were described as undocumented, the use of coercive force against them might be harder to justify. The language of criminalisation assists in justifying the deployment of coercive enforcement techniques in the field.

Indirect Measures

Directive 2003/110 on assistance in cases of transit for the purposes of removal by air aims to end ‘illegal residence of third country nationals who are the subject of removal orders’ (preamble (1)). The terminology of the directive is very much oriented towards that of convicted (and possibly dangerous) criminals.

c. Asylum

Direct Measures

Directive 2003/9 sets out the minimum standards for the reception of asylum seekers in the member states. It applies to all persons who apply for asylum in a member state and sets out what member states must ensure as regards conditions of life. Article 16(3) relates to the provision of accommodation for asylum seekers. It states “Member States may determine sanctions applicable to serious breaches of the rules of the accommodation centres as well as to seriously violent behaviour.” There is an obvious overlap with criminal law as the criminal law of most member states provides for crimes of damage to property or assault against persons. The sanctions

67. The death of a Nigerian woman in the process of expulsion from Belgium at the hands of Belgian officials led to an inquiry by the UN Committee on the elimination of all forms of racial discrimination in 2002. <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/B89EC49E63CAFB7AC1256B7C004F013F?opendocument>.

available include “Decisions for reduction, withdrawal or refusal of reception conditions or sanctions...shall be taken individually, objectively and impartially and reasons shall be given. Decisions shall be based on the particular circumstances of the person concerned...” (Article 16(4)). As the reception conditions are by their very nature minima, allowing states to lower them as a sanction against criminal behaviour means that the individual may be reduced to a state of abject poverty.

Indirect Measures

Regulation 2725/2000 provides for the creation of a database containing the fingerprints of all asylum seekers in the EU and those persons apprehended irregularly crossing an external frontier.⁶⁸ As mentioned above the Commission has proposed allowing all EU law enforcement agencies access to the database.

Directive 2005/85 establishes the minimum standards on procedures in member states for granting and withdrawing refugee status. While the language of ‘unlawful’ is used rather than ‘illegal’ (see for instance Article 23(4)(l) “the applicant entered the territory of the Member State unlawfully...”) a number of its provisions raise questions as to an indirect effect in criminalizing asylum seekers. For instance, Article 11 imposes a series of obligations on asylum seekers which otherwise only apply to persons under suspicion of or convicted of committing a criminal offence.⁶⁹ These include: a duty to report to the authorities at any time designated by the later; a duty to hand over all their identity documents and any other documents which the authorities consider relevant to the

68. E. Guild, ‘The Bitter Fruits of a Common Asylum Policy’ in T. Balzacq and S. Carrera, ‘Security versus Freedom? A Challenge for Europe’s Future’ Ashgate, Aldershot, 2006, pp 61 – 76.

69. For these purposes, I leave aside the treatment of persons for their own safety as in respect of minors and mentally handicapped persons.

application; a duty to inform the authorities of any change of address coupled with no duty on the authorities to ensure that correspondence is necessarily sent to the correct address; a power to the authorities to search the individual and his or her belongings at any time without specifying a reason; a power to the authorities to record the individual without consent.

d. Detention

The banalisation of the detention of foreigners on the grounds that they are not citizens has been much discussed elsewhere.⁷⁰ This section focuses on three EU measures which include provisions to limit the liberty of foreigners.

Direct Measures

Directive 2008/115 (already referred to above) on common standards and procedures in Member states for returning illegally staying third country nationals provides in Chapter IV - Detention for the Purpose of Removal - that foreigners may be detained for the purposes of return or removal where other less coercive measures cannot be applied (Article 15(1)). The examples given for the use of detention are: where there is a risk of absconding; where the foreigner avoids or hampers the preparation of return of the removal process (Article 15(1) (a) & (b)). In the first instance, detention must not exceed six months (Article 15(5)). However, this period can be extended for a further twelve months.

Directive 2005/85 on minimum standards on procedures for asylum also includes a provision on detention. Here it is stated “Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum” (Article 18(1)). Where held in detention, the second part of this provision requires “the possibility of speedy judicial review.”

70. C. Fernandez, A. Manavella & J-M. Ortuno, ‘The Effects of exceptional legislation on criminalisation of immigrants and people suspected of terrorism’ CHALLENGE, Report 9, 2009.

Finally, Directive 2003/9 on reception conditions for asylum seekers contains an oblique reference to detention in Article 7(3) “when it proves necessary, for example, for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law.” Confinement is another way of speaking of detention. There is a proposal under discussion to extend the provisions on detention in this Directive.

VI. Conclusions and Recommendations

As can be seen from the above description of the Council of Europe member states’ and EU measures which relate to the criminalisation of migration, there is a steady advance of the discourse of ‘illegality’ in migration law and policy. While the early EU legislation refrains from using the terminology, after about 2003, it becomes common currency appearing again and again throughout documents, legislation and decisions.⁷¹ This trend is of questionable consistency with the human rights obligations of the member states and their activities within the Council of Europe. As regards human rights, all the EU measures discussed above confirm, at least in their preambles, that they comply with the EU’s fundamental rights obligations. Explicit references are made to member states’ duties under the ECHR and, in asylum related measures to the UN Refugee Convention. However, the recognition of these commitments does not appear to influence, in practice, the approach towards criminalisation.

71. Even the European Court of Justice has used the term recently in a judgment though this appears only to be a repetition of the question asked by the national court: “By this question, the referring court asks whether Article 12 EC precludes national rules which exclude nationals of Member States of the European Union from receipt of social assistance benefits which are granted to illegal immigrants.” C-22/08 & 23/08 *Vatsouras* 4 June 2009 para 48.

Two aspects of the EU's criminalisation of foreigners are striking. First there is the pervasive way in which the measures (a) separate foreigners from citizens through an elision of administrative and criminal law language and (b) subject the foreigner to measures which cannot be applied to citizens, such as detention without charge, trial or conviction. Secondly, there is the criminalisation of persons, whether citizens or foreigners who engage with foreigners. The message which is sent is that contact with foreigners can be risky as it may result in criminal charges. This is particularly true for transport companies (which have difficulty avoiding carrying foreigners) and employers (who may be better able to avoid employing foreigners at all). Other people, going about their daily life, also become targets of this criminalisation such as landlords, doctors, friends etc. Contact with foreigners increasingly becomes associated with criminal law. The result may include rising levels of discrimination against persons suspected of being foreigners (often on the basis of race, ethnic origin or religion),⁷² xenophobia and/or hate crime.⁷³

The Council of Europe member states should reverse these trends and establish a human rights compliant approach to irregular migration.

For this reason a number of recommendations are provided below, as a starting point to ensure the correct intersection of human rights and the treatment of foreign nationals. They touch on hard issues of sovereignty versus the dignity of the individual. But the duty of Council of Europe member states to protect the individual and promote human rights is not limited to states' own nationals. The treatment of the foreigner is the challenge in respect of which the commitment of member states to human rights is measured internationally.

72. See for instance the report of the EU's Fundamental Rights Agency 'European Union's Minorities and Discrimination Survey' Results: April and May 2009 http://www.fra.europa.eu/fraWebsite/home/pub_eu-midis_en.htm.

73. S. Cohen, 'Moral Panics and Folk Devils' 3rd Edition, Routledge, New York, 2003.

The key issues which need to be considered and the recommendations come within the following six categories.

1. General policy and law-related issues

- The language which Council of Europe member states use regarding foreign nationals must exclude the term 'illegal immigrant'. The term is counter productive and misleading. People are not 'illegal'. Their status vis-à-vis state authorities may not be regular but that does not render the individual somehow beyond humanity.
- Member states should refrain from adopting criminal laws which apply exclusively to foreign nationals unless this is specifically and clearly justified on grounds of international human rights commitments and is consistent with the Council of Europe treaties applicable.
- Member states should not use the term 'illegal immigrant' or 'illegal immigration' in their press releases and discourage the use generally in the media. Ministers and other public officials should be vigilant in this regard in all their public and semi-public pronouncements and deliberations.

2. External border crossing

- Foreign nationals arriving at the external borders of member states should be treated with respect and dignity. Their application to enter the state should be considered on the merits and not be tainted by discrimination which is prohibited in human rights law.
- Border guards should not use the language of 'illegal immigrant'. Any decision to refuse admission to the state to an individual should not have any automatic consequence as regards criminal law.
- Where individuals arrive at places outside designated border crossing points, the reasons for such arrival must be taken into account and not permitted to colour or otherwise prejudice the consideration of their application to enter the state.

- In whatever circumstances an individual makes apparent his or her claim to international protection (whether through an indication of fear to return to the country of destination or a more express claim) the individual must be able to enjoy his or her international law right to non-refoulement and to protection during the consideration of the claim.

3. Immigrants' residence and employment

- Member states must ensure that their administrative systems are sufficiently effective that foreign nationals' residence does not become irregular merely because the authorities have failed to deal with an application in a timely manner.
- Where necessary, member states should ensure that their legal systems provide that so long as the authorities have failed to make a decision on a foreigner's outstanding application which was made before the individual's permission to reside expired, the individual is entitled to residence and economic activities until there is a final decision.
- Member states must ensure that foreigners receive documentation at each stage of their residence which clarifies to all other authorities both public and private, the individual's residence status so that they can prove beyond doubt the regularity of their residence and employment.
- Where a member state has refused a foreigner residence, but failed to ensure his or her departure within 30 days, the state must issue the individual with at least a preliminary residence document and permission to work. States may not leave people in limbo neither permitted to be present nor expelled.
- Where there is no reasonable prospect of expelling a foreigner within 30 days of the individual coming to the attention of the authorities, he or she should be given a preliminary residence document and permission to work.

4. Asylum

- All Council of Europe member states are committed to protecting those in need of international protection because they fear persecution, torture, inhuman or degrading treatment or punishment in their home country. Full and inclusive effect must be given to this commitment.
- Wherever an individual in need of international protection and outside his or her country of origin or persecution comes into contact with the authorities of a state and indicates his or her need for protection, the state authorities must protect the individual and consider the application in accordance with their international commitments.
- Where an individual seeks international protection, state authorities must register the claim in a timely manner and ensure that the individual receives documents confirming the regularity of his or her presence on the territory.
- All persons seeking international protection in Council of Europe states must be provided with their basic needs (housing, food, health care, education) while their applications are under consideration.
- Where an application for international protection is rejected, state authorities must ensure that the individual can return in dignity to his or her country of origin or issue the individual with a preliminary residence document and permission to work.

5. Detention

- No one should be subject to detention of any kind on the sole basis that he or she is not a national.
- Every migrant's detention should be subject to an effective judicial review.
- As a matter of principle, no person seeking international protection should be subject to detention.
- Any place of detention must provide conditions of detention which meet the needs of the individuals and fulfil

the requirements set out by the Council of Europe standards.

- No migrant child should ever be subject to detention. The fact of having a dependent child must be ground for an adult not to be detained except in accordance with the lawful order of a criminal court.

6. Social rights

- Differences in access to social rights on the basis of nationality must be subject to anxious scrutiny to ensure that they are consistent with the human rights obligations of Council of Europe member states.
- No difference in access to social benefits should be based exclusively on nationality.
- The level of minimum entitlement to social benefits should not discriminate between foreigners and citizens – if a state assesses that a level of poverty is unacceptable for its citizens then the same level should also apply to foreign nationals.
- The fact that a foreign national's presence on the territory of a state is unauthorised should not be the primary consideration regarding access to social benefits. It should never be a consideration regarding access to emergency health treatment.
- The duty of confidentiality between health professionals and their patients, educators and their students and other professionals should always be respected and never subject to reporting possibilities regarding immigration status.

Appendix

Mandate of the Commissioner for Human Rights

The Commissioner for Human Rights is an independent institution within the Council of Europe, mandated to promote the respect for human rights in 47 Council of Europe member states.

The first Commissioner, Mr Alvaro Gil-Robles, held the post between 15 October 1999 and 31 March 2006, while the current Commissioner, Mr Thomas Hammarberg, assumed the position on 1 April 2006.

The fundamental objectives of the Commissioner for Human Rights are to:

- foster the effective observance of human rights, and assist member states in the implementation of Council of Europe human rights standards;
- promote education in and awareness of human rights in Council of Europe member states;
- identify possible shortcomings in the law and practice concerning human rights;
- facilitate the activities of national ombudsperson institutions and other human rights structures; and
- provide advice and information regarding the protection of human rights across the region.

The Commissioner's work, thus, focuses on encouraging reform measures to achieve tangible improvement in the area of human rights promotion and protection. Being a non-judicial institution, the Commissioner's Office cannot act upon individual complaints, but the Commissioner can draw conclusions and take wider initiatives on the basis of reliable information regarding human rights violations suffered by individuals.

The Commissioner co-operates with a broad range of international and national institutions as well as human rights monitoring mechanisms. The office's most important intergovernmental partners include the United Nations and its specialised offices, the European Union, and the OSCE. The office also co-operates closely with leading human rights NGOs, universities and think tanks.

RESOLUTION (99) 50

on the Council of Europe Commissioner for Human Rights
(adopted by the Committee of Ministers on 7 May 1999 at its 104th session)

The Committee of Ministers,

Considering that the aim of the Council of Europe is the achievement of greater unity between its Members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms

Having regard to the decisions taken by the Heads of State and Government of the member States of the Council of Europe at their Second Summit (Strasbourg, 10-11 October 1997)

Considering also that the 50th Anniversary of the Council of Europe provides an occasion to enhance further the work undertaken since its creation,

Decides to institute the Office of Council of Europe Commissioner for Human Rights ("the Commissioner") with the following terms of reference:

Article 1

1. The Commissioner shall be a non-judicial institution to promote education in, awareness of and respect for human rights, as embodied in the human rights instruments of the Council of Europe.

2. The Commissioner shall respect the competence of, and perform functions other than those fulfilled by, the supervisory bodies set up under the European Convention of Human Rights or under other human rights instruments of the Council of Europe. The Commissioner shall not take up individual complaints.

Article 2

The Commissioner shall function independently and impartially.

Article 3

The Commissioner shall:

- a. promote education in and awareness of human rights in the member States;
- b. contribute to the promotion of the effective observance and full enjoyment of human rights in the member States;
- c. provide advice and information on the protection of human rights and prevention of human rights violations. When dealing with the public, the Commissioner shall, wherever possible, make use of and co-operate with human rights structures in the member States. Where such structures do not exist, the Commissioner will encourage their establishment;
- d. facilitate the activities of national ombudsmen or similar institutions in the field of human rights;
- e. identify possible shortcomings in the law and practice of member States concerning the compliance with human rights as embodied in the instruments of the Council of Europe, promote the effective implementation of these standards by member States and assist them, with their agreement, in their efforts to remedy such shortcomings;

- f. address, whenever the Commissioner deems it appropriate, a report concerning a specific matter to the Committee of Ministers or to the Parliamentary Assembly and the Committee of Ministers;
- g. respond, in the manner the Commissioner deems appropriate, to requests made by the Committee of Ministers or the Parliamentary Assembly, in the context of their task of ensuring compliance with the human rights standards of the Council of Europe;
- h. submit an annual report to the Committee of Ministers and the Parliamentary Assembly;
- i. co-operate with other international institutions for the promotion and protection of human rights while avoiding unnecessary duplication of activities.

Article 4

The Commissioner shall take into account views expressed by the Committee of Ministers and the Parliamentary Assembly of the Council of Europe concerning the Commissioner's activities.

Article 5

1. The Commissioner may act on any information relevant to the Commissioner's functions. This will notably include information addressed to the Commissioner by governments, national parliaments, national ombudsmen or similar institutions in the field of human rights, individuals and organisations.
2. The gathering of information relevant to the Commissioner's functions shall not give rise to any general reporting system for member States.

Article 6

1. Member States shall facilitate the independent and effective performance by the Commissioner of his or her functions. In particular, they shall facilitate the Commissioner's contacts, including travel, in the context of the mission of the Commissioner and provide in good time information requested by the Commissioner.

2. The Commissioner shall be entitled, during the exercise of his or her functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder.

Article 7

The Commissioner may directly contact governments of member States of the Council of Europe.

Article 8

1. The Commissioner may issue recommendations, opinions and reports.

2. The Committee of Ministers may authorise the publication of any recommendation, opinion or report addressed to it.

Article 9

1. The Commissioner shall be elected by the Parliamentary Assembly by a majority of votes cast from a list of three candidates drawn up by the Committee of Ministers.

2. Member States may submit candidatures by letter addressed to the Secretary General. Candidates must be nationals of a member State of the Council of Europe.

Article 10

The candidates shall be eminent personalities of a high moral character having recognised expertise in the field of

human rights, a public record of attachment to the values of the Council of Europe and the personal authority necessary to discharge the mission of the Commissioner effectively. During his or her term of office, the Commissioner shall not engage in any activity which is incompatible with the demands of a full-time office.

Article 11

The Commissioner shall be elected for a non-renewable term of office of six years.

Article 12

1. An Office of the Commissioner for Human Rights shall be established within the General Secretariat of the Council of Europe.
2. The expenditure on the Commissioner and the Office of the Commissioner shall be borne by the Council of Europe.

Other Issue Papers

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July 2006, (revised in January 2008)

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The Council of Europe Commissioner for Human Rights has expressed his concern regarding the trend to criminalise the irregular entry and presence of migrants in Europe, presented as part of a policy of migration management.

The Commissioner has stressed that such a method of controlling international movement corrodes established international law principles and causes many human tragedies without achieving its purpose of genuine control.

This Issue Paper builds upon these concerns and examines systematically the human rights implications of the criminalisation of migration in Europe. It focuses on and analyses the following relevant key issues: external border crossing, migrants' residence and protection of their social rights including employment, as well as asylum and detention.

The Issue Paper concludes with a number of recommendations to Council of Europe member states, as a starting point to ensure the correct intersection of human rights standards and the treatment of foreign nationals.

