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UNDOCUMENTED MIGRANTS

THE PRECARIOUS SITUATION

OF THIRD COUNTRY

NATIONALS RESIDING

IRREGULARLY IN EUROPE

POSITION PAPER OF CARITAS EUROPA

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1. Introduction

Caritas Europa is a network of 48 national Caritas organisations, which are active in 44 European countries. Caritas Europa and its members are active in issues relating to poverty and social exclusion, international cooperation, emergency humanitarian relief, development and issues of migration and asylum.

Caritas organizes social services and social and legal counseling for asylum seekers, refugees and migrants. The phenomenon of the “Sans-Papiers” or undocumented migrants is an indisputable reality in our societies. In several Caritas organisations, people with an irregular residence situation constitute over 50 percent of the assisted migrants. This bears some witness of the extent to which undocumented migrants are living in precarious situations in terms of health, housing, labour conditions etc.

The experience of the Caritas Services shows that there are several types of situations of irregular stay. . In reality, a variety of circumstances can eventually lead someone to a situation of undocumented migrant; circumstances clearly illustrating the marginalization processes that people in a weak situation face. This reality suggests that a range of responses needs to be found and implemented.

Moreover, this situation is fluid: one can observe progressive changes in the composition and the extent of the population of undocumented migrants as well as in governmental measures; whilst governments generally develop restrictive policies, one also finds certain diametrically opposed examples, some of which demonstrate a better understanding of individual situations and others which are inspired by different motivations: regularisations based on labour, family situation, long term residence etc. These measures show that the complexity of the problems has, to some extent, been taken into consideration.

The complexity of the situation is evidenced by a new terminology which is developing: “suspension of the order to leave the country”, visa of “tolerated person”, “temporary leave to stay for exceptional reasons”, status “of humanitarian protection”, “special protection status”, leave to stay “private life and family life”, etc.

In many ways, the presence of third country nationals in an irregular status in European countries raises complex questions where passions and opportunism are often in competition with objectivity and reason. Public opinion is formed, based on perceptions rather than on hard facts. In addition, political parties, governmental organizations, associations, foreigners’ collectives etc. discuss the issue, without reaching a consensus, thus making it very difficult to find any solutions.

The quantification of the phenomenon is an example of that debate: it is effectively impossible to reliably estimate the number of third country nationals residing irregularly in European countries. Estimations can differ widely. In any event, Europe has within its territory several hundreds of thousands, if not several millions of third country nationals in an irregular situation.

The discourse concerning migrants in an irregular stay is so confused and general that it prevents these migrants from being seen as individual human beings; many among them live under frightening and precarious conditions, which threaten their human dignity.

Before tackling the difficult administrative situations that are not more than a consequence of forced migration, it is important to keep in mind some of the causes:

- Wars, conflicts, persecutions, human rights' violations, economic crises and collapsed state structures and environmental and natural disasters are causes of forced movements. The inequalities between North and South are accentuated in a world where globalization plays an important role. In a number of countries people don't perceive any improvement in their living conditions so they emigrate to places where the conditions and the economic, political and social rights are preferable to those in their country of origin. These perspectives are strongly encouraged by a real demand for a "cheap" labour force in Europe.
- The self-interest that is the motivation of rich countries hinders the development of a number of the other countries, victims furthermore of the emigration of their nationals. The economic and social conditions in different countries of emigration sometimes make it difficult to envisage a future based on a genuine human dignity, or even one that satisfies basic needs.
- Modern means of communication encourage people not to resign themselves to living conditions of mere survival. This hope for a solution through emigration is endorsed by the rumours or the examples of compatriots who have "succeeded" abroad, and are strongly encouraged by intermediaries or exploiters: to earn a living for themselves and their families, many use all their savings and contract debts, sometimes lifelong...

Fighting irregular migration in Europe should in the first place mean fighting the causes of forced migration, because no one leaves his/her country without a reason.

Caritas Europa wants to encourage all stakeholders (the governments of countries of origin and of destination, the migrants, the local communities and civil society) to find solutions to these degrading situations and to base their actions on the full respect of human dignity. The Caritas Europa definition of the undocumented migrants is followed by an overview of the international, European and national legislative instruments relating to the protection of the rights and the dignity of every human being. The next part recalls the motivation for the engagement of Caritas Europa in upholding respect for the dignity of human beings in an irregular situation of residence. The final part contains the recommendations of Caritas Europa, translated into concrete demands addressed to Churches, politicians and different social actors.

2. Clarification of concepts, used in this paper

For the purpose of this paper, Caritas Europa defines the **undocumented migrant** as "*a third country national or a stateless person who does not possess or no longer possesses a valid document authorising his/her stay in a country*".

This definition includes a variety of situations. As a matter of fact, certain persons either do not obtain or lose leave to stay for a variety of reasons: gaps in the legal provisions of the country of residence, slow or malfunctioning administrations, inadequate knowledge of legislation, job loss, a legal or facts-related situation in the country of origin, the material impossibility to present a document of civil status, etc.

The concept of "undocumented migrant" covers here by extension the minor children, even if - in certain countries - they don't need to possess personal "papers" covering their stay.

3. The proclamation of Human Rights and their Realisation

Article 1 of the Universal Declaration of Human Rights affirms, "**All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience**

and should act towards one another in a spirit of brotherhood.” The subsequent articles set forth a series of civil, political, economic, social and cultural rights.

The Universal Declaration of Human Rights is not a legally binding instrument but it has an important influence on international conventions and treaties¹, constitutions and national legislations² putting these rights into practice. It must be recognised however that the declaration of rights and liberties is one thing whilst their practical effectiveness and the safeguarding of these rights is another.

The priority given to the integrity and dignity of the human being is the main driving force behind the Caritas action on behalf of migrants, independent of their administrative situation of residence. This respect for the dignity of the human being is reflected in the Gospel message and in the social teaching of the Catholic Church.³

The universality of human dignity, understood as the fundamental prerequisite according to which every person has rights solely by the fact that he is a human being, is not fully recognised by States' practice.

Even if they recognise the universality of human dignity, the constitutions, national legislations and international Conventions contain provisions authorising States to limit the scope of application (derogations and reservations)⁴. These provisions allow States to distinguish between the rights of non-nationals according to their legal or irregular stay, all the more so since the right to control entry and stay of non-nationals on their territory is an essential element of their sovereignty. States should however not with such exceptions deprive migrants from the exercise of fundamental human rights.

Not having residence permits, migrants in an irregular situation generally do not enjoy social rights. While they are victims of exploitation or discrimination, they face difficulties in asserting their rights, even fundamental rights, in the same way as nationals or foreigners in a regular situation are able to do. In the majority of European States, undocumented migrants do not have legal access to social assistance or to a guaranteed minimum

¹ Among the international conventions we mention in particular: the international Pact on economic, social and cultural rights (1966); the international Pact on civil and political rights (1966); the Convention on Children's Rights (1989). At European level: The European convention for the Protection of Human Rights and fundamental Freedoms (Council of Europe, 1950); the Charter of fundamental Rights of the European Union (integrated in the draft constitutional Treaty of the EU).

² For example:

- in Germany: Article 1 of the Constitution: "*The dignity of the human being is inalienable (...). Consequently, the German nation recognises the inviolable rights of the human being.*"
- In Belgium: Article 23 of the Constitution provides that *everybody has the right to lead his life in conformity to human dignity*" and enumerates the guaranteed rights: the right to social security, to protection of health and to social medical and legal assistance and the right to housing
- In France: according to the preamble of the Constitution of 27 October 1946 "*the French people proclaims again that every human being, without distinction of race, religion or belief, possesses inalienable and inviolable rights. They solemnly confirm the rights and liberties of man and citizen established by the declaration of rights of 1789 (...). The Nation assures the individual and to the family the necessary conditions for their development.*"
- In Italy: the Constitution of 27 December 1947, article 2 "*The Republic recognises and guarantees the inviolable human rights to individuals as well as to social groups where he develops his personality, and requires the accomplishment of the undeniable obligations of political, economic and social solidarity*", and article 3 "*All citizens have equal social dignity and are equal for the law, without distinction of sex, race, language, religion, political opinions, personal and social conditions*"

³ See annex 1

⁴ Example: Article 191 of the Belgian Constitution: "*All foreigners on the territory of Belgium enjoy the protection given to persons and goods, but for the exceptions established by the law* ». The legislator leans on this article to refuse assistance to undocumented migrants, which they should receive.

satisfaction of basic needs. In some countries they even don't have access to minimum health care provisions.

With respect to "basic needs", necessary to ensure survival and the full respect of human rights, it seems that social rights and the dignity of persons in an irregular situation are allowed in principle but not in practice. Moreover, legislation of some States requires civil servants to denounce persons in an irregular situation of stay or allows the penalising of persons for giving humanitarian assistance to undocumented migrants.

Rights, even for undocumented migrants

Living conditions respecting human dignity, including the exercise of certain rights must be guaranteed to every person, regardless of his/her administrative situation of residence.

Even if international law provides for derogations and restrictions to the exercise of human rights, some of these rights are inalienable and impose unconditional obligations for the States that cannot refuse access to persons in an irregular situation. Four of these are found jointly in the International Pact on civil and political rights and in the European Convention for the protection of human rights. These four inalienable rights are the individual rights related to the physical and moral integrity of the human being and to his/her liberty: *the right to life, the right not to be subject to torture or inhuman or degrading treatment, the right not to be kept in slavery or servitude, the right to non-retroactivity of penal law.*

The provisions, labelled as "necessary", which allow the derogation from the rights of persons in an irregular situation frame their own limits: *the States shall respect a certain number of criteria, the objective has to be legitimate and the means put into place have to be proportionate to the legitimate objective.*

The courts of justice are entrusted with the interpretation of these criteria and their application in national legislations. A minority of undocumented migrants obtain some rights by "going to justice", a certain jurisprudence is created which sometimes leads to rare positive modifications in legislation.

In this sense, The European Convention for the protection of human rights and the European Court for human rights, assuring the legal control effectively give birth to certain fundamental rights for undocumented migrants. As a matter of fact, article 1 of the Convention aims at protecting every person towards whom the contracting states have a certain authority, independently of his/her nationality, his/her residence or his/her administrative residence status.

An important aspect of the judgements delivered by the Court in relation to non-nationals, concerns people with an irregular residence status. The judgements are often based on the assessment of the proportionality between the interest of the states to control immigration and the right of the petitioner.

If the right of each individual to lead a life in conformity with human dignity is at the basis of the other rights, this first "fundamental" right without which the individual could not claim his/her other rights has not yet been the subject of a jurisprudence of the European Court for human rights.

4. The recommendations of Caritas Europa

Migratory movements have always taken place, with undeniable positive benefits for societies. With regard to forced migration however, as long as unreasonable inequalities between countries in economic, social and political rights exist and grow, people will be forced to emigrate, seeking for a better life

Caritas Europa and its member organisations want to denounce the precarious situation of irregular migrants, promote their fundamental rights and contribute to solutions which would provide for full respect for human rights and for a decent living in one's own country, thus preventing forced migration.

They have, however, assessed that in reality hundreds of thousands of third country nationals live clandestinely in extremely precarious conditions in Europe. Above all else, Caritas sees men, women, and children living throughout Europe in inhuman situations.

In the light of their experience with migrants in an irregular situation in Europe, our Caritas organisations put forward the following recommendations:

1. Respect for the dignity and the integrity of the human being

Above all, it is of immediate and fundamental importance to give practical effect to the right of every human being in Europe for respect and for recognition of his or her dignity. This includes access to food, health care, housing, education, and a family life...

For minors in particular, the Convention on the Rights of the Child must be fully and effectively enshrined in national legislation, including the protection of unaccompanied minors.

Respect for the dignity and integrity of every human being should be guaranteed in all circumstances,⁵

2. Combating the root causes of forced migration

If the right to leave one's own country is a recognised right⁶, every person also has the right to live in his/her own country.

Numerous persons leave their country because it cannot provide them with mere survival or the promise of a decent future in terms of employment, education or civil rights. While more and more financial means are found, particularly to control immigration to Europe, aid for real development of the poorest countries is notoriously insufficient to create the conditions for a better future; the international commitments to development aid, promised by our countries are not fully implemented. Consequently a number of persons with the most initiative experience various degrees in compulsion related to the decision to emigrate. Committed development policies include an outspoken human rights policy, the political will to create fair trade relations worldwide and more severe control on arms trade.

Committed and comprehensive policies and measures allowing people to see prospects for a decent future in their own country and efforts for development are fundamental prerequisites to combat the root causes of forced migration. We ask national governments to fully commit to the fulfilment of the Millennium Development Goals.

3. Fair and efficient legislation...

The complexity of legislations on immigration and the facility it affords to certain qualified migrants generates a lack of clarity prejudicial to all. Moreover, in their attempt to tackle irregular immigration, legislation tends to criminalise all third country nationals in

⁵ Article 1 universal Declaration of Human Rights

⁶ Universal Declaration of Human Rights, article 13 – 1 & 2

administratively irregular situations and hardly takes into consideration individual circumstances.

- ⇒ Caritas organisations often meet persons who suffer from indirect and perverse effects of legislations on immigration and asylum. Before adopting new legislation, studies should assess the negative consequences that migrants will face, and propose amendments; whatever the reason in full knowledge of the facts, persons who suddenly lose their permit to stay should be given the benefit of an authority empowered to grant exceptions.
- ⇒ The migrants that our organisations meet often find themselves in unusual situations requiring special treatment. A decision of refusal of stay should not be taken without the advice of a commission comprising a representative of a social service.
- ⇒ Some do not take any steps anymore because they believe – correctly or incorrectly – that they risk being repatriated; e.g. women who have come to join their husband, who was at that time incapable of fulfilling the conditions for family reunification: from their arrival they are condemned to a clandestine stay, often through ignorance of the legislation in force.

Fair and efficient legislation is necessary to avoid that persons in a regular position fall into an irregular situation because of administrative requirements.

Undocumented migrants should have access to competent free legal and social counselling.

Undocumented migrants should have access to the fulfilment of the basic needs (education, shelter, food, health care) Caritas Europa asks the European Governments to ratify the UN Convention on the Protection of the Rights of all Migrant Workers and the Members of their Families.

Churches, NGO's and other civil society actors should not be penalised in their efforts to assist and support undocumented migrants. Caritas asks the relevant authorities to recognise the counselling activities for migrants provided by civil society.

Caritas Europa and its member organisations have an important role to play in monitoring the relevant legislation as well as its consequences for the people concerned.

4. ... with a human face

A residence permit for third country nationals is often granted solely from the point of view from their usefulness to our countries.

- ⇒ Some migrants, when losing their job, lose their permit to stay at the same time.
- ⇒ Sometimes migrants have no true link anymore with their country of origin while they have established roots in Europe
- ⇒ Among the migrants in an irregular stay many are or become victims of exploiters or networks of exploitation and sanctions often hit them harder than those who benefit from them. Measures have been implemented to protect certain victims if they denounce their exploiters, but the effectiveness of these measures is weak compared to the risks trafficked persons have to take.

Caritas Europa asks humane, family-related and humanitarian criteria to be considered when examining the possibilities of granting a permit to stay to the applicants.

Persons, known for having applied for a permit to stay should not be kept in a limbo administrative situation: permits to stay should be issued, at least

temporarily, opening access to the labour market and to health care. Procedures exceeding a reasonable length should result in a permit to stay.

5. The right to international protection

Many persons become or have become undocumented migrants because their **application for protection is treated under inequitable circumstances**. Many migrants are **constrained to an irregular stay** because of inefficient administrations or requirements that are often very difficult to meet.

- ⇒ Some persons have not been able to present their application in a favourable light, wrongly informed, not understanding the language or the subtleties of the procedure in the country where they apply for protection, without the support of qualified and accessible translators and interpreters.
- ⇒ Others are victims of provisions and regulations (e.g. accelerated procedure, Dublin regulation) forcing them to apply for asylum in unfavourable conditions or to hide in order to be able to apply in a country where they have some links.
- ⇒ When a refugee asks for family reunification, after a long period of time before being granted refugee status, he will often have to wait several years, especially in the case when the civil services in the country of origin are in default, while s/he knows that her/his family is in danger...
- ⇒ The slowness or requirements of administrations do not conform adequately to the reality of life. The will to live with one's family in Europe cannot endure the complex and lengthy legal requirements for family reunification: to enjoy their right to live with their family, some will anticipate the administrative authorisations and let their family members come and join them, consequently taking important risks for their own stay.
- ⇒ Sometimes certain undocumented migrants meet the conditions to obtain a residence permit, but the loss or the absence of a document hinders them from proving it. The evidence of many people as well as that of conclusive certificates of many organisations are insufficient to convince the administration.

The assessment of each application for international protection should be done through a fair and efficient procedure with respect to the socio-cultural and psychological situation of the applicant.

Procedures exceeding a reasonable length should result in a permit to stay.

6. Regularisations

We note and welcome the fact that different countries organise **regularisation** initiatives, sometimes collectively, sometimes on a case-by-case basis. They are however often represented as acts of pure generosity without seriously informing public opinion in order to understand the logic and the ground of the operations.

These operations often overlook the need to put in place a consistent policy of social integration: housing, counselling of the persons concerned, infrastructure etc....⁷

Migrants **are tolerated** in irregular stay by the authorities:

- ⇒ Because of diverse international Conventions (the right to live a family life, Children's Rights, country of return profoundly troubled or seriously violating human rights ...) or for diverse other reasons independent of their will, certain undocumented migrants can not be expelled or cannot leave. For their survival, they are often pushed in a parallel economy, completely dependant on exploiters.

⁷ cfr Caritas Europa position paper "Integration, a process involving all" (March 2004)

⇒ Others, seriously sick, do not in practice have access to medical treatment in their country.

Caritas calls for regularisation measures for undocumented migrants under certain conditions, to avoid exploitation and degradation of human beings.

Caritas Europa recommends that criteria for regularisation include provisions for families with children, for medical reasons, for long-term residents who have no links with the country of origin and for persons tolerated in the country of residence.

Provisional residence documents should cover the necessary period to examine the application for a residence permit and any subsequent appeal.

Caritas Europa asks that public opinion be informed correctly about the issue of immigration and that public debate be launched on objective bases

7. Removal and repatriation

Caritas Europa challenges the policies of forced removal and repatriation as the solution to the. Moreover, the execution of a measure of forced return to the country of origin increases the risk of violation of human rights.

Forced removal often takes place under deplorable conditions, in a context of humiliations, and repatriation under such conditions affects severely the prospects for reintegration.

⇒ When a forced removal is decided, measures are effectively taken in order to ensure its execution, without concern for the preservation of full respect of dignity before, during and after the removal and repatriation.

⇒ It also happens that certain third country nationals, because of their extremely precarious situation, wish to return home but can't for practical reasons (means of transportation, reinstallation) ; if they are affected by a decision of forced removal, the administration can't offer them this type of return. In the case of voluntary repatriation and "humanitarian" repatriation, assistance must be provided, without being jeopardised by pedantic conditions.

Caritas Europa calls for humane and dignified return policies. Voluntary return, including reintegration programmes should be the favoured option in a return policy.

When authorities decide on removal, conditions respecting human dignity and human rights must be guaranteed during the time necessary to organise the return as well as during the return procedure and reintegration in the home country. Detention as a measure to enforce removal should only be used as last option.

In conclusion, Caritas Europa calls on the competent authorities and services to develop their policies based on a full respect of human rights and taking into account the realities that force people to migrate.

It is of major importance that European countries formally recognise that they are countries of immigration, that they need migrants and that a thoughtful and well planned immigration policy can result in an economic, social and cultural wealth for those who succeed in welcoming immigrants, respecting their dignity. This

policy must not adversely affect the development of the countries of origin. It must balance different interests and so produce a universal common good.

Approved by ExBo, Brussels, February 2006

Annex 1

The Christian Message : the foundation of Caritas action

The option for the poor

Caritas organisations have adopted a **preferential option for the poor**, the frail persons or those at risk of frailty. The Bible presents three main faces of the poor: the widow, the orphan and ... the stranger (Ex 22/20, Dt 24/17-21, Dt 27/19, etc.). In the Gospel Christ names diverse categories of poor of his epoch: those who are hungry or thirsty, those who have no clothes, the sick, the prisoners and... the foreigners, to whom He compares himself to the point that they become a criterion for the final judgement: "I was a stranger and you welcomed me" (Mt 25/31-46). Welcoming the foreigner becomes, so to speak, impossible to circumvent.

The human family

Through and in Jesus Christ, God is the Father of all people, and the foundation of the sisterhood and brotherhood of all humankind. The apostle Paul keeps coming back to this paternity and communion of human beings amongst themselves: "You are all the children of God through your faith in Jesus Christ ... There are no longer Jews nor Greeks, there are no longer slaves nor free men, ..." (Gn 3, 26 & 28).

The right to live in a country, to migrate and the obligation to welcome

The Church, in its services to humankind, has always had concern for the stranger. Its lasting insistence on this, however varied in time or place, can be found in numerous documents.

The first right of the migrant is the right to live in his/her own country: "*To me it seems opportune, in this context (of complexion and aggravation of migrations) to reaffirm that **living in one's own country** is a fundamental human right. This right however becomes effective only if **the factors pushing people to migrate are constantly kept under control.***" (John-Paul II to the World Congress of 1998)

In 1963, the encyclical "*Pacem in terris*" of Pope JOHN XXIII raised emigration to the status of a right, even if conditional:

" Every human being has the right to free movement and of stay in the political community of which he is a citizen; he also has the right, under valid reasons, to go abroad and to take residence there" (n° 25).

In 1992, the Catechism of the Catholic Church draws the link between the fundamental rights and the local and universal common good, and the duty to welcome.

*"**Political powers are required to respect the fundamental rights of the human being (2237). "It behoves the STATE to defend and promote the common good of civil society, citizens and all intermediary bodies" (1910).***

*"The realisation of a **universal common good** is a basic condition for the unity of all human beings, which will include people of equal natural dignity. This requires an*

organisation of the community of nations, capable of fulfilling the various needs of men, as well in the sphere of social life (nutrition, health, education...) as to cope with myriads of particular circumstances emerging here or there (e.g. to answer to the needs of refugees, the assistance to migrants and to their families)" (1911)

*"The common good consists of **three main elements**: the respect and promotion of the fundamental human rights, the prosperity or development of society's spiritual and worldly goods, and the peace and security of the group and its members" (1925).*

It is precisely due to the fact that in numerous countries the common good suffers from serious deficiencies, and development processes towards the common good are partially or completely hampered, that the Church's teaching raises to the level of a Right, the right to immigrate and to the level of an obligation, the duty to welcome strangers who leave these countries:

*"**More advantaged countries are required to welcome**, wherever possible, the stranger in search of security and vital resources which he cannot find in his own country. Public powers will ensure the respect of the natural right which places the guest under the protection of his host" (2241).*

Even if it is true that *"political authorities may, in the name of the common good, **submit the exercise of the right to immigrate** to various legal conditions, particularly with regard to the duties of migrants towards their adoptive country" (2241), such conditions should not constitute a limitation or hindrance to this right.*

The Church recognises the legitimacy of laws: a state has the right to define the conditions of entry and stay of foreigners on its territory. John-Paul II recalls:

*« Public authorities have the responsibility **to exercise a control on migratory flows in function of the requirements of the common good**. A good reception must always be done in respect of legislation and therefore must go together with a determined repression of the abuses" (Apostolic exhortation, *The Church in Europe*, June 2003, n° 101)*

Where state regulations violate the Fundamental Human Rights, **disobedience** can become necessary:

"Every citizen has the moral duty not to comply with the regulations of state authorities if these regulations violate ethical laws, the Fundamental Human Rights, or Evangelical Laws. This disobedience to state laws that violate the laws of morality can be justified by the distinction between service to God and service to mankind. "Give unto Caesar what is Caesar's and to God what is God's!" (Mt 22, 21). "Thou shalt obey God more than man!" (Apg. 5, 29) (2242).

These messages of the Holy Scriptures and the teachings of the Church form the basis of Caritas' work for migrants, be their stay regular or irregular.

For our Caritas organisations, **respect for human dignity includes a number of aspects**: from the basic needs to assure material as well as spiritual survival to the right to lead a normal family life, access to health care and preparing children for their life as adults. But requiring the respect for the dignity of all human beings does not mean helping people to hide their identity or to neglect steps to legalise their stay.