

**ECRI GENERAL POLICY
RECOMMENDATION NO. 16**

**ON SAFEGUARDING IRREGULARLY
PRESENT MIGRANTS FROM DISCRIMINATION**

ADOPTED ON 16 MARCH 2016

Strasbourg, 10 May 2016

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

Abstract:

For the purposes of this General Policy Recommendation (GPR) “irregularly present migrants” should be understood as individuals – women, men and children - present in a member State that is not their country of origin, who do not, or no longer, fulfil the conditions under national law for entry or stay in that member State.

The purpose of the GPR is to address a pressing issue of discrimination which is causing grievous hardship to a substantial number of migrants who are irregularly present in member States. It deals exclusively with the question of ensuring access by all persons in this particularly vulnerable group to those human rights which are guaranteed to them in international human rights instruments, in particular as concerns education, health care, housing, social security and assistance, labour protection and justice, while they are within the jurisdiction of a member State.

To this end, this GPR calls for the creation of effective measures (hereafter “firewalls”) to prevent state and private sector actors from effectively denying human rights to irregularly present migrants by clearly prohibiting the sharing of the personal data of, or other information about, persons suspected of irregular presence or work, with the immigration authorities for purposes of immigration control and enforcement.

This GPR does not seek in any way to address member States’ laws and practices concerning the expulsion of irregularly present migrants. Nor does it deal with questions or issues of possible access to the labour market or regularisation of persons in such irregular situations.

The European Commission against Racism and Intolerance (ECRI):

Recalling that Article 1 of the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights;

Recalling that human rights are the patrimony of all people expressed in the international instruments of the United Nations, the Council of Europe and other international bodies as well as in national legislation;

Having regard to a broad definition of “irregularly present migrants”, meaning individuals – women, men and children - present in a member State that is not their country of origin, who do not, or no longer, fulfil the conditions under law for entry or stay in that member State;

Stressing that all migrants, including irregularly present migrants, have human rights, including civil, political, economic, social and cultural rights; recalling that international law establishes minimum standards in this respect which must be guaranteed without discrimination on grounds prohibited under ECRI’s mandate;

Acknowledging the power of all states, as an expression of national sovereignty, to control the entry and stay of foreign nationals onto their territory subject to their human rights obligations, including both the duty of non-discrimination and the principle of equal treatment; also that national sovereignty entails responsibility for human rights protection of all persons within a state’s jurisdiction;

Recalling that those people whom states have categorised as irregularly present migrants, and in particular children, are among the most vulnerable of all persons subject to state action and therefore require special attention to protect their human rights;

Having regard to the European Convention on Human Rights and its Protocols and to the case law of the European Court of Human Rights;

Having regard to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, the Council of Europe Convention on Action against Trafficking in Human Beings, the Convention against Discrimination in Education, the Labour Inspections Convention, the Migration for Employment Convention (Revised), the Migrant Workers (Supplementary Provisions) Convention and the Domestic Workers Convention;

Having regard to the specific obligation of member States according to the Convention on the Rights of the Child always to take into account the best interests of the child as a primary consideration when considering the position of children and their parents irrespective of their immigration or migratory status;

Having regard to the European Social Charter (revised) and to the case law of the European Committee of Social Rights;

Having regard to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data and its related instruments;

Recalling Resolution 1509 (2006) of the Parliamentary Assembly of the Council of Europe on the human rights of irregular migrants; Recommendation 1985 (2011) on undocumented migrant children in an irregular situation, a real cause for concern; Recommendation 1917 (2010) on migrants and refugees, a continuing challenge for the Council of Europe; Recommendation 1975 (2011) on living together in 21st-century Europe, a follow-

up to the report of the Group of Eminent Persons of the Council of Europe; Recommendation CM/Rec(2011)13 of the Committee of Ministers on mobility, migration and access to health care; and Resolution 2059 (2015) of the Parliamentary Assembly of the Council of Europe on criminalisation of irregular migrants: a crime without a victim;

Recalling the reports of the UN Special Rapporteur on the Human Rights of Migrants, in particular the 2013 Regional Study: Management of the External Borders of the European Union and its Impact on the Human Rights of Migrants; the reports of the UN Special Rapporteurs on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and on the right to education;¹ and the 2014 Report of the Office of the High Commissioner for Human Rights on the economic, social and cultural rights of migrants in an irregular situation;

Recalling General Comment No. 2 of the Committee on Migrant Workers on the rights of migrant workers in an irregular situation and members of their families (2013) and the reports of the European Union Agency for Fundamental Rights, in particular its 2015 report on the Cost of exclusion from health care: the case of migrants in an irregular situation;

Recalling the Positions on the rights of migrants in an irregular situation of the Commissioner for Human Rights of the Council of Europe, and in particular the 2007 Issue paper on the human rights of irregular migrants in Europe and 2010 Issue paper on the criminalisation of migration in Europe: human rights implications;

¹ Such as the UN Special Rapporteur on the right to education's 2010 report on the right to education of migrants, refugees and asylum seekers (A/HRC/14/25), and the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health's 2013 report on the right to health of migrant workers (A/HRC/23/41).

Recalling the Council of Europe's Strategy on Children's Rights and in particular its attention to the most vulnerable children, such as unaccompanied minors;

Recalling that ECRI is entrusted with the task of combating racism,² racial discrimination,³ xenophobia, antisemitism and intolerance in greater Europe from the perspective of the protection of human rights and that it has always examined the situation of non-nationals, including irregularly present migrants, in its country monitoring work;

Recalling ECRI's General Policy Recommendations No. 1 on combating racism, xenophobia, antisemitism and intolerance; No. 2 on specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level; No. 7 on national legislation to combat racism and racial discrimination; No. 8 on combating racism while fighting terrorism; No. 10 on combating racism and racial discrimination in and through school education; No. 11 on combating racism and racial discrimination in policing; and No. 14 on combating racism and racial discrimination in employment;

Recalling that the fight against racism, racial discrimination, xenophobia, antisemitism and intolerance is an integral part of the protection and promotion of universal and indivisible human rights of every human being with no distinction whatsoever;

²According to ECRI's General Policy Recommendation (GPR) No. 7 on national legislation to combat racism and racial discrimination, "racism" shall mean the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons.

³ According to ECRI's GPR No. 7, "racial discrimination" shall mean any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification.

Recognising, further, that the inherent dignity and equality of irregularly present migrants as individual human beings requires state authorities to refrain from discourse that encourages or implicitly justifies discrimination on grounds prohibited under ECRI's mandate; similarly, it requires them to avoid locating migration as an exclusively economic or security issue, which abstracts its human dimension;

Having regard to the vulnerability of people – women, men and children - who, notwithstanding their entitlement to human rights, find that, on account of states' allocation of specific statuses relating to non-nationals, they are outside of specific national rules on rights and the object of coercive action to force them to leave the state;

Taking into account the increasing volume of case law of the European Court of Human Rights and the European Committee of Social Rights that enunciates the obligation of states to protect the fundamental rights of all persons within their jurisdiction, including irregularly present migrants, specifically as regards education, health care, housing,

social security and assistance, labour protection and justice;

Taking into account that the practical protection of the human rights of all persons, including those irregularly present within the jurisdiction of member States, requires the strict separation of immigration control and enforcement activities from other state and private services; taking into account that this also requires the creation of firewalls to prevent, both in law and practice, state and private sector actors from effectively denying human rights to irregularly present migrants by clearly prohibiting the sharing of the personal data of, or other information about, migrants suspected of irregular presence or work with the immigration authorities for purposes of immigration control and enforcement;

Stressing that these firewalls must be binding on state authorities and the private sector in order fully to protect the human rights of those migrants designated as irregularly present, in accordance with the objectives of relevant ECRI General Policy Recommendations;

Recommends that the governments of the member States:

1. Ensure that all irregularly present migrants – women, men and children - are fully protected against all forms of discrimination, including by enacting legislation to this effect in accordance with international norms and instruments, including relevant ECRI General Policy Recommendations;
2. Respect the fundamental human rights of irregularly present migrants, inter alia in the fields of education, health care, housing, social security and assistance, labour protection and justice;
3. Decouple immigration control and enforcement from the provision of services and assurance of rights of irregularly present migrants within their jurisdiction in order to ensure that those rights are guaranteed to such migrants and to relieve authorities whose primary responsibilities lie elsewhere (such as in the fields of education, health care, housing, social security and assistance, labour protection and justice) from interference by immigration enforcement policies and institutions;

4. Protect the personal data of all persons, including irregularly present migrants, in accordance with international obligations and ensure that all state authorities are required to obtain individualised and specific authorisations based on grounds of reasonable suspicion of criminal activities by named individuals or grounds of national security before seeking personal data which is protected by the right to respect for privacy;
5. Recognise and affirm the obligations that exist in relation to irregularly present migrant children within their jurisdiction and ensure that all policies affecting irregularly present migrants are developed in light of the obligation to respect children's rights, in particular the principle that the best interests of the child shall be a primary consideration;
6. Recognise and ensure the right to respect for family life, bearing in mind the best interest of the child to reside with his or her parent(s), family member or guardian irrespective of their immigration or migratory status;
7. Ensure that irregularly present migrants have full, non-discriminatory access to appropriate administrative and judicial remedies including against private sector actors such as landlords or employers without risk of the sharing of their personal data or other information with immigration authorities for the purposes of immigration control and enforcement;
8. Comply with the spirit of UN General Assembly Resolution 3449 (2433rd Plenary Meeting 9 December 1975) on measures to ensure the human rights and dignity of all migrant workers, and with Resolution 2059 (2015) of the Parliamentary Assembly of the Council of Europe on criminalisation of irregular migrants: a crime without a victim, and refrain from designating as "illegal" those migrants who have entered or are present in a member State without immigration permission;

I. INTERNATIONAL LEGAL INSTRUMENTS

9. If not already parties, sign and ratify, and in all cases implement all instruments set out in the Appendix to this recommendation;

II. DISCRIMINATION ON GROUNDS OF CITIZENSHIP

10. In accordance with ECRI's GPR No. 7, prohibit all forms of discrimination within ECRI's mandate, including on the basis of citizenship; any differential treatment must be set out in law, justified on reasonable grounds and subject to a proportionality assessment;

III. PROTECTION OF IRREGULARLY PRESENT MIGRANTS IN KEY AREAS OF PUBLIC AND PRIVATE SERVICES

a) General provisions

11. Ensure that no public or private bodies providing services in the fields of education, health care, housing, social security and assistance, labour protection and justice are under reporting duties for immigration control and enforcement purposes;
12. Develop legislation, policy guidelines and other measures to prohibit public and private bodies from reporting to and sharing with immigration authorities the personal data of, or information about, migrants suspected of irregular presence for any purposes, other

than in exceptional circumstances which are set out in law and subject to judicial review and a substantive appeal right;

13. Prohibit the carrying out of immigration control and enforcement operations at, or in the immediate vicinity of, schools, health facilities, housing centres (including accommodation agencies, shelters and hostels), legal assistance centres, food banks and religious establishments;
14. Ensure that the provision of social and humanitarian assistance to irregularly present migrants in all areas of public and private services is not criminalised;
15. Encourage competent authorities, in cooperation with civil society, to raise awareness amongst irregularly present migrants, service providers and public authorities about entitlements and access to services (such as education, health care, housing, social security and assistance, labour protection and justice) for all persons, regardless of their immigration or migratory status;
16. Ensure that immigration control and enforcement measures do not result in the application of disproportionate restrictions on the right to marry and establish a family, such as blanket prohibitions on marrying or the imposition of restrictions which go beyond an assessment of the genuineness of the relationship or which discriminate against migrants or their spouses on grounds prohibited under ECRI's mandate;
17. Ensure both in law and practice that irregularly present migrants are able to register the birth and obtain a birth certificate for their children born within the jurisdiction of a member State without the risk of the sharing of their personal data or other information with immigration authorities for the purposes of immigration control and enforcement;

b) Education

18. Guarantee access to preschool, primary and secondary education for children of irregularly present migrants and irregularly present unaccompanied minors under the same conditions as nationals of the member State;
19. Ensure that school authorities do not require documentation relating to immigration or migratory status for school enrolment which irregularly present migrants cannot procure;
20. Ensure that children of irregularly present migrants or irregularly present unaccompanied minors are able to obtain certificates in member States indicating the level to which they have completed their education;

c) Health care

21. Ensure that the right to health care is formally guaranteed in national law for all persons, including irregularly present migrants and those among them who are destitute, and that it includes emergency medical treatment and other forms of necessary health care;
22. Ensure that health service providers do not require documentation relating to immigration or migratory status for registration which irregularly present migrants cannot procure;

23. Ensure that health care professionals provide adequate and appropriate care by following the same guidelines, protocols and codes of conduct that medical and academic professional organisations adhere to in care for any other patients;
24. Ensure that irregularly present migrant children have full access to national immunisation schemes and to paediatric care and that irregularly present migrant women have access to all medical services related to pregnancy;

d) Housing

25. In order to reduce the risk of exploitative or abusive situations, ensure that renting accommodation to irregularly present migrants is not criminalised by reason only of their immigration or migratory status;
26. Establish a framework that recognises and ensures the right to emergency accommodation, including in homeless shelters, for irregularly present migrants;
27. Recognise the specific obligation to ensure adequate shelter for all children, including those who, or whose parents, are irregularly present, regardless of whether or not they are unaccompanied;

e) Labour protection

28. Ensure that decent working conditions are guaranteed in legislation for all persons, irrespective of immigration or migratory status, on the basis of the principle of equal treatment and in accordance with international labour standards, including fair wages and compensation, working hours, leave, social security, access to training and rights at work, the right to organise and to bargain collectively, accident insurance, and access to courts of the member State;
29. Ensure an effective system of workplace monitoring and inspection by separating the powers and remit of labour inspectors from those of immigration authorities;
30. Establish effective mechanisms to allow irregularly present migrant workers to lodge complaints in respect of labour standards against employers and obtain effective remedies without the risk of the sharing of their personal data or other information with immigration authorities for the purposes of immigration control and enforcement;
31. Where irregularly present migrant workers have made contributions to the social security system through employment, ensure that they are entitled to receive the resultant benefits or reimbursement of these contributions if they are required to leave the country;

f) Policing and criminal justice

32. Prohibit the abuse of immigration control and enforcement activities to justify racial profiling in all circumstances, and ensure effective independent monitoring of all police, national security and immigration control and enforcement practices;
33. Establish safeguards ensuring that irregularly present migrants who are victims of crime are aware of their rights and are able to report to law enforcement authorities, testify in court and effectively access justice and remedies without the risk of the sharing of their personal data or other information with immigration authorities for the purposes of immigration control and enforcement;

IV. ASSISTANCE TO IRREGULARLY PRESENT MIGRANTS: SPECIALISED BODIES AND CIVIL SOCIETY

34. Establish effective independent specialised bodies to provide assistance to migrants, including those irregularly present, who claim to be victims of discrimination contrary to this GPR; where such bodies already exist, such as equality bodies, national human rights institutions or ombudspersons, ensure that they are also available to irregularly present migrants who should be able to access them without the risk of the sharing of their personal data or other information with immigration authorities for the purposes of immigration control and enforcement;
35. Encourage civil society bodies to ensure that their activities and services include all individuals within the jurisdiction in so far as those activities and services relate to the delivery of human rights.

Appendix: Legal Instruments

Council of Europe Instruments

- Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (1950) and its additional protocols
- European Social Charter (1961) and its additional protocols
- European Social Charter (revised) (1996)
- European Convention on Establishment (1955)
- European Convention on the Protection of Individuals with regard to Automatic Processing of Personal Data (1981) and its related instruments
- Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (2011)
- Council of Europe Convention on Action against Trafficking in Human Beings (2005)

United Nations Instruments

- Universal Declaration of Human Rights (1948)⁴
- International Covenant on Civil and Political Rights (1966)
- International Covenant on Economic, Social and Cultural Rights (1966)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990)
- International Convention on the Elimination of All Forms of Racial Discrimination (1965)
- Convention on the Elimination of All Forms of Discrimination against Women (1979)
- Convention on the Rights of the Child (1990)
- Convention against Discrimination in Education (1960)
- ILO Labour Inspections Convention, 1947 (No. 81)
- ILO Migration for Employment Convention (Revised), 1949 (No. 97)
- ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)
- ILO Domestic Workers Convention, 2011 (No. 189)

⁴ As this is a Declaration neither signature nor ratification is required.

Explanatory Memorandum

This General Policy Recommendation (GPR) addresses a pressing issue of discrimination that causes grievous hardship to the substantial number of migrants who are irregularly present in member States - namely their inability to enjoy certain rights they have under international law because of the vulnerability inherent in their immigration status.⁵

The GPR defines “irregularly present migrants” as individuals - women, men and children - present in a member State that is not their country of origin, who do not, or no longer, fulfil the conditions under national law for entry or stay in that member State. The GPR recognises that this is a diverse group, including persons who are in an irregular situation because of technical reasons but also those who might have intentionally tried to flout or circumvent national rules on legal entry and stay. Taking this into consideration, the GPR deals exclusively with the question of how to secure for these persons effective access to certain human rights for the time period - however long or limited this may be - that they are still within the jurisdiction of a member State.

The GPR’s approach is based on the incontrovertible fact that member States have assumed a number of obligations – in particular in the fields of education, health care, housing, social security and assistance, labour protection and justice - under the European Convention on Human Rights (ECHR) and its Protocols, the European Social Charter (revised) and the other instruments set out in the GPR’s Appendix. As a result, all migrants, including those irregularly present, have certain civil, political,⁶ economic, social and cultural rights. While the underlying international-law obligations only set out minimum human-rights standards, these must be guaranteed without discrimination on a number of grounds, including immigration status.

The central pillar of this GPR is the creation of “firewalls” which prevent certain public authorities, but also some private-sector actors, from effectively denying some human rights to irregularly present migrants by means of a clear prohibition on the sharing of personal data of, and other information about, migrants suspected of irregular presence, with immigration authorities for purposes of immigration control and enforcement.⁷ This sharing of personal data and information constitutes a barrier, often insurmountable, for irregularly present migrants to the enjoyment of human rights to which they are entitled, as any effort to access them results in immigration control and enforcement related activities rather than the delivery of those rights.

The GPR does not seek to address member States’ law and practices regarding the entry, expulsion or detention of irregularly present migrants. The European Court of Human Rights (ECtHR) has long recalled “that the [ECHR] does not guarantee the right of an alien to enter or to (continue to) reside in a particular country” (*Boultif v. Switzerland*⁸). The ECtHR has also recognised that irregular migrants may under certain circumstances be subjected to detention. However, the sovereign right to control the entry and stay of migrants cannot relieve member States of their duty to secure human rights to all persons within their jurisdiction irrespective of immigration or migratory status.

⁵ Recognised by the European Court of Human Rights on numerous occasions (such as in *M.S.S. v. Belgium and Greece*, Application no. 30696/09, 21 January 2011; *Jeunesse v. Netherlands*, Application no. 12738/10, 3 October 2014; *Nunez v. Norway*, Application no. 55597/09, 28 September 2011; and *Rodrigues da Silva and Hoogkamer v. Netherlands*, Application no. 50435/99, 3 July 2006).

⁶ This GPR includes political rights only in so far as they have been recognised to everyone in the International Covenant on Civil and Political Rights and as interpreted by the UN Human Rights Committee established under it.

⁷ See especially Recommendations 3, 4, 11 and 12 of this GPR.

⁸ Application no. 54273/00, 2 August 2001.

The fields of law and policy covered by this GPR are: education, health care, housing, social security and assistance, labour protection and justice. As concerns labour, it should be noted that there is no specific right for irregularly present migrants to work without authorisation, and this GPR does not deal with the question of access to the labour market. Moreover, the GPR does not address the issue of the regularisation of persons in irregular situations.

However, it should be noted that ECRI, in its country monitoring reports, has frequently recommended the creation of comprehensive and long-term strategies on migration, addressing also the issue of irregular migration, with the necessary human and financial resources and training for personnel dealing with irregularly present migrants to ensure full respect for international and European human rights standards (see for example, its fourth report on Greece). As noted in ECRI's fifth report on Greece, where irregular migrants fall into situations of destitution, this leads the general public to associate them with the decay and impoverishment of certain areas and contributes to increased racism and intolerance.

The objective of this GPR is the protection of fundamental human rights irrespective of immigration or migratory status. It is essential that the inclusiveness of human rights designed to cover everyone within a jurisdiction is not undermined by rules based on citizenship and immigration status as prerequisites to the enjoyment of such rights. This GPR does not seek this result through placing constraints on member States' legislation in respect of migration. It is strictly limited to ensuring access to human rights for all persons within the jurisdiction by restricting the circumstances in which state authorities and private sector actors can be compelled or encouraged to share personal data or other information with immigration authorities for the purposes of immigration control and enforcement.

Recommendation 1

States are encouraged to enact legislation for the elimination of all forms of discrimination within ECRI's mandate, and ensure that these apply to all persons, including irregularly present migrants. A list of the key international instruments is contained in the Appendix to the GPR. The relevant ECRI General Policy Recommendations are No. 1 on combating racism, xenophobia, antisemitism and intolerance; No. 2 on specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level; No. 7 on national legislation to combat racism and racial discrimination; No. 8 on combating racism while fighting terrorism; No. 10 on combating racism and racial discrimination in and through school education; No. 11 on combating racism and racial discrimination in policing; and No.14 on combating racism and racial discrimination in employment.

Recommendation 2

The fundamental rights of all persons within the jurisdiction of member States must be respected.⁹ Recommendation 2 addresses, among others, the right to education, health care, housing, social security and assistance, labour protection and justice. The importance of these fields and their inclusion in this GPR are the result of ECRI's findings in its country reports regarding the situation of many irregularly present migrants. Specifically in these fields they are often subject to discrimination, both direct and indirect. National laws excluding irregularly present migrants from education, health care, housing, social security and assistance (direct discrimination) are common. Some national laws create indirect discrimination by making core labour rights inaccessible to irregular migrants as any effort to access such rights results in the transfer of personal data and information to the immigration authorities (indirect discrimination). ECRI has recommended, for example, in numerous reports of its fourth monitoring cycle, that states provide in law for access to medical care for

⁹ See Office of the High Commissioner for Human Rights, The Economic, Social and Cultural Rights of Migrants in an Irregular Situation, HR/PUB/14/1, 2014.

everyone within their jurisdiction, irrespective of legal status (see the reports on Azerbaijan, Greece, Spain and Sweden). ECRI's fourth report on Cyprus expressed concern that the contact details of migrant children enrolling in school were regularly sent to the police. Exploitation and mistreatment of irregularly present migrant workers and abusive labour conditions are highlighted in many of ECRI's reports (see its fourth reports on Belgium, Cyprus, the Russian Federation and Spain). ECRI has also recommended the decriminalisation of renting accommodation to irregular migrants (see its fourth report on Italy and fifth report on Greece). In its fourth report on Spain, ECRI welcomed the provisions on registration in the population register of all persons, regardless of immigration status, in order to access basic health care, social services and assistance; however, it expressed concern that registration required the presentation of identity and residence documents. Exclusion from housing is also contrary to the case law of the European Committee of Social Rights, in particular in its decisions in *Defence for Children International (DCI) v. Netherlands*¹⁰ and *Conference of European Churches v. Netherlands*¹¹ where the Committee held that access to emergency housing is a duty of all states on the basis of need, not immigration status. This case law may, by extension, also be applied to other core social rights.

Recommendation 3

The application of immigration rules must not interfere with the correct application of the human rights obligations of states in respect of all persons within their jurisdiction. The legitimate objectives of justice and interior ministries regarding immigration control and enforcement should not compromise the fulfilment of the human rights obligations of other parts of government regarding people who may be irregularly present. Those who are homeless, in need of food and necessary medical treatment, or children who need schooling, are under the responsibility of ministries other than justice and interior and which are unrelated to immigration control. There must be clear firewalls which separate the activities of state authorities which provide social services and, where applicable, the private sector, from immigration control and enforcement obligations. These firewalls are the ineluctable consequence of states' duties to protect everyone within their jurisdiction from discrimination as set out in numerous human rights treaties and ECRI's General Policy Recommendations.¹²

All of the areas of state and private sector activity covered in this GPR are particularly important to the delivery of human rights to all persons in the jurisdiction. Some of ECRI's country reports indicate that these are often the fields where justice and interior ministries conduct the fight against irregular migration. In its fifth report on Greece, for example, ECRI recommended that, where medical services for irregular migrants are provided by NGOs, access to them should not be jeopardised by police checks. The human cost of permitting immigration control considerations to compromise the delivery of human rights in these fields is considerable. First, it results in social exclusion and destitution, and forms a basis for racism and intolerance (see comments on Recommendation 10).¹³ ECRI noted in its fifth report on Greece that irregular migrants left to fend for themselves, without any social protection, have resorted to squatting in abandoned houses and derelict apartment buildings, which has resulted in local residents associating them with the decay and impoverishment of these areas. Second, it stigmatises all migrants by creating suspicion and requiring continuous checks on the immigration status of all persons on the basis of the fight against irregular immigration. Third, it distracts state authorities responsible for the delivery of social

¹⁰ Complaint No. 47/2008, 20 October 2009.

¹¹ Complaint No. 90/2013, 1 July 2014.

¹² See also the European Committee of Social Rights Statement of interpretation on the rights of refugees under the European Social Charter, 15 October 2015.

¹³ See also Resolution 2059 (2015) of the Parliamentary Assembly of the Council of Europe on criminalisation of irregular migrants: a crime without a victim.

and public services from their primary duties and requires them to use precious resources on justice and interior ministry priorities. Fourth, it creates suspicion and division among staff working with those in need, and fear among people who are unsure of their immigration status or are irregularly present but in desperate need of assistance.

It is necessary to decouple immigration-control activities from the assurance of human rights to irregularly present migrants. This can only be done by removing immigration-control related obligations from the delivery of human rights in the fields covered by this GPR.¹⁴

A number of good practices can be cited here. In Paris, Médecins du Monde operates 21 medical dispensaries for irregular migrants with the cooperation of local authorities.¹⁵ Some states, such as Austria, operate on a “functional ignorance” basis, allowing irregular migrants to access emergency health care services without inquiry regarding legal status.¹⁶ The Italian cities of Florence, Torino and Genoa have publicly extended access to education by granting all children the right to attend nursery school regardless of immigration status.¹⁷ Similarly, the Hesse region in Germany has allowed children to enroll in school without proof of local residence since 2009, and several municipalities, including Frankfurt, Hamburg and Munich have lifted the obligation of staff working in the education sector to report irregularly present migrant children in schools.¹⁸ Several municipalities in Europe have extended the provision of legal assistance and services to all individuals regardless of immigration status. For example, the city of Ghent in Belgium provides free legal advice to all migrants in cooperation with Information Point Migration, organised by the Integration Service of the city of Ghent and funded by the local government.¹⁹

Recommendation 4

The right to respect for private life is guaranteed under Article 8 ECHR and applies to all persons irrespective of immigration status. The personal data of irregularly present migrants must be protected from automatic sharing by state authorities and private actors with immigration authorities of member States, as required also by the European Convention on the Protection of Individuals with regard to Automatic Processing of Personal Data (1981) and its related instruments. Exceptions are possible but on specific grounds where immigration authorities have obtained individualised and specific authorisations based on grounds of reasonable suspicion of criminal activities by named individuals or grounds of national security. This principle that personal data protection duties can only be derogated from on specified grounds forms part of the EU Data Protection Regulation and Data Protection Directive on the protection of individuals with regard to the processing of personal data by both competent authorities and private sector actors for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal

¹⁴ European Union Fundamental Rights Agency, *Apprehension of Migrants in an Irregular Situation – Fundamental Rights Considerations*.

¹⁵ François Crépeau, “Protecting Migrants’ Rights: Undocumented Migrants as Local Citizens” in François Crépeau and Colleen Sheppard, eds, *Human Rights and Diverse Societies: Challenges and Possibilities* (Newcastle upon Tyne, UK: Cambridge Scholars Publishing, 2013) at 208.

¹⁶ Ursula Karl-Trummer, Sonja Novak-Zezula and Birgit Metzler, “Access to health care for undocumented migrants in the EU: A first landscape of *NowHereland*” (2010) 16:1 *Eurohealth* at 13-15.

¹⁷ Sergio Carrera and Joanna Parkin, *Protecting and Delivering Fundamental Rights of Irregular Migrants at Local and Regional Levels in the European Union* (Centre for European Policy Studies, 2011) online: <<http://cor.europa.eu/>> at 19.

¹⁸ Sergio Carrera and Joanna Parkin, *Protecting and Delivering Fundamental Rights of Irregular Migrants at Local and Regional Levels in the European Union* (Centre for European Policy Studies, 2011) online: <<http://cor.europa.eu/>> at 19.

¹⁹ Sergio Carrera and Joanna Parkin, *Protecting and Delivering Fundamental Rights of Irregular Migrants at Local and Regional Levels in the European Union* (Centre for European Policy Studies, 2011) online: <<http://cor.europa.eu/>> at 22.

penalties, and the free movement of such data.²⁰ Matters of policing and criminal justice must remain the responsibility of the relevant specialised authorities.

Recommendations 5 and 6

The protection of children, both those who are irregularly present themselves and those whose parents are irregularly present migrants, is a matter of specific concern as regards human rights. The United Nations Convention on the Rights of the Child is expressed in terms of the rights of *all* children. Children are a particularly vulnerable group who not only need protection on account of their age but also, in some cases, on account of their irregular presence which renders them especially vulnerable.²¹ All actions of member States must be consistent with the Convention on the Rights of the Child and the principle that the best interests of the child shall be a primary consideration.

Article 8 ECHR requires all member States to respect the right to private and family life. The ECtHR has consistently recognised and upheld the duty of states to protect children irrespective of their immigration status or that of their parents, including the right to education,²² and the right to contact with their parents. While this does not necessarily require states to respect the choices of families and individuals as to the country where they wish to live, it does require member States to take into account the circumstances of each person and their families to determine whether they should be allowed to reside in that state. The best interests of the child as a primary consideration have been confirmed by the ECtHR as sufficiently important to require states, in some circumstances, to issue residence permits to irregularly present migrants in order to permit the full enjoyment of the rights of the children.²³ In any event, the irregularities of their parents' immigration status must not be a reason for states to refuse human rights, including social rights, to such children.

Recommendation 7

Rights without remedies have little value for people who need to establish their entitlements. The right to an effective remedy is enshrined in Article 13 ECHR for breaches of rights guaranteed under that convention. In recognition of this, all member States have extensive systems of administrative and judicial oversight and adjudication to settle disputes between individuals and between individuals and the state. These administrative and judicial dispute resolution channels must be available to all persons, including irregularly present migrants, on the basis of non-discrimination with nationals of the state, in order to resolve claims to rights. The exercise of the right to access to justice must not be discouraged for irregularly present migrants, for instance because of automatic sharing of personal data and other information with immigration authorities for the purposes of immigration control and enforcement.

Recommendation 8

Language matters both in law and practice. It is of utmost importance that governments and their officials avoid the prejudicial language of illegality when speaking about migrants. This language of illegality confuses the public, suggesting that criminal offences which constitute

²⁰ The status of the Directive and Regulation were confirmed as politically agreed by the Council of the European Union on 28 January 2016 and they should be formally adopted shortly.

²¹ See the Council of Europe Strategy for the Rights of the Child (2012-2015).

²² *Ponomaryovi v. Bulgaria*, Application no. 5335/05, 28 November 2011; *D.H. and Others v. the Czech Republic (GC)*, Application no. 57325/00, 13 November 2007.

²³ *Jeunesse v. Netherlands*, Application no. 12738/10, 3 October 2014; *Nunez v. Norway*, Application no. 55597/09, 28 September 2011; and *Rodrigues da Silva and Hoogkamer v. Netherlands*, Application no. 50435/99, 3 July 2006.

a danger to society are committed by those so categorised. The Council of Europe's Commissioner for Human Rights has strongly urged all states to cease the criminalisation of migration²⁴ as profoundly problematic for the respect of human rights and counterproductive in social policy terms. The public must not be influenced into confounding irregular immigration status with criminal activities which harm society. The Parliamentary Assembly of the Council of Europe, in its Resolution 2059 (2015) on criminalisation of irregular migrants: a crime without a victim, underlined that inappropriate use of the terminology relating to migration plays a part in reinforcing xenophobic and racist attitudes and heightens fear of migrants. It called on member States to promote the use of neutral terminology and replace the term "illegal migrants" with "irregular migrants" in speeches and official documents. Similarly, ECRI, in its fourth report on the United Kingdom, urged the authorities "not to assimilate as criminals persons who have breached immigration law." Furthermore, ECRI frequently calls upon member States to stress in public debate the positive aspects of immigration and the contribution of people with migrant backgrounds to society and to the economy (see its fifth report on Norway, for example).

I. INTERNATIONAL LEGAL INSTRUMENTS

Recommendation 9

States must take seriously their human rights obligation to prevent and combat discrimination. The starting place is the signature and ratification of all the core human rights treaties which provide a sound foundation for human rights protection, including for irregularly present migrants. The list of international and Council of Europe treaties contained in the Appendix includes all core treaties which states should ratify if they have not already done so. Particular attention is drawn to Protocol No. 12 to the ECHR, which provides for a general prohibition of discrimination; ECRI consistently calls upon those member States which have not yet ratified it to do so. However, ratification is insufficient in itself. It must be accompanied by full and comprehensive implementation particularly with regard to irregularly present migrants.

II. DISCRIMINATION ON GROUNDS OF CITIZENSHIP

Recommendation 10

ECRI calls for the prohibition of all forms of discrimination within its mandate, including on the basis of citizenship.²⁵ While discrimination on the basis of citizenship is prohibited in most human rights treaties, this is not the case for all. Differential treatment on the basis of citizenship may be permissible for purposes of border controls but must not result in indirect or disguised discrimination on another ground, such as "race" or ethnic origin. This must be avoided at all costs. As discussed above in respect of Recommendation 3, the legitimate activities of states' justice and interior ministries in immigration control and enforcement must not be allowed to "function creep" into other state activities. They must be strictly limited to their specific domain as otherwise these activities risk providing a basis of racism and intolerance because they are always directed at persons who are classified by those immigration authorities as others (all too often confused in the public imagination with visible differences).

²⁴ See the Council of Europe Commissioner for Human Rights, report *Criminalisation of Migrants in Europe: The Human Rights Implications*, 10 February 2010, <https://wcd.coe.int/ViewDoc.jsp?id=1579605>.

²⁵ According to ECRI's GPR No. 7 on national legislation to combat racism and racial discrimination, "racism" is the belief that a ground such as race, colour, language, religion, nationality or national or ethnic origin justifies contempt for a person or a group of persons, or the notion of superiority of a person or a group of persons. "Racial discrimination" is any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has no objective and reasonable justification.

This position is based on the approach of the ECtHR in cases such as *Gaygusuz v. Austria*²⁶ and *Koua Poirrez v. France*²⁷ in which it has consistently held that citizenship is a suspect category which cannot necessarily justify differences of treatment which otherwise would be classified as prohibited discrimination. The ground of citizenship is suspect for discrimination although it can be justified in specific cases such as border controls. On the one hand, discrimination on the ground of citizenship may be elided with discrimination on the basis of ethnic origin and thus, while the citizenship discrimination is direct, it effectively constitutes indirect discrimination on a prohibited ground. On the other hand, discrimination on the basis of citizenship is suspect because it may encourage racist attitudes.

This position has been particularly important in the judgments concerning social rights which should be allocated on the basis of need and in a non-discriminatory manner, including with respect to citizenship.²⁸ Only exceptions which are set out in law, justified on reasonable grounds subject to a proportionality assessment should be contemplated.

III. PROTECTION OF IRREGULARLY PRESENT MIGRANTS IN KEY AREAS OF PUBLIC AND PRIVATE SERVICES

a) General Provisions

Recommendation 11

As set out above regarding Recommendation 3, this GPR is founded on the firewalls approach between civil and administrative activities which form part of human rights entitlements and immigration control and enforcement activities of the state. For all the reasons set out in the GPR, the only way to protect the human rights of all persons within the jurisdiction and to ensure that everyone is able, in law and practice, to exercise their human rights is to establish firewalls between the activities of state and private sector authorities which provide social services and immigration control and enforcement authorities. This Recommendation gives voice to those firewalls by prohibiting reporting duties on all those providing services in the areas of education, health care, housing, social security and assistance, labour protection and policing and criminal justice regarding the immigration status of people who come before them.

Recommendation 12

Immigration control and enforcement activities often commence with obligations by both public and private sector actors, in the context of other activities in the fields of education, health care, housing, social security and assistance, labour protection and justice, to report and share with immigration authorities the personal data of, or other information about, persons suspected of being irregularly present in the jurisdiction. This kind of personal information sharing sometimes takes place on a voluntary basis or it may be a legal requirement. In either case the result is highly problematic for the delivery of human rights to irregularly present migrants and, as seen in relation to Recommendation 4, creates an obstacle to the respect for private life. The personal data of irregularly present migrants must be protected from automatic sharing with immigration authorities. The principle that personal data protection duties can only be derogated from on specified grounds is also set out in the EU Data Protection Directive and Regulation 2016, as mentioned above. This objective can

²⁶ Application no. 17371/90, 16 September 1996.

²⁷ Application no. 40892/98, 30 September 2003.

²⁸ *Gaygusuz v. Austria*, Application no. 17371/90, 16 September 1996; *Koua Poirrez v. France*, Application no. 40892/98, 30 September 2003; *Luczak v. Poland*, Application no. 77782/01, 27 November 2007.

best be accomplished where legislation or policy instruments explicitly set out a prohibition on general information-sharing.

The division of responsibilities among state authorities and private actors should always operate in such a way that immigration control and enforcement authorities are primarily responsible for immigration control and enforcement activities. These duties should not be transferred to other state authorities or private sector bodies and actors unless truly exceptional circumstances arise which are set out in law, duly justified and subject to judicial challenge.

Recommendation 13

Identification and immigration checks at a variety of public locations, including schools, health centres, and religious facilities have been reported.²⁹ ECRI, in its fifth report on Greece, for example, expressed concern about the frequent checking of migrants' documents by police outside NGO-operated health care centres in Athens, which had become a major disincentive for irregular migrants to access the centres, for fear of arrest and possible deportation. Such immigration control activities have the effect of creating fear for irregularly present migrants and constitute an obstacle to the delivery of human rights. The purpose of this recommendation is to ensure that irregularly present migrants are able to access services in the fields covered by this GPR without fear of encountering immigration control and enforcement authorities in the vicinity of those places where assistance is made available. For the purposes of this GPR, housing centres are places where those in urgent need of accommodation may go to receive assistance in finding shelter.

Recommendation 14

The criminalisation of social and humanitarian assistance to irregularly present migrants encourages intolerance and racism as it punishes people for helping others on the basis of their immigration status. By social and humanitarian assistance this GPR includes all aid and action designed to save lives, alleviate suffering and maintain and protect human dignity. The Parliamentary Assembly of the Council of Europe, in its Resolution 2059 (2015), noted that some member States sanction humanitarian assistance, thereby creating an "offence of solidarity", and has called for an end to the threat of prosecution on charges of aiding and abetting irregular migration of people who rescue migrants.³⁰ Threatening citizens and regularly present migrants with criminal charges, trials and penalties if they assist irregularly present migrants is highly counterproductive to the delivery of human rights. As irregularly present migrants will inevitably be foreigners and may be in need, such measures encourage a false convergence in the public imagination of irregularly present migrants as dangerous. Criminalising those who provide assistance to irregular migrants can also result in exploitative circumstances where individuals engaged with irregular migrants, such as landlords or employers, shift the risk associated with their relationship by exacting abusive demands from the irregular migrants for continued employment, housing, etc. However, in no circumstances should a claim to be acting to provide social and humanitarian assistance be tolerated as an excuse to exploit irregularly present migrants. Finally, the criminalisation of assistance to irregularly present migrants also enhances their precariousness within society.³¹ It will often result in heightened fear and hesitation on their part to seek out the services they may need, including, for example, urgent medical care.

²⁹ European Union Fundamental Rights Agency, *Fundamental Rights of Migrants in an Irregular Situation in the European Union*, November 2011.

³⁰ Resolution 2059 (2015) of the Parliamentary Assembly of the Council of Europe on criminalisation of irregular migrants: a crime without a victim.

³¹ See the Council of Europe Human Rights Commissioner's 2010 report on the criminalisation of migrants in Europe: human rights implications.

Recommendation 15

In order to ensure that all persons, including irregularly present migrants and those who provide social and public services, are aware about entitlements and access to the services which form the subject of this GPR, competent authorities in these different fields are encouraged to raise this general awareness. ECRI has made this point also in some of its country reports, such as its fourth report on Finland, in which it recommended that the authorities take measures to facilitate access to health care for irregularly present migrants, specifically ensuring that they have the necessary information to benefit from their rights. The assistance of NGOs in this respect is of great importance since they often have direct contact with irregularly present migrants.

Recommendation 16

The right to marry is a human right contained in the ECHR (Article 12) and other international human rights treaties. It has the effect of permitting all persons to regulate their matrimonial status in accordance with national law. It does not necessarily confer a right to remain in the jurisdiction of the state where the marriage takes place. The right to marry may be made subject to legitimate restrictions, such as to prevent bigamy, but there must be no restrictions interfering with the right to marry applying exclusively to irregularly present migrants. Such restrictions might include, for instance, the production of specific identification documents which are never available to irregularly present migrants, such as valid residence permits, specific nationally-issued identity cards, passports, or nationally-issued authorisations for foreigners to marry within the jurisdiction of the state. All other legitimate means to prove the identity of the person seeking to marry should be accepted by those authorities entitled to carry out such ceremonies.

Recommendation 17

All children have the right to be registered immediately after birth (Article 7 of the Convention on the Rights of the Child). This right must be respected without the parents being discouraged from registering their children by reason of the irregularity of their presence in the jurisdiction because of automatic sharing of personal data and other information with immigration authorities for the purposes of immigration control and enforcement. Individuals must be able to register births without having to produce documents which they may not possess and are not able to obtain (such as valid residence permits, passports, nationally issued ID cards). While it is acknowledged that some documentation may be required to register births, flexibility should be exercised and requested documentation should not include documents exclusively related to immigration status.

b) Education

Recommendation 18

The right to education is enshrined in Article 2 of the Protocol to the ECHR. The ECtHR has held that the right to education is a fundamental democratic value of the Council of Europe and, as such, constitutes a right to which every person is entitled.³² The right of all children to education must be assured irrespective of the immigration status of the parents or the children (see also comments on Recommendations 5 and 6). This has been affirmed by the ECtHR in the case of *Ponomaryovi v. Bulgaria*³³ and *D.H. and Others v. the Czech*

³² *Timishev v. Russia*, Application nos. 55762/00 and 55974/00, 13 December 2005, see § 64.

³³ Application no. 5335/05, 28 November 2011.

Republic.³⁴ Access to education is central to the achievement of the human potential of all persons and an inseparable component of human dignity. The right to education does not stop at the end of primary school but continues to the end of all compulsory education. In its fourth report on Slovenia, ECRI recommended that all children should have equal access to upper secondary education, regardless of their citizenship, ethnic origin or immigration status or those of their parents. Preschool education can be critical to realising children's potential, closing any gaps resulting from disadvantage and preparing children for compulsory education. It should be provided to all children on the basis of equality, as should tertiary education. Many of ECRI's country reports echo this approach. Its fifth report on Norway calls on the authorities to guarantee a legal right to preschool education (for asylum seeking children). ECRI also strongly recommended, in its fifth report on the Czech Republic, that the authorities carry out their plans to introduce at least one year of compulsory and free of charge preschool for all children before entry to mainstream primary education. Finally, it is desirable that equal treatment also be granted regarding access to vocational training and apprenticeships.

Recommendation 19

Children must be able to register for school at all levels without having to produce documents (such as valid residence permits, national ID documents, passports) which they and their families are unable to obtain. While there may be circumstances where educational authorities will need to know about the immigration status of a child, for instance where the child clearly suffers from stress on account of the uncertainty of his or her family's situation, in order best to address the educational needs of that child, such information must remain confidential within the school.

Recommendation 20

In the event that the family and the children leave a member State, children must be entitled to all documents confirming the level of education which they have completed in that state in order that their continued education elsewhere is not hindered. This is also reflected in the Committee on the Rights of the Child General Comment No. 6 on the Treatment of unaccompanied and separated children outside their country of origin.

c) Health care

Recommendation 21

The right to health is guaranteed under Article 12 of the International Covenant on Economic, Social and Cultural Rights, Article 5(e)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 24 of the Convention on the Rights of the Child and Article 11 of the European Social Charter (revised). The latter also guarantees the right to medical assistance in Article 13.

The European Committee of Social Rights, in *FIDH v. France*,³⁵ has confirmed that health care is a core social right. All persons must be entitled, at a minimum, to all emergency medical treatment and other forms of necessary health care. The ECtHR has interpreted this obligation of states as including a duty to make health care available to their whole population, the denial of access to health care possibly implying a violation of Article 2 of the ECHR.³⁶ ECRI has drawn attention to this obligation in many of its country monitoring

³⁴ Application no. 57325/00, 13 November 2007.

³⁵ Complaint No. 14/2003, 3 November 2004.

³⁶ *Cyprus v. Turkey* (GC), Application no. 25781/94, 10 May 2001; *Powell v. the United Kingdom*, Application no. 45305/99, 4 May 2000; *Nitecki v. Poland*, Application no. 65653/01, 21 March 2002.

reports. Its fourth report on Finland, for example, recommended that the authorities take measures to facilitate access to health care for irregular migrants, and in its fourth report on Greece, ECRI recommended that the authorities provide, in law, for access to public medical care for everyone living on Greek territory, irrespective of their immigration or migratory status. The determination of the necessity of health care is a medical assessment which must be taken with full regard to the case law of the ECtHR.³⁷ The right to health care is also of central importance for the host community which may suffer substantial health consequences if persons in need of health care do not receive it (for instance in the case of persons suffering from communicable diseases). In its fifth report on Greece, ECRI recommended that the authorities provide adequate medical treatment to migrants irrespective of their residence status in cases of serious infectious diseases or other public health risks.

One of the greatest barriers to accessing health care is the inability to pay for it. In many member States, all residents, including those who are irregularly present, are obliged to take out health insurance. But in practice, many cannot afford such costs. This recommendation ensures that even destitute migrants' right to health care should be guaranteed. People in a situation of destitution are those whose material conditions fall below the threshold of inhuman and degrading treatment as prohibited by Article 3 ECHR and such as to be also a violation of the right to dignity as determined by the ECtHR in *M.S.S. v. Belgium and Greece*.³⁸

Recommendation 22

Individuals must be able to access health services without having to produce documents which they may not possess and are not able to obtain (such as valid residence permits, passports, nationally issued ID cards). While it is acknowledged that health care providers may require some documentation to register patients in care, flexibility should be exercised, and requested documentation should not include documents exclusively related to immigration status. ECRI has made this point, for example, in its third report on Azerbaijan, in which it strongly recommended that no-one should be wrongly deprived of health care on any discriminatory ground due to their lack of legal status in Azerbaijan and that persons in need of urgent medical treatment should not be required to produce a valid residence permit. In its fourth report on Spain, ECRI recommended that the authorities review the conditions for registration in the population register (which granted access to free health care, basic primary social services and social aid) of immigrants whose status is irregular to ensure that those who do not possess the necessary documents are not automatically excluded.

Recommendation 23

The same medical standards should apply to all the professional activities of health care workers irrespective of the immigration status of the person in need of their services. All health care professionals should be made aware of the indivisibility of their obligations. Under no circumstances should a dual track health care system be permitted to exist where irregularly present migrants receive a lower standard of care than other patients.³⁹

³⁷ *Mehmet Emin Yüksel v. Turkey*, Application no. 40154/98, 20 October 2004; *Serifis v. Greece*, Application no. 27695/03, 2 November 2006; *Tariyeva v. Russia*, Application no. 4353/03, 14 December 2006; Committee on Economic, Social and Cultural Rights General Comment No. 20, paragraph 33; World Health Organization Fact Sheet No 323, December 2015.

³⁸ Application no. 30696/09, 21 January 2011.

³⁹ World Health Organization Fact Sheet No 323, December 2015; see also the ILO HIV and AIDS Recommendation 2010 (No. 200), Recommendation concerning HIV and AIDS and the World of Work.

Recommendation 24

Access to paediatric care and immunisation is important for all children, not only those who are regularly present within the jurisdiction. The health of the whole community depends on all children receiving these services. Similarly, all women may need medical services related to pregnancy and there should be no differentiation on the basis of the immigration status of the women in need. This care must include access to ante-, peri- and post-natal care and other related health services.

d) Housing

Recommendation 25

In some member States a highly problematic set of obligations has been or is being imposed on landlords (both public and private) and other providers of housing requiring them to share personal data and information with immigration authorities or to refuse to rent residential property to persons whose immigration status has not been established as regular. The penalties for failure to do so not only include fines, but also criminal sanctions with imprisonment for the landlords. These measures are contrary to the objectives set out in ECRI's GPR No. 1 on combating racism, xenophobia, antisemitism and intolerance. By forcing landlords to carry out immigration checks, where any failure on their part correctly to do so may have extreme consequences for them personally, is likely to encourage suspicion on the part of landlords that anyone who "looks foreign" needs to be subjected to further examination to ensure that he or she is not irregularly present. As highlighted above, as soon as immigration control and enforcement objectives enter areas of social and contractual arrangements, people frightened by the risk of possible fines and imprisonment are likely to err on the side of caution and refuse housing to all non-nationals. Even where they do take the risk to rent or provide housing to migrants, they may find themselves in a situation of anxiety about the legality of their actions. These kinds of laws can only stoke racism and discrimination and result in the denial of the right to housing under the European Social Charter (revised). In its fourth report on Italy, ECRI recommended that the authorities repeal the provision whereby the act of letting accommodation to migrants without legal status is punishable by a prison sentence of between six months and three years together with seizure of the accommodation. ECRI's fifth report on Greece recommended the decriminalisation of the provision of accommodation to irregular migrants in order to enable charitable organisations to provide assistance to irregular migrants suffering from homelessness.

Recommendation 26

ECRI has raised concerns about homelessness in some of its country reports, such as its fifth reports on Hungary and Greece. The right to housing is deeply embedded in international and European human rights law. It is guaranteed under Article 11 of the International Covenant on Economic, Social and Cultural Rights, Article 5(e)(iii) of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 27(3) of the Convention on the Rights of the Child and Article 31 of the European Social Charter (revised). People must not be left vulnerable to the elements and violence on the streets. This has been affirmed by the European Committee of Social Rights in *Defence for Children International (DCI) v. Netherlands*⁴⁰ and *Conference of European Churches (CEC) v. Netherlands*.⁴¹ The responsibility of states includes an obligation to allocate funding and resources to ensure that any person, irrespective of immigration status, receives an

⁴⁰ Complaint No. 47/2008, 20 October 2009.

⁴¹ Complaint No. 90/2013, 1 July 2014.

adequate standard of living. United Nations experts lauded the Government of the Netherlands for announcing in January 2015 a decision to provide funding to municipalities that offer emergency shelters for homeless migrants, following the above-mentioned *Conference of European Churches (CEC)* decision.⁴² Access to housing should be provided in conditions of equality and non-discrimination.

Recommendation 27

As already observed, international law recognises the special position of children as vulnerable and requires their protection (Convention on the Rights of the Child). The best interests of the child, the overriding international duty to children, must always be served by ensuring that children, whether accompanied by adults or alone, have adequate shelter. The immigration status of children and their parents must never be used as an excuse to fail to deliver this right.

e) Labour protection

Recommendation 28

The right of everyone to the enjoyment of just and favourable conditions of work is guaranteed in numerous international instruments, including the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the International Convention on the Elimination of All Forms of Racial Discrimination, and the European Social Charter (revised).

Labour protection rights are not tied to immigration status. As the Court of Justice of the European Union affirmed in *O. Tümer v. Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*,⁴³ the status of worker and the rights attached to it must be accorded on the basis of non-discrimination to all workers irrespective of their immigration status. Any other approach which would exclude any workers (for instance on the basis of their irregular immigration status) from labour protection and rights would inevitably lead to exploitation and discrimination, which in turn is the breeding ground of racism and intolerance. The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, in its General Comment No. 2, interprets a number of articles of the Convention on the Rights of All Migrant Workers and Members of Their Families, which align with issues contemplated in this GPR, including: Article 25 (on equal labour treatment) and Article 27 (on rights to social security). Equality in labour law is critical to ensuring good employment practices by employers and the necessary conditions of proper application of health and safety rules.

Recommendation 29

Work place inspections to ensure the correct application of labour standards are necessary to protect everyone who forms part of the labour force. In some member States, authorities have increased the regulatory burden on labour inspectorates by including obligations to check immigration status and work permit status. This mix of activities is profoundly problematic. As highlighted above, all workers are entitled to equal application of labour standards irrespective of their immigration status. The social objective of labour standards, which is to guarantee employees minimum protections, would be undermined if any section of the labour force was excluded. Labour inspectors have a fundamental role in ensuring fair

⁴² Office of the High Commissioner for Human Rights, Press Release, “Dutch decision to fund emergency assistance for homeless migrants welcome change of position” – UN experts” (28 January 2015, Geneva).

⁴³ Case C-311/13, 5 November 2014.

play in the labour market. They must be able to rely on all workers having access to them to complain about their working conditions in order to enforce labour standards. Bad practices in the work place hurt everyone and the job of inspectors is to ensure that such practices are prevented or stopped. Additional obligations which have the effect of contradicting the primary objectives of inspectors, such as checking immigration status, are not consistent with the social objective of labour standards and undermine efforts to address undeclared work, by excluding a section of the labour force. Where there are specific and exceptional circumstances, however, the GPR does make provision for deviation from this rule (see Recommendation 12) but only where covered by a specific law which controls the extent and justifications of an exception and recourse to judicial remedies.

All but five Council of Europe member States have ratified the International Labour Organisation's Labour Inspections Convention, 1947. Article 3(2) states that: "Any further duties which may be entrusted to labour inspectors shall not be such as to interfere with the effective discharge of their primary duties or to prejudice in any way the authority and impartiality which are necessary to inspectors in their relations with employers and workers." The International Labour Conference (95th Session, 2006)⁴⁴ on the Convention and associated documents, provided clarification for signatory states on the meaning of Article 3(2) in particular regarding control of irregular employment and migration. The Committee recalled that the primary duty of labour inspectors is to protect workers and not to enforce immigration law (§ 78).

Moreover, the European Parliament, in its Resolution of 14 January 2014⁴⁵ on effective labour inspections as a strategy to improve working conditions in Europe expressed great concern at the extreme vulnerability of migrant workers with irregular or unauthorised status, as they risk being exploited in undeclared work of low standards, with low wages and long working hours in unsafe working environments, and underlined that any cooperation between labour inspectors and immigration authorities should be limited to identifying abusive employers, and should not give rise to sanctions against, or expulsions of, the migrant workers concerned, as this would actually undermine the efforts to address undeclared work (§ 29). Separating the powers of labour inspectors from those of immigration authorities does not, however, prevent or otherwise affect the authority of immigration bodies to undertake activities related to immigration control and enforcement.

The firewall approach in labour inspections has also been addressed by the UN Special Rapporteur on the human rights of migrants, François Crépeau, and the Chair of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Francisco Carrión Mena, in their statement of 15 December 2015, ahead of International Migrants' Day (18 December 2015). ECRI has also addressed this issue in its third report on Azerbaijan in which it recommended that the law should not impose an obligation on labour inspectors who have had to deal with cases of racial discrimination against migrant workers in an irregular situation to communicate information permitting the identification of the victims to the immigration authorities.

⁴⁴ Report III (Part 1B), General Survey of the reports concerning the Labour Inspection Convention, 1947 (No. 81), and the Protocol of 1995 to the Labour Inspection Convention, 1947, and the Labour Inspection Recommendation, 1947 (No. 81), the Labour Inspection (Mining and Transport) Recommendation, 1947 (No. 82), the Labour Inspection (Agriculture) Convention, 1969 (No. 129), and the Labour Inspection (Agriculture) Recommendation, 1969 (No. 133).

⁴⁵ P7-TA (2014) 0012.

Recommendation 30

Some national laws create indirect discrimination by making core labour rights inaccessible to irregular migrants as any effort to access such rights results in the transfer of personal data and information to the immigration authorities. Instead of getting justice against exploitative employers, irregularly present migrants may be threatened with expulsion by the authorities. The consequence is that bad labour practices are not exposed and equality in the labour market is frustrated to the detriment of both national workers and migrant workers.⁴⁶ This is contrary to ECRI's GPR No. 14 on combating racism and racial discrimination in employment. In line with the EU Data Protection Directive and Regulation 2016, personal data protection duties should only be derogated from on specific grounds and personal data information should not otherwise be shared with or transferred to immigration authorities.

A number of ECRI's fourth cycle reports highlighted the difficulty for irregularly present migrants to lodge complaints against employers for abuses, including racial discrimination. ECRI's fourth report on the Russian Federation, for instance, recommended the setting up of a functional mechanism whereby migrants in an irregular situation are able to report labour abuses by employers.

Recommendation 31

Migrant workers who leave the state, including on the basis of their irregular status, must either be able to enjoy the benefits of the social contributions which they have made or receive full reimbursement of contributions made. The state must not deprive them of the benefits of such contributions or reimbursement, thus effectively depriving them of part of their wages.

f) Policing and criminal justice

Recommendation 32

ECRI has called for the definition and prohibition by law of racial profiling in policing in its GPR No. 11 on combating racism and racial discrimination in policing. This is particularly clear regarding the problems of racial profiling by the police and its unacceptable consequences regarding racism and intolerance. In the case of irregularly present migrants, immigration status must not become a substitute for "race", thereby purporting to justify profiling in policing and criminal justice.

Recommendation 32 also calls for independent monitoring of police. ECRI's GPR No. 11 recommends governments of member States to provide for a body, independent of the police and prosecution authorities, entrusted with the investigation of alleged cases of racial discrimination and racially-motivated misconduct by the police.

Recommendation 33

Irregularly present migrants must be able to report crime to the police without fear of being reported to immigration authorities. It is in everyone's interests that crime is reported and investigated. It is highly detrimental to good policing that people should be deterred from reporting crime for fear of the consequences for themselves insofar as they are victims of crime. The whole of society must have confidence and trust in police in order for that authority to carry out its job correctly. If part of the society is afraid to come forward, then police will not be able function properly. It is the duty of law enforcement authorities to

⁴⁶ See the UN Special Rapporteur on the Human Rights of Migrants 2014 report on the labour exploitation of migrants, paragraph 60.

investigate reported crime and to instigate criminal proceedings where appropriate. The decisions of prosecutors to pursue criminal charges depend on everyone being able to give full and frank testimony in so far as it is relevant to proving the charges. If some members of the public or victims of crime are inhibited from giving testimony because of a fear that their personal data will be passed to the immigration authorities for immigration control and enforcement purposes, prosecutors, police and all parts of the criminal justice system are hampered in the execution of their duties. The EU Data Protection Directive 2016 acknowledges the importance of personal data protection in relation to criminal justice and judicial authorities and limits information sharing in this context. The Directive also calls on states to create an independent supervisory body to monitor personal data protection within the criminal justice system.

In this context, ECRI's fifth report on Greece draws attention to a ministerial decision providing for residence permits to be issued - on humanitarian grounds - by the Minister of Interior to third country nationals who are victims or witnesses of racist offences; the permits are valid until the case is closed or a final court judgment issued. In its fourth report on Poland, ECRI recommended that victim-support centres and judicial authorities which deal with racially motivated offences against immigrants in an irregular situation refrain from communicating information that could alert the immigration authorities. Further, if victims of crime are fearful of reporting criminal offences which have been committed against them for reasons of personal data sharing between the police and other parts of the criminal justice system and immigration authorities for the purposes of immigration control and enforcement, this part of the public is denied human rights under the procedural obligations of states to investigate alleged instances of ill-treatment and, where appropriate, prosecute perpetrators of crime (Article 3 ECHR). In its fifth report on Greece, ECRI raised concerns about the severe under-reporting of racist violence, mainly due to fear amongst victims of being arrested and deported on account of their lack of residence permits.

Good practice from the Netherlands can be cited here. In Amsterdam a pilot project was set up which allowed persons with no identification papers to report a crime to the police as a victim or witness without being arrested or prosecuted on the grounds of their irregular status. In cases of serious crime, an order to leave the country can be postponed for a period of three months if the Prosecution Service decides that the presence of the person is necessary for the investigation. Following the success of the pilot scheme it will now be applied nationally. In November 2015, the pilot was awarded a prize for best practice in work with diverse communities by the Platform for Police Management of Diversity.

IV. ASSISTANCE TO IRREGULARLY PRESENT MIGRANTS: SPECIALISED BODIES AND CIVIL SOCIETY

Recommendations 34 and 35

All persons, whether irregularly present migrants or others, are entitled to remedies in respect of breaches of their human rights. Bodies to assist them must be available where they can claim their rights without fear of the sharing of personal data or other information with immigration authorities for the purposes of immigration control and enforcement. In line with the EU Data Protection Regulation and Directive 2016, personal data protection duties should only be derogated from on specific grounds and personal data information should not otherwise be shared with or transferred to immigration authorities.

Such bodies may be anti-discrimination bodies already in existence in member States whose remit should clearly include irregularly present migrants. Reference is made to ECRI's General Policy Recommendations No. 2 on specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level and No. 7 on national legislation to combat racism and racial discrimination. The EU Data Protection Directive also

recommends states to adopt an independent supervisory body to monitor information sharing amongst public actors. Access to an effective domestic remedy is inherent in Article 13 ECHR and has been developed and interpreted by the ECtHR in numerous cases.⁴⁷ Further, civil society bodies are frequently the most important source of assistance for people in need to ensure that their human rights are delivered in practice as well as law. Civil society should be encouraged to make available their services and activities to all persons within the jurisdiction of the state irrespective of immigration status.

⁴⁷ *Al-Nashif v. Bulgaria*, Application no. 50963/99, 20 September 2002; *Shebashov v. Latvia*, Application no. 50065/99, 9 November 2000, unreported; and *Čonka v. Belgium*, Application no. 51564/99, 5 May 2002.

