

Protecting the dignity and rights of migrants in an irregular situation

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migration

Recommendations from the National Red Cross Societies in the European Union and the International Federation of Red Cross and Red Crescent Societies⁽¹⁾

As leading providers of humanitarian services, National Red Cross Societies in the European Union (EU) witness the pressing challenges faced by the EU in protecting the dignity and rights of all migrants, particularly those in an irregular situation. They have indeed observed the humanitarian consequences of migrants' irregular administrative status, which jeopardises migrants' fundamental rights, as well as their access to humanitarian assistance, basic services, and protection⁽²⁾. As a result, migrants in an irregular situation are among the most vulnerable people in Europe.

Protecting the dignity and rights of migrants in an irregular situation requires decisive action. With this in mind, National Red Cross Societies in the EU make the following recommendations to the EU and its Member States:



Migrants in an irregular situation are often forced to live in the shadows of society due to fear of being reported, detained or deported, Germany, 2011.

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1. Implement an effective framework for safe and legal migration to the EU so as to reduce irregular migration.
2. Ensure access to humanitarian assistance for all migrants, irrespective of their legal status.
3. Support access to information about the rights of all migrants.
4. Apply the 'firewall principle' to ensure clear separation between immigration authorities, and other law enforcement authorities and public services.
5. Guarantee effective access to justice for migrants in an irregular situation.
6. Facilitate migrants' access to a secure and dignified status.
7. Abstain from detaining migrant children and make the detention of adult migrants a measure of last resort.
8. Make sure that return procedures comply with fundamental rights.

Background

In recent years, the EU and its Member States have prioritised reducing migrants' irregular entry and stay through the reinforcement of external border controls and the intensification of detention and return measures. Yet, in the absence of accessible legal channels, irregular migration is the only way to reach the EU for many migrants, including people in need of international protection. Such a

1. Including the Norwegian Red Cross as a member of the Red Cross EU Office.

2. PERCO, Expert Opinion on the Vulnerabilities of Migrants which are Caused by the Lack of a Legal Status, 8 May 2015.

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Our Principles

At all times, we are guided by our Fundamental Principles:

Humanity
Impartiality
Neutrality
Independence
Voluntary Services
Unity
Universality

limited legal and policy framework drives migrants to resort to means of travel that expose them to multiple risks, including death, injury, inhuman and degrading treatment, exploitation by criminal networks, trafficking, and other violations of their rights⁽³⁾.

For the last three years, the Red Cross EU Office and its member National Red Cross Societies have advocated the adoption of additional legal avenues to access the EU as a key strategy for reducing the vulnerabilities of migrants trying to make their way to Europe⁽⁴⁾.

However, for many migrants, irregular entry is not the only way to fall into an irregular status. Amongst others, irregularity can result from: 1) rejection of an application for asylum or for another form of international protection, 2) loss of a residence permit due to unemployment or exploitation, 3) bureaucratic failures in processing residence or work permit applications, 4) withdrawal or loss of status, 5) termination of regular status due to the breakdown of a personal relationship, and 6) birth in the EU to parents who are in an irregular situation⁽⁵⁾.

Due to their irregular status, numerous migrants are prevented from accessing basic services and much needed assistance. Migrants' access to fundamental and social rights – including the rights to health care, to adequate housing, to education and training, to a minimum subsistence, to family life, to moral and physical integrity, to legal aid, and to fair labour conditions – are significantly restricted, and sometimes entirely denied by measures aimed at curtailing irregular migration to and within the EU⁽⁶⁾. Consequently, this affects the related obligations that States have under international and human rights law. It also tends to foster increased violence, xenophobia, racism and exploitation.

The mandate of National Red Cross and Red Crescent Societies and the Fundamental Principles which guide their activities, require them to provide humanitarian assistance to all migrants based solely on need, without consideration of legal status.

This commitment was reasserted by States and all components of the International Red Cross and Red Crescent Movement at the 30th and 31st International Conferences of the Red Cross Red Crescent in 2007⁽⁷⁾ and 2011⁽⁸⁾ respectively. In the Movement's experience, migrants – especially those in an irregular situation – are among the most vulnerable groups assisted. Yet paradoxically, National Red Cross Societies in the EU experience difficulties in reaching out to this group, which prevents them from fulfilling their humanitarian mandate.

3. RCEU, Perilous journeys – Vulnerabilities along migratory routes to the EU, December 2015.

4. RCEU, Legal avenues to access international protection in the EU, 27 February 2013, and RCEU, Addressing the Vulnerabilities Linked to Migratory Routes to the European Union, 17 December 2015.

5. Mark Provera, CEPS, The Criminalisation of Irregular Migration in the European Union, February 2015, and Franck Düvell, Paths into Irregularity: The Legal and Political Construction of Irregular Migration, 2011.

6. See, for instance: OHCHR, The economic, social and cultural rights of migrants in an irregular situation, 2014, and FRA, Fundamental Rights of Migrants in an Irregular Situation in the EU, 2011.

7. See Resolution 1, 'Together for Humanity': "We acknowledge the role of National Societies, based on the principles of humanity and impartiality, and in consultation with public authorities, in providing humanitarian assistance to vulnerable migrants, irrespective of their legal status".

8. See Resolution 3: "...requests States, in consultation with National Societies, to ensure that relevant laws and procedures are in place to enable National Societies, in conformity with the Statutes of the Movement and, in particular, the Fundamental Principles, to enjoy effective and safe access to all migrants without discrimination and irrespective of their legal status".

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At the beginning of 2015, the European Commission published an Action Plan against Migrant Smuggling⁽⁹⁾. It describes measures aimed at countering and preventing migrant smuggling, while ensuring the protection of migrants' human rights. Among the concrete policy initiatives listed in the Action Plan, the European Commission announced the ongoing revision of the "Facilitators Package"⁽¹⁰⁾, as well as a review of the impacts of the Directive on the Residence Permits issued to Victims of Trafficking in Human Beings and of Smuggling⁽¹¹⁾.

National Red Cross Societies in the EU wish to contribute to these processes with the recommendations below, presenting elements to support a more balanced and comprehensive approach that takes due consideration of human rights and humanitarian aspects. These measures should be implemented by the EU and its Member States to ensure protection of the dignity and rights of migrants in an irregular situation, including those that have been smuggled.



Norwegian Red Cross health center for migrants in an irregular situation, Oslo, 2011.

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Our Recommendations

It is the prerogative of States to manage their borders and determine who is allowed to enter their territories. However, when exercising this prerogative, EU Member States are bound by their obligations under international, human rights and refugee law. This position paper aims to contribute to mainstreaming respect

9. European Commission, EU Action plan against migrant smuggling (2015-2020), COM(2015) 285, 27.5.2015.

10. The 'Facilitators Package' is composed of Directive 2002/90/EC establishing a common definition of the offense of facilitation of unauthorised entry, transit and residence, and Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence.

11. Council Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

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for the dignity of all migrants and compliance with their fundamental rights, into EU border management, immigration and law enforcement legislation. It focuses particularly on measures that the EU and its Member States should carry out to protect the dignity and rights of migrants in an irregular situation within the EU.

1. Implement an effective framework for safe and legal migration to the EU so as to reduce irregular migration.

The scarcity of safe and legal avenues to the EU for third-country nationals forces many to migrate in an irregular way, often resorting to the services of smugglers due to a lack of viable alternatives. In addition, irregular entry into the EU and criminalisation as a result of illegal border crossings, expose migrants to rights violations, detention, financial sanctions and re-entry bans.

This criminalisation adversely affects the public's perception of migrants, facilitating increased discrimination, racism and xenophobia, which in turn impact migrants' access to basic services and undermine social cohesion within the EU.

Irregular entry and stay should not expose migrants to custodial or financial penalties. Legal avenues to safely access international protection in the EU need to be implemented, for example through protection-sensitive entry mechanisms, including family reunification procedures and humanitarian visas⁽¹²⁾.

Additional legal migration channels should be considered, especially for labour migration purposes – covering all wage-brackets and skill-sets. With this in mind, Member States should fully implement the EU's Seasonal Workers Directive⁽¹³⁾.

2. Ensure access to humanitarian assistance for all migrants, irrespective of their legal status.

All provisions in national and EU law that criminalise the delivery of humanitarian assistance to migrants in an irregular situation must be abolished. Existing legislation that could complicate, or even outlaw the provision of humanitarian aid to migrants must be reviewed and amended.

The right of National Red Cross Societies in the EU to exercise their humanitarian mandate by accessing and providing humanitarian support to all migrants – including detained migrants – should be strictly respected.

Explicitly excluding humanitarian assistance from the scope of the EU Facilitation Directive⁽¹⁴⁾ would enhance legal certainty, and increase migrants', service providers', and the general public's understanding of any related rights and duties.

Our call

The EU and its Member States must abolish all provisions in national and EU law that criminalise assistance to migrants in an irregular situation.

12. RCEU, Legal avenues to access international protection in the EU, 27 February 2013.

13. Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers.

14. Directive 2002/90/EC establishing a common definition of the offense of facilitation of unauthorised entry, transit and residence.

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The British Red Cross provides assistance to refugees and destitute migrants with tracing requests, as well as emergency vouchers for food and clothing, United Kingdom, 2011.

© Jonathan Banks / British Red Cross

The EU's anti-smuggling strategy should target the heads of criminal networks and not individuals acting on humanitarian grounds.

The EU Facilitation Directive must be revised to include a mandatory exemption which prohibits punishment for the provision of humanitarian assistance to people who are in breach of laws on entry, transit and stay. In line with the Palermo Protocol⁽¹⁵⁾, the financial gain element in the definition of the crime should be further underlined so as to ensure that sanctions only affect people making substantial profits in the smuggling business.

3. Support access to information about the rights of all migrants.

Currently, there is limited understanding of the fundamental rights that all migrants have, irrespective of their legal status. It is therefore crucial that access to information is improved for all migrants.

The EU and its Member States should facilitate easily accessible and clear information about the fundamental rights held by all migrants, irrespective of their legal status. This information should be provided in as many languages as is necessary to ensuring that it can be understood by all migrants. In addition, awareness among the general public about the reasons for irregular migration, the conditions faced by migrants in an irregular situation, and their entitlement to fundamental rights, must be increased.

Law enforcement authorities, such as police officers and border guards, should be properly informed and trained on the fundamental rights of migrants in an irregular situation, including on the specific situation and needs of particularly vulnerable groups like children, women and the elderly.

4. Apply the 'firewall principle' to ensure clear separation between immigration authorities, and other law enforcement authorities and public services.

In practice, access to fundamental rights often depends on a person's legal status. Seeking to access services, such as health care, shelter, education and legal aid can expose migrants in an irregular situation to the risk of being reported, or apprehended by migration and/or law enforcement authorities. The authorities may indeed compel service providers to verify residence status and/or share their users' data with migration and law enforcement authorities.

15. Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.

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The AMBER MED health clinic, a project run in partnership between the Austrian Red Cross and the Diakonie Refugee Service, provides medical services for people without medical insurance, migrants, asylum seekers, undocumented migrants and Austrian citizens.

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There should be a clear separation in law and practice regarding the powers and remits of migration and law enforcement authorities on the one hand, and those of social services and the judicial system on the other.

In particular, a 'firewall' between healthcare providers, and immigration authorities is necessary to guaranteeing access for all migrants to basic preventive, curative, and rehabilitative health services without the risk of being reported, arrested, detained or returned⁽¹⁶⁾.

All migrants should be given effective access to education facilities, primary and secondary schools, and vocational training without being reported to immigration authorities.

In addition, the police and immigration authorities should not be allowed to apprehend migrants without a legal status in the vicinity of schools or health-care facilities⁽¹⁷⁾.

5. Guarantee effective access to justice for migrants in an irregular situation.

Migrants in an irregular situation are particularly prone to abuse and exploitation as they are often insufficiently informed about their rights and their options for seeking legal remedies to offenses and crimes committed against them. They may also fear that reporting any violations they have suffered will expose them to the risks of apprehension, detention and return.

A uniform, effective and easily accessible legal remedy must be established to address the fundamental rights violations committed against migrants. Member States should review and strengthen their national systems for free legal aid and other State funded/supported legal assistance programmes to better serve the needs of migrants in an irregular situation.

Furthermore, accessible channels for migrants to report smuggling, trafficking and other migration-related criminal activities, should be created. Victims and witnesses of crimes, including crimes committed during smuggling, for instance debt-bondage, property crime, and physical or sexual violence, must have effective access to support services and residence permits⁽¹⁸⁾.

16. FRA, Cost of exclusion from healthcare, The case of migrants in an irregular situation, 2015.

17. See: FRA, Guidelines on apprehension practices, 2014.

18. In line with Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime and Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

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6. Facilitate migrants' access to a secure and dignified status.

Irregularity may be the result of procedural or administrative inadequacies in immigration and asylum legislation which push migrants into a legal limbo. Some people may not qualify for asylum or subsidiary protection, but cannot be returned to their countries of origin because of concrete practical or legal obstacles, including the risk of being subject to violations of certain fundamental rights, as safeguarded by the principle of *non-refoulement*. Migrants that are in transit, or that have not yet requested international protection, may be considered to be in an irregular situation. Similarly, people that are waiting for the conclusion of an administrative asylum or regularisation procedure, also find themselves without a determined status. Finally, there are people that have spent years in their countries of residence, actively contributing to its social and economic life, yet have no prospect of regularisation because there is no adequate legal framework.

A secure status must be granted to all migrants who have lodged an application for international protection or filed a claim for legal status, including during the appeals procedure. EU Member States should consider granting migrants access to a provisional independent permit for the purpose of securing a status after the breakdown of personal or employment relationships.

The EU should also promote continuous mechanisms to regularise migrants' status and grant them official leave to remain in the country. These types of schemes could offer possible regularisation under conditions related to the length of stay, family and social ties, and/or employment relationships.

7. Abstain from detaining migrant children and make the detention of adult migrants a measure of last resort.

Detention must be used as a measure of last resort, not as a tool to deter migration. Any detention has to be determined necessary, reasonable, and proportionate to a legitimate purpose. Currently, migrants can be detained in the context of return procedures, initial arrival, or Dublin transfers.

There should be a review of the impact of EU legislation on the detention of migrants within and beyond the EU. This review should consider the following aspects: the necessity and proportionality of detention decisions, the length of detention, the rate of repeated detention, the effectiveness of the legal review of detention decisions, and the availability of effective legal aid.

National Red Cross Societies in the EU recommend reducing the current 18-month maximum duration of detention, and setting up mechanisms to prevent repeated periods of detention. Detention should always be subject to legal review, and detained migrants must be informed of their rights and enjoy effective access to appeal mechanisms. Detention should be an exceptional measure, following prior consideration of liberty and other alternatives to detention.



Children in an irregular situation are particularly vulnerable and should never be detained due to their status, Indomeni, 2016.

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The special circumstances of particularly vulnerable groups, such as children, the elderly, victims of torture or trafficking, people with mental or physical illnesses, and people with disabilities, should be taken into account. The detention of these vulnerable groups has to be avoided. Children should enjoy additional safeguards and must never be detained.

8. Make sure that return procedures comply with fundamental rights.

Return is a possible phase of migration that should only take place when it can be carried out safely and with dignity, in full compliance with the migrant's fundamental rights, including procedural rights. In line with the principle of *non-refoulement*, migrants should never be returned to countries where there are substantial grounds to believe that they risk being subjected to violations of certain fundamental rights.

Migrants should have access to free legal aid in order to appeal return decisions, and appeals against return must be automatically suspensive. Readmission procedures and common lists of safe countries of origin, should not prevent appropriate examination of a person's individual situation.

Forced returns must only be used as a measure of last resort. Return procedures should include a support component to help set up livelihood projects in countries of return, so as to improve the socio-economic prospects of returned migrants and facilitate their re-integration. Any information and assistance that is provided should be needs-based and take account of the necessity of special measures, especially for vulnerable people.

The Red Cross EU Office

28 National Red Cross Societies in the European Union and the Norwegian Red Cross form part of the world's largest humanitarian network, and employ over 250,000 staff. They also engage well over one million volunteers, and have more than eight million members. The Red Cross EU Office represents their interests, as well as those of the International Federation of Red Cross and Red Crescent Societies (IFRC), before the EU and its institutions.

Asylum and Migration

Asylum, migration and displacement are of high importance to National Red Cross Societies in the EU, as many play a key role in receiving refugees and providing counselling, health care and social assistance, as well as supporting their integration and participation in community life. We help National Red Cross Societies in the EU to better understand the EU policy framework on migration and asylum, and advocate for EU migration policies that safeguard humanitarian principles and respect the dignity of migrants and refugees, regardless of their legal status. We promote adequate support for all vulnerable migrants, including access to protection and to basic services.



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