

JRS Europe Policy Positions

Policy positions flowing from the report on Destitute Forced Migrants

Please find below a Summary followed by the full text of Twenty Policy Positions.

These policy positions address Human Rights, Return and Social Inclusion policies.

- *JRS Europe recalls that human rights apply to every person, regardless of nationality or legal status. These rights include: right to health care, right to adequate housing, right to a minimum subsistence, right to fair working conditions, right to social security, and the right of equality before the courts (see below JRS Europe Policy Positions, no 1 – 2).*
- *Illegally staying third-country nationals should never be penalised for their personal choices made regarding return, by imposing destitution through the withholding of basic rights. (PP 6)*
- *JRS Europe urges States to eliminate long periods of time spent living in limbo which directly and instantly affect the persons' dignity. Destitute migrants who are left in uncertainty regarding the right to stay are specially exposed to degrading treatment. (PP 7)*
- *It is an illusion to believe that irregular migration can be completely tackled and that all illegally staying third-country nationals can be removed in due time. Return policies at the national and the European level have their limitations in terms of success of actual removals and encouragement of return. (PP 8)*
- *Forcing persons into destitution by withholding legal entitlements to access goods and services does not encourage their return. JRS Europe advocates on the basis of this study that forced destitution is counterproductive to return. (PP 11 – 12)*
- *When return policies are not fair and efficient, alternatives for return should be sought. (PP 13)*
- *A fully-fledged residence permit should be granted to third-country nationals who cannot be removed. JRS Europe believes that toleration to remain on the territory is under no circumstances a durable solution in cases where return is not possible. (PP 15 – 16)*
- *JRS Europe advocates that the state has a duty of care for destitute migrants with an irregular or tolerated stay up until the moment of return. JRS Europe is highly critical of practices through which the state shifts this responsibility onto civil society actors. (PP 17)*
- *Destitution of illegally staying third-country nationals should be addressed within the social inclusion policies at the European and national level. Society is missing out on the skills of destitute migrants by not offering them the right to enter the formal labour market. (PP 18 -19).*
- *Destitution leads to an alienation from society of a large group of migrants who are living in abject poverty and are excluded from accessing public goods and services. The creation of a group of third-class citizens should be avoided. (PP 20)*

The findings of the study concern three areas of policy making: the implementation of human rights policies; the design and implementation of return policies; and the lack of social inclusion policies. The following chapter articulates the concerns of JRS Europe with regards policies in these three areas that lead to severe and prolonged situations of destitution for forcibly displaced persons.

JRS Europe has a mission to speak out on behalf of asylum seekers, refugees, and other forcibly displaced persons. The following policy positions arise from practical experience of frequent encounters and accompaniment. JRS Europe offers the positions as a contribution to initiate a broad civil society dialogue on destitution, which is still a little known and hidden phenomenon. Being part of civil society, JRS Europe is deeply rooted in the values of the Christian gospel and the social teaching of the Catholic Church. Both put

the human being at the centre of their attention: the human being that is created in the image of God and deserves to be respected in its dignity and integrity, also in its social relations as a member of society.

1. Human Rights Policies

(1) JRS Europe recalls that human rights apply to every person, regardless of nationality or legal status.¹ It is a great misconception to assume that rejected asylum seekers and other destitute migrants whose stay on the territory is irregular do not have any rights at all.

(2) JRS Europe recalls that the rights to which destitute migrants are entitled on the basis of the human rights framework include: right to health care, right to adequate housing, right to a minimum subsistence, right to fair working conditions, right to social security, and the right of equality before the courts.² The respective international and regional human rights instruments are applicable to all third-country nationals regardless of their status.

(3) JRS Europe recalls that the recognition of the above mentioned human rights in the international instruments imposes various obligations on the State which are of immediate effect. In particular, governments are obliged to respect, protect and fulfil human rights:

The Obligation to Respect entails that governments shall refrain from any action which infringes on rights or which prevents persons from satisfying these rights for themselves when they are able to do so.

The Obligation to Protect entails that governments must protect persons within their jurisdiction from violations of their human rights by others, especially non-State actors.

For the purposes of this study, the Obligation to Fulfil is the most important one: It entails that governments must realise the full enjoyment of all human rights to all persons.

Interlinked with these obligations is the right to Non-Discrimination: Governments must ensure that all people within their jurisdiction, regardless of their nationality or residence status, can in fact enjoy their human rights. "Human rights are, in principle, to be enjoyed by all persons. States are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights". Hence, States must "remove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health".³

(4) JRS Europe is greatly concerned that the destitute migrants interviewed, including rejected asylum seekers, asylum seekers in appeal, third-country nationals whose stay on the territory is tolerated and irregular migrants are not in a position to fully exercise these rights in the concrete situations in which they find themselves. However, all of them are human beings who are in the possession of human rights and whose human dignity should be protected at all times.

(5) JRS Europe is concerned by the fact that state practice greatly contributes to this situation: In sharp contrast to their obligations, EU Member States have adopted laws, policies and practices which exclude migrants – with residence rights, tolerated or irregular stay – to a large extent from accessing essential services on the basis of legal status, or access is made dependent on the duty to cooperate with return. Exclusionary policies are conducted with respect to health care, employment, social benefits, housing, and other services provided in kind such as food and clothing. These obstacles to the exercise of human rights of destitute migrants should be removed.

(6) JRS Europe believes that human rights can never be taken away from a person in any circumstance. Therefore JRS Europe argues that illegally staying third-country nationals should never be penalised for their personal choices made regarding return by imposing destitution through the withholding of basic

¹ Respect for human rights and human dignity with the individual as the focal point is also a guiding principle adhered to by the EU. Just recently, in the "Berlin Declaration" celebrating the 50th anniversary of the Treaties of Rome the EU Member States solemnly stated: "In the European Union, we are turning our common ideals into reality: for us, the individual is paramount. His dignity is inviolable. His rights are inalienable."

² PICUM in March 2007 completed a study on human rights for irregular migrants: "Undocumented Migrants Have Rights! – An Overview of the International Human Rights Framework", which provides an overview of the human rights that apply to undocumented migrants as they appear in the relevant core human rights treaties and in the universal declaration of human rights on pages 31-33.

³ UN Committee on the Elimination of Racial Discrimination (CERD), General Recommendation No. 30: Discrimination Against Non Citizens. 01/10/2004, paragraphs 3, 29. (To be accessed at [www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/e3980a673769e229c1256f8d0057cd3d?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/e3980a673769e229c1256f8d0057cd3d?OpenDocument), last visited 16 April 2007.)

rights in the fields of housing, employment, health care, and social welfare. The dignity as a human being should be respected, regardless of choices made.

(7) JRS Europe urges States to eliminate long periods of time spent living in limbo which directly and instantly affect the persons' dignity. JRS Europe observes that destitute migrants who are left in uncertainty for long periods of time regarding the right to stay are particularly exposed to degrading treatment. This concerns in particular many rejected asylum seekers who are not being removed and do not receive a residence status; many persons who receive a so-called "toleration" status that has no or insufficient social rights attached; and some asylum seekers in appeal who lose their residence rights after a negative decision by the administrative authorities. However, destitute migrants are human beings who at some point in time are in need of clarity in order to develop future perspectives for their lives.⁴

2. Return policies

Policy positions in this section address first the limitations to return (numbers 8-12c) and then alternatives to return in situations where removal cannot take place (numbers 13-17b).

(8) JRS Europe urges all state actors concerned to recognise that it is an illusion to believe that irregular migration can be completely tackled and that all illegally staying third-country nationals can be removed in due time. This study provides strong evidence that return policies at the national and the European level have their limitations in terms of success of actual removals, encouragement of return and the handling of the cases of third-country nationals who find themselves within the removal process. In this sense JRS Europe argues for policies that take into account reality.⁵

(9) JRS Europe acknowledges that national governments have already identified in their laws and policies some situations in which removal cannot take place.⁶ (It should be noted that JRS Europe does not believe this is a comprehensive enumeration of such situations.)

(10) JRS Europe is deeply concerned about situations where national governments accept legitimate grounds for non-removal without offering durable solutions to third-country nationals who cannot be removed on the grounds identified by the government. This study shows: Many third-country nationals who are not being removed⁷ are left to their own devices. Although some of the barriers to return do exist only temporarily, many barriers have a more permanent character in practice.⁸

⁴ See in this respect also: "Comments on the European Commission's Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals COM (2005) 391", of Caritas Europe, CCME, COMECE, ICMC, JRS Europe, QCEA, which states on p. 10: "Migrants and refugees are human beings who need clear perspectives for their life and the life of their families. Therefore we denounce the forced return of migrants and refugees who have lived in the EU for more than 5 years. Even if return does take place, the perspectives of the migrants and refugees should always be taken into account."

⁵ The European Commission acknowledged in September 2005 that around two-third of migrants supposed to be removed are not sent back to their countries of origin in : "Reliable estimation for the number of illegal immigrants who have entered or are present illegally on the territory of the Member States is difficult to make. Data compiled by the Commission services in the preparation of the proposal for a European Return Fund show that, in 2004 in the EU(25), 650 000 return decisions had been issued, and that 164 000 forced returns and 48 000 voluntary returns took place", see Common Standards on Return, Memo/05/288 of 1 September 2005; <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/05/288> (last visited 18 April 2007).

⁶ The EU Commission Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals COM (2005) 391 recognises under Article 8 the following circumstances according to which Member States shall postpone the execution of a removal order as long as those circumstances prevail:

1. inability of the third-country national to travel or to be transported to the country of return due to his or her physical state or mental capacity;
2. technical reasons, such as lack of transport capacity or other difficulties making it impossible to enforce the removal in a humane manner and with full respect for the third-country national's fundamental rights and dignity;
3. lack of assurance that unaccompanied minors can be handed over at the point of departure or upon arrival to a family member, an equivalent representative, a guardian of the minor or a competent official of the country of return, following an assessment of the conditions to which the minor will be returned.

⁷ This group includes among others persons who are released from detention when removal is not feasible without the issuance of a residence permit, or persons who have been made subject to reporting duties for long periods of time without a change in their legal situation. A current trend to be discerned is the issuing of a "toleration" which merely allows the stay on the territory, which is re-issued or pro-longed for long and unforeseeable periods of time.

⁸ Obstacles to return may be: the lack of required travel and identity documents and the unwillingness of the respective embassies to re-issue official documents and accept the return of their own nationals; the absence of a safe travel route to the country of origin; medical reasons that prevent travelling; or the medical condition of the person requires adequate medical reception facilities which are lacking.

(11) JRS Europe advocates on the basis of this study that forcing persons into destitution by withholding legal entitlements to access goods and services does not encourage return. It is unreasonable to believe that denying third-country nationals all forms of support and prohibiting the right to access the formal labour market will encourage them to return to their country of origin.⁹

(12) JRS Europe advocates on the basis of this study that forced destitution is also counterproductive to return. The following aspects can be identified:

(12a) Mental health problems caused by destitution create high barriers to return. Mental health problems such as depression are a frequent consequence of prolonged destitution.¹⁰ Typical mental health problems lead to passiveness which takes over the life of a person and prevents him/her from making any reasoned choices about returning to the country of origin.

(12b) Destitution creates a distance between the third-country national and State in which he/she resides. Destitution results in exclusion from the social support system with respect to health care, social welfare, housing and employment. Contacts with the State are cut off or reduced to a bare minimum by pushing third-country nationals out of the public support systems. In particular, destitution quickly leads to homelessness which makes third-country nationals hard to reach and invisible to state authorities. The distance between state authorities and the third-country national serves as a barrier to discuss the possibilities of return and make an informed decision.

(12c) Destitution results in a distrust of the third-country national regarding a State's return policies. Third-country nationals without residence rights distrust the State with respect to its return policies because of the way they have been treated during their stay. Voluntary return on the basis of information provided by the government becomes less feasible due to the experience of destitution.

(13) JRS Europe believes that when return policies are not fair and efficient, alternatives for return should be found. Rejected asylum seekers and other destitute migrants with an irregular stay should not become victims of a failing return policy; when they cannot be returned, a durable solution should be sought for their cases. JRS Europe argues on the basis of this study that at present a number of laws, policies and practices on return cannot be considered fair and efficient. In particular the procedures that lead to destitution need to be re-examined.

(14) JRS Europe strongly suggests that when removal is not taking place due to safety reasons, protection should be granted. When a third-country national is not removed because of an unsafe country of origin or for the risk that human rights will be violated upon return, protection should be offered by the country of stay. Practice shows that protection is not always granted in situations where these grounds form an impediment to return. In these cases, EU member states do not provide the protection required according to the Convention Relating to the Status of Refugees and according to EU legislation.

(15) JRS Europe argues that a fully-fledged residence permit should be granted to third-country nationals who cannot be removed. Third-country nationals should not for an indefinite time live a life in limbo, without residence rights and basic social rights. If return cannot be enforced within a reasonable time defined by law, a third-country national should be given a residence status with a full set of rights. Third-country nationals who find themselves living in limbo should be able to leave this situation behind. There are three durable solutions for refugees: resettlement, return and recognition. Destitute migrants living in limbo are offered neither of the three solutions: Since resettlement and return are not possible, a solution should be sought in the realm of recognition and integration.¹¹

⁹ Numerous interviews of which some are presented as typical cases at the beginning of the country chapters give witness to this fact. Severe deprivation is outweighed by real fear and/or the lack of a possibility to return.

¹⁰ The high dependency on others for basic needs, the daily struggle for survival, the insecurity of stay, lack of future prospects and the constant fear of being removed are, for many destitute migrants, too much to cope with. Many migrants interviewed for this study chose severe destitution over feared or expected persecution.

¹¹ This view is also expressed in: "Common principles on removal of irregular migrants and rejected asylum seekers, statement by eleven NGOs – a.o. Amnesty International, HRW, JRS, ECRE, PICUM, Cimade - August 2005, <http://hrw.org/english/docs/2005/09/01/eu11676.htm> (last visited 11 April 2007), according to which: "The execution of the removal order or the return decision should be carried out within a reasonable period fixed by law. Where removal cannot be effected within this period, the removal order or return decision should be cancelled or suspended. Once a removal order or a return decision is cancelled or suspended, the person subject to the order or to the decision must immediately be granted a legal right to remain that allows for the exercise of rights. If, after a reasonable period defined by law, the removal or the return decision cannot be executed, the person subject to the order should have the opportunity to apply for a residence permit. Those persons should never be detained."

(16) JRS Europe believes that toleration to remain on the territory is under no circumstances a durable solution in case where return is not possible. A toleration to remain on the territory is used as an instrument within the return policies when removal cannot be enforced. Even though under the national law toleration is intended as a temporary measure, it is often issued for long periods of time. "Toleration" only entails an authorisation to remain on the territory; no other rights bestow from it.¹² It is not a residence permit and for this reason does not resolve the case of a third-country national who cannot be removed for reasons which are not of a temporary nature. Toleration should never be issued for long periods of time.

(17) JRS Europe advocates that the state has a duty of care for destitute migrants with an irregular or tolerated stay up until the moment of return. JRS Europe is highly critical of practices through which the state shifts this responsibility to civil society actors that then provide essential care to destitute migrants. Firstly, the duty of care is based upon the State's obligation to respect, protect and uphold human rights of all regardless of nationality or status.¹³ In particular cases of third-country nationals who are or have been within the asylum procedure the State has decided to process their asylum claims and legitimate expectations have been established that care will be provided to them during the procedure to be continued until they have left the country voluntarily or have been removed by the State. From this general duty of care the following can be derived:

(17a) JRS Europe concludes that continued support equal to asylum support received upon filing an asylum claim should be provided to asylum seekers in appeal and rejected asylum seekers until the moment that they have left the country of stay. In addition, they should be granted the right to access the formal labour market to allow them to generate their own income.

(17b) JRS Europe concludes further that irregular migrants should be provided at least with basic support during the removal process.¹⁴ The minimum basic support should include housing as well as financial support of a sufficient level to cover all needs regarding food, clothing, health care, hygiene products and other material essentials. In addition, irregular migrants should be granted with the right to access the formal labour market to allow them to generate their own income.

3. Social inclusion policies

(18) JRS Europe argues on the basis of this study that destitution of illegally staying third-country nationals should be addressed within social inclusion policies at the European and national level. JRS Europe concludes that as a result of the limitations of return policies, significant numbers of destitute rejected asylum seekers and destitute third-country nationals without a residence status are likely to remain for long periods of time on the territory of European States. The existence of these destitute migrants should not be ignored by the State authorities at the national, regional and local level, nor by European policy makers.¹⁵ Integration policies should address, at least, minimum rights and access to services for illegally staying third-country nationals. Migration and asylum policies which cause destitution are a harmonised area of policy making in the European Union. Therefore the effects of such policies such as the social exclusion of persons living for long periods of time on the territory of EU member states also need to be addressed at the causal level: i.e. the European level, among others.

(19) JRS Europe is deeply concerned that society is missing out on the skills of destitute migrants by not offering them the right to enter the formal labour market. Not only do governments not profit from their expertise and miss out on taxes and social security contributions: Third-country nationals who for long periods of time are not allowed to work become de-skilled which makes integration into society more difficult. Given the fact that destitute migrants who have so far not returned to their country of origin are even less likely to return, the disadvantages created by such policies are to be dealt with in the EU member states. Therefore such policies should be detrimental to the interest of EU member states. Excluding migrants from society by way of destitution is harmful to European societies.

(20) JRS Europe believes that destitution leads to the alienation from society of a large group of migrants who are living in abject poverty and are excluded from accessing public goods and services. The creation of a group of third-class citizens should be avoided.

¹² Therefore "toleration" is often the origin of destitution at its early stages and contributes to sustaining it.

¹³ See also points 2 and 3.

¹⁴ The time period concerns the period between the issuance of the removal order and the actual removal.

¹⁵ The Common Basic Principles on Integration (CBP) do not consider the inclusion of illegally staying third-country nationals to be an issue to be addressed within integration policies. The EU should widen their focus. Common Basic Principles on Integration (CBP), adopted by the EU Council in November 2004.