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INTOLERANCE AGAINST MIGRANTS IN THE OSCE AREA
Introductory speech at the OSCE Review Conference Session on Intolerance against Migrants
Warsaw, 8 October 2010

INTRODUCTION

It is my pleasure to provide an introductory overview to the issues OSCE participating states wished to cover during this session. I will speak on behalf of The Equal Rights Trust – an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. I was previously the Founding Executive Director of the European Roma Rights Centre, and as such, I have over many years been involved with migrant rights issues.

The recent row in the European Union on the treatment by France of immigrant Roma communities epitomises the current *Zeitgeist*, with the dominant tensions between migration-related aspects of the public interest which normally should operate in harmony: human rights, economic development and security. The Roma developments of the last few months which are too well known to be described at this forum should prompt OSCE to focus strongly on migration and migrant rights, when taking account of the special needs of most vulnerable migrant groups, among which the Roma present an extreme and urgent issue.

Whilst a comprehensive overview of the intolerance against migrants within the OSCE area is not possible given our time restraints, and the diversity within the region, I aim to highlight some key areas of concern regarding hate crime against migrants, anti-immigrant discourses, and the impact on migrant rights along the entire migration cycle; and make some recommendations as to how these concerns could be addressed. It should also be noted that a detailed analysis of the issues involved would necessitate distinctions between categories of migrants, for example asylum seekers, stateless migrants, legally present migrant workers as well as the so called "irregular" migrants. As the focus of this session is on the generalised intolerance against migrants, whatever their status, I will also try to present the issues at the level the general notion of migrants. Although their protection needs differ, migrants (immigrants in any case, but also in some contexts emigrants) can all be victims of hate crimes based on their real or perceived status as migrants, and be further negatively affected by intolerant discourses and scapegoating.

As a result of global economic, political and social developments, migrants are becoming increasingly vulnerable to discrimination on the basis of their immigration

status in many different ways, including through being targets of hate-motivated crimes and incidents. Before I turn to the key issues of hate crimes and incidents and the intolerant discourse and scapegoating of migrants, I would like to highlight the significance of international migration within the OSCE region. The latest statistics on the website of the International Organisation for Migration, based on the UN's Population Division's assessment of Total Migrant Stock (The 2008 Revision), show that the majority of the 214 million international migrants worldwide reside in the OSCE region. By way of example, 69.8 million are in Europe (defined geographically rather than with reference to any regional bodies) and 50 million are in North America. The OSCE region also includes 8 of the 10 countries with the largest number of international migrants – US, Russia, Germany, Canada, France, UK, Spain and Ukraine. These figures indicate the significance of migrant issues to the OSCE and therefore the importance of this discussion.

I would also like to highlight the role played by the current global economic context in the deteriorating position of migrant rights within the OSCE region. A report published by the Migration Policy Institute in September 2009[i] confirmed that while there is no single, global trend that captures the ways in which the recession has affected migration flows, the following conclusions can be drawn:

i) That whilst the recession has dampened the movement of economic migrants to the major immigrant-receiving regions of the world, immigrants who have already relocated are choosing to stay put in their adopted countries rather than return home despite high unemployment. By way of example, annual flows from Mexico to the United States declined from 1 million to 600,000 from 2006 to 2009 as a result of a drop in illegal immigration, although levels of legal immigration remain largely unchanged. There has been virtually no change in return flows to Mexico despite the fact that unemployment rates for Mexican and Central American immigrants in the United States have more than doubled.

ii) That confronted with the most severe economic crisis in decades and the resulting rise in unemployment, governments have adopted policies which seek to suppress the inflow of migrants, encourage their departure, and protect labour markets for native-born workers. For example, Kazakhstan and Russia have sought to restrict access to their labour markets by halting, or at least decreasing, the numbers of work permits for foreigners. Similarly, the United States placed restrictions on some companies seeking to bring in the highly skilled. Italy sought to make it harder for migrants to live and work illegally by stepping up enforcement and curbing access to public services whilst authorising citizen patrols to assist police in combating crime and responding to immigration violations (which I will address further in due course). In early 2009, the French government conducted a series of high-profile worksite raids in an effort to remove illegal immigrants. Countries such as Spain and the Czech Republic have offered economic incentives such as paid one-way tickets home and lump sum payments in exchange for a migrant's promise to leave the country.

A 2009 report by the UK Equality and Human Rights Commission on the impact of the recession on immigration in the UK[ii] also highlighted concerns regarding the way in which the recession will affect the migrant condition within the UK. The experience of the past indicates that immigrants are often the worst-affected by economic downturns, especially those low-skilled immigrants who do not return home and are not entitled to benefits. The exploitation of vulnerable migrant workers is also a concern during a time of high unemployment. Finally, it is envisaged that at a time of recession, there will be increased challenges relating to immigrant integration and good relations within society. The risk of social unrest and backlashes against immigrants is likely to increase as native workers feel increasingly insecure.

In summary, the global recession is a key consideration when looking at migrant rights in the OSCE participating states given that whilst the number of immigrants is unlikely to decline significantly, the tendency for governments to impose stricter controls upon migration and for society to grow increasingly hostile against migrants will have serious consequences for migrant rights.

I. Hate-motivated Crimes and Incidents

"Hate crime" is a term which has gained wide acceptance, due to research and advocacy efforts, including within projects conducted or sponsored by the OSCE. However, it should be noted that the term may be a misleading one if "hate" is meant as a really felt emotion. While the motivation of the perpetrator matters, the approach to "hate-motivated crimes" should relate to a range of motives that do not necessarily involve a subjective feeling of hate but that, whatever the subjective journey in the mind of the perpetrator, lead to offences in which a particular characteristic of the victim has been the reason or part of the reason of the offence. In other words, the approach to "hate-motivated crime" should draw on the understanding of the concepts of discrimination and discriminatory ill-treatment: actions "motivated wholly or in part by the victim having a characteristic or status associated with a prohibited ground".

On the issue of the nexus between equality of rights and violence, the Declaration of Principles on Equality, an instrument of international best practice adopted in 2008 and supported by a number of experts and advocates, states:

> "Any act of violence or incitement to violence that is motivated wholly or in part by the victim having a characteristic or status associated with a prohibited ground constitutes a serious denial of the right to equality. Such motivation must be treated as an aggravating factor in the commission of offences of violence and incitement to violence, and States must take all appropriate action to penalise, prevent and deter such acts."[iii]

International standards related to hate-motivated crime and discriminatory ill-treatment should be fully applicable to cases in which the ground of the ill-treatment is one's immigration status. These standards include, inter alia, Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); General Recommendation No. 15 of the Committee on the Elimination of Racial Discrimination; Article 20 of the International Covenant on Civil and Political Rights (ICCPR); General Recommendation No. 19 of the Committee on the Elimination of Discrimination against Women; Articles 10, 15 and 16 of the Convention on the Rights of Persons with Disabilities; the Council of Europe ECRI's Policy Recommendation No. 7 on National Legislation To Combat Racism and Racial Discrimination (2002); and the EU Framework Decision on Racist and Xenophobic Crime (2008). In addition, the ODIHR of OSCE has also developed a detailed set of standards on hate crime that are fully relevant to hate crime against migrants.[iv]

The jurisprudence on the European Convention on Human Rights Article 14 (non-discrimination) on racially motivated crimes should also apply by analogy to crimes motivates by a bias against migrants. In *Nachova v. Bulgaria* (Chamber, 2004), the Chamber of the European Court of Human Rights based its finding of racial discrimination against Roma associated with a killing on the following principles: need for additional facts in a case suggesting discrimination; duty of the authorities to investigate racist motives where there are such facts - § 162; shifting the burden of proof onto the respondent - § 171; taking into account international reports on discrimination against Roma and the government reaction - § 174.

In *Anegelova* and *Iliev v. Bulgaria* (2007), the Court again found a violation of Art. 14 in respect of Article 2 (right to life) in a case of murder of a Roma by private individuals and stressed the duty of the authorities to "unmask any racist motive" during the investigation - § 115. The Court noted "[T]he widespread prejudices and violence against Roma during the relevant period and the need to reassert continuously society's condemnation of racism and to maintain the confidence of minorities in the authorities' ability to protect them from the threat of racist violence" - § 116.
In *Opuz v. Turkey* (2009), the Court went further in developing approaches to discriminatory ill-treatment – in this case, based on gender. The landmarks of this case relevant to hate crime against migrants include the principle that a violation of the right to non-discrimination can be derived from a general and discriminatory judicial passivity, albeit unintentional, which mainly affects members of a group that has a protected characteristic (in that case, gender). Most importantly, no specific facts were required showing discrimination in the particular case.

While it is difficult to see a region-wide trend in hate crime against migrants due to unreliable or non-existing statistics and under-reporting, hate crime incidents against migrants have been occurring very frequently in the last few years. Some examples: Monitors should watch out for the outcome of a trial taking place in District Court in Scranton, Pennsylvania, USA, of the federal hate crime case against two Pennsylvania men who are accused of fatally beating a Mexican immigrant while shouting racial epithets at him. The attack took place in 2008; the men were found guilty of simple assault last year and sentenced to 23 months imprisonment. If they are found guilty of the hate crime charge, however, they could be convicted for life.

In the UK, a BBC report in August 2010 featured the treatment of migrant workers in Peterborough. In the last 5 years, the number of migrant workers in the Eastern region of England has increased by 60%; in the past year alone, there have been 600 reports of hate crimes, 170 of which were in schools.

A 2008 report of the US-based non-governmental organisation Human Rights First (HRF) (The 2008 Hate Crime Survey) provides many examples of hate crimes from the OSCE participating states, although it did not focus specifically on migrants. The study focused on six facets of violent hate crime in the OSCE region – Racism and Xenophobia; Anti-Semitism; Violence against Muslims; Religious intolerance; Roma; Sexual orientation and gender identity bias. It must be noted that anti-migrant sentiment is often combined with or linked to racist bias, and the two types of bias may converge on the same victims. Migrants who are of a different skin colour than that in the host country and have other visible genetic differences associated with race or ethnicity, remain most vulnerable.

The HRF report documented cases of hate crime against migrants including in:

- Germany – members of the large Turkish minority faced harassment and violence in many parts of the country. People of African and South Asian origin were also among the targets of persistent and sometimes extreme violence there. Foreign-owned shops were targeted for vandalism and arson; members of minorities attacked in the street.
- Ireland – official hate crime monitors and the media reported increased hate crime attacks on immigrants, including immigrant workers from Eastern European countries newly admitted to the European Union, mostly in the Dublin area. A case in March 2008 involved a violent attack on a young Brazilian woman in which no attempt was made to rob her, only to do her harm.
- Latvia – the anti-immigrant discourse was accompanied by racist attacks on immigrants belonging to visible minorities. Although Latvia has adopted legal provisions imposing more serious sentences for bias-motivated crimes, HRF found little evidence that these

amendments are being applied with vigour. Concerning is the widespread denial of the problem on the part of the public and the authorities.

- Spain – the Spanish Commission to Aid Refugees reported three hundred racist attacks in 2006 on people of immigrant origin, and spoke out on continuing racist attacks during 2007 and 2008. The office of the Spanish Commission to Aid Refugees was also repeatedly attacked in 2007 and vandalised three times in 2006.
- Switzerland – during 2007, at least six incidents were reported in which assailants attacked housing estates for asylum seekers with firebombs or gunfire. The incidents received almost no publicity in the national media but were documented by the Swiss Foundation Against Racism and Anti-Semitism.
- Ukraine – in June 2008, a UNHCR spokeswoman described the increasingly violent attacks on foreigners and non-Ukrainians in Kiev and elsewhere in the country.
- UK – attacks on Poles, Lithuanians and other immigrants from the new EU member states became a major new component of hate crime violence, particularly in Scotland and Northern Ireland. In June 2007, police in Edinburgh said that they were receiving an average of three reports of hate crime attacks daily with continuing attacks on Polish and other Eastern European workers representing a high proportion of the attacks. Police said they were considering establishing a system through which Polish victims of hate crimes could report incidents to police anonymously through third parties at a Polish community centre.
- United States – the Southern Poverty Law Center confirmed a 35% rise in hate crimes against people of Hispanic origin between 2003 and 2006 based on an analysis of FBI crime reports.

II. Intolerant Discourse and Scapegoating of Migrants

In the last few years, politicians and public servants across Europe capitalised on growing public xenophobia, contributing to anti-immigrant rhetoric and blaming immigrants for political, economic, and social problems. For example in Italy at the end of 2007, the Mayor of Rome, Walter Veltroni, blamed the increase in violent crime overall on the recent immigration of Romanian Roma, asserting that "before the entry of Romania into the European Union, Rome was the safest city in the world." In Germany, at the end of 2007, in response to the arrest of a Turkish man and a Greek man in relation to an attack on a German pensioner in Munich, the premier of Hesse state, Roland Koch, declared that "we have too many criminal young foreigners" and "foreigners who don't stick to our rules don't belong here". In Greece, in December 2007, Supreme Court Prosecutor George Sanidas offered a generalisation identifying the perpetrators of crime in one section of Athens as "foreign women of African and non-African origin and Roma". In the context of this discourse, a series of incidents were reported in Athens in which migrant workers were the victims of organized attacks by extremist anti-immigration militants. In Switzerland, the run-up to the October 2007 parliamentary elections was marked by a vicious anti-immigrant campaign by the Swiss People's Party, which propagated stereotypes of foreign nationals and ethnic minorities as the perpetrators of crime, as violent, as having no respect for the law and as incapable of integrating into Swiss society. Examples can continue: most national election campaigns in the period 2008-2010 have inevitably featured the role of immigrants in society, and most parties have failed to emphasise either the positive contribution migrants make to society and the economy, or the obligations of the host country to protect migrant's rights as human rights.

The media discourse almost everywhere is dominated by a social welfare and security agenda in relation to migrants, while missing is a rights-based vision. This was most pronounced in the way in which the deportations of Roma from France of the last few months were covered by the

mainstream media in Western European states, including for example the BBC in the UK. The story of the Roma deportations was presented in the light of political concerns with alleged abuse of social welfare and public order. The French actions were presented as regrettable, perhaps even as a disgrace, but not as illegal, not as a direct and blatant policy of racial discrimination, singling out one ethnic community for less favourable treatment. Only after Commissioner Reding called for opening infringement procedure against France by the European Commission, did the media begin to pay some attention to the human rights law aspects of the Roma developments.

The main point that I would like to emphasise regarding the issue of intolerant anti-immigrant discourses is this: states carry a positive duty to respect, protect and fulfil human rights to all. This duty is not conditional on public opinion and should not be allowed to be its hostage. It is a very good thing that OSCE states, as evidenced by the agenda of this Review Conference, are looking at ways to combat "rhetoric from political parties, movements and groups that incite violent acts of hatred against migrants". However, action in this direction should not distract from the basic legal obligations of states to realise human rights, including migrant rights, on an equal basis. States efforts should not be wholly dominated by educational measures aimed at influencing the anti-migrant discourse; governments should lead by example, through – first of all – respecting and protecting the rights of migrants, rather than seeking to limit them as much as they can to please sections of the electorate. A rights-based approach to the issue of anti-immigrant attitudes must be at the centre of any measures to combat them.

III. Migrant Rights in the OSCE Area

The rights of migrants suffer a severe blow due to the failure of states to give sufficient weight to their own duty regarding migrant rights, in the light of the understanding that human rights are of highest public interest.

I will outline briefly the ways in which migrant rights have been negatively affected by the intensified anti-immigrant discourse, presenting the main issues in the order in which a migrant would experience them. Therefore, I will begin with issues relating to movement from one country to another (access to destination country), then turn to issues of process of admitting migrants, issues of integration, and finally issues surrounding the removal of migrants.

A. Access to Destination Countries

There is evidence to suggest that destination countries are increasingly taking action to prevent access to their territory as a means of limiting their migrant populations.

1. Prevention of Access at the Borders

There are a number of recent examples of OSCE states taking action to prevent access to their borders. Such behaviour needs to be considered primarily in the context of international law obligations in relation to migrants, especially those migrating in order to seek protection.

It has long been the practice of US immigration authorities to interdict Haitians at sea in order to prevent them from gaining access to US territory and the rights that await them on arrival. Currently, U.S. policy is to return Haitians to Haiti without inquiry as to whether they might qualify for asylum. Only if Haitians verbally object to, or physically resist, repatriation are they asked if they fear persecution if returned to Haiti. Not all asylum seekers escaping by boat are subject to this

policy, known as the shout test. For example, Cubans are questioned in Spanish to determine whether or not they have a reason to fear return[v].

A similar approach has been adopted through an arrangement between the Italian and Libyan governments to prevent the access of migrants to Italian territory by sea. Joint patrols are carried out on vessels provided by Italy to Libya. According to a report by Human Rights Watch[vi], on 12th September 2010, Libyan personnel aboard a Libyan patrol boat with Italian *Guardia di Finanza* officers and technicians on board opened fire on an Italian fishing trawler. No-one was injured in the incident, and no migrants were aboard the ship, but, in response, the Italian Interior Minister Roberto Maroni suggested that the Libyans "perhaps...mistook the fishing boat for a boat with illegal migrants." The implication is that it would have been acceptable for the Libyans to open fire on a boat carrying migrants. The patrol boat involved in the incident was one of six vessels Italy gave Libya under a 2009 agreement between the two countries that initiated joint Italian-Libyan patrols aimed at preventing sub-Saharan migrants from reaching Italy by sea.

Another example of the prevention of access was the recent closure of the border between Kyrgyzstan and Uzbekistan as a result of the civil unrest in Kyrgyzstan in June 2010[vii]. According to Human Rights Watch, in the immediate aftermath of the June violence, hundreds of ethnic Uzbek families in the city of Osh faced arbitrary arrests, detention, beatings, and torture at the hands of the Kyrgyz law enforcement and security agencies who were investigating the causes of the unrest. In mid-July, the office of the United Nations High Commissioner for Refugees confirmed that the Kyrgyz side of the border was effectively closed and that the Uzbek border was officially closed. The closures meant that all Kyrgyz nationals, including the sizable Uzbek minority living in Osh, could not cross the border and that only Uzbek and other non-Kyrgyz nationals may do so. Similarly to the incidents referred to in the US and Italy, this is another example of access to protection being prevented, in contravention of the spirit of the UN Refugee Convention.

2. The Use of Health as a Barrier to Access

An alternative means of reducing immigrant populations, especially those perceived to be a threat to the health of a nation, is by imposing health restrictions on entry. According to the Global Database on HIV-specific travel and residence restrictions[viii], 17 of the 56 OSCE participant states impose such restrictions[ix]. In a very positive step, in January 2010, the Obama administration brought an end to all HIV-related restrictions on travel into the United States, stating that the restrictions were based on fear rather than science. United Nations Secretary-General Ban Ki-moon has urged all countries with similar restrictions -- more than 50 around the globe -- to follow the lead of the US and remove them.

3. Security issues

In the post 9/11 world, security considerations have increasingly played a role in immigration policy and activity. The US Department of Homeland Security was established specifically in response to the apparent ease with which terrorists entered the US to carry out the 9/11 terrorist attacks, and its main task is to improve border security. A January 2010 report by the Migration Policy Institute[x] highlighted the increased use of trans-Atlantic information sharing regarding human mobility, which is described as an attempt to “export the border” and deal with potential threats whilst they remain abroad rather than allowing them to arrive on the nation’s doorstep. Information about individual travellers is freely shared by air carriers to allow governments to vet all travellers against watch lists and databases to enable them to identify any potential threats. The Migration Policy Institute report raises doubts as to how effective such practices really are,

especially given the unavailability of data for scrutiny and evidence, such as the aborted Christmas Day (2009) terrorist attack which demonstrated how human error can undermine information-sharing practices.

It is worth stressing, however, our concerns beyond the failure of such information-sharing practices to fulfil their role as a counter-terrorism measure. In relation to migrant rights, the use of such information to restrict access outside of security concerns – for example, the use of the EURODAC fingerprinting system to prevent multiple asylum claims within Europe (I will return to the issue of the Dublin II regulations in due course) is an example of restrictions on access through such mechanisms which may serve to breach a nation's obligations to asylum-seekers under international law. Further, as highlighted in the Migration Policy Institute report, the process of information-sharing for security purposes raises issues of how best to guarantee privacy and personal data protection. These issues of privacy and data protection were addressed by the EU-US High Level Contact Group which established agreed common principles for sharing information for law enforcement purposes and recommended at the end of 2009 that the US and EU should enter into a binding international agreement to address such issues.

4. Irregular Travel and Trafficking

Having outlined some of the ways in which OSCE countries have sought to restrict the access of migrants to their territories, I would now like to draw attention to the problems of trafficking and irregular means of travel including smuggling of persons – both of which are significant problems within the OSCE region – and which are arguably exacerbated by the attempts by destination countries to restrict entry by regular, legal means. A full discussion of this issue is outside the scope of this overview, but I do wish to highlight the connection between policies adopted by governments in an attempt to restrict access to their territory, and the resulting reliance of trafficking victims on their traffickers to provide them with a route to, what they frequently believe will be, a better life.

The problem of trafficking has long been a primary concern of the OSCE, as evidenced by the invaluable work of the Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, the Special Representative herself – Maria Grazia Giammarinaro, and the Alliance Against Trafficking in Persons. Given that trafficking continues to be a pressing issue within the OSCE, it is vital that all participating states support the work of the Special Representative and take all steps necessary to implement the OSCE Action Plan to combat Trafficking in Human Beings.

B. Process of Admitting of Migrants

For those migrants who do manage to gain access to their destination country, they then have to navigate their way through often complex and unjust processes of assessment which face them on arrival.

Greece has long been criticised for the unjust nature of its asylum determination procedure[xi]. It is not only a complex procedure but one which provides for a very low rate of status grants (for example, 0.04% in 2009 or 11 people out of almost 30,000 applicants). Further problems include the carrying out of asylum interviews without interpreters, a lack of sufficient protection for unaccompanied asylum-seeking children, and the imposition of destitution due to the lack of asylum support provision. To add insult to injury, the appeals process was abolished in July 2009. These elements of the Greek asylum process, amongst others, have combined to create a situation

against which the European Commission has now issued two infringement proceedings (in November 2009 and June 2010). Human Rights Watch has recently urged the UN High Commissioner on Refugees to intervene in Greece given its mandate to protect refugees when a government is unable or unwilling to do so[xii]. This has become even more pressing given the failure of the Greek government to implement long-promised reforms, which are now unlikely to be witnessed until the end of 2011 at the earliest.

When considering the flawed asylum process in Greece, we must also acknowledge the pan-European asylum mechanism which has arguably made a significant contribution to the worrying state of the Greek asylum system. The Dublin II Regulation[xiii] of 2003 was designed to assist states to identify the state responsible for processing an asylum application and to prevent multiple asylum applications by a single applicant being considered simultaneously. Thomas Hammarberg, the Council of Europe's Commissioner on Human Rights, recently described the Dublin II system as "dysfunctional" as it results in the responsibility for asylum applications being "shouldered by the EU border states through which most asylum seekers enter"[xiv]. He stated in September 2010:

"Countries such as Greece and Malta have, during recent years, been unable to provide adequate protection because the numbers of asylum seekers have exceeded their capacity. This is simply not fair and has, in extreme cases, even put lives at risk. It is now high time to revise the Dublin Regulation. The regulation is not designed to guarantee that the responsibility for asylum seekers is shared among the EU member states. Nor does it ensure that asylum seekers have access to adequate asylum procedures. It is based on the false assumption that the national asylum systems in place in Europe all provide similar, high standards of protection to people who seek to escape from violence and persecution."

In the meantime, Commissioner Hammarberg calls on EU states to "halt all transfers of asylum seekers back to countries where they face enormous difficulties in gaining access to the asylum procedure and where they do not enjoy basic safeguards such as interpretation and legal aid."

The decision to halt the return of asylum seekers to Greece may well be taken out of the hands of European states by the European Courts. The recent UK case of *Saeedi* was referred to the European Court of Justice in July, and the judgment of the Grand Chamber of the European Court of Human Rights in the case of *MSS v Belgium and Greece* is eagerly awaited. Both these cases address two issues – firstly, whether return to Greece was in and of itself a breach of the individual's Article 3 rights, and secondly, whether concerns regarding whether Greece would adequately and fairly assess the asylum claims of those individuals before returning them to potential risk situations are sufficient to prevent such removal.

Within such problematic asylum systems, the ability of asylum-seekers to access adequate legal aid becomes increasingly important. Sadly, legal aid has been a further victim of the global economic crisis, with seemingly disproportionate effect on the plight of vulnerable migrants. Cuts in the UK legal aid system under the Labour government have recently led to the collapse of one of the largest providers of legal aid representation to migrants and asylum-seekers – Refugee and Migrant Justice[xv]. In June 2010, 10,000 clients of Refugee and Migrant Justice found themselves without legal representation, often at crucial stages in their asylum claims. Whilst the legal aid body – the Legal Services Commission – did take steps to re-allocate these cases to other providers, new providers were expected to use slots allocated for "new" cases to take on these "old" cases, thereby reducing the number of available slots for new claimants in the forthcoming year. A similar problem has been identified recently in Canada, where legal aid lawyers representing the growing number of Tamil asylum-seekers have complained of insufficient funds to carry out the increasing workload[xvi].

The ability for asylum-seekers to access justice is further curtailed in countries which impose a "fast track procedure" on cases which are (often arbitrarily) deemed to be straightforward. Such speedy procedures inevitably prevent sufficient time for a claimant to collate the evidence necessary to present his or her case, especially when they are often forced to do so without adequate access to legal representation. The "priority procedure" in France is a prime example. OFPRA (the Office français de protection des Réfugiés et Apatrides) gives a ruling on the applicant's claim within 15 days or within 96 hours if the applicant is in a detention centre. Often, this decision is made without interviewing the applicant. Unlike regular procedure applicants, those under the "priority procedure" are not issued a provisional authorization to stay. Accordingly, "priority procedure" claimants may be subjected to a removal order and placed in detention while waiting for OFPRA's decision. They may not be removed, however, until OFPRA renders its decision. However, further appeals by those in the "priority procedure" on the OFPRA decision are not suspensive. This means that they can be removed from the country before the appeal is judged. In 2008, 43% of first-instance asylum claims in France were streamed through the "priority procedure", the vast majority of which were applicants from Mali. In a 2006 report on France, the former European Commissioner for Human Rights, Alvaro Gil-Robles, expressed some concern with the summary nature of the "priority procedure", particularly for those claimants applying from detention centres. Despite such criticisms of the procedure, the current immigration bill being considered in France retains the "priority procedure" without providing for suspensive appeals against the decisions it produces.

C. Integration

In addition to having to navigate unjust processes in order to regularise their stay in the destination country, immigrants are also forced to face further challenges in their attempts to integrate within their host society. The recent experiences of the European Roma community provide an extreme example of the integration challenge faced by migrants across the OSCE region. The French government justified its policy to destroy Roma settlements on the basis that they were the source of illegal trafficking, profoundly degrading living conditions, the exploitation of children for the purposes of begging, prostitution and criminality. Such statements only serve to further entrench the deep-rooted prejudice against Roma communities.

A further problem regarding migrant integration is that presented by the growing criminalisation of immigrants through the creation of immigration offences, combined with an increased use of immigration detention as a means of controlling immigrant populations. The creation of immigration offences is problematic given the overlap between such criminal behaviours and those behaviours which migrants, especially asylum-seekers, are forced to engage in to reach their destination country. The use of immigration detention is problematic given that it is often not subject to sufficient safeguards which can result in lengthy unlawful detention.

The criminalisation of immigrants has taken place recently in Italy with the introduction of Law 94 in July 2009. This law criminalised undocumented entry and stay, a "crime" which many asylum-seekers will automatically become guilty of if they attempt to enter the country illegally, for example, by boat from Libya[xvii]. The state of Arizona recently adopted the Support our Law Enforcement and Safe Neighbourhoods Act (April 2010) which allows police to stop individuals on "reasonable suspicion" that they might be in the US illegally and citizens can sue a town or city for failing to apply the law vigorously enough. The enforcement of the most problematic provisions of this law has been temporarily blocked on the basis that they violate the federal government's exclusive jurisdiction on matters of immigration. The fact that these provisions violate the

obligations of the United States under the International Convention for the Prevention of Racial Discrimination seems to have been ignored[xviii].

A recent report on the problem of indefinite detention in the UK has been produced by the London Detainee Support Group[xix]. The report concludes that immigration detention is ineffective, inefficient, opaque, and entails terrible human cost. This is particularly the case when the detainee is an individual awaiting deportation who cannot logistically be removed due to the failure of his or her country of origin to confirm his or her nationality and/or provide the documentation necessary for the return to be carried out.

One of the most concerning consequences of the increased criminalisation of migrants is the rise in vigilantism and hate crimes towards this vulnerable community. Italy represents a worrying example of how vigilantism has risen in response to fear and xenophobia. Not only have government policies exacerbated the situation, but also through Law 94 of 2009, the Berlusconi government sanctioned such behaviour through the creation of "citizen groups", entitled to patrol the streets to help law-enforcement authorities to combat crime. Unauthorized vigilante groups were already operating in some municipalities, especially in northern Italy, where the anti-immigrant party Lega Nord (Northern League) has broad support. Some cities, including Milan, have authorized groups. The impetus for the creation of these groups was several highly publicized rapes allegedly committed by immigrants in Rome, Milan, and Bologna in 2008 and 2009. The incidents prompted anti-immigrant mob violence, primarily against Roma.

Labour exploitation is a further example of the challenges faced by migrants once they have reached their destination country. Whilst the International Convention on the Protection of the Rights of All Migrant Workers and Their Families provides a comprehensive framework for the protection of the rights of migrant workers, including the prevention of discrimination and the guarantee of equal remuneration and adequate working conditions, only six of the 56 OSCE participating states have ratified or acceded to this Convention (Albania, Azerbaijan, Bosnia and Herzegovina, Kyrgyzstan, Serbia and Turkey).

The rights of migrant workers are frequently abused, especially given that they have little to no control over the terms of their employment, and too much power lies in the hands of employers (for example, the ability to cancel a visa and cause deportation). Domestic and construction workers tend to be the worst hit in this regard, as suggested by a 2009 report of Human Rights Watch[xx]. In July 2010, the abuse of migrant tobacco workers (mainly migrants from former Soviet Union states) was documented in Kazakhstan, and in September 2010, the New York Times highlighted the exploitation of berry-pickers in Sweden by Swedish companies who by-passed government requirements in order to ensure they had a suitable workforce.

D. Removal

Issues surrounding the removal and deportation of migrants are becoming increasingly significant as states seek to reduce their "migrant burden" by such means, often in potential breach of international or regional law.

1. Expulsions of Roma

In addition to the discrimination suffered by Roma in all areas of life, Roma communities in Europe are currently at increasing risk of removal – including those who are European Union citizens entitled to live within the European Union in accordance with the EU provisions for freedom of

movement. The recent expulsions of Roma from France and Italy are deserving of criticism given the breaches of both international and European law which such actions represent. Further, it is noted that in addition to direct expulsions, France is also taking indirect steps to reduce its Roma population through provisions in the proposed new immigration bill. The bill has been described as an "anti-Roma bill" – although it may be neutral on its face and provides for the expulsion of EU citizens who abuse France's welfare system, profit from begging by others, and abusively occupy land. The timing and focus of the amendments, and statements by government ministers, strongly suggest that the measure is aimed at the Roma.

2. Breaches of the Non-refoulement Principle

The international law principle of non-refoulement (articulated in Article 33 of the 1951 Refugee Convention) is clear – individuals should not be returned to their country of origin if their lives or freedoms would be at risk. There have, however, been recent attempts by OSCE participating states to return failed asylum-seekers to countries where such a risk exists. In June 2010, the UK returned a group of failed asylum-seekers to Baghdad by charter flight despite (i) no evident improvement in the Iraqi security situation since a similar charter flight was sent in October 2009 resulting in the return of 29 of the 39 passengers by Iraqi officials, and (ii) the advice from UNHCR that returnees to Iraq would not be safe. Further, in July 2010, the Netherlands sought to remove failed asylum-seekers to Somalia, a country that the UN continues to declare as unsafe.

3. Impact on Other Rights

The removal of a migrant who has resided in a destination country for any length of time will inevitably result in a potential breach of his or her other human rights.

A recent decision of the Inter-American Commission on Human Rights in the case of *Armedariz and Smith* suggests that the right to a family life should be taken into consideration when dealing with deportation. Similar reasoning was found in the UK House of Lords cases of *Chikwamba* and *Beoku-Betts* in 2008.

Attempts have been made to rely on the right to health to challenge deportation from OSCE participating states. The decisions of the European Court of Human Rights in *D v UK* and *N v UK* served to set the threshold in these sorts of cases incredibly high and as such, claims on this basis are unlikely to be successful. A decision is currently awaited, however, from the Asylum and Immigration Chamber of the UK First-Tier Tribunal in a Zimbabwe Country Guidance case addressing the risks facing a returnee suffering with HIV given the politicisation of the distribution of anti-retroviral treatment by Mugabe's Zanu-PF regime.

E. Most Vulnerable Migrants

As I mentioned at the outset, the fact of being a migrant in and of itself attracts discriminatory practices, but for certain sub-sets of the migrant community – for example, Roma, stateless migrants, children and those suffering from mental ill-health – their experience is one of multiple discrimination through which their vulnerabilities combine to place them in an even more disadvantageous position. In addition to the Roma who were referred to extensively above, the following groups of migrants are most at risk and have the strongest protection needs.

1. Stateless Migrants

The Equal Rights Trust has over the past two years conducted extensive research on the detention and discrimination of stateless persons throughout the world. ERT's recent report "Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons" sets out our principal research findings, conclusions and recommendations in this regard. Of the OSCE participating states, this report focussed on detention practices of stateless persons in the UK and USA and also on good practices implemented in Hungary and Spain, through the implementation of statelessness determination procedures. There are many large stateless communities within the OSCE region, of which the non-citizens of Latvia (although not migrants per se) are the most well known. Similarly, many Roma remain stateless even today, and others are at heightened risk of statelessness due to the irregular nature of their status in many countries throughout Europe. Issues of particular concern are the present inequalities between the treatment of *de jure* and *de facto* stateless persons, the failure of many states to implement statelessness determination procedures, and the failure of immigration detention regimes to recognise and respond to the specific challenge posed by statelessness. The Equal Rights Trust has submitted a separate statement on stateless migrants which is available through the distribution system of this Review Conference.

2. Children

One way in which the disadvantage faced by immigrant children has been enhanced is through restrictions placed on access to education. A recent example of this comes from France, where Jacqueline Eustache-Brinio, the mayor of the town of Saint Gratien near Paris, has refused to allow children of asylum seekers to attend school. The reasoning behind this was that she could not see why local residents "should pay for these children"[xxi]. This is a further example of the economic downturn used as pretext for the unjust treatment of vulnerable migrants and exacerbating the integration problems which they face.

More positively, in the United States, the 1982 Supreme Court case of *Plyler v Doe* upheld the right of every child, no matter his or her immigration status, to attend a US public school from kindergarten through 12th grade[xxii]. Whilst there have been numerous subsequent challenges to the position upheld in *Plyler v Doe*, a recent article by the Migrant Policy Institute confirms that "the *Plyler* case has proven quite resilient, fending off litigation and federal and state legislative efforts to overturn it, and nurturing efforts to extend its reach to college students" and that "*Plyler* has helped ensure the integration of children born outside the United States at a time when the country's immigrant population has increased from about 20 million in 1990 to nearly 38 million in 2008".

Following on from my earlier discussion about immigration detention, an extreme concern in this regard is the practice of detaining child immigrants. When the Conservative-Liberal Democrat coalition government came into power in the UK in May 2010, they made a promise to end the detention of immigrant children, a practice which Nick Clegg described as "state-sponsored cruelty". Over four months on, a recent report produced by Medical Justice (a UK charity which provides healthcare to immigrant detainees) has confirmed that children continue to be held in immigration detention with extremely detrimental effect. A further example of this practice is in the Canary Islands in Spain, which have long been criticised for their detention of children in unregulated emergency shelters which do not meet the government's minimum care standards for migrant children and have no occupancy limits. Further, the approximately 100 children in the

biggest and most secluded emergency centre, La Esperanza, receive low-quality food, lack adequate heating, hot water, and blankets, and report frequent violence from other children.

3. Migrants Who Have Mental Health Problems

There is a high incidence of mental health illness in particular among refugee communities, due to the impact of previous traumatic experiences either in their country of origin or during their journey to the destination country. The Equal Rights Trust recent literature review suggests that the rate of suicide among immigrant communities in a number of countries is significantly higher than among the general population. Immigrants suffering from mental illness are disproportionately disadvantaged by many of the policies and issues raised already, for example, immigration detention and restricted access to justice. Whilst the detention of those with severe mental illness in the UK is held to be inappropriate, arbitrary decisions regarding the severity of a particular individual's illness and the ability for such illness to be controlled by a medical team in an immigration centre, have resulted in immigration centres housing many detainees for whom the detention experience is detrimental. The London Detainee Support Group highlighted this problem in its recent report which I mentioned previously.

In the summer of 2010, a suit was filed in the federal central district court in Los Angeles, on behalf of immigration detainees with mental disabilities facing deportation. The suit was filed by the ACLU Immigrants Rights Project, ACLU of Southern California, ACLU of San Diego, Public Counsel Law Center, Northwest Immigrants Rights Project, and the law firm Sullivan and Cromwell. The suit began with the case of Jose Antonio Franco, a legal permanent resident with severe cognitive disabilities who has been threatened with deportation. Franco had no lawyer at his initial immigration hearings. The judge found he was not capable of representing himself in further immigration proceedings, ordered Immigration and Customs Enforcement (ICE) to conduct a mental health evaluation, and administratively closed the case. Five years later, Franco remained in detention, without having received a mental health evaluation. He was finally released from detention on March 31, although his deportation remains pending. In addition to Franco, several of the other detainees who are represented in the lawsuit have been lost in the immigration court and detention system due to the failure of the Department of Homeland Security, of which ICE is a part, and the Department of Justice to develop protections for people with mental disabilities. The remedies the suit seeks include appointment of counsel, competency evaluations, and a standard for competency so that immigration judges can determine when safeguards are necessary.

CONCLUSION AND RECOMMENDATIONS

I would like to conclude this broad overview of issues relating to intolerance against migrants and migrant rights in the OSCE area by making the following recommendations:

OSCE participating states should:

1. Follow a rights-based approach to issues of intolerance against migrants, and not allow migrant rights to be a hostage of anti-migrant sentiment even where such sentiment prevails among large majorities of the public; governments must lead by example through ensuring migrant rights, rather than surrender to anti-immigration discourses and restrict migrant rights in exchange for political gains.

2. Review the Action Plan on Improving the Situation of Roma and Sinti Within the OSCE Area and its revision in light of recent expulsions of Roma from OSCE participating states and develop a set of special measures to oppose the discriminatory ill-treatment of Roma who have crossed international borders.

3. Review national equality and anti-discrimination legislation and ensure that they have in place comprehensive equality legislation which extends protection against discrimination to migrants and ensures the equal rights of migrants in all areas of life regulated by law.

4. Enact legislation that expressly addresses discriminatory ill-treatment of migrants and bias-motivated crime against migrants; any act of violence or incitement to violence that is motivated wholly or in part by the victim being a migrant constitutes a serious denial of the right to equality. Such motivation must be treated as an aggravating factor in the commission of offences of violence and incitement to violence, and States must take all appropriate action to penalise, prevent and deter such acts.

5. Provide adequate instruction to law enforcement bodies on their role in combating hate crime; introduce measures to monitor and report on hate crime.

6. Address the rise of intolerant anti-immigrant discourses through implementation of training and educational programmes at all levels of society. Build such programmes on the principle that migrant rights are human rights, and that commitment to human rights is not genuine unless human rights are accepted as inherent to all, including migrants.

7. If not a party to the International Convention for the Protection of All Migrant Workers and their Families, sign and/or ratify this Convention.

8. Terminate all restrictions on entry and long-term visas based on the health of the applicant, in line with the recommendations of the UN Secretary-General.

9. Join the Council of Europe Commissioner for Human Rights in calling for a revision of the Dublin II Regulation.

10. Comply with international and regional human rights obligations when implementing policies aimed at reducing the size of immigrant populations within their territories.

ENDNOTES

[i] http://www.migrationpolicy.org/pubs/MPI-BBCreport-Sept09.pdf.

[ii] http://www.migrationpolicy.org/pubs/Immigration-in-the-UK-The-Recession-and-Beyond.pdf.

[iii] See Declaration of Principles on Equality, published by The Equal Rights Trust, London 2008, p. 8.

[iv] See OSCE ODIHR, Hate Crime Laws: A Practical Guide, 2009, available at http://www.osce.org/publications/odihr/2009/03/36671_1263_en.pdf.

[v] http://www.miamiherald.com/2010/02/03/1459850/get-rid-of-the-shout-test.html.

[vi] http://www.hrw.org/en/news/2010/09/16/libya-end-live-fire-against-suspected-boat-migrants.

[vii] http://www.hrw.org/en/news/2010/07/20/kyrgyzstanuzbekistan-governments-should-open-border.

[viii] http://hivtravel.org/Default.aspx?pageId=142.

[ix] Andorra, Armenia, Belarus, Bosnia & Herzegovina, Canada, Cyprus, Germany (Bavaria), Hungary, Kazakhstan, Kyrgyzstan, Moldova, Russian Federation, Slovak Republic, Tajikistan, Turkmenistan, Ukraine and Uzbekistan.

[x] http://www.migrationpolicy.org/pubs/infosharing-Jan2010.pdf.

[xi] http://www.hrw.org/en/news/2010/09/20/greece-asylum-reform-delay-unacceptable.

[xii] http://www.hrw.org/en/news/2010/09/20/greece-asylum-reform-delay-unacceptable.

[xiii] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

[xiv] http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=80.

[xv] http://www.lawgazette.co.uk/news/legal-aid-payment-regime-blamed-rmj-collapse; http://www.bbc.co.uk/news/10342476.

[xvi] http://www.upi.com/Top_News/World-News/2010/09/17/Lawyers-for-Canada-migrants-low-on-funds/UPI-22091284745544/.

[xvii] http://www.hrw.org/en/news/2009/06/21/italy-reject-anti-migrant-bill.

[xviii] http://www.hrw.org/en/news/2010/07/28/arizona-us-court-blocks-immigration-law-s-worst-aspects.

[xix] http://www.ldsg.org.uk/files/uploads/NoReasonReport0910.pdf.

[xx] http://www.hrw.org/node/87265.

[xxi] http://www.crin.org/resources/infodetail.asp?id=23255.

[xxii] http://www.migrationinformation.org/Feature/display.cfm?ID=795.