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Undocumented Migrant Workers in Europe





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Undocumented Migrant Workers in Europe

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Hoger instituut
voor de arbeid

This report is based on proceedings of a conference organized by PICUM, the Platform for International Cooperation on Undocumented Migrants:

Undocumented Migrant Workers
26 May 2003
European Parliament, Brussels, Belgium

Edited by Michele LeVoy, Nele Verbruggen and Johan Wets
January 2004

Layout: Ann Groffils (HIVA)
Cover: Liesbeth Villa (HIVA)
Printing: HIVA

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ISBN: 90-5550-352-5

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GLOSSARY OF ACRONYMS

AFL-CIO	American Federation of Labour-Congress of Industrial Organizations (U.S. trade union confederation)
ALJ	Administrative Law Judge
AME	Aide Médicale d'Etat (French health care for undocumented migrants)
BCIS	Bureau of Citizenship and Immigration Services (U.S. public institution)
CCOO	Comisiones Obreras (Spanish trade union)
CGIL	Confederazione Generale Italiana del Lavoro (Italian trade union)
CGT	Confederación General de Trabajo (Spanish trade union), Confédération Générale du Travail (French trade union)
CISL-CESIL	Italian trade union confederation
CITE	Centro de Información para Trabajadores Extranjeros (Spanish Foreign Workers' Advice Center)
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ETUC	European Trade Union Confederation
FNV	Federatie Nederlandse Vakbeweging (Dutch trade union confederation)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICFTU	International Confederation of Free Trade Unions
ICMW	International Convention for the Protection of the Rights of All Migrant Workers and the Members of Their Families
ILO	International Labour Organisation
IOM	International Organization for Migration
IRCA	Immigration Reform and Control Act of 1986 (U.S. legislation)
LPR	Lawful Permanent Residents
NLRB	National Labour Relations Board (U.S. institution)
OECD	Organisation for Economic Co-operation and Development
OMI	Office des Migrations Internationales (French public institution)
PRWORA	Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (U.S. legislation)

SAPs	Structural Adjustment Programs
SSA	Social Security Administration (U.S. public institution)
SUD-PTT	French trade union
TGWU	Transport and General Workers Union (British trade union)
UDHR	Universal Declaration of Human Rights
UGT	Unión General de Trabajadores (Spanish trade union)
UNICE	Union of Industrial and Employers' Confederations of Europe

ACKNOWLEDGMENTS

PICUM would like to thank the following foundations for their financial support for the conference: NOVIB (Oxfam Netherlands), King Baudouin Foundation (Belgium), Belgian Federal Ministry of Social Affairs and ACV (Belgium).

PICUM is very grateful to Anne van Lancker, MEP, for inviting us to hold the conference at the European Parliament. We extend our gratitude to Francis Bordon for all practical arrangements.

Members of the preparatory working group and other members of the PICUM network gave constructive support in elaborating the conference program. PICUM would like to thank Amaya Fernandez, Alain Morice, Myriam de Feyter, Nicholas Bell, Emma Martin Diaz, Maria Helena Bedoya, Didier Vanderslycke, Johan Wets, Norbert Cyrus and Marijke Bijl. Thanks also to Rian Ederveen and Wilfried Gepts for their comments on the report.

PICUM would also like to thank all of the speakers at the conference: Patrick Taran, Bridget Anderson, Lucy Rix, Bernd Honsberg, Nicholas Bell, Alain Morice, Roger Plant, Anna Gallagher, Claudia Cortes Diaz, Didier Verbeke, Norbert Cyrus, Ghassan Saliba and Wahid. Special thanks also to Godelieve van Heteren and Alima Boumediene-Thiery, moderators at the conference.

We would also like to thank all those who dedicated their time and efforts for the practical organization of this conference: Jo Adriaens, Stéphanie Fonseca, Frédérique Delcourt, Timbo Ibrahima, Brita Pohl, Joke Gelade, Simone Sergeant and Shaju Hendrikx. Thanks also to Géraldine Herbiet and Isabelle Ledent for interpretation during the conference.

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INTRODUCTION

1. Migration Dynamics

Starting in the late 1980s, Western Europe began to be transformed into a continent of immigration. Immigration has now become a political issue in all of the countries affected by it and has found its place on the political agenda. The discussion has become politicized and emotionalized, largely due to the growing influx of refugees and asylum seekers coming from developing countries.

Large-scale migration from countries in the South (as well as from countries in the East) is to a large extent a matter of the exportation of their problems. These problems include violence, poverty, high unemployment and a significant population growth (despite child mortality). An average global population growth rate of 1.4 per cent per year may not sound like a large number, but, at this rate, nearly 90 million people will be added to this year's population. The less developed countries are accountable for more than 90% of the world's population growth. The impact of growth rates can best be seen by looking at the time it takes for a population to double in size. Many countries in the South are facing a population doubling time of thirty years or less. Twice as many people will need twice as much food and water, along with adequate houses, schools, hospitals, jobs, roads, etc. This accelerates the degradation of the environment, strains finite resources and gives rise to social ills, such as poverty and unemployment. To accommodate all new workers coming into the labour force and to reduce unemployment, the world will have to create 500 million new jobs over the next 10 years, according to the International Labour Organisation (ILO).

This is not only unlikely; it is impossible. A large share of the current and future generations of labourers in the South has the choice between unemployment and migration to work. This work can be found in the region, or further away, in the industrialised world.

There, no legal front doors are open and the legal 'side doors' are only accessible to a small number of migrants. As a result, 'back doors' are increasingly being used. The flip side of shielding Europe from unwanted migration is not a decline

in the number of entrances. If the possibilities to legally enter the continent are restricted, new forms of immigration and residence in the grey zone between legality and illegality emerge. In addition, large numbers of migrants cross the borders illegally and are smuggled into the country. Society and the political world react in different ways. Migration policies are elaborated and the link with problems in the home countries is made. But the unwelcome pressure of migration cannot be relieved by migration policies, regularisations, border controls or development assistance. Although fighting the causes of unwanted, large-scale migration is indispensable, it will not lead to less migration on the short-term. Europe will undoubtedly bear the burden of dealing with a permanent migration pressure and the presence of illegal migrants.

2. The Context

There is growing evidence that hundreds of thousands of undocumented workers work in Europe on a daily basis. The unprotected status of these workers often leads to various problems: they often work long hours in dangerous and/or unhygienic conditions; many do not receive their wages or receive less than was agreed upon; and workers are fired without being given due notice. If an industrial accident occurs, the lack of official proof of employment renders it complicated and often impossible to have any health care refunded. If an undocumented worker is apprehended, s/he will most likely be deported without being able to claim his/her wages.

Undocumented workers are often unwilling to protest against these bad conditions, since their main aim is to have work, regardless of the conditions. For example, they well know that filing a complaint against an employer would have negative consequences on their chances of employment. There are several institutions and bodies that traditionally protect and monitor employment rights and working conditions. Yet access to most of these established institutions is problematic for those without legal status. Not all trade unions are convinced of the necessity of including undocumented workers, and labour legislation is in many cases not applicable to undocumented migrants.

This problem is far-reaching. It is a question of social exclusion: why are so many people today in a democratic Europe deprived of their basic social rights? It is a question of workers' rights: why do certain workers have no rights and are completely unprotected against any form of exploitation? It is a question of economic organization: why do we accept the claims by certain industries that they structurally need this type of labour? It is a question of North-South relations, and a question of consumer awareness: the only way to have cheaper products available at

any given moment is to generalize slavery.¹ How far do we as consumers want to go?

3. PICUM's Focus on Undocumented Migrant Workers

These issues were addressed at the international conference on undocumented migrant workers, held by PICUM, the Platform for International Cooperation on Undocumented Migrants, on May 26, 2003, at the European Parliament in Brussels. Nearly 200 participants came together from 20 countries in Europe, including undocumented workers, researchers, European and local policymakers, activists, representatives of trade unions, employers' organizations and migrant worker organizations, as well as social inspectors. The conference aimed to provide opportunities to exchange expertise and information; to stimulate networking; to address the situation of undocumented migrant workers in various sectors of the economy; and to look for solutions with all actors involved.

The conference corresponded to one of PICUM's main objectives as a non-governmental organization, to promote respect for the human rights of undocumented migrants in Europe. PICUM seeks to achieve this aim by gathering information on law and practice regarding social rights, detention and deportation of undocumented migrants and the possibilities of regularization of their residence; by providing its members and other interested parties with expertise, advice and support; by strengthening networking amongst organisations dealing with undocumented migrants in Europe; and by formulating recommendations for improving the legal and social position of these immigrants, in accordance with the national constitutions and international treaties.

The main aim of PICUM's actions concerning undocumented migrant workers is to find appropriate ways to protect them. These actions will first be directed at PICUM member-organizations, which are mainly NGOs that provide assistance to undocumented migrants. To tackle this issue, however, new coalitions should be made in a field in which the organizations often do not have prior expertise. Therefore it is a challenge for PICUM to involve different partners from the beginning, including trade unions, employers' organizations, researchers, migrant worker organizations, social inspectors, activists, relevant policy makers and undocumented workers themselves. The conference brought together actors from these fields in order to provide opportunities for them to exchange experience and expertise and to 'stimulate' networking.

¹ Terray E. (2002), "L'économie du travail illégal", in *Le goût amer de nos fruits et légumes: l'exploitation des migrants dans l'agriculture intensive en Europe*, Limans: Forum Civic Européen, p. 124.

4. Overview of the Report

This report is based on the proceedings of the international conference on undocumented migrant workers. It contains contributions from all of the speakers, as well as conclusions and recommendations that were formulated afterwards.

Part 1 aims to shed light on the international forces that have contributed to the widespread phenomenon of international migration and deterioration of working conditions for undocumented migrants. The current situation in Europe – where governments tolerate a large-scale incorporation of undocumented workers in various sectors of the economy – is analyzed. Elements for viable, sustainable migration management are proposed, and various facets of policies adopted by EU Member States towards undocumented workers are revealed. This overview provides a backdrop for understanding the presence of undocumented workers in the several sectors of the economy in Europe, which is discussed in Part 2.

In Part 2, labour conditions faced by undocumented workers in agriculture, construction and domestic work are highlighted. These are by no means the only sectors which utilize undocumented labour, but were focused upon at the conference and included in this report.

The issue of basic social rights, with a focus on the right to fair working conditions, is analyzed in Part 3 from various points of view. This part begins with an overview of the highest standards of labour rights, as outlined in various international treaties and conventions. The second chapter of this part (Chapter 8) outlines minimum standards to protect workers from forced labour, and discusses strategies that can be developed in this matter. In Chapter 9, a synopsis is given of undocumented migrants' rights and access to services in the United States, with particular focus on labour rights. Lastly the pros and cons of regularization campaigns and permanent regularization measures are debated, considering recent measures in France and the United Kingdom.

Part 4 profiles several actors who contribute in different ways to promoting undocumented workers' rights. The part includes examples of supportive measures they have taken to foster undocumented workers' basic social rights. One such actor is the labour inspector, who may be viewed rather dubiously due to his/her role in revealing the existence of undocumented workers to the authorities (which oftentimes results in deportation). Yet social inspection activities may also be seen in a positive light in that they aim to prevent human trafficking. A concrete example of protection of undocumented workers is given with the presentation of a German NGOs work in making claims on behalf of undocumented workers for remuneration of unpaid wages. Several trade unions in Europe have carried out different initiatives to support undocumented workers, and some are highlighted. Particular focus is made on a Spanish trade union's activities.

In conclusion, the report highlights some general findings concerning undocumented workers and lists several recommendations.

PART 1
POLICY MAKERS' APPROACHES TO
UNDOCUMENTED WORKERS

CHAPTER 1

GLOBALIZATION, MIGRATION AND EXPLOITATION: IRREGULAR MIGRANTS AND FUNDAMENTAL RIGHTS AT WORK

Patrick A. Taran,² International Labour Office, Geneva.

1. Globalization and Mobility

There is growing evidence that the effects of globalization are contributing to increased human mobility. As a recent ILO study put it, “The evidence points to a likely worsening of migration pressures in many parts of the world ... Processes integral to globalization have intensified the disruptive effects of modernization and capitalist development.”³ Many developing countries face serious social and economic dislocation associated with persistent poverty, growing unemployment, loss of traditional trading patterns, and what has been termed a “growing crisis of economic security.”

ILO calculates the current global total number of migrant workers and family members to be about 120 million. Global estimates for international migration figures more than doubled between 1975 and 2000, from 75 million people living outside their homelands to well over 150 million (including labour migrants, dependants, refugees, permanent immigrants). It is likely these numbers will double again in the next 25 years.

Growth in the trade of goods and foreign direct investment has not significantly reduced the propensity to migrate in many countries. Rather, both demand for low- and high-skilled foreign labour as well as vast differences in living standards structure today's migration flows.

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³ Stalker P. (2000), "Workers without Frontiers – the impact of globalisation on international migration", ILO, Geneva.

In a number of countries, accelerated trade is replacing or undercutting domestic industrial and agricultural production with cheap imports, but at the expense of many jobs in those sectors. Structural Adjustment Programs (SAPs) imposed reductions in government spending, state budgets and state subsidies. Reductions also meant significant reductions in government employment including professionals as well as skilled and unskilled workers. Job creation by the private sector in many countries affected by SAPs has not kept up with the numbers rendered unemployed by downsizing governments. In some countries, it has lagged behind. In many countries, structural adjustment conditions included termination of government subsidies or food price supports that also indirectly supported employment in agriculture, food processing and distribution.

1.1 Growing Demand for Migrant Labour

Meanwhile, the demand for migrant labour is not declining. Demographic trends and ageing work forces in many industrialized countries suggest that immigration will be an increasingly important option to address, both increasing ratios of retired to active population and aging work forces. Some governments have begun to consider 'replacement migration' as one policy option.⁴

Recent changes in migration policies in a number of OECD countries intended to respond to labour market needs have generally focused on recruiting high-skilled candidates with little attention to low skilled migrants. Nonetheless, in several developed countries, the actual foreign workforce is on average less qualified than the national profile, it is concentrated in the lowest socio-professional categories, and it is characterized by high mobility in response to the cyclical fluctuations of the labour market.⁵

It is often said that migrant labour fills the 'three-D' jobs: dirty, degrading and dangerous. Research in southern European countries demonstrates the extent to which 'the migrants take jobs that the locals refuse. It's simply a matter of substitution.'⁶ A recent study prepared for ILO concluded, "We can conclude that migrants are in competition only with marginal sections of the national labour force ... when they are not sufficiently sustained by welfare provisions, in specific sectors, and/or in the less-developed areas inside these countries."⁷

4 UN Population Division, "Replacement Migration – Is It a Solution to Declining and Ageing Populations?", New York, March 2000.

5 OECD, June 2001, "OECD Employment Outlook".

6 Reynieri E. (2001), "Migrants in Irregular Employment in the Mediterranean Countries of the European Union", International Migration Paper No. 41, ILO, Geneva.

7 Ibid.

Industrialized countries and numerous developing nations have remained a pole of attraction for migrant workers, who migrate before the presumed economic equalization forces of trade liberalization have time to act.⁸ Often they are well-educated people who are ready to take up jobs that they would not accept in their home environment and this process involves an enormous loss of human resources. Wage differentials, however, between countries of origin and destination justify their interest especially where conditions at home are akin to poverty.

While not a subject addressed by this paper, recent comparative ILO research⁹ confirms that some developing countries continue to lose 10-30% of qualified manpower through 'brain drain'. This has negative effects on productivity and economic growth. These effects may, in turn, further limit possibilities for national economic growth, job creation and retention of population.

1.2 Labour Insertion of Irregular Migrants

The persistence of dual labour markets under globalization appears to be expanding the number of precarious jobs which national workers are reluctant to take. As a result, the demand for foreign labour reflects the long term trend of informalization of low skilled and poorly paid jobs, where irregular migrants are preferred as they are willing to work for inferior salaries, for short periods in production peaks, or to take physically demanding and dirty jobs.¹⁰

Small and medium size companies and labour-intensive economic sectors do not have the option of relocating operations abroad. Responses in these sectors include downgrading of manufacturing processes, deregulation, and flexibilization of employment, with increased emphasis on cost-cutting measures and subcontracting.¹¹ In a considerable number of countries, these measures have expanded the number of jobs at the bottom of the employment scale. Such employment needs are met only partially or not at all by available or unemployed national workers, for reasons of minimal pay, degrading and dangerous conditions, and/or low status in those jobs and sectors, as well as alternative access available for unemployed in some countries to social welfare and unemployment insurance.

The insertion of irregular migrants in the lowest skilled occupations responds to a structural need in developed societies. For the least qualified jobs, employers de-

⁸ Stanton Russell S. (1998), "Migration between Developing Countries in Sub-Saharan Africa and Latin America" in United Nations: Population Distribution and Migration, New York, p. 242.

⁹ Lindsay Lowell B. & Findlay A., "Migration of Highly Skilled Persons from Developing Countries – Impact and Policy Responses, Synthesis Report", International Migration Paper No. 44, ILO, Geneva, 2002.

¹⁰ Stalker P., *op. cit.*

¹¹ Lean Lim L. (1998), "Growing Economic Interdependence and its Implications for International Migration", in United Nations: Population Distribution and Migration, New York, p. 277.

mand workers who will not exercise pressures on the salary structures. Given that, at least initially, immigrant workers won't challenge the relation between salary and the social status attached to specific occupations, contracting migrant workers avoids the economic risks – particularly structural inflation – that national workers induce when they demand salary increases.

The exploitability of migrant labour, particularly when it is legally unprotected, renders it an attractive instrument for maintaining competitiveness. However, this is at the expense of formal protections of workplace safety, health, minimum wage and other standards. As the International Confederation of Free Trade Unions (ICFTU) highlights, organizing migrants and immigrants into unions or organizations to defend their interests and rights is often extremely difficult. When it is not considered illegal under national laws, organizing – especially of those without legal authorization for employment – is easily intimidated and disrupted by the threat or actual practice of deportation.¹²

The demand for migrant workers provides a significant impetus to labour flows and facilitates the incorporation of undocumented migrants.¹³ Despite relatively high unemployment in a number of developed countries, foreign workers – including unauthorized migrants – are able to find jobs easily.¹⁴ For example, a Mexican undocumented migrant worker to the USA will usually find a job two weeks after his/her arrival. Similar evidence in Europe indicates that undocumented migrants are rarely 'unemployed'.¹⁵

1.3 Fundamental Policy Dilemmas

Distance between policy pronouncements and de facto arrangements reflects a major contemporary contradiction in states' practice. Despite all the political rhetoric about illegal migration, numerous governments informally tolerate irregular migration while they officially reinforce controls against 'illegal' migrant workers. The effects are, on the one hand, a continued supply of cheap labour, while on the other hand, 'illegal' migrants unable to organize in the workplace to defend their dignity and decent work conditions, stigmatized and isolated as well from allies and support.

¹² See for example, Linard A.(1998), "Migration and Globalisation - the New Slaves", ICFTU, Brussels.

¹³ Escobar Latapí A., "Emigration Dynamics in Mexico, Central America and the Caribbean", 12th IOM Seminar on Migration, Managing International Migration in Developing Countries, Geneva, April 1997, p. 4.

¹⁴ Lean Lim, *op. cit.*

¹⁵ OSCE Office for Democratic Institutions and Human Rights Conference Report: "Europe Against Trafficking in Persons", Berlin, 15-16 October 2001, p. 72.

The practices of tolerating migrant workers in irregular status to meet labour needs in certain sectors of the market constitutes a de facto employment policy in which part of the work force becomes a variable which can be reduced or even eliminated (in theory) in periods of economic downturn, through exercise by states of their prerogative to expel foreigners from their territory. By the same manner that migration policy can be utilized to satisfy labour market needs with foreign labour, deportation can be utilized to reduce 'excess supply' by returning this temporary labour to countries of origin.

However, it appears that many formal restrictive measures have been established with little consideration of domestic labour demand and supply. In some regions, imposition of tighter border controls and restrictions on movement have cut across traditional routes and patterns of labour and trade migration. Basic labour economics theory suggests that placing restrictive barriers between high demand and large supply creates a potentially lucrative market for services of getting the supply to where the demand is.

Tighter border controls have not halted migratory flows nor have they had projected results in reducing the number of workers crossing borders. Instead they have put more pressure on those who migrate. With few options available for legal migration in the face of strong pull-push pressures, irregular migration channels become the only alternative, and one which presents lucrative 'business' opportunities for helping people arrange travel, obtain documents, cross borders and find jobs in destination countries.

The flow of low-skilled migrants to more developed regions is channelled by clandestine means precisely because of the non-existence of legal migration categories that would allow for their legal entry in destination countries. Once they are in host countries, they remain confined to jobs in unstructured or informal sectors, in irregular work and under exploitative conditions of employment.¹⁶

Tolerance of restrictions on freedom of movement, long working hours, poor or non-existent health and safety protections, non-payment of wages, substandard housing, etc. all contribute to expanding a market for trafficked migrants who have no choice but to labour in conditions simply intolerable and unacceptable for legal employment. Abuse is compounded by the absence of worksite monitoring, particularly in such already marginal sectors as agriculture, domestic service and sex-work, where monitoring could both contribute to identifying situations of forced or compulsory labour, as well as discourage irregular employment.

¹⁶ Abella M.I., "Mondialisation, marchés du travail et mobilité", in *Migrations et avenir*, CIEMI, Paris, Vol. 14, No. 79, January-February 2002.

The global response to trafficking in persons has heretofore been dominated by discourse and practice emphasizing security, control and policing measures, albeit with some attention to protection of victims. However, this control-focused approach has given little attention to the structural causes and potential remedies to these causes. Unless fundamental causes are addressed - international labour market disparities, decent work deficits in many countries, growing demands for cheap labour - increasing barriers and controls is only going to increase the attraction and profits of trafficking migrants.

Last year, the ILO Global Report on Forced Labour highlighted that, "The recent rise in labour trafficking may basically be attributed to imbalances between labour supply and the availability of legal work in a place where the jobseeker is legally entitled to reside."¹⁷ The fact that the trafficking and smuggling 'business' continues expanding to an estimated value of 10-15 billion U.S. dollars¹⁸ may well be testimony to the ineffectiveness of anti-trafficking approaches based unilaterally on control measures.

Ultimately, labour trafficking would have far less reason to take place if jobseekers had more freedom of geographical movement and freedom of access to employment. Smuggling occurs because borders have become barriers between jobseekers and job offers. Trafficking occurs not only when borders are barriers to labour supplies meeting demands, but when no knowledge is available about proper migration channels, when employment is itself illegal and/or underground, and where conditions of work much worse than legal minimums are tolerated or ignored.¹⁹

1.4 Discrimination

Debate on migration policy in Europe has been dominated by the banal association of irregular migration with crime, arms, drug trafficking and terrorism, and discussion of draconian measures to 'combat illegal migration'. In the context of an increasingly diverse work force across Europe, discrimination and outright violence against foreigners are encouraged by the language of illegality. The use of military terms further suggests that 'illegal migrants' are some kind of an enemy in military confrontation.

Legally and semantically, the term illegal migrant contradicts the spirit and letter of the Universal Declaration of Human Rights, which establishes in Article 6 that

17 ILO (2001), "Stopping Forced Labour", Global Report, Report I (B), Geneva, at 53.

18 Widgren J., "Le trafic d'hommes, un marché lucratif", in *Courrier International*, No. 505, July 2000.

19 ILO, "Stopping Forced Labour", *op. cit.*

every person has the right to recognition before the law, and in Article 7, that every person has the right to due process.

The ILO conducted research in recent years to document levels of discrimination and to identify remedies in Europe and North America. Detailed country studies in Belgium, Germany, the Netherlands and Spain found net discrimination rates to be as high as 37 per cent; more than one in every three applications by minorities of immigrant backgrounds were rejected or not given consideration while identically qualified nationals were considered.²⁰ Similar findings were made in Canada, the United Kingdom, the USA and other countries.

Perceived convergences between race and nationality led the U.S. trade union confederation AFL-CIO to reverse last year its support for 'employer sanctions' enacted in 1986. Legal sanctions against employers who hired unauthorized foreign workers were found to have resulted in widespread discrimination in hiring against citizen and authorized resident blacks, Hispanics, Asians, and other non-white workers. Employers usually cited difficulties in verifying work-authorizing documentation presented by applicants as reason for excluding some or all minority candidates from consideration. However, civil rights and labour advocates widely raised concerns that sanctions provided a convenient cover for employers disposed to discriminate.

1.5 Gender and Migration

A word on the gender dimensions of irregular migration is warranted. Differential opportunities for legitimate employment affect men and women differently. Demand for migrant workers from receiving countries is defined by the labour market segmentation in these countries, i.e., opportunities are available for precisely these low-skilled jobs considered suitable for women.

Correspondingly, restrictions on admission and work are dramatically gender-differentiated. Most existing legal channels of migration offer opportunities in typically male-dominated sectors. Gender-selective migration policies and regulations for admission and entry often reproduce and intensify existing social, economic and cultural inequalities between male and female migrants; e.g. the right to entry does not necessarily mean the right to work for women in certain Western European countries. In addition, women have less access to information on migration/job opportunities, recruitment channels, and often have less preparation than men to cope with the working and living conditions in countries of destination.

²⁰ Zegers de Beijl R. (ed.) (2000), "Documenting Discrimination Against Migrant Workers in the Labour Market", ILO, Geneva.

The feminisation of international labour migration, the fact that most job opportunities for women migrants are in unregulated sectors (agriculture, domestic work, sex industry) and the existence of sex-disaggregated labour markets contribute to the increase of discriminative labour markets in countries of destination, markets that foster participation by irregular migrant women. These factors marginalize female migrants even further and expose them to worse forms of abuse.

2. The Importance of Standards

Migration policy and practice can only be viable and effective when it is based on a firm foundation of legal norms, and thus operates under the rule of law.

2.1 Fundamental Rights at Work

The ILO has emphasized²¹ the need to mobilize the entirety of its standard-setting, technical cooperation and research resources in all its areas of competence, to give particular attention to persons with special social needs, notably migrant workers.

Following principles and rights articulated in the ILO Constitution, the International Labour Conference adopted the ILO Declaration on Fundamental Principles and Rights at Work in 1998. This declaration, approved by tripartite delegations from all 176 member countries, established that all Member States, even if they have not ratified the fundamental Conventions, have an obligation arising from the very factor of membership in the organization to respect, to promote and to realize the principles concerning the fundamental rights which are the subject of those conventions, namely:

- freedom of association and the effective recognition of the right to collective bargaining;
- elimination of all forms of forced or compulsory labour;
- effective abolition of child labour; and
- elimination of discrimination in respect of employment and occupation.

These principles are incorporated in the eight fundamental conventions of the ILO,²² which are applicable to all workers, without distinction of nationality, and generally regardless of migration status.

21 ILO (1998), ILO Declaration on Fundamental Principles and Rights at Work, Geneva.

22 Conventions on Forced Labour, 1930 (No. 29) and on Abolition of Forced Labour, 1957 (No. 105), on the Elimination of Discrimination (employment and occupation), 1958 (No.111); on Equal Remuneration, 1951 (No. 100) and Discrimination (Employment and Occupation), 1958 (No. 111); on Freedom of Association and Protection of the Right to Organise, 1948 (No. 87) and on the Right to Organise and Collective Bargaining, 1949 (No. 98); and on Minimum Age, 1973 (No. 138) and on the Worst Forms of Child Labour, 1999 (No. 182).

A recent decision of the Supervisory Committee on Freedom of Association of the ILO held²³ that Article 2 of Convention No. 87 recognizes the right of workers, without distinction whatsoever, to establish and join organizations of their own choosing without previous authorization.²⁴

2.2 The International Labour Standards on Migrant Workers

The ILO elaborated two international standards specifically covering migrant workers. The Migration for Employment Convention, 1949 (No. 97) provides the foundations for equal treatment between nationals and regular migrants in areas such as recruitment procedures, living and working conditions, access to justice, tax and social security regulations. It sets out details for contract conditions, the participation of migrants in job training or promotion and deals with provisions for family reunification and appeals against unjustified termination of employment or expulsion, and other measures to regulate the entire migration process. 42 states have ratified this instrument.

The Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) was adopted at a time when concern about irregular migration was growing. Its two main objectives are: 1) to regulate migration flows, eliminate clandestine migration and combat trafficking and smuggling activities; and 2) facilitate integration of migrants in host societies. It provides specific minimum norms of protection applicable to migrants in an irregular situation, or who were employed illegally, including in situations where their status cannot be regularized. This principle is expressed in Article 1, where it establishes the obligation of ratifying states to “respect the basic human rights of all migrant workers,” independent of their migratory status or legal situation in the host state.

This convention also addresses social security benefits deriving directly from past employment, and stipulates access to rights or benefits accrued during periods of employment whether legally authorized or not.

2.3 A Set of International Standards

These two ILO conventions on labour migration provide a basic framework for national legislation and practice on managing labour migration. The 1990 UN International Convention on the Protection of the Rights of All Migrant Workers

23 Case No. 2121, Complaint presented by the General Union of Workers of Spain (UGT) against the Government of Spain for denial of the right to organize and strike, freedom of assembly and association, the right to demonstrate and collective bargaining rights to 'irregular' foreign workers.

24 The only permissible exception to Convention No. 87 is that set out in Article 9 concerning the armed forces and the police.

and Members of Their Families, which entered into force on July 1, 2003, extends considerably the legal framework for migration, treatment of migrants, and prevention of exploitation and irregular migration.

The content of ILO Conventions 97 and 143 formed the basis for drafting the 1990 Convention, which expanded and extended recognition of economic, social, cultural and civil rights of migrant workers rights. ILO participated in the 'global campaign' effort launched in 1998 to promote wider ratification, led by a Steering Committee that includes IOM, the Office of the UN High Commissioner for Human Rights, UNESCO and several international trade union, church, migrant and human rights NGOs.²⁵ Since this campaign was initiated, ratifications and signatures tripled.

These three conventions together provide a comprehensive 'values-based' definition and legal basis for national policy and practice regarding non-national migrant workers and their family members. They thus serve as tools to encourage states to establish or improve national legislation in harmony with international standards. They are not simply human rights instruments. Numerous provisions in each add up to a comprehensive agenda for national policy and for consultation and cooperation among states on labour migration policy formulation, exchange of information, providing information to migrants, orderly return and reintegration, etc. Section 5 of the International Convention provides in eight articles a very substantial agenda for international inter-state consultation and cooperation on managing international migration.

A total of 62 different states have ratified one or more of these three complementary standards;²⁶ 11 Member States of the European Union have ratified one or both ILO conventions.²⁷

²⁵ See Global Campaign website at <http://www.migrantsrights.org>.

²⁶ The ILO Migration for Employment Convention No. 97 of 1949, ratified by 42 countries, the ILO Migrant Workers (Supplementary Provisions) Convention No. 143 of 1975, ratified by 18 countries; and the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, ratified by 21 countries and signed by 10 others. Texts and related information available respectively on the ILO website, at <http://www.ilo.org/ilolex>, and on that of the Office of the UN High Commissioner for Human Rights, <http://www.unhchr.ch>.

²⁷ Belgium, France, Germany, Italy, Netherlands, Norway, Portugal, Slovenia, Spain, Sweden, and the United Kingdom.

3. Comprehensive Policy Responses Required

Assuring decent treatment for migrant workers cannot be obtained by piecemeal measures or isolated advocacy and actions here or there. The numerous and complex aspects require elaborating a comprehensive approach.

The existing international norms, policy recommendations agreed to by representatives of nearly all governments of the world, and the 80 years' experience of ILO and its tripartite constituents provide a very solid policy framework. We identify five core elements for viable, comprehensive and sustainable national policy.

1. A standards-based approach to 'migration management', protecting basic rights of all migrants and combating exploitation and trafficking. The point of establishing legal rights and policy standards is to ensure social legitimacy and accountability, which can only be ensured by a foundation in the rule of law. Social legitimacy of – and public cooperation with - governance comes of its association with justice, human dignity and democratic values.
2. An informed and transparent labour migration admissions system designed to respond to measured, legitimate labour needs, taking into account domestic concerns as well. Such a system must be based in labour ministries and rely on regular labour market assessments conducted in consultation with social partners to identify and respond to current and emerging needs for workers, high and low skilled. ILO research underlines this as a fundamental starting point: legal labour migration channels contribute to reducing exploitation, trafficking and smuggling of migrants.²⁸
3. Enforcement of minimum national employment conditions standards in all sectors of activity, to criminalize abuse of workers and of discouraging irregular employment. Enactment of national minimum standards for protection of workers, national and migrant, in employment, is required where these do not exist. ILO Conventions on occupational safety and health, against forced labour, and on discrimination provide minimum international norms for national legislation. A necessary complement is monitoring and inspection including in agriculture, domestic work, sex industry and other sectors subject to 'irregular' employment, to identify and prevent exploitation of children and to detect and stop forced labour, as well as to uphold minimal decent work conditions.
4. A Plan of Action against discrimination and xenophobia to sustain social cohesion. The Declaration and Program of Action adopted at the World Conference Against Racism and Xenophobia (WCAR) in Durban in 2001 included 40 para-

²⁸ ILO, Mekong Sub-Regional Project to Combat Trafficking in Children and Women, *Legal Labour Migration and Labour Markets: Alternatives to Substitute for Trafficking in Children and Women*, p. 1.

graphs on treatment of migrant workers, refugees and other non-nationals that constitutes a comprehensive and viable program of action to combat xenophobia and discrimination. International organization²⁹, trade union³⁰ and NGO delegates³¹ from all regions at preparatory meetings and the conference itself contributed much to this achievement.

Main elements identified in the Durban program of action³² include:

- Adoption in national law of relevant standards to protect rights of non-nationals.
 - Make racist and xenophobic discrimination, behaviour and action unacceptable and illegal.
 - Elaborate administrative measures and procedures to ensure full implementation of legislation, and accountability of all government officials.
 - Establish independent national human rights/anti-discrimination monitoring bodies with power to (i) monitor and enforce legislation; and (ii) receive and act upon individual complaints.
 - Promote respect for diversity and multicultural interaction.
 - Encourage communications media to emphasize positive images of diversity and of migration
 - Incorporate multi-cultural and diversity training in educational curricula.
 - Mobilize civil society cooperation.
5. Institutional mechanisms for elaborating, implementing and monitoring national migration policy and practice, in coordination with social partners. Ensuring coordination within governments and consultation with social partners and concerned civil society bodies on all main areas of policy concern is essential to ensuring viable and sustainable practice. ILO experience shows that policy will only be viable, credible and sustainable if it takes into account the concerns and interests of employers and workers, particularly including migrant workers themselves.

Transparent and consultative administrative mechanisms are required to address a wide range of concerns, including supervision of recruitment, administration of admissions, public education and awareness raising, training of public service and law enforcement officials, recognition of educational

29 ILO, the OHCHR and IOM jointly produced a working paper for the Conference, entitled Racism, Discrimination and Xenophobia and International Migration, which summarized relevant experience and policy recommendations.

30 The ICFTU facilitated and coordinated much of the worker input to this process. See the ICFTU Report on WCAR.

31 See "Proposed Elements for a Program of Action Against Xenophobia" at <http://www.migrantwatch.org/WCAR>.

32 See "List of paragraphs in the Durban Declaration and Programme of Action which include provisions relating to migrants and refugees", OHCHR.

equivalencies, provision of social and health services, rights restoration and recovery for victims of trafficking, and other aspects of managing labour migration.

These five pillars are the essential lines. However, fully addressing the dynamics of labour migration today also requires:

- Policies for labour mobility – freedom for labour to move – in regional integration areas.
- Changing terms of aid, trade and international relations to facilitate development in more equal terms.
- Creation of specialized institutions for policy coordination, enforcement and monitoring
- Encouraging voluntary return and reintegration of migrants into their countries of origin.
- Combating trafficking and exploitation of migrants by organized crime.
- Elaboration of gender sensitive policies and implementation focusing on ensuring both equal treatment and equal outcomes.

3.1 Cobbling Policy Lacunae

In the last few years, controlling or managing migration has become an expressed priority for many governments. Intergovernmental dialogue processes towards policy coordination have been established in virtually all regions. New legislation affecting labour migration has been established or proposed in dozens of countries worldwide.

In a considerable number of countries, migration management responsibilities have been shifted from labour ministries to interior or home affairs ministries, thus transforming contexts for policy elaboration and implementation from that of labour market regulation to that of policing and national security. To the vast extent that migration is about work, ministries of labour/employment must retain a central role in administration of migrant worker policies, because labour migration inevitably has direct implications on labour market regulation, conditions of work and other fundamental areas of their competence.

Reference to social dialogue – consultation with social partners – is regrettably absent in many migration policy initiatives. The ultimate consequences are very serious. To the extent that an increasingly large and important sector of the working class is managed outside normative protections, outside social dialogue and outside labour market institutions, it contributes to accelerated deregulation of labour markets as well as to deterioration of labour-employer-state relations overall.

The predominance given to migration control is both root and reflection of fundamental impediments to rationally and effectively addressing international migration. Promoting an agenda of migration control may be a useful vehicle to capture political attention and budgetary resources. However, when pursued to the detriment of other considerations, that focus inevitably subordinates fundamental humanitarian and human rights considerations as well as economic and developmental factors to secondary roles.

Migration, regular and irregular, has, does and will continue as inexorably as the economic forces at work in a globalized economy. The international community – sometimes reluctantly – acknowledges the need to manage and regulate movements of capital, goods, technology, services, information, etc., whether through formal means or ‘market mechanisms’. It is manifestly contradictory when this logic is denied application to migration.

3.2 The Role of Social Partners, ILO and NGOs

The trade union movement in a number of countries has made enormous strides in recent years in addressing the challenges of international labour mobility. Major policy shifts followed by extensive organizing drives among migrant workers have taken place in recent years by mainstream trade unions and national confederations across Europe, as well as in the Americas and Asia. National confederations in Argentina, Belgium, Canada, France, Germany, Ireland, Italy, Korea, Portugal, Spain, the UK and the USA – among others – have full-time national staff for migrant worker organizing and anti-discrimination issues; all are active in policy advocacy for improved protection of rights and decent work conditions for migrants.

Employers’ organizations across Europe have also been turning their attention to migration policy issues; UNICE (Union of Industrial and Employers’ Confederations of Europe) in particular has elaborated an active approach in Council of Europe and European Union fora.

Much of the concrete attention to migrants, including protection of their rights and dignity, is given by the day-to-day work of local, national and regional civil society organizations. A survey of NGO activity in migration was conducted under the auspices of the UN Commission on Population and Development in 1997.³³ More than 100 NGOs in all regions of the world provided data, demonstrating that NGOs world-wide provide direct services to migrants, some complementing their

33 UN Commission on Population and Development (1997), *Activities of intergovernmental and non-governmental organizations in the area of international migration*; Report of the Secretary General, New York, UN document E/CN.9/1997/5.

service activities with public education and policy advocacy with local and national government.

The International Labour Organization was established in 1919 to elaborate, promote and monitor implementation of international standards regarding treatment of labour; to provide orientation and technical assistance to its tripartite constituents; and to address contemporary issues affecting workers, employers and governments worldwide. ILO is a specialized agency of the United Nations system; it is unique in having civil society participation in its governance through its tripartite structure in which representatives of national employer and worker organizations participate alongside representatives of government.

In addition to assisting states in ratification and implementation of relevant standards, a major ILO activity is technical co-operation on migration policy, legislation and administration with governments and social partner organizations. Currently, ILO is identifying and publishing an evolving listing of 'good practice' examples of anti-discrimination measures developed by governments, employers, trade unions and NGOs across Europe to make them accessible as models for wider implementation.

3.3 Conclusion

The rule of law and respect for universal notions of human rights are essential foundations for democracy and social peace. Irregular migration can only be tackled – and the basic human rights of all migrants upheld – by a comprehensive policy framework based on legislation that incorporates the international norms regarding migrant workers and decent work.

Adherence to basic international human rights standards, addressing labour market needs and composition, elaboration of anti-discrimination legislation and implementation of appropriate practices are shared responsibilities among government, social partners, civil society and migrants themselves. Recent progress is encouraging, but the challenge is huge. Only active engagement by the institutions of the European community, and its member governments – as well as social partners and civil society – will assure viable, credible and sustained protection and decent working conditions for foreign and national workers alike.

CHAPTER 2

MIGRATORY POLICIES AND THE EVOLUTION OF WORK IN THE EUROPEAN UNION: WHERE UNDOCUMENTED MIGRANTS FIT INTO THIS SYSTEM

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The issue of undocumented migrants has gradually become controversial. Most European Union (EU) countries today have become immigration countries. Within the framework of harmonization of Member States' migration policies, the EU is faced with contradictory objectives and realities.

The specific issue of undocumented migrant workers cannot be considered outside of this global framework. In fact, it appears that this particularly vulnerable category of the working population is at the same time a witness and experimental ground for current political and economic trends. To begin, I will make a short summary of the contradictory position in which the EU has slowly put itself in, and of which it has become prisoner today.

On the one hand, under pressure from the xenophobic extreme right in old countries of immigration such as France, Belgium and Switzerland as well as in more recent countries of immigration, the harmonization of migration policies is officially done in a more and more limited way. This is also concerning asylum seekers, who receive less and less protection from the 1951 Geneva Convention. The case of refugees is noteworthy: not only because hospitality is refused to the majority under the pretext that they are fake refugees, but also because most of these rejected asylum seekers increase the numbers of undocumented migrants – we know in fact that most escape from deportation. Let's remember this in general: xenophobic policies depict the foreigner as an unwanted and suspicious person, thus bringing about competition amongst countries in the views, laws and practices aiming to criminalize immigration.

On the other hand, we observe that as migration has become globalized, EU countries have shown that they are incapable of applying their positions. Not only does reality demonstrate that they do not know how to individually or collectively control Europe's external and internal borders (and that this anarchy is an occasion for clandestine foreigners to enter and circulate in the EU, taking advantage

of the sort of permanent guerilla that our countries lead amongst themselves); but also the fact that governments are submitted to the political-ideological pressure and lobbying of employers who, following a mercantile application of the law of supply and demand of work, claim a flexible and adaptable management of the introduction of the foreign workforce. Some ask for the law to provide for immigrant quotas based upon the sectoral and situational needs of the economy. Others, mainly in sectors where there traditionally was use of clandestine employment and corruption of labour inspectors, prefer to silently hire foreign workers and remind the government from time to time that thanks to the employment of immigrants, they contribute to maintaining activities with small profit margins or threatened by international competition.

The structural gap between stated intentions and obtained results constitutes a challenge for a scientific researcher. We all know, and governments do, that our current economic system does not allow sustainable planning, with or without legal quotas. It is impossible to quantitatively or qualitatively adjust the insertion of a foreign work force to the strict needs of the economy. The structural presence of a growing stock of undocumented migrants within many EU countries should be analyzed against this background. The official policies of so-called “control of migratory flows” do not globally reduce immigration: they only relatively reduce the number of people legally admitted to enter and reside in these countries, thus increasing the proportion of foreigners in an irregular situation.

In countries like France, which for a long time relied on immigration to rebuild and repopulate the country (for example between 1945 and the oil crisis of 1973), the massive insertion of ‘clandestines’ (which is what they were called at the time) didn’t cause a problem during the period of growth: as soon as these immigrants were granted a work permit, they easily obtained their administrative legalization. The majority, who hoped to quickly return to their country of origin, ended up staying, despite usually appalling working and living conditions, and started families. The extreme right, taking advantage of the crisis in the 1970s, based its propaganda on the theme of unwanted foreigners who should be sent back to their countries of origin.

Today, thirty years later, one has to admit that xenophobia (legal or illegal) has inevitably become the major ideological reference for most of the parliamentary parties of immigration countries, and appears to have guided the main trends of harmonization of European migratory policies since the Sevilla Summit (June 2002).

The legally and economically precarious situation of migrants is organized and has gradually become a real paradoxical institution against this backdrop of xenophobia and even racism. As mentioned above, there are two categories of employers: those who demand quotas of foreigners adapted to their needs and those who,

based upon their needs, favor a reserve of a foreign workforce they can exploit. Two legal and practical trends correspond to these two categories.

The first trend advocates, on the one hand, for a selection of migrants allowed to enter, and on the other hand, for the obligation for them to return to their country at the end of the contract or as soon as they can no longer find work. In this perspective, the migrant only receives a non-renewable residence permit for a limited duration. Beyond this time period, it becomes a crime to illegally reside in the country. There are numerous examples of this opportunist and precarious management of immigration, from Asian computer scientists to seasonal agricultural workers. (Sometimes it is even compulsory for border workers to return to their homes every night to sleep; this is the case of the *Grenzarbeitnehmer* in Germany). There is thus a new category of immigrants who are deprived of basic social rights, often housed in special places far away from nationals. Police harassment or racial acts often remind them that they are only tolerated. The large demand of work from migrants coming from dominated countries allows for strong competition to be maintained amongst them and to select those that are the most docile and easily exploitable.

The doctrine of this first trend can be resumed by this utilitarian and cynical slogan: "Have work without having the worker." In reality, it is obvious that a large number of precarious migrants added to rejected asylum seekers will not return to their countries at the end of their contracts (or will move to another country within the EU) and will add to the ranks of undocumented migrants.

The second trend favors *laissez-faire*. It is represented by employers in sectors where there is a large demand for undocumented migrants, and where there generally is a large amount of illegal work, taking all categories of workers into account. Beyond the particularities of each country, the biggest concentration of undocumented workers is mainly found in construction, agriculture, the hotel and clothing industries and in various services. In general, these sectors are characterized by a cyclical or seasonal variability of their activities and by the brutality of conditions and working relations. As opposed to the first trend, the second trend does not openly advocate a preference for illegal employment and undocumented migrants – and we observe that precisely, this secret becomes an ideological lever in the dependency of undocumented migrants. This trend is nonetheless very active towards politicians among whose interests are represented: this is what explains, for example in France, why the police are so inactive in the fight against illegal work in general, preferring to persecute undocumented migrants during selective ID checks.

Within the EU, there has been put into place what we could call a real political economy of undocumented migrants. By contemplating the issue in this way, we understand that the laws aimed at 'controlling immigration', although appearing

inefficient, are in fact very efficient, but not in respect to their official objectives: in reality they organize illegality to the service of social dumping. The main lever of this efficiency is the migrant's dependency on all of those who help him/her to migrate: the person who helps to organize the trip, the one who provides the migrant with a real or fake visa for his/her passport; the one who helps the migrant to travel, the one who helps with housing, the police officer that extorts his/her money and of course above all the migrant's employer. The migrant is constantly in financial or moral debt towards those who tolerate or use his/her illegal situation. In particular, there is a psychological mechanism that is easy to understand: the employer is a protective figure for him/her, to the point that in surveys, we met undocumented migrants who have the impression that they are the ones that take advantage of their bosses. The relationship of exploitation is thus reversed, thus guaranteeing submission. In this process, the role of xenophobic laws and even more so, police repression, is to constantly maintain a threat. Thus, it is easier to understand why, for example in France or in the Mediterranean region, the rate of carrying out deportations remains very low: it is not a matter of deporting all undocumented migrants – which would create anger amongst employers – but to sanction some so as to maintain all of them in a permanent fear.

The dependency of the undocumented migrant is logically achieved on the basis of his/her supposed clandestine presence. However, this dependency is also seen more openly in institutional practices and decisions. For three years, the French government delegated to the Red Cross the creation and management of the Sangatte camp, which supplied tens of thousands of undocumented migrant workers to Great Britain; in France as well, Prime Minister L. Jospin declared in 1998 that the government would not pursue the 70,000 undocumented migrants who were refused regularization, on the condition that they would work without being noticed; in 2000, the Greek government allowed farmers to hire clandestine Albanians on the condition that they would escort the workers to the border at the end of the harvest; or finally in 2002, S. Berlusconi, in Italy, not only suggesting to workers who were laid off by the car manufacturer FIAT that they should turn to undeclared work, promoted a very strange law in 2002 regularizing undocumented migrant domestic workers (*colf*): the employers were granted an amnesty and were invited to fill out the application for regularization of their employees, given that if a contract was broken, the employees would be eligible for deportation. This here is an extreme case of official dependency that, like the example of L. Jospin above, is a call for the invisibility of the undocumented migrant: s/he will only be tolerated if s/he is linked to an employer, but definitely not as a citizen. It is no coincidence that Italian legislation made a tentative move towards innovation in respect to domestic workers: this type of work serves as a focal point for one of the central demands of employers of immigrant workers, documented or not: their unlimited availability. Dependency, invisibility and availability: these

are the three qualities that are found or are supposed to be found amongst undocumented migrant workers.

Due to the pressure of the development differential of countries and of wars, the trafficking of the workforce towards dominating countries is reproduced and becomes widespread, leading to the creation of a permanent and functional reserve of individuals without documents and without rights, which plays an analogous role to townships under apartheid. It would certainly be improper to state that some hundreds of thousands of undocumented migrants are sufficient to make the European economy work, even if they sometimes have a strategic sectoral importance. In addition, a certain tendency is being drawn up to fall back upon other sources of the workforce, or more precisely new forms of employment.

I would like to concretely conclude on the general implications of the phenomenon of undocumented migrants by examining its experimental character. In countries such as France (or beforehand, Great Britain, under some aspects), thanks to the 1970s crisis and the monetarist turn of the 1980s, immigration on the whole served as a laboratory for the profound restructuring of the economic fabric and work models. The new orientation of capital-work relations can be described in two words: flexibility and externalization. Temporary work, precarious contracts, subcontracting, mobile schedules, dependency of employees, undeclared employees: not one of the elements of this system hasn't been tried out on first on foreign workers.

Thus it becomes clear that, by definition, and by their legal situation, undocumented migrants make up the experimental ground par excellence of this movement of deregulation of work: considered to be outside the law, employment law is not considered to apply to them. Formally, it does: in France, they are theoretically protected by labour regulations.³⁴ Practically speaking, it is almost impossible for an undocumented migrant to take a labour-related matter to court, since s/he can be deported due to the absence of a residence permit. But today, particularly due to the externalization of work, which allows employers to turn their employees into freelancers, but also due to the development of subcontractor nets, this movement tends to spread out beyond the limited sphere of working of undocumented migrants.

Unfortunately, one can imagine a future where employment law would have declined enough so that employers, who would become 'principals', would no

³⁴ This is why we have a small conceptual problem with English speakers. Until now the notion of 'illegal workers' in French labor law has not made sense, since the crime is regarded as committed by the employer and never by the employee, which labour regulations considers to be a victim. Nonetheless, the right wing of French parliament is presently disputing this conception concerning all foreigners without working permits (undocumented workers, asylum seekers, students, etc.).

longer need to rely on undocumented migrants. Undocumented migrants would thus have the historical privilege, if we may say so, of having been the instruments for the benefit of the deregulation of work. They would in this scenario have to fear that repression towards them would suddenly become truly efficient, especially with the enlargement of the EU, which will legally bring a new contingent of exploitable workforce. But it appears that for still some time, undocumented migrants will be called to play a more and more important role in the working system. To conclude, it is possible to have doubts about the legitimacy of the repetitive regularizations that some countries practice from now on, and that contribute to perpetuate the introduction of undocumented migrants as a utilitarian and opportunist 'migratory policy'.

CHAPTER 3

PROTECTIVE AND REPRESSIVE MEASURES IN EU MEMBER STATES

The treatment of undocumented migrant workers in the national legal systems in Europe ranges from full legal exclusion to full legal inclusion. Table 1 contains a brief overview of various measures taken by various EU countries (as well as Switzerland) to offer or deny protection to undocumented migrant workers.

The first three columns of Table 1³⁵ highlight practices concerning entitlements of undocumented migrant workers. Undocumented migrants in some Member States are entitled to legal protection. It is noteworthy to highlight the contrast between, Italy, for example, which grants full legal inclusion, and Sweden and Great Britain, where undocumented workers are subject to factual legal exclusion. Although the table does not contain information about implementation (in which case an undocumented worker in e.g. Italy may be prevented from making a claim due to his/her exclusion from the system), it brings into light the theoretical differences amongst Member States in the matter of undocumented workers and protection.

The last three columns of Table 1³⁶ give a brief overview of how Member States work to combat undeclared work and employment of undocumented migrants. The level of priority that national and local governments grant to the combat against undeclared labour is included. The table also indicates if there is a focus on the employment of undocumented workers. Finally, the type of approach used (prevention, repression or regulation) is highlighted.

³⁵ Cyrus N., "Presenting Undocumented Migrant Workers in Industrial Tribunals. Stimulating NGO Experiences from Germany." Paper presented at the PICUM International Conference on Undocumented Migrants, Brussels, May 2003.

³⁶ Boelens S., "The Combat Against Undeclared Labor and Against the Employment of Illegal Immigrants in Europe." Addendum to paper presented by Didier Verbeke at the PICUM International Conference on Undocumented Migrants, Brussels, May 2003.

Table 3.1 Overview of Protective and Repressive Measures towards Undocumented Migrant Workers in Selected European Countries

Country	Work Contract*	Entitlements from illegal employment*	Authority in charge – Representation of claims by third parties*	Governmental priority in combating undocumented labour**	Focus of Combat**	Approach Used**
Austria				High priority.	Focus on the employment of illegal immigrants.	Repressive: 50 out of the 300 Labour Inspection staff control the illegal employment of foreigners.
Belgium		Entitlement for withheld wages exists.	Undocumented migrant workers have access to industrial courts, but no legal aid. The procedure can be initiated from abroad.			
Denmark				High priority.	No focus on the employment of illegal immigrants.	

*Cyrus Norbert, 2003.

**Boelens Steven, 2003.

Table 3.1 Overview of Protective and Repressive Measures towards Undocumented Migrant Workers in Selected European Countries. Continuation

Country	Work Contract*	Entitlements from illegal employment*	Authority in charge – Representation of claims by third parties*	Governmental priority in combating undocumented labour**	Focus of Combat**	Approach Used**
Finland				High priority.	No focus on the employment of illegal immigrants.	Finland is not a popular target for foreigners due to tough border controls on the Finnish-Russian border, the geographic situation (Northern Europe) and the fact that Finnish society is so highly organised and regulated that it is hard to remain undiscovered for long.
France	Invalidity of the contract.	Entitlement to payment for work done exists.	Industrial court. Action for compensation because of unjustified enrichment. Trade unions can independently make a charge as long as the worker does not oppose.	National: high priority. Local: medium priority.	Focus on the employment of illegal immigrants.	Repressive: New legislation, increased sanctions and more inspections. In 1997, creation of DILTI (Délégation Interministérielle à la lutte contre le travail illégal).

Table 3.1 Overview of Protective and Repressive Measures towards Undocumented Migrant Workers in Selected European Countries. Continuation

Country	Work Contract*	Entitlements from illegal employment*	Authority in charge – Representation of claims by third parties*	Governmental priority in combating undocumented labour**	Focus of Combat**	Approach Used**
Germany	Invalidity of the contract. Dismissal of the worker without notice is possible.	Entitlement to wage for work done exists (factual employment) and can be enforced.	Industrial tribunal. Legal aid is possible. Examination of residence and work permit is not compulsory. Representation of workers by lawyers or authorized persons is possible. The procedure can be initiated from abroad.	National: high priority. Local: medium priority.	Focus on the employment of illegal immigrants.	Repressive: Intensification of control measures, more inspectors, data exchange between authorities, creation of special teams of inspectors, hiring of private detectives, increased punishment and higher fees for employers, changes in legislation. Prevention: Information campaign (“illegal ist unsozial”).
Greece	Invalidity of the contract.	Employer has to settle all the claims (Principle of unjustified enrichment).	The competent court deals with claims. No provisions from the Foreigners Act are salient in the industrial tribunal procedure. The procedure can be initiated from abroad.	High priority.	Focus on the employment of illegal immigrants.	Repressive: Labour Inspection was completely reorganised and modernised in 2000 and the number of Labour inspectors was significantly increased. Higher fees for employers.

Table 3.1 Overview of Protective and Repressive Measures towards Undocumented Migrant Workers in Selected European Countries. Continuation

Country	Work Contract*	Entitlements from illegal employment*	Authority in charge – Representation of claims by third parties*	Governmental priority in combating undocumented labour**	Focus of Combat**	Approach Used**
Ireland				Medium priority.	No focus on the employment of illegal immigrants.	Regulating: New procedure of registration of foreigners without a work permit in order to provide them with a temporary employment card.
Italy		Full entitlement to remuneration and social rights.		Very high priority (from all authorities).	Focus on the employment of illegal immigrants.	Repressive: New legislation on the entry and residence in Italy and on the employment of foreigners. Increase of inspections by synchronizing the taxable base and the social contributions base.

Table 3.1 Overview of Protective and Repressive Measures towards Undocumented Migrant Workers in Selected European Countries. Continuation

Country	Work Contract*	Entitlements from illegal employment*	Authority in charge – Representation of claims by third parties*	Governmental priority in combating undocumented labour**	Focus of Combat**	Approach Used**
Luxembourg				Low priority.	No focus on the employment of illegal immigrants.	
The Netherlands	Invalidity of the contract but annulment only by the regional court or president of the employment service.	No entitlements out of employment contract but claim for compensation can be raised.		High priority.	Focus on the employment of illegal immigrants.	Repressive: New legislation on the employment of foreigners (Wet Arbeid Vreemdelingen), changes in legislation on entry and residence, increase of inspections, creation of SIOD (Sociale Inlichtingen en Opsporingsdienst).
Portugal				Unknown.	Focus on the employment of illegal immigrants.	Regulating: The emphasis is on making it easier to employ foreigners by changing the legislation on entry and residence (granting a residence authorisation for foreign people who have been offered or have signed a contract of employment and allowing illegal immigrants to regularise their situation).

Table 3.1 Overview of Protective and Repressive Measures towards Undocumented Migrant Workers in Selected European Countries. Continuation

Country	Work Contract*	Entitlements from illegal employment*	Authority in charge – Representation of claims by third parties*	Governmental priority in combating undocumented labour**	Focus of Combat**	Approach Used**
Spain				National: medium priority. Local: low to very low priority.	No focus on the employment of illegal immigrants.	
Sweden		No entitlement exists.	No opportunities to enforce the payment of withheld wages via industrial tribunals.	Medium priority.	No focus on the employment of illegal immigrants.	
Switzerland				National: high priority Local: (Canton of Geneva – no information on other cantons): high priority.	Focus on the employment of illegal immigrants.	Repressive: The Canton of Geneva has a special team of inspectors, responsible for carrying out inspections of companies that employ foreign workers (Employment Inspection Unit of the Office de la main-d'oeuvre étrangère).
United Kingdom	Illegal	No entitlement due to the illegal characteristic of the employment contract.	None. Courts and tribunals cannot enforce illegal contracts.	National: very high priority. Local: high priority.	No focus on the employment of illegal immigrants.	The Asylum and Immigration Act (1996) gives employers the duty to check if new employees have a right to work in the UK.

Sources: Information from scientific services of the national parliaments of the Member States, compiled by the Scientific Service of the German Bundestag (2001); Survey: Office of the national coordinator MERI – THE Social Inspection (Belgium)

PART 2
SITUATION IN SELECTED SECTORS

CHAPTER 4

THE EXPLOITATION OF MIGRANTS IN EUROPEAN AGRICULTURE

Nicholas Bell, European Civic Forum.

Over the past three years the European Civic Forum has carried out an extensive study of the exploitation of migrants in European agriculture. Very little is known about this sector of the economy which operates in the countryside far from the eyes of the vast majority of the population, far from city-based immigrant communities, human rights and anti-discrimination organisations.

This question must be seen within the context of the development of a highly intensified, industrial and ferociously competitive form of agriculture producing poor quality food for consumers seeking the lowest prices and unaware of the social and environmental conditions in which the production takes place. Most areas of agricultural activity have been almost entirely mechanised. There remains one major sector which requires a large workforce: fruit and vegetable production.

This is also one of the agricultural sectors which is the least regulated or protected within the framework of the Common Agricultural Policy and is therefore subjected to the fierce pressures of a liberalised free market.

Not only is fruit and vegetable production affected by climatic uncertainties which make it difficult to plan precisely the moment of pruning, picking and so on. It is now also totally dominated by supermarket chains which in many countries control up to 80% of the market. It is they who decide what must be produced. They constantly cut prices to compete with their rivals and attract customers. Their buyers can call farmers at any moment and ask for a lorry-load, or just one or two palettes, of this or that product the next day. If the farmer is unable to deliver, the buyer will look elsewhere. The fact that a dozen or more workers are suddenly required for a few hours makes it impossible to have a fixed labour force. A reserve army of unemployed, supplementary benefit claimants and clandestine workers is needed.

Undocumented migrants form the least protected and most severely exploited part of a workforce made up of four categories, all of which suffer exploitation and discrimination to some extent: nationals working legally but not being paid cor-

rectly for overtime; nationals doing undeclared work to supplement unemployment benefits or minimal subsistence allowances; immigrants working legally, but once again doing additional undeclared and unpaid hours; and finally undocumented migrants.

In many of the main fruit and vegetable producing areas employers do not seek to employ local workers because they know that they are not willing to do the long hours of hard work for such low pay and in such poor conditions. Immigrants who have succeeded in being regularised are often refused the jobs they earlier had when they were undocumented.

In the Lot et Garonne region in France, fruit and vegetable producers organised a demonstration in July 2001 with the slogan "We want Polish workers!". The local president of the Rural Coordination, a farmers union, explained that "the employment agency says that there are thousands of local candidates for employment, but we know that this workforce is not adapted to our needs. They come one or two days and then leave because the work is too hard for them. We do not want people from the yoghurt generation, but competent, efficient and readily available workers".

'Available' means that they have no family on the spot, are lodged badly at the farm, and are ready to work ten hours a day and at weekends without ever demanding overtime payments. 'Efficient' means that they will obey every order for fear of being sent back home.

The pressure on producers is enormous. They are squeezed by bank loans, the farm supplies industry and supermarket chains. Over the last ten years, for example, 40% of the fruit and vegetable farmers in the Bouches-du-Rhône department in France have gone bankrupt. Producers try to survive by making savings in the only area they control, namely employment.

Our attention was first drawn to the situation by the vicious racist riots in February 2000 in the Andalusian town of El Ejido against Moroccans working, mostly illegally, in the 30,000 hectares of greenhouses in the area. We sent an international commission there to investigate, which published a detailed report. It was clear that the presence of thousands of undocumented immigrants working and living in intolerable conditions was vital to this economic 'miracle'. They make up an instantly available cheap labour force at moments of picking.

15,000 farm businesses produce 3 million tonnes of fruit and vegetables, half of which is exported to northern Europe. Around 1,000 lorries leave the region every day during the high season. At the time, over 90% of the region's agricultural workers, estimated at between 30,000 and 40,000, were immigrants, the vast ma-

majority coming from the Maghreb and sub-Saharan Africa (64% being Moroccans). Over half of them were undocumented.

The municipality has a deliberate policy of segregation aimed at discouraging immigrants from 'colonising' the town centre. Most have to live in old shacks abandoned by the rural population, often with no drinking water, washing or toilet facilities or electricity. They also have to put up with appalling working conditions with temperatures of up to 50°C in the greenhouses and contact with huge amounts of pesticides.

Three years after the riots in El Ejido and the ensuing international outcry, the situation has if anything deteriorated and remains highly explosive. I will return to this later on.

The massive presence of illegal immigrants working in Spanish agriculture was also highlighted by a terrible road accident near Murcia in January 2001, which killed 12 illegal labourers from Ecuador. This led to the discovery that there were some 20,000 clandestine immigrants from Ecuador in this region and some 150,000 in Spain. The accident victims had all been working for an hourly wage of 2.41 Euros.

Of course this phenomenon does not just concern Spain. The situation in Almeria is more obviously shocking, but there are abuses in the fruit and vegetable sector throughout Europe.

In Great Britain, for example, it is the 'gangmasters' system that supplies the large number of labourers needed at peak picking times. Gangmasters fix wage levels and working conditions and are paid for this service by the farmers. This has become big business and some employ up to 2,000 people, making a turnover of 20 million euros. Many workers are brought from Eastern Europe. The gangmasters are in direct contact with recruiters who 'organise' the illegal migrant labour. The workers pay up to 4,000 Euros for visas and, in many cases, fake passports. In the Netherlands about one third of all undocumented migrants work in agriculture, while in Germany half of migrant agricultural workers are undocumented.

Recently an increasing number of migrants have been coming from central and eastern European countries, with or without legal papers. They are beginning to replace the traditional immigrant labour forces coming, for example, from the Maghreb. The social and economic consequences of EU enlargement, including the destruction of small-scale agriculture in countries like Poland, will force millions of people to seek their livelihood elsewhere. This can only be of great advantage to Europe's employers. What better than to obtain a cheap and easily exploitable workforce which is, in addition, white and even Christian?

This is the true background to the El Ejido riots in February 2000. Over the years, the Moroccan community had become organised and held several strikes that totally stopped production. Shortly before the riots, employers had gone to the Baltic countries in search of workers who could replace the troublesome Moroccans.

Racism forms part of the recipe used to force the Moroccans to leave the region. This is no new tactic. It was already used in the 19th century in the fruit and vegetable plantations of California. Jean-Pierre Berlan, a researcher with the French National Agronomy Institute, has studied the history of the 'Californian model' which closely resembles today's reality in Almeria. "It is important to understand that racism plays an essential role in this system. It is necessary to split up the labour market by various methods, including racism".

A spectacular example of immigrant replacement occurred in spring 2002 in the Andalusian province of Huelva. Every year, 55,000 workers pick strawberries over a period of three months. In past years around 10,000 of them have been immigrants, mostly undocumented Moroccans. In 2001 thanks to the huge campaign in Spain by 'sans-papiers', about 5,000 Moroccans obtained permits restricted to the 2002 strawberry harvest in Huelva. Much to their surprise, thousands of young Polish and Romanian women arrived and began picking strawberries for less money than the Moroccans would have expected. Despite having regularised the Moroccans specifically for this job, the Spanish government had offered 'contracts of origin' to 6,500 Poles and 1,000 Romanians for the same job.

The farmers were reluctant to employ Moroccans with a legal status, as these would be more likely to demand their rights. This left them in a state of total poverty and despair in the streets, without shelter, food or even water. The situation became extremely tense, giving rise to a wave of racism against the Moroccans, and 4,000 people demonstrated in Huelva against 'civil insecurity'. In fact, the Moroccans played a part in the harvest. Whenever there was a particularly big harvest, or on Sundays or religious holidays, the employers could turn to this reserve army of labourers. At the end of the season the employers stated with satisfaction that it had been one of the most profitable so far.

According to the Andalusian agricultural workers union SOC, this phenomenon has also taken place in El Ejido this season. Whole busloads of Romanians and Lithuanians have been arriving to take the jobs that used to be done by Moroccans and other Africans. They do not need visas and in general do not have any contract. They have been working for as little as €18 a day, which is far lower than the €27 – €30 that the Moroccans used to earn.

Meanwhile, a large number of migrants from Africa are still in the region, living in conditions of desperate poverty. It is normal for six or seven people to live in a shack with only one of them earning any money. The situation is becoming in-

creasingly explosive. The arrival of new migrants can cause resentment and tensions among the more traditional immigrant communities who see their status lowered even further.

In the greenhouses in the Westland region of the Netherlands it is above all Bulgarians who have recently been arriving in large numbers, working mostly without a contract. These new migrants are paid as low as €2 per hour, compared to the €5 or €6 which was usual for undocumented workers in 1998. An official scheme exists which enables farmers to recruit Polish workers, but this has been taken up by very few producers, no doubt because they would have to pay higher wages.

It is very difficult to take action against abuses because of the increasingly fragmented organisation of the labour market. In the Netherlands, migrants are now often hired for a few hours or at the most a few days. They are recruited by agencies often run by members of ethnic communities living in the country. Anybody can form such an agency. Since the decision to put an end to the licensing system in 1998, the number of agencies has rocketed from a few dozen to 2,000.

Due to enlargement, the EU will be made up of a number of very rich and highly developed countries with a growing need for workers prepared to accept low-paid jobs refused by the population, and of another group of countries whose economy and standard of living are infinitely lower. This large 'internal' supply of cheap labour makes it less necessary to import workers from Africa or Asia.

It is clear that it is essential to throw greater light on the exploitation of undocumented migrants in agriculture and to ensure that they access to legal statuses which guarantee full rights on a par with natural workers. We must, however, be wary with regard to legal statuses for seasonal work. Such statuses have existed for many years throughout Europe. For example, since the '70s several thousand workers from Poland, Tunisia and above all Morocco have come every year in France for up to eight months. There are many abuses with these OMI contracts, too many to detail here. The fact that the contracts are nominative and the farmer can decide whether to employ the worker again next year ensures that he does not dare protest against poor conditions or unpaid hours. He must present himself at the OMI office in Morocco within a week of the end of his contract and is therefore unable to take his employer to court. He can come legally to France every year for 25 years and have no right whatsoever to apply for a residence permit, whereas a migrant who has been illegally in the country for ten years has some chance of being regularised.

Recently some OMI workers have decided to take their employers to the labour court. They have been greatly helped in this by the Collective for the Defence of

Foreign Workers in Agriculture which was created two years ago in southern France.

In Austria the 'Erntehelfer' (harvest helper) status established in May 2000 enables 7,000 seasonal workers to come for up to six weeks. There is practically no social insurance, the wages are low and the unions absent. The employer saves over 15% because he does not have to pay social charges. In 1991 Germany introduced the status of seasonal worker for the agriculture, forest and hotel sectors. The contract is limited to three months. In theory there is a ceiling on the number of permits, but the government has introduced a whole series of exceptions, such as 'the danger of bankruptcy due to an over-costly workforce' ...

Such seasonal and temporary work statuses cement an intolerable form of segregation on the labour market. As Alain Morice, a French researcher on Migration and Society, puts it, "one can imagine that little by little, by adopting one derogation after another, by gradually dismantling the Labour Laws, it will no longer be necessary to resort to illegal workers for the simple reason that the very notion of legality in the field of labour rights will have so strongly receded. When you look, for example, at agricultural work, you can see that the French 'Rural Code' includes a vast mass of derogations weakening positive labour rights".

A new form of underclass of temporary workers will replace each other in a sort of permanent rotation of precarious existence, without the same rights as other workers. Migrants will above all not have the right to live in a normal way with their family.

Combating this form of exploitation is not easy and most of those exploited do not want attention drawn to their situation. They rightly fear that the only official response will be to deport them, rather than any condemnation of the practices of their employers. This is a problem intimately linked to a brutally competitive and consumer-oriented society and can only be fully tackled by a radical change in attitudes.

Perhaps we should turn to the United States for inspiration. There a major campaign has been launched by migrant workers in Florida, mostly from Central America, picking tomatoes in appalling conditions in the biggest tomato growing area in the United States. They discovered that the largest buyer of these tomatoes is Taco Bell, one of the biggest fast-food restaurant chains in the U.S. They have organised nation-wide information and demonstration tours with the slogan "End sweatshops in the fields!" and have called for a boycott of Taco Bell.

CHAPTER 5

UNDOCUMENTED MIGRANTS IN THE CONSTRUCTION SECTOR IN EUROPE

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The construction sector in Europe is one of the biggest employment sectors for undocumented migrant workers. The use of undocumented migrant workers by some employers is a part of a bigger black or grey economy in the sector. The black or grey share of the construction sector is estimated by experts to be 40% in Italy and 35% in Germany. The same goes for many other countries in Europe.

Many of the workers in the clandestine part of the sector are residents – some officially jobless. Others are so-called ‘posted workers’ with a working permit. They are officially employed but are forced by their employers to work in illegal working conditions, below the legal minimum wage.

But a very large part of the black work is performed by undocumented migrant workers who come into the country as ‘tourists’, lose their legal stay or are smuggled or trafficked. Some of them are self-employed and seek small construction jobs from private customers on a day-to-day basis. But most work under the control of gangmasters and employers.

Why do so many employers in the construction sector make use of undocumented migrant workers? Many employers deny that their motive for employing undocumented workers is profit. Most will tell you that they have been forced by market forces to seek cheaper labour or haven’t found anybody willing to do the job. Some even speak of humanitarian reasons.

Even if a price pressure exists and there may be a labour shortage in some regions of Europe, those motives are not the real ones. All of these employers still make a bigger profit than they could from legal employment and pay their workers less than they should. So, the true motive for employing undocumented workers is simply greed.

³⁷ The German trade union for construction, agriculture, forestry, janitorial and environmental workers.

Subcontractors who employ the legal workforce in Europe in the construction sector can earn a profit of a meagre 1-8% or perhaps 10%. But if you make use of undocumented migrant workers you can earn a profit between 30-70%, depending on the country you're working in, the country of origin and the type of undocumented workers (trafficked, bonded and mafia-type controlled or not).

This profit rate can be compared to the usual profit from drug dealing or pimping. That's the reason why organized crime is getting more and more involved in the illegal part of the sector. The true motive for all these employers is greed.

There are two other important parties interested in the existence of this subcontractor system. General contractors play an active role. In recent years many European general contractors reduced their own workforce by large numbers. Today they only employ engineers, overseers and specialists, in short all those who are needed to guarantee a certain level of quality. The workers who do the more simple work on the site are provided by a cascade of subcontractors, some of them legal and some illegal.

The subcontractor at the end of the chain who employs the undocumented workers offers his service at unbeatable prices, because he can calculate the prices without any social security contributions, taxes, paid holidays and minimum wages. The general contractor and all others in the cascade who pass down the job to the last subcontractor earn their part of the profit and the general contractor can offer his services at a cheaper price.

All of them know exactly what is happening at the end of the chain but their risk is near zero: no trace will be found by the police, because nothing is written down and the subcontractors will not talk about it.

The other interested party in the construction market is the consumer. Many consumers are not willing to pay the necessary price for legal work at every stage and tend to look away when illegal employment of every kind is the result. Even most city and state governments look away when it comes to their own sites.

But again, price pressure is only a side factor in the game, because in most cases the job is not given directly from the end consumer to the undocumented migrant worker and in most cases you'll find local contractors in between. So the price argument told from the contractor's side is more or less rubbish.

The working and living conditions of undocumented migrant construction workers speak for themselves. Usually they earn much less than a legal migrant or resident worker. In the German construction labour market, wages for undocumented migrant construction workers range from €1 to €5 per hour, very seldom €6 or €7. In comparison legal workers earn between €9 and €17 and the minimum wage is €10.12 in the western part and €8.75 in the eastern part of Germany.

The same differences can be found in Portugal and Greece, the countries with the lowest construction wages in western Europe, as well as in Poland, Czech Republic and so on, where the wages paid for undocumented Albanian, Moldavian, Ukrainian and Russian workers range from 10–50% of usual wages for residents.

Even in Russia, Romania and Bulgaria, resident construction workers are increasingly being replaced by cheaper undocumented migrant workers, which leads to more undocumented migration to Western Europe from those countries. Several cases have been reported of the employer paying much less than promised. The risk for undocumented workers of never getting paid at all is enormous. Some employers call the police themselves when the work had been done to get rid of the undocumented migrant workers as cheaply as possible.

Undocumented workers have to pay high rents for their clandestine accommodation and in many cases have to pay additional fees to labour agents and mafia-type gangmasters. Consulate officials of the country of destination have to be bribed to issue false tourist visas.

This all results in debt bonded labour for many undocumented workers. Many cases have been reported of undocumented workers who wanted more money or complained about other working conditions and were threatened by gangmasters with severe consequences for their families in their country of origin.

Health and safety at work is a special problem. Construction sites are one of the most dangerous workplaces. Some undocumented workers have never worked on a construction site and don't know much about the prevention of accidents or job-related illnesses. The direct employer usually doesn't take care of this and the general contractor is also uninterested. When an accident occurs and an undocumented worker is the victim and especially when a mafia gangmaster is involved as the boss, the victim will be treated inadequately or will be left unconscious at the hospital door, or might even be murdered by not being treated medically at all. Policemen who deal with unidentified dead bodies today often find traces of recent work at a construction site.

Working time regulations and paid holidays are of course also unknown in the clandestine part of the construction sector. 60 hours per week or more is the usual working time for undocumented workers. This adds to the danger of fatal accidents.

Of course all this leads to unfair competition and unemployment in the legal part of the sector. The first victims of the downward spiral in Germany were legal migrant construction workers, who were fired by the contractors to be replaced by the cheaper workforce of illegal subcontractors.

Authorities are not very helpful. They often prefer to chase undocumented workers instead of chasing the employers. This is mainly due to structural reasons. Enquiries to uncover the chain of employment are difficult and time-consuming. Employers in general and especially big construction companies have good lawyers. And in most countries the success of the individual police officer or control authority is measured by the sheer number of cases. So it's easier to polish up your statistics by reporting huge numbers of arrested and deported undocumented workers as individual cases instead of spending weeks with one case concerning the chain of employment.

In Germany the law is on the side of the illegal employer. While the undocumented migrant worker is arrested, subject to a criminal court ruling and deported after some days in jail at his own costs, the employer usually will get away with a small fine if the number of workers is not too big and the employment wasn't too long, which he will always tell the authorities as soon as the workers are out of the country. Normally the fine is lower than the unpaid wages at the moment of discovery.

If the undocumented worker finds somebody who claims the wage for him, the employer will still get away if he can convince the labour court that he didn't take the initiative for the illegal employment. Then the court will speak of an illegal contract with no obligations for either side. But even in clear cases the authorities usually will do nothing to give the victim any advice or assistance to get his wage paid.

A change in legislation is needed. I've heard that in one European country – which might be the Netherlands - the undocumented migrant worker now is entitled to claim the full usual wage for the full time of his employment without any possibility for the employer to get out and gets cost-free legal assistance for this. I think this should be introduced to all member states by European legislation and I appeal to EP members to take an initiative on that.

For trafficked workers even more has to happen. They should be encouraged to report to the police by giving them cover, free legal assistance and legal stay for them and their family if they want to stay. Otherwise they are indirectly forced to support the mafia by lying to the authorities when caught on site.

Many tell us that regularisation of all undocumented migrant workers is the best and only way to address the problems of the individual and the labour market. Though I admit that a general regularisation helps the individuals to get a legal stay and is necessary for long-term undocumented out of humanitarian reasons, I don't believe that it will stop illegal employment practices. But of course, I'm not against this.

Former undocumented workers will only add to the unemployed legal workforce after regularisation. A regularised migrant is no longer that vulnerable and will see to it that he earns a normal wage, so the illegal employer is not interested in his continued employment. The illegal employer will immediately react and import fresh undocumented migrant workers to replace the regularised worker to keep up profits. Those will be lured into undocumented migration with the argument that there might be a chance to become regularised sometime in the future.

By the way, our experience with Polish, Ukrainian and Russian workers has shown that most do not come on their own initiative but are lured by local labour agents with the promise of more or less legal work. This has been the experience in countries which regularise undocumented migrants from time to time.

Thus, a general regularisation without accompanying measures will not really solve the problem of illegal employment and greedy gangs. And of course, it should never be combined with an amnesty for the employers and gangmasters. I prefer an individual solution in the form of a fair deal. When an undocumented migrant worker reports to the police and uncovers his employer's identity and criminal activity, he shall be given a legal stay, a working permit and cover, if needed.

What can unions do to change the situation? I think it is time to think about an international trade union for posted and undocumented migrant workers. I appreciate the work of the humanitarian NGOs for migrants. But what is needed is more than social work, where migrants are only an object. We need an organisation where they themselves can act against fraudulent employers and exploitation and obtain all the necessary assistance. My union is presently discussing a new approach with several other unions.

CHAPTER 6

UNDOCUMENTED DOMESTIC WORKERS IN PRIVATE HOUSEHOLDS: AN OVERVIEW OF DEMAND AND STATE RESPONSE

Bridget Anderson, Institute of Social and Cultural Anthropology, University of Oxford.

1. Overview of Sector

Domestic work is a huge and very varied employment sector including live-in and live-out work, caring and cleaning, and employment relations are cloaked in a wide variety of ways – au pairs, ‘helping out’, cash in hand and so on. Migrants form a large proportion of workers in this sector, but also so do working class citizens, particularly black and ethnic minority citizens. While it is a very feminised sector, men, especially migrant men, work in domestic work, and are very invisible within it – services tend to be offered on the (correct) assumption that the majority of clients will be women. It is a sector that is growing for many reasons: demographic, social and cultural reasons – ageing populations, changes in family structures, female employment, increasing demands of work and lack of consideration for caring responsibilities, growth in consumption, and growing discrepancy between rich and poor.

Different states are becoming interested for their own reasons in this sector, wanting to regulate and formalise it in different ways. There are also ways in which the state is facilitating the development of the sector: particularly in the proliferation of cash for care schemes funded by national and provincial governments that are likely to assume increasing importance as populations age. In this paper I will focus on live-in carers and cleaners, because this is the area where undocumented migrants tend to congregate, and where they are particularly vulnerable, but much of what I say will be more generally applicable.

Our appreciation of the position of undocumented workers in this sector must recognise that, despite its importance and proliferation, domestic work is rarely regarded as ‘proper’ work. It is not ‘productive’, but is concerned with the reproduction of the stuff of everyday life, the reproduction of workers, true, but also of broader social and cultural relations. It encompasses care of the elderly and disabled, the facilitation of consumption in the home (polishing and arranging our

many possessions, washing up and preparing meals), and the reproduction of status (imagine if all those politicians were wearing dirty, crumpled shirts). This work is visible, but not important – and it is very expensive to recognise. Estimates and satellite accounts variously put the value of domestic labour at over 100% of GNP. This contradiction lies at the heart of our capitalist economies. We can see it in our own practise – how often can we afford to arrange to cover the cost for childcare or provide it at our conferences?

2. Why Is It That ‘Illegal’ Workers Are So Common in the Domestic Work Sector?

There are two issues here:

- Why there are so many migrants in domestic work;
- Why so many of these migrants are undocumented.

We must recognise that migrants, internal and international, work in private households all over the world, not just in Europe and North America, and not just in wealthy or middle class households either. Some of the reasons for employing migrants seem clear: domestic work typically involves long hours for low wages – but there are many citizens prepared to work under these conditions, so we need also to look at additional constraints for migrants that make them desirable employees. What is euphemistically termed ‘flexibility’ is important – not just long hours, but hours when and if you need them, say if the office keeps you late at work. Racism and its role in domestic service is worth a whole conference, but just to say for now that many employers find it easier to share their house with a migrant and that domestic work is seen as appropriate labour for certain kinds of women. Reliability: it may sound obvious, but migrants, particularly if they are undocumented, are likely to be separated from their families. This is an important consideration: if you’re looking for someone to become ‘part of a family’ the requirements of another family become very intrusive. A person who is physically separated from their family cannot make their sick child a priority however much they may worry. Their employer is absolved from personal responsibility, from the necessity of asserting their requirement to go to work over their employee wanting to be with their child. That is just not a possibility. Many employers hire live in workers because they require ‘flexibility’, that is they want somebody available outside working hours, particularly for caring work. This must be seen within the context of the kinds of demands, long hours and weekends, that working life currently places on people. How did those of us with caring responsibilities arrange to be in Brussels by 9am (in the UK half term holiday!). Typically, those employing live-in caring workers want the worker to form a relationship with the person cared for and this demands that they be likely to stay for some time – if little Johnny loves his nanny, her leaving can make more than logistical

problems for the household. Migrants are, as research that I'm doing with Julia O'Connell Davidson is revealing, viewed as more likely to stay, and questions of labour retention are very important to employers. Let us remember that in the informal sector, unregulated, low paid, and often unorganised, a worker's only means of control is to withdraw their labour, whether to go for better wages or conditions, or simply to leave an exploitative or abusive relation. This can be difficult for migrants, particularly newly arrived and undocumented, partly because they do not necessarily have a network of contacts to access other jobs – though this can soon be developed as long as they are not kept isolated, but crucially because of immigration laws.

Broadly speaking immigration laws increase employers' power in one of two ways: by making the worker undocumented or by making them dependent on the employer for their immigration status. In many countries there are no work permits available for domestic workers despite the demands for this labour and indeed, specifically for migrant labour, forcing people to migrate illegally, or to work illegally even if they have a legal immigration status. In countries where there are work permits available the worker must have an employer willing to support their application for renewal. Under both these regimes the employer has not only the power to hire and fire, but the power to report and deport. In the latter case it could be argued that an employer of a domestic worker has no more power than that given to any employer of migrant labour. So for example in the UK a work permit is usually given to a company rather than an employee, no matter how lofty a managerial status the employee has. But one must bear in mind the unique relationship between a live-in migrant domestic worker and their employer, their dependence on their employer, not only for their employment, but for their accommodation and basic necessities of life, and, because of the isolating and intense nature of the job, often for their human interaction and affirmation too.

3. Working Conditions

Kalayaan, an organisation based in the UK that works with migrant domestic workers, has gathered some statistics on domestic workers that are not particularly unusual. I have also brought together some statistics from a questionnaire completed by employers on what they consider to be rights of domestic workers. Bottom line, as expressed by a Swedish female purser, when asked why she employed a migrant:

They are generally more flexible than Swedes. Swedes are so governed by rules. It is unthinkable for a Swede to work during nights or weekends. Migrants don't question the kind of work they are expected to perform. Swedes on the other hand always talk about rules formulated by their unions.

4. State Response

European states respond differently, both to the demand for migrant domestic labour and to the presence of migrant domestic workers. We must appreciate that state intervention in the domestic labour sector is a very tricky business. Firstly because increasingly the state is not supposed to intervene in labour markets at all which are supposed to be self-regulating – with the huge exception of migrant labour of course, from which the domestic labour market must, we are told, be protected. Secondly, because this is not ‘real’ work: I’ve mentioned the lack of recognition given to reproductive labour which means that demand is very much hidden or not constructed as demand for labour (the importation of au pairs to do caring and cleaning work which is represented as cultural exchange is an interesting example of this). But it is also in part a reflection of the difficulty in commodifying domestic labour, and live-in caring labour in particular. Relations within the household are extremely difficult to regulate by contract. The home is constructed as governed by mutual dependency and altruism, in opposition to the instrumentalism and the self-interest of the market, encapsulated by contract. For instance, when employers are paying for childcare, they are not simply looking for a good worker motivated by career development and good pay packet, but a person who will care for the child, provide an intense and loving personal relation – indeed that is one of the perceived advantages of paying for care in one’s own home rather than using nurseries. But can money buy love? Of course there are model contracts governing the relationship in several European states, and quite right too, that is a way forward, but in practice these do not manage to capture important elements of the relationship. As one employer put it “Adel, the contract is only paper. What is important is what is between me and you”. Thirdly, for issues that can be contractually covered, how is the contract enforced and regulations implemented in the private household? How can a worker assert her rights against an individual employer in the private household? For the state is not supposed to intervene in the family. There are plenty of exceptions to this, particularly as those who work with migrants know, but it still holds true for many middle class households. Indeed, it is worth pointing out that for undocumented migrants this is an important advantage to working in such households, which you can be confident that the police will not raid and for all the isolation and exploitation, at least, provided you are a good worker, not be afraid of a knock on the door. This leads to all kinds of curious anomalies for caring work – in the UK for instance a childminder may not smoke in front of the children they are caring for – unless they are their children. The reasons for the hypocrisy and double standards of the state response to the demand for domestic labour are complex.

PART 3

WHAT RIGHTS FOR UNDOCUMENTED MIGRANT WORKERS?

CHAPTER 7

RIGHT TO FAIR WORKING CONDITIONS

There is a difference between the right to work and the right to fair working conditions. Concerning the right to work, Article 23 of the Universal Declaration of Human Rights (UDHR), for example, is said only to apply to workers ordinarily residing in a country. But since many undocumented migrants are workers (who work in the informal labour market), the right to fair conditions of work is very relevant and important. The principle of safeguarding at least safe and fair working conditions such as remuneration for all workers, also for those who are undocumented, is expressly protected in instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention for the Protection of the Rights of All Migrant Workers and the Members of Their Families (ICMW) and the ILO-Convention No. 143, all of which attempt to promote equality amongst migrant workers and nationals.

The ICMW is a very important instrument for the protection of undocumented (and documented) workers and their families from exploitation and the violation of their human rights. It entered into force on July 1, 2003, and is binding for the 22 countries that have ratified (in order of ratification): Egypt, Morocco, Seychelles, Colombia, Philippines, Uganda, Sri Lanka, Senegal, Bosnia-Herzegovina, Cape Verde, Azerbaijan, Mexico, Ghana, Guinea, Bolivia, Uruguay, Belize, Tajikistan, Ecuador, El Salvador, Guatemala and Mali. Ten countries³⁸ have signed the convention, the first step towards ratification.

In the ICMW, inhuman living and working conditions and physical abuse that many migrant workers endure are covered by the reaffirmation of their right to life (Article 9) and prohibition against cruel, inhuman or degrading treatment or punishment (Article 10) as well as the prohibition of slavery or servitude and forced or compulsory labour (Article 11). Migrant workers are to be treated as equal to the nationals of the host country concerning remuneration and conditions of work (Article 25), and have the right to join trade unions and any other associa-

³⁸ Bangladesh, Burkina Faso, Chile, Comoros, Guinea-Bissau, Paraguay, Sao Tome & Principe, Sierra Leone, Togo and Turkey.

tions with a view to protecting their economic, social, cultural and other interests (Article 26).

International Convention for the Protection of the Rights of All Migrant Workers and the Members of Their Families

Article 25

1. Migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and:
 - (a) Other conditions of work, that is to say, overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and any other conditions of work which, according to national law and practice, are covered by these terms;
 - (b) Other terms of employment, that is to say, minimum age of employment, restriction on home work and any other matters which, according to national law and practice, are considered a term of employment.
2. It shall not be lawful to derogate in private contracts of employment from the principle of equality of treatment referred to in Paragraph 1 of the present article.
3. States Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle by reason of any irregularity in their stay or employment. In particular, employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of such irregularity.

Reference to the right to fair and just working conditions for all workers is also made in the International Covenant on Civil and Political Rights (ICCPR), which forbids any forced or compulsory labour (Article 8) and attributes the right to everyone to recognition everywhere as a person before the law (Article 16).

CHAPTER 8

FORCED LABOUR AND MIGRANT WORKERS

Roger Plant, Head, Special Action Programme to Combat Forced Labour, ILO, Geneva.

This paper addresses in particular two issues. First, what are the minimum standards to protect workers from forced labour? Second, what strategies can be developed to this effect? These are two central issues at the heart of the ILO's new global programme against forced labour, which commenced just over a year ago in response to a rising need in many parts of the world, including Europe.

1. Standards Against Forced Labour

International standards, whether of the United Nations or the ILO itself, can be presented quite briefly. Of more importance is the need to adapt these standards creatively to the needs of the modern world, and to new vulnerable categories of workers, especially irregular or undocumented migrant workers.

The ILO has two conventions against forced labour, one adopted 73 years ago in 1930, the second in 1957. The first, Convention No. 29, contains the basic definition of forced labour which is still considered valid today. Forced labour is "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily". Please forgive the lack of gender sensitivity, from an age-old instrument. There are certain exceptions such as prison labour imposed after a court sentence, compulsory military service, or minor communal services considered as normal civic obligations.

The second convention – adopted at the height of the cold war, and just over a decade after the Nazi concentration camp era – did not change the definition of forced labour. Rather, it emphasized the urgency of the immediate abolition of forced labour for political or ideological purposes. Ratifying states undertook to suppress any form of forced labour as a means of political coercion or education, or as a punishment for holding political views ideologically opposed to the existing system; as a method of mobilizing labour for purposes of economic development; as a means of labour discipline; as a punishment for having participated in strikes; or as a means of racial, social, national or religious discrimination.

The two ILO instruments on forced labour have to be considered together with the two League of Nations or UN Slavery Conventions, adopted at very similar periods. A 1926 Convention proscribed more traditional forms of slavery. A 1956 UN Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery is of more relevance for today's discussion. It calls on states to abolish progressively, and as soon as possible, such practices as debt bondage and serfdom. This is the first attempt to grapple with the subjects of debt bondage and debt servitude in international law. Debt bondage is defined as "the status or condition arising from a pledge by a debtor of his personal services or those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined". In fact, as I shall argue later, it is of much importance in legal terms for understanding the kind of forced labour and modern slavery that can affect migrant workers in the continent of Europe today.

In looking at these definitions, we have to understand the historical context. The earlier instruments were concerned mainly with abuses by colonial powers, and with the need to protect indigenous workers against such abuses. The ILO's second convention was even more concerned with the state, as the institution which exacts forced labour for political purposes. But today's situation is different. Most coercion against workers is exacted by private agents and enterprises, often in the black and shadow economy, and in a disturbing number of cases linked to organized crime. In these cases the duty of the state is to pass the appropriate legislation against forced labour, to identify and prosecute the offenders, to release and rehabilitate the victims, and to tackle the structural causes of the problems in accordance with the circumstances of each country.

Seen in this light, a highly relevant standard is the so-called 'Palermo' or 'trafficking' Protocol of the year 2000, supplementing the UN Convention against Transnational Organized Crime.³⁹ This instrument is about to enter into legal force, having recently received notice of its 40th ratification, the minimum number needed to enter into force. This Protocol defines "trafficking in persons" as the "recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation". Exploitation in turn is defined as, "at a minimum, the exploitation of the prostitution of others or other

³⁹ Its full title is the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (United Nations, 2000).

forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”.

This protocol is now causing UN Member States, in particular in Europe at present, to revisit their criminal laws. Trafficking, as we all know, is very much in the international limelight at present. The media attention, however, tends to be almost all on the plight of the young women or girls trafficked into sex slavery, into the brothels and massage parlours of the main European cities. The first European legislation, in Belgium and Italy for example, considered the trafficking paradigm as applicable only to sexual exploitation. Slowly but surely, though, analysts and policy makers are turning to the other forms of trafficking, for forced labour and labour exploitation. The Dutch Ministry of Justice will be undertaking a study into other forms of slavery and labour exploitation in the Netherlands, beyond the sex sector. The German government has requested our assistance in clarifying the concept of forced labour, as an element in the new penal code definition of trafficking in human beings. The governments of Sweden and Switzerland are currently working along similar lines. Further east, Russia's Duma has drafted a new basic law on trafficking, covering debt bondage, forced or compulsory labour, and slavery. In the present Russian draft, labour exploitation in home servitude and catering, production, agricultural and criminal business is listed among the activities where the victims of trafficking can be subject to criminal exploitation.

2. Definitional and Strategic Dilemmas

The ILO view is that its own definition of forced labour is flexible enough to cover modern forms of coercion. Certainly its supervisory bodies responsible for the application of conventions have progressively taken on board such concerns as trafficking, debt bondage and bonded labour. Some people, however, feel that new instruments are necessary. Concerns are also expressed about the 'trafficking paradigm'. The agencies and institutions involved in work against trafficking generally assume that, perhaps after the prosecution of the traffickers, the victims will be returned home. They may, in the case of victims of sexual exploitation, be given a degree of short-term protection. At the end of the road, the assumption is that they will be repatriated and somehow rehabilitated.

Many people also question whether forced labour as such exists in European destination countries. There is much anecdotal reference to trafficking for labour exploitation in garments and textiles, construction, agriculture, the entertainment sector and the hotel industry. There have been very few systematic studies, a deficit that our own ILO programme against forced labour is now trying hard to remedy. And there are very few complaints, for very simple reasons. Under the current legal and political situation, there is no incentive for a forced labour victim to

register a complaint. For irregular and undocumented workers, the most likely outcome will be deportation.

A further problem is that the victims are very often in ethnic enclaves. The clearest example is the smuggled or trafficked Chinese workers, in France and Italy, Israel, Russia and elsewhere. Our first pilot study, carried out by a Chinese lawyer in France, concluded that the conditions of recruitment and employment were indeed forced labour, but they may not be perceived as such. And there is a question mark over when and whether the conditions are definable as debt bondage, under the UN Slavery Conventions. Chinese undocumented workers and their families incur huge debts of up to USD 40,000. Working hours and living conditions are horrendous. Workers can be confined. There is widespread evidence of threats and violence against workers and their families back home, in the case of late payment of debt. But most Chinese workers appear to see light at the end of the tunnel, assuming they will work off the debt over a period of between five and ten years.

3. Strategies

Finally a few words about strategies, and in particular the strategic approach of our own Special Action Programme against Forced Labour.

As with all work on trafficking, there is a need to work across the cycle in origin and destination countries. In destination countries we need rigorous case studies, sometimes of a general nature, sometimes together with a particular ethnic group, and sometimes by the industrial sector. We have launched these studies in a number of Balkan countries, in France, Germany, Hungary, Russia, Turkey and the United States. Without better facts, it will prove impossible to move forward.

Second, there is a need for balanced assessment of labour demand in different regions and sectors, taking account of demographic projections and new production techniques. Most rational assessment knows that migrant workers, large numbers of them currently undocumented, do the jobs that the nationals of destination countries won't do, work for far lesser wages, and present no competition for the domestic labour force. Moreover, it is not difficult to predict that the need will increase, with the ageing societies of Western Europe. And yet xenophobia against these much-needed workers is on the rise almost everywhere. Of equal importance, the imbalance between migration policies and labour demand in certain sectors is creating the preconditions for trafficking. On this issue, one needs to convince reputable businesses that better managed migration is in their own interest. At the recent OSCE Economic Forum in Prague, there were some interesting discussions as to the extent to which labour trafficking and organized crime are penetrating legitimate as well as 'cowboy' businesses. But some involvement of

employers' as well as workers' organizations will be imperative for real progress on these issues.

That trade unions need to be more involved, is an obvious point. In the ILO we have seen signs of positive international and national trade union involvement, in agriculture and construction amongst other sectors. Trade unions can strengthen themselves in the long term, by incorporating migrant workers within their ranks and taking their issues on board.

And of course – an obvious but still contested point – labour inspection, monitoring, and some regulation of employment services and contractual systems are a *sine qua non* for eradicating the modern forced labour to which undocumented migrants are subjected. In some countries deregulation has gone so far that labour inspection is almost non-existent, and private employment agencies can operate practically without controls. No one wants to return to state monopolies over all employment services, the bugbear of private enterprise. But nor do we want a proliferation of the employment-cum-tourist agencies that trick young women into brothels, or Chinese and other migrant workers into sweatshops. This may not be a popular issue today, but it has to be driven back onto government agendas.

In our own activities, when we identify the victims of forced labour, we are aiming to develop integrated programmes of action in the poorer origin and wealthier destination countries. This combines research, community development, awareness raising, victim identification and support, labour market analysis, and a contribution to law enforcement through the strengthening of labour institutions. Above all, we want to ensure that these social and labour concerns are given the same weight as border and security concerns, when migrant workers are dealt with.

CHAPTER 9

THE SITUATION OF UNDOCUMENTED PERSONS IN THE U.S.: A PRACTICAL OVERVIEW

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1. Introduction

America is a nation of immigrants. This sentiment is universally accepted and recognized by Americans regardless of political affiliation or ideology. During the 1990s, there were record high numbers of immigrants coming to the country; over 13 million immigrants⁴⁰ entered the United States – more than one million per year. According to the United States Census of 2000, 31 million foreign born persons were living in the U.S. as of the date of the census, documented and undocumented, representing 11% of the entire population. It has been estimated that the undocumented population may be as high as 10 million persons, and half of that number is Mexican nationals.⁴¹

Undocumented persons are those persons who either enter the United States without inspection, the majority through the U.S./Mexican border, and those persons who enter the United States with documentation which subsequently expires or becomes invalid. It is important to note that under the United States Constitu-

⁴⁰ The terms immigrant, migrant and noncitizen in this paper include documented and undocumented persons. Documented immigrants are those persons who enter the United States, are inspected and admitted formally. Documented persons include lawful permanent residents, non-immigrant visa holders, asylees, refugees and persons paroled into the United States (parolees).

⁴¹ It is difficult to determine with any precision the number of undocumented persons living and working in the United States. In 1996, the Immigration and Naturalization Service (INS) estimated that as of October 1996 there were 5 million undocumented migrants in the United States, with an estimated growth of 275,000 more persons per year. U.S. Dep't of Justice, 1998 Statistical Yearbook of the Immigration and Naturalization Service 239 (2000). However, according to a press release issued in January 2003, the INS admitted miscalculating that number in the past and estimates that the current population of undocumented persons is 7 million, with an annual growth of 375,000 more persons per year. See, Press Release, INS Releases Updated Estimates of U.S. Undocumented Resident Population (Jan. 21, 2003) available at <http://bcis.gov>, last visited on June 29, 2003.

tion, all persons born on U.S. soil are considered citizens.⁴² Therefore, the status of an undocumented immigrant does not pass from one generation to another.

The major destination states in the United States for immigrants, documented and undocumented, are: California (28%); New York (12%); Texas (9%); Florida (9%); New Jersey (5%), and Illinois (5%).⁴³ Despite statements to the contrary, the possibility of accessing government public benefits does not appear to drive the migration choices of immigrants. Although the states listed above have the highest numbers, many migrants have also settled in new, non-traditional growth states which have relatively weak safety nets for immigrant families. These include North Carolina, Georgia, Nevada, Arkansas, Utah, Tennessee, Nebraska, Colorado, Arizona and Kentucky.⁴⁴ The primary factor influencing these destination choices is the availability of jobs.

Despite the continued and increasing need for a migrant work force, legislative, executive and judicial officials continue to pass restrictive laws, implement even more restrictive policies towards immigrants and issue disturbing court opinions, especially after the events of September 11, 2001. Several laws and court decisions over the last fifteen years have resulted in serious adverse consequences for immigrants wishing to permanently settle and make their lives in the United States. Starting in 1986, employers – prior to hiring an employee – were required to demand proof that their employees had the legal right to work in the United States.⁴⁵ Before 1986, there were no laws either sanctioning employers who hired undocumented workers or laws requiring such workers to show proof of legal status. The 1986 laws had the unintended effect of the creation and subsequent growth of a huge false document industry.

During the 1990s, the United States Congress drastically reduced the possibilities for unskilled undocumented workers to obtain permanent residency through sponsorship by their employers in what is known as the labour certification process.⁴⁶ As a result of these legislative changes, the waiting periods to obtain permanent legal status for unskilled workers – those whom the employers are willing to sponsor – have increased from a period of a few years to over ten years, significantly reducing the possibilities for residency.

⁴² U.S. Const. 14th Amendment.

⁴³ Fix C. & Passel, "Immigrant Families and Workers: Facts and Perspectives", Brief No. 2 (Urban Institute 2002) available at <http://www.urban.org>, last visited on June 29, 2003.

⁴⁴ Ibid.

⁴⁵ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986).

⁴⁶ Through this process, employers in the United States can sponsor an employee or potential employee for lawful permanent residence upon proof that there are insufficient U.S. workers to fill the position.

Finally, provisions contained in the Illegal Reform and Immigrant Responsibility Act of 1996 bar immigrants in the United States - unlawfully for a period of six months or more who travel outside and seek readmission - from re-entering for periods of up to ten years, depending on the length of time that they were out of status.⁴⁷

2. Labour Situation and the Rights of Undocumented Workers

Prior to 1986, employers were not prohibited from hiring undocumented workers nor were undocumented workers required to obtain authorization to work in the United States. However, with the passage of the Immigration Reform and Control Act of 1986 (IRCA) and subsequent implementing regulations, employers are now required to obtain proof of each employee's right to work in the U.S.⁴⁸ Such proof must be documented on a governmental form, the Employment Eligibility Verification Form, known as an I-9 Form, maintained on the premises of the employer and made available upon request for inspection by the government. Employers who hire persons not authorized to work in the United States are subject to receiving fines up to \$11,000 per unauthorized hire.⁴⁹

Employees in the United States are authorized to work either automatically - as United States citizens or lawful permanent residents - or with authorization from the Bureau of Citizenship and Immigration Services (BCIS). Persons who are eligible for work authorization include asylees, refugees, certain non-immigrants whose temporary visas permit them to work and other persons granted permission because of a pending asylum application or temporary permission to stay in the United States.⁵⁰

All persons in the United States, regardless of immigration status, have the right to organize and join labour unions and to engage in collective bargaining. Citizens, lawful permanent residents, documented and undocumented workers generally have the same workplace rights under many labour and civil rights laws in the United States. These rights include minimum wage and overtime pay, disability

⁴⁷ This provision of the 1996 law takes effect when a person leaves the country and attempts to return. Persons in an unlawful status for six months to a year are subject to a three year bar. Persons in an unlawful status for over a year are barred from returning for ten years. INA § 212(a)(9)(B)(i) [8 USC § 1182(a)(9)(B)(i)].

⁴⁸ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986); INA 274A [8 USC § 1324a]; 8 CFR § 274a.1(g).

⁴⁹ INA § 274A(e)(4) [8 USC 1324a(e)(4)].

⁵⁰ The categories of persons who must request work permission in the United State are listed in 8 CFR § 274a.12. The Code of Federal Regulations (CFR) is available on the website of the Bureau of Citizen and Immigrant Services at <http://www.bcis.gov>.

pay and compensation, safe worksite conditions and guarantees that the workplace will be free of discrimination based on race, gender, religion and ethnicity.⁵¹

Although undocumented workers have many of the same rights as documented immigrants and U.S. citizens in the workplace, they face particular problems when they seek to exercise those rights. At times, employers use the threat of deportation proceedings against undocumented workers who are active in organizing and forming a union. Additionally, undocumented workers are afraid to file claims against unscrupulous employers who pay either below the minimum wage or, sometimes, do not pay at all. The threat alone of deportation – whether carried out or not – is often sufficient to discourage workers from exercising their rights.

A recent United States Supreme Court case has made the situation worse. In *Hoffman Plastic Compounds v. National Labour Relations Board*,⁵² the United States Supreme Court held that the National Labour Relations Board (NLRB) had improperly ordered back pay to an undocumented migrant worker. Jose Castro was one of several employees fired by Hoffman Plastic for union organizing activities. In issuing the decision, an administrative law judge (ALJ) found several unfair labour practices by the company, which subsequently appealed the decision to the National Labour Relations Board. The NLRB agreed with the ALJ and ordered Hoffman Plastic to reinstate the fired employees, including undocumented migrant worker Jose Castro, and provide them with back pay. During a subsequent hearing to determine the amount of back pay, the ALJ learned that Mr. Castro was an undocumented Mexican national who had borrowed a friend's birth certificate to obtain employment and, therefore, recommended neither reinstatement nor back pay for him.

The case was subsequently appealed to the United States Supreme Court which addressed the following question: Is an undocumented alien who, without the employer's knowledge, obtained employment by presenting fraudulent immigration documents to the employer, entitled to back pay as compensation for the employer's violation of the National Labour Relations Act – retaliatory firing for union organizing - even if the migrant worker was not authorized to work in the United States during the back pay period? The Supreme Court held that such a person is not entitled to back pay and found that the National Labour Relations Board improperly awarded back pay to Mr. Castro and reversed the lower court and administrative agency decisions ordering that the employer pay the amount in question.

⁵¹ For more information on immigrants and labour rights, visit the website of the AFL-CIO, a federation of U.S. unions, at <http://aflcio.org>.

⁵² 535 U.S. 137 (2002).

The AFL-CIO, a federation of North American unions with over 13 million members, has filed a complaint with the International Labour Organization (ILO) concerning the Supreme Court's decision in *Hoffman Plastics Compound v. NLRB*. The complaint alleges that the decision was a violation of ILO conventions that protect the rights of workers 'without distinction whatsoever' and against acts of anti-union discrimination. It is anticipated that the ILO will address the complaint and issue a decision in 2003.⁵³

As a result of the Supreme Court decision, undocumented migrants are even more fearful of pursuing claims against employers and of exercising their labour rights. Undocumented migrant workers are afraid to organize and form unions, to file wage complaints or to request worker compensation benefits as a result of a disability or injury caused by their employment. In the wake of the Hoffman decision, law firms representing companies and businesses around the United States are advising their clients that they may face less financial exposure for claims of employment discrimination and wrongful discharge cases involving undocumented migrants. In unpaid wage cases, attorneys representing employers are requesting that the courts order immigrants to disclose their legal status in the United States. Although many courts have denied such requests, others have ordered disclosure in cases involving unpaid wages, discrimination and workers' compensation claims.⁵⁴

3. Welfare Benefits for Undocumented Migrants

Prior to 1996, all noncitizens, regardless of immigration status, were eligible to receive federal and state welfare benefits. On August 22, 1996, former President Clinton signed into law the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).⁵⁵ This act provided for a comprehensive revision of the welfare laws of the United States as applied to citizens and noncitizens alike. Many provisions addressed issues relating to access by documented immigrants, refugees and undocumented immigrants to virtually all federal, state and local benefits. A major goal of PRWORA was to discourage immigrants likely to seek public benefits from entering the United States.

⁵³ See, Press release, AFL-CIO Files Complaint with United Nations ILO on Hoffman Plastic Supreme Court Decision Denying Immigrant Workers Rights (Nov. 8, 2002), available at <http://aflcio.org/mediacenter>, last visited on June 29, 2003.

⁵⁴ For a summary of cases, see, Mexican American Legal Defense and Educational Fund, National Employment Law Project, *Used and Abused: The Treatment of Undocumented Victims of Labour Law Violations Since Hoffman Plastic Compounds v. NLRB* (January 2003) available under Publications at <http://www.maldef.org>, last visited on June 29, 2003.

⁵⁵ Pub. L. No. 104-193, 110 Stat. 2104 (Aug. 22, 1996).

The law also shifted the responsibility for support of immigrants from the government to those persons who sponsor immigrants. Lawful permanent residents or citizens who apply for permanent residency on behalf of eligible family members (parents, spouses and children) are obligated to sign a complicated government form known as an Affidavit of Support, Form I-864, promising to support the sponsored family member for a requisite period of time after he or she comes to the United States. Under provisions contained in PRWORA, if the sponsored family member receives public benefits within a prescribed time period after entering the United States, the sponsoring family member who signed the Affidavit of Support is required under law to repay the amount of benefits received to the United States government.

In order to determine a person's eligibility for public benefits, the law distinguishes between qualified and unqualified immigrants. Qualified immigrants include the following: 1) lawful permanent residents (LPR); 2) refugees, asylees, persons granted withholding of deportation or removal, conditional entry (prior to April 1, 1980) or paroled into the United States for at least one year; 3) Cuban/Haitian entrants; and, 4) battered spouses and children with a pending or approved visa application under the Violence Against Women Act. Unqualified immigrants are all other persons who do not fall under the above-described categories, including persons authorized by the government to remain in the United States, and undocumented migrants.⁵⁶

The act barred most immigrants from receiving food stamps and social security income (cash assistance for the poor, elderly and disabled).⁵⁷ Under the law, lawful permanent residents are only eligible to receive federal public benefits after five years of legal residence in the United States as LPRs.⁵⁸ Refugees and asylees are eligible to receive federal public benefits without any restrictions. In order to determine a person's eligibility for these benefits, the agencies that provide the benefits must verify the legal status of the applicants.

Provision of welfare benefits has shifted from the federal government to the states. In response to the significant cuts in federal benefits, nearly half of the states have

⁵⁶ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 402(b)(2), 110 Stat. 2104 (Aug. 22, 1996), codified at 8 U.S.C. § 1621. Persons authorized to remain in the United States include non-immigrant visa holders such as tourists, students, diplomats, temporary workers and others.

⁵⁷ In 1997, Congress passed additional legislation reinstating benefits for documented immigrant children and elderly, disabled immigrants. The Agriculture, Research, Extension and Education Reform Act, Pub. L. No. 105-185, 112 Stat. 523 (June 23, 1998).

⁵⁸ Federal public benefits include any retirement, welfare, health, disability, public or assisted housing, post-secondary education, food assistance, unemployment benefit or any similar benefits to which payment or assistance is provided to an individual, household or family eligibility unit by an agency of the United States.

implemented substitute methods of assistance for immigrants, documented and undocumented. However, only a small number of states have been able to completely replace the lost federal benefits for unqualified immigrants and most of the state programs are limited to providing assistance to the elderly and children. Working-age undocumented adults remain unprotected.⁵⁹

4. Primary, Secondary and Post-Secondary Education

All children present in the United States, regardless of immigration status, have a right to attend public primary and secondary schools.⁶⁰ However, foreign students wishing to apply for and enter the United States with a non-immigrant student visa to attend public high school can only do so for a period not to exceed 12 months and must reimburse the school for the entire amount prior to issuance of the visa.⁶¹

Foreign students who wish to come to the United States and study must first be accepted at a university or college and then apply for and receive a non-immigrant student visa, an F-1 visa, in order to enter the United States.⁶² However, there is no requirement under the law that a person already in the United States be in a legal immigrant status in order to attend a university, college or vocational program. In practice, though, it is very difficult for undocumented persons to obtain post secondary degrees. Additionally, some states openly discourage admission of undocumented migrant students. For example, the Office of the Virginia Attorney General released a memorandum on September 5, 2002 that strongly encouraged all Virginia public colleges and universities to deny enrollment to students they believe to have an undocumented immigration status. In response to this memorandum and subsequent practices of some institutions in the state of Virginia, the Latino civil rights organization, the Mexican American Legal Defense and Educational Fund (MALDEF), filed a lawsuit against several officials from various Virginia public colleges and universities on behalf of students who have been or will

⁵⁹ For more detailed information regarding the impact of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, see, Fix M. & Passel J. (2002), "The Scope and Impact of Welfare Reform's Immigrant Provisions", Washington, D.C., The Urban Institute, available at <http://www.urbaninstitute.org>, last visited on June 29, 2003.

⁶⁰ *Plyler v. Doe*, 457 U.S. 202 (1982) (class action law suit brought on behalf of Mexican children who had entered the United States illegally and resided in Texas).

⁶¹ INA § 214(l)(1) [8 USC § 1184(l)(1)].

⁶² INA 101(a)(15)(F) [8 USC § 1101(a)(15)(F)].

be denied the right to attend the schools based on their perceived immigration status.⁶³

Most states require that students seeking admission into their state university systems present a social security number in order to matriculate. Most undocumented persons, including students, do not have valid social security numbers. Universities in the United States are very expensive and most students borrow money to pay the costs. In order to be eligible for financial aid, students must also generally present a social security number. Even if an undocumented person can overcome these hurdles or pay for his or her studies without any aid, upon graduation, it is almost impossible to obtain employment in his or her professional field because of lack of employment authorization.

Currently, there is debate in many state legislatures across the United States regarding whether to permit undocumented students to attend state universities as 'state residents' and, therefore, be eligible for lower in-state resident tuition rates and financial aid. There is support from both Democrats and Republicans for such measures. There is also a bill pending before the United States Congress, the DREAM Act, to permit those foreign students who successfully complete a university or college degree to obtain lawful permanent residency status.⁶⁴

5. Documenting the Undocumented, Social Security Payments and Taxes

5.1 False Documents

Immigration regulations require that all employers in the United States complete an Employment Eligibility Verification Form, known as an I-9 Form, for each employee hired, and maintain copies of these forms available for inspection by governmental authorities, upon request, on the premises of their business establish-

⁶³ Doe, et al v. Dr. Alan G. Merton, et al, Civ. Action No. 03-1113-A (E.D.Va. Sept. 3, 2003). A copy of the memorandum of the Office of the Attorney General is included in the complaint as an appendix. For more information on the case, visit the MALDEF website at <http://www.maldef.org>.

⁶⁴ For more information on these proposed bills, visit the website of the National Council of La Raza at <http://nclr.org> and the American Immigration Lawyers Association at <http://aila.org>. Enter 'Dream Act' in the search box of each website to access the information. Also, see, Jennifer Galassi, Dare to Dream? A Review of the Development, Relief, and Education for Alien Minors (DREAM) Act, 24 *Chicano-Latino L. Rev.* 79 (Spring 2003); Janice Alfred, Denial of the American Dream: The Plight of Undocumented High School Students within the U.S. Educational System, 19 *N.Y.L. Sch. J. Hum. Rts.* 615 (Spring 2003); Victor C. Romero, Post-secondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls, 27 *N.C. J. Int'l and Com. Reg.* 393 (Spring 2002).

ment.⁶⁵ In addition to completing this form, an employer must request that a potential employee provide original documents – such as a birth certificate, passport, residency card, social security card⁶⁶ or work permit – to establish his or her eligibility to work in the United States. As previously mentioned, United States citizens, lawful permanent residents, asylees, refugees and persons granted authorization by the U.S. government are eligible to be employed.

Therefore, in order to work in the United States, immigrants must present documentation to their employers. Because of the increasing difficulty – impossibility in most cases - to obtain temporary work permits or legal residency by undocumented migrants, a thriving fraudulent document industry has developed across the United States. Many undocumented persons purchase false lawful permanent residency cards, known as green cards, false social security cards and false employment authorization documents and use these to obtain employment, pay taxes and open bank accounts.

Purchase and use of false documents to obtain employment or immigration related benefits are a crime under federal law.⁶⁷ Additionally, purchase and use of false documents can result in a denial of immigration benefits for eligible undocumented persons.

5.2 National Identification Documents

As an alternative to the purchase and use of false documents, many undocumented persons use identification cards issued by their own consulates and embassies. Mexico and Guatemala offer identification cards to their nationals residing in the United States. Peru, Honduras, El Salvador and Poland are considering doing the same. The government of Mexico for the past one hundred years has been issuing ‘matriculas’ which specify the name and Mexican nationality of the cardholder. During 2002, Mexico issued over a million such cards to its nationals living in the United States. Many private companies, such as banks, and state government agencies permit undocumented persons to use such cards to open bank ac-

⁶⁵ 8 CFR 274a (2003).

⁶⁶ A social security number is issued by the United States Social Security Administration to all persons born in the United States, naturalized citizens, certain persons authorized to work and certain immigrants residing temporarily in the U.S. This number is used for identification purposes to pay federal and state income taxes, to pay social security payments to the government by employers, to obtain drivers’ licenses (in many states), to register children in school, to open bank accounts and for a variety of other daily life purposes. In order to live and work in the United States, a person must have a social security number.

⁶⁷ 8 USCA § 1546 (fraudulent documents for entry/false statements); 18 USCA §1028(b) (fraud and related activity in connection with identifying documents); 18 USCA § 1543 (knowing and willful use of a false passport); 8 USCA § 1542 (knowing and willful false statement to obtain a passport); 18 USCA § 1001 (false statements); 18 USCA § 911 (false claim to U.S. citizenship); 42 USCA § 408(a)(7)(B) (use of another person’s social security number).

counts, apply for driver's licenses and for other administrative applications. Banks, such as Citibank, Bank of America and Wells Fargo, support the use of 'matriculas' because they want to open accounts in which thousands of undocumented workers can deposit their money and wire transfers to family members in their home countries. It is estimated that documented and undocumented migrants send millions of dollars per year to families and communities in their home countries.⁶⁸

5.3 Social Security Numbers and Taxes

As mentioned above, in order to work, attend school or perform a variety of daily life tasks in the U.S. – such as applying for a driver's license, register your child in school, open a bank account – you need a social security number. This number is issued to all persons born in the United States – usually at the time of birth – and to certain eligible documented immigrants, including lawful permanent residents, asylees, refugees, students, temporary workers, diplomats and others.

Many undocumented migrants purchase false social security numbers and use them to obtain work and to file their annual federal income tax forms. Regardless of immigration status, all persons who work in the United States must pay state and federal taxes.⁶⁹ Employers are required to deduct federal tax and social security payments from their employees' salaries and forward those amounts to the relevant government agency.

Social security payments are maintained in a fund managed and administered by the Social Security Administration and distributed to workers after their retirement. In 1994, the Social Security Administration (SSA) began to send out what are called 'no match' letters to companies with large numbers of employees with mismatched social security numbers. Normally, the SSA sends out letters only to companies with 10% or more of mismatches. However, in 2002, SSA realized that it had \$345 billion uncredited money in its accounts and sent out over 950,000 letters to every company with at least one employee whose name did not match his or her social security number.⁷⁰ The intent on the part of the Social Security Administration was to clear up misinformation which could cause problems in persons accessing their social security earnings. However, it did not have much success. What did happen was that thousands of undocumented migrants – using

⁶⁸ For more information on remittances, visit the website of the Inter American Dialogue at <http://www.iadialog.org>. The Inter American Dialogue is a non-profit organization located in Washington, D.C. devoted to policy analysis on issues in the Western Hemisphere. They have done research and writing on the issue of remittances and immigrants.

⁶⁹ Undocumented migrants use either false social security numbers or tax identification numbers assigned by the Internal Revenue Service, the U.S. government agency in charge of collecting taxes, in order to complete the annual tax return forms.

⁷⁰ In 2001, it had sent out 110,000 such letters.

false social security numbers – lost their jobs because they could not explain to their employees the discrepancy. In 2003, the Social Security Administration, recognizing the failure of its effort, has returned to its initial policy of sending out ‘no match’ letters to companies with significant numbers of employees with bad social security numbers. Unfortunately, the damage from its 2002 efforts was overwhelming to thousands of undocumented immigrants.

6. Driver’s Licenses

Because of long distances between work and home and a lack of good public transportation systems outside major urban areas, the great majority of people in the United States must drive in order to earn a living, take their children to school and generally perform the daily tasks of life. Therefore, it is vital to have a valid driver’s license. States differ as to the eligibility requirements – aside from the ability to drive – for obtaining a license. Some require social security numbers. Others do not and will accept government issued tax identification numbers, passports or national identity cards as adequate proof of identity in order to process an application.

With the rise of concerns and fears regarding security after September 11, 2001, many states are revisiting their requirements for issuing driver’s licenses and restricting access to those with valid social security numbers. What has happened, practically, is that undocumented persons often travel to states with the least restrictive requirements and obtain driver’s licenses there to use in their states of residence.

Immigrant advocacy groups around the country are monitoring the status of driver’s license requirements and any pending regulation to restrict or loosen those requirements.⁷¹ Many groups advocate for loosening the requirements, including private insurance companies, arguing that licensing drivers – regardless of status – is better for the entire community. Licensed drivers can obtain car insurance and, therefore, protecting them from the risk of incurring liability debt – often unpaid – if involved in accidents. Insurance companies have joined in the campaign for loosening the requirements, recognizing the potential market for increased business from immigrant clients. Employer groups also support less restrictive eligibility requirements, recognizing the need for a mobile work force. Those who promote stricter eligibility requirements argue that permitting undocumented immigrants access to driver’s licenses is just another case of rewarding criminal behaviour – unlawful entry and/or stay in the United States.

⁷¹ For more information regarding state eligibility requirements, visit the website of the National Immigrant Law Center, a non-profit organization advocating for better protection of immigrants’ rights in the United States, at <http://www.nilc.org>.

7. Obstacles to Obtaining Legal Status for Undocumented Persons

The United States has a well developed and sophisticated migration system under which there are the following five ways to obtain permanent legal status:

- Asylum or refugee status: Persons who either enter the United States as recognized refugees or are granted asylum are permitted, under law, to apply for lawful permanent residence status one year after receiving that grant and residing in the country. There is no limit on the number of refugees or asylees that the United States can receive a year. However, only 1,000 asylees or refugees can change their status to that of permanent residence per year which results in a long waiting line of applications to be adjudicated.
- Family immigration: Certain family members of lawful permanent residents and United States citizens - spouses, parents or children - can be granted lawful permanent residence status. There are an unlimited number of permanent residency visas for immediate relatives of United States citizens. For all other eligible family members, 223,000 permanent resident visas are granted yearly.
- Employment immigration: Employers who can prove that there are no American workers available to fill positions within their business establishment can file what is called a labour certification on behalf of a migrant and, ultimately, request lawful permanent resident status based on an approved labour certification. A minimum of 140,000 permanent resident visas based on employment are granted yearly.
- Diversity Immigrant Visa Program: This program - known as the visa lottery - grants up to 55,000 permanent resident visas annually to qualifying individuals. To be eligible, an individual must be a national of a country with a low number of visa admissions and must have at least a high school education, or its equivalent, or two years work experience in a job requiring such experience.
- Special legislation: The United States Congress also passes legislation granting permanent resident status to certain categories of migrants. Over the years, several bills have been passed granting status to Cubans, Haitians, Eastern Europeans, Nicaraguans, Guatemalans and Salvadorans.

Unlike many countries in Europe, the United States does not - aside from occasional special legislation targeting certain nationalities as mentioned above - rely on legalization programs to regularize the status of its undocumented population. The United States Congress passed the only formal legalization program in U.S. immigration history as part of the Immigration Reform and Control Act in 1986 as a result of which over 5 million undocumented persons regularized their status. Shortly before September 11, 2001, President Vicente Fox of Mexico and President George W. Bush of the United States began to seriously discuss the possibility of legalizing millions of Mexican migrants in the United States; many advocacy groups and immigration experts believed that such legalization was imminent.

Unfortunately, as a result of the events of September 11, 2001 and, subsequently, Mexico's position against the war on Iraq, those discussions have been derailed.

Despite the variety of ways previously mentioned to obtain permanent legal status, undocumented persons face particular obstacles in doing so. Prior to the early 1990s, both skilled and unskilled immigrant workers could apply for and receive legal status under the same procedures and within the same time period. As previously mentioned, in the 1990s, Congress passed legislation distinguishing between skilled and unskilled jobs resulting in skilled migrants receiving status much quicker than unskilled migrants. Procedures for skilled immigrants take about three years compared with procedures for unskilled immigrants which can take up to ten or more years. Because of the lengthy wait, very few employers are willing to sponsor unskilled migrants for residency.

Undocumented migrants also face what are known as unlawful presence bars to returning to the United States after a trip abroad. Under these bars, a noncitizen who is in the United States in unlawful status from six months to a year, who then leaves the United States for a trip abroad and seeks re-entry, is barred from returning for a period of three years. A noncitizen who is in the United States in unlawful status for a year or more – and who leaves for a trip abroad – cannot return for ten years. Generally, undocumented persons who are the beneficiaries of family petitions for permanent resident status must return to their home countries to complete the final visa processing at the American Embassy. At the moment they leave, they are then subject to the three or ten year unlawful presence bars. There are waivers to these bars but they are difficult to obtain. Therefore, many undocumented persons eligible for lawful residency forgo final processing for such status because of legitimate fears that once they leave they will be prevented from returning for many years.

In light of the many obstacles to legalization, many undocumented migrants live in the United States for years and years in a sort of limbo, going about the normal daily life tasks, working, caring for their children, participating in their community but always living with the fear that it may end overnight with deportation.

8. Conclusion

After September 11, 2001, it has been even more difficult to advocate for greater benefits for undocumented persons. The government has adopted a policy of zero tolerance towards violators of the immigration laws and undocumented persons are easy targets for detention and deportation.

Despite strong public sentiment among certain groups against immigrants, there is recognition that we are a nation of immigrants. Politicians court the vote of for-

eign-born U.S. citizens, many of whom have undocumented family members or who themselves resided in the U.S. in unlawful status at one time. Hopefully, with the passage of time and the increasing growth and power of foreign born voter population, decision makers will respond to the needs of this most vulnerable population and pass legislation and implement policies which recognize and respect the human rights of the millions of undocumented men, women and children living in the United States.

CHAPTER 10

REGULARIZATION OF UNDOCUMENTED MIGRANT WORKERS: WHAT ARE THE ADVANTAGES? WHAT ARE THE INCONVENIENCES? WHAT ARE THE CRITERIA?

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I have been asked to address the issue of regularization of undocumented migrant workers, and the advantages and inconveniences of such campaigns.

Nonetheless, it appears to me that the French example requires me to present the problem in a different light. In fact, due to the current political and legal context in France as well as in the European Union, I think that it would be more appropriate to rather speak about limits to the regularization of foreign workers in an irregular situation.

When I refer to limits, I mean two things:

- On the one hand, the very widespread idea that an undocumented migrant is deprived of all rights is not correct from a legal point of view in France. But it is this idea that legitimizes the view that regularization would be a miraculous remedy to get out of a no-go situation.
- On the other hand, regularization is certainly desirable and even essential. However, it is not the response to all types of situations. Most regularization campaigns in fact result in the granting of a precarious status (a one-year residence permit) that can be called into question when conditions to renew it are not met. In addition, as soon as there is a situation of unemployment and an economic crisis, we know very well that the first to face the consequences are foreign workers, especially those with a precarious status. I would also like to add here in parentheses that even foreigners with a 'stable' residence status (which in France is equivalent to a residence permit) and despite the principle of equal treatment by law, are not protected against 'discrimination'. Such discrimination can be 'legal' (e.g. jobs 'closed' to foreigners in France) or against the law (discrimination during the hiring procedure, in housing, etc.). But this is not the focus of my presentation.

Gisti launched a call (which numerous French and European and international institutions have signed) for regularization without criteria of all undocumented

migrants in Europe in view of the full recognition of the rights for everyone, nationals and foreigners, in application of the principle of equal treatment.

However, even if this regularization would be achieved, it is only through an immigration policy based on the freedom of movement that the application of this principle could increase in scale.

1. Without Papers But Not Without Rights

I would like to clarify that this title is taken from a Gisti publication that is addressed to foreigners as well as to anyone who, due to their work or activism, is in direct contact with foreigners.⁷²

In accordance with international and European treaties that have been signed and ratified by France (including the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) or the International Convention on the Rights of the Child), basic rights are guaranteed irrespective of the administrative situation of the individual. Thus, “promoting the rights of undocumented migrants is a demand not only to act in favor of equal treatment between French and foreigners, but also to promote the state of law.”⁷³

These rights are of different orders and are linked to the family, to work and to health.

1.1 Family

One of the rights linked to the family is the ‘right to get married’ which is guaranteed by Article 12 of the ECHR and by French law.

No condition of legal status can be demanded of the future spouses. Besides, the Law of 29 October 1981 had abrogated the measures in the Law of 12 November 1938 that foresaw that foreigners that could not get married in France unless they had obtained a residence permit valid for more than one year. However, even today and despite the clearness of the texts, some mayors or public prosecutors do not hesitate to start a whole administrative or legal procedure in order (according to them) to detect all the ‘marriages of convenience’.

In the coming days, the French National Assembly will proceed to discuss the proposal of law on immigration that foresees, amongst other measures, that a foreigner in an irregular situation getting married is a ‘serious’ indication of fraud.

⁷² Gisti (2002), “Sans papiers mais pas sans droits”, 2nd edition.

⁷³ Ibid.

Thus, the public prosecutor will be able to suspend the celebration of marriage and will have to “immediately” inform the prefect of this situation.

1.2 Education

The ‘right to education’ is also a basic right. This right is guaranteed by the International Convention on the Rights of the Child, by Protocol n°2 of the ECHR and by the Preamble of the 1946 French Constitution.

Education in France is mandatory and free between the ages of 6 and 16 years. The administrative situation of the parents is completely independent from this right. Although school is not obligatory for children aged 3 to 6 years and 16 to 18 years, the refusal of enrolment for a child in either one of these categories of ages can only be due to ‘pedagogical reasons’ and not at all because of residence status. However, this is regularly circumvented by mayors and school principals who refuse to register foreign children under the pretext of having a ‘lack of room’ or a ‘lack of means’.

1.3 Health

Concerning the rights linked to health, in 1999, France installed universal health care (*couverture maladie universelle* – CMU) that is granted based upon income and to foreigners who have a regular residence status (as well as to those who have submitted an application for a residence permit). Individuals with irregular status may benefit (based upon requirements of means) from state medical aid (*aide médicale d’Etat* – AME). This medical aid allows the undertaking of medical costs and treatment performed at the hospital or in doctor’s offices after three years of residence in France.

However, a proposal for a *circulaire* (or a decree) is currently being elaborated by the Ministry of Health and Social Affairs to ‘check’ the access that foreigners with irregular status have to AME. Under the pretext that AME is ‘very expensive’ and to control health costs, mechanisms will be put into place to prevent these foreigners from obtaining AME. Thus, the basic ‘right to health’ will no longer be guaranteed in practice.

Finally, concerning the rights linked to work, French regulations foresee that any person, French or foreign, in a legal or irregular situation, can obtain reimbursement of medical costs due to a work-related accident or illness. In practice, many obstacles exist, including the absence of a declaration of a work-related accident – this implies gathering testimonies – and the reticence of insurance companies to recognize such an accident. Despite such difficulties, recognition of this right is not impossible. On the other hand, there is also the possibility of starting legal proceedings to ask for the full rights linked to paid employment.

Despite the situation concerning these basic rights, it is clear that foreigners in an irregular situation are deprived of other rights, especially the right to have paid employment or very simply the right to come and go. This is why regularization at first is a response or a means to put an 'end' to this situation. However, as I stated in the introduction, this regularization is far from being able to surmount all obstacles. On the one hand, whether the regularization is occasional or permanent, its effect is that in most cases the individual obtains a precarious status, and also, foreigners do not benefit from this equal treatment. The existence of jobs that are closed to foreigners and the non-recognition of citizenship are two examples amongst many.

2. Regularization of Undocumented Migrants: A Godsend?

Within recent years, practically all Member States of the European Union have carried out regularization campaigns for foreigners present on their territories. Some countries foresee types of regularization in their legislation (so called 'permanent regularization') as is the case of France (Article 12a of the Order of 2 November 1945).⁷⁴

I am not going to discuss these regularizations in detail. However, in observing the criteria on which these campaigns were made, it becomes evident that for most, it was simply a 'regularization' of people who in reality had the 'right to residence' in accordance with international conventions: rejected asylum seekers fearing for their life or integrity upon return to their country of origin (Article 3 of the ECHR), personal or family life (Article 8 of the ECHR), children reunified with their family (International Convention on the Rights of the Child, ECHR), etc.

Thus, it appears that regularization cannot be done on the basis of criteria: these are only of use in carrying out a 'selection' of the foreigners that are needed at the given moment. We do not share this position. In addition, as I have said previously, most of the established criteria are only the demonstration of the non-application of international law (whose value is superior to domestic law) and even the non-application of the law itself. This is the case in France, where the law foresees a system of 'permanent regularization' for certain categories of foreigners (residing on French territory for more than 10 years, sick foreigners, people who have personal and familial links in France) but the administrative and even legal practices strongly reduce these effects.

⁷⁴ For an in-depth analysis see, Bruylant (éd.) (2000), "La régularisation des étrangers illégaux dans l'Union européenne", Réseau académique d'études juridiques sur l'immigration et l'asile en Europe, Bruxelles.

This is why Gisti and numerous European organizations and international institutions call for a global regularization that is not based on criteria of all undocumented migrants in Europe.

This call is only part of a wider vision of another migratory policy and is only just a 'first step'. Once again, regularization cannot be considered as an isolated measure. It must be included in an immigration policy that can only be one of open borders and free movement. The closure policies adopted by different individual European countries since the 1970s and currently on the European Union level have demonstrated their limitations and their negative effects.

We thus think that it is only by this other immigration policy that the respect of basic rights and the application of the principal of equal treatment will increase in scale.

3. A Call for the Regularisation of All Illegal Residents in Europe⁷⁵

At the meeting of the European Council in Seville in June 2002 a large amount of time was devoted to the debate on the development of a future common policy on immigration and asylum. However, the rights of those affected by such a policy and the citizens of states outwith Europe were only mentioned as a sideline. As far as the rights of those who are de facto residents are concerned, variously referred to as illegal residents or clandestines, there was no mention.

Once again, the majority of the debate was on border surveillance, the possibility of repatriation to countries of origin and the cooperation of the police in the fight against illegal immigration. Europe, as it develops, constructs rules which, it claims, aim at 'controlling migratory flux'.

The method of 'control' proposed is to deny access to the European territory to all, except those whom the European economies requires, in particular to support the proposed systems of pensions.

While waiting for this proclaimed, grand harmonisation of European immigration policies, each of the Union states is adopting a harder line. The implementation of regulations, and administrative practices, are more often a cocktail of repression, suspicion of fraud and denial of rights. Occasionally, when the situation becomes controversial and the actions of illegal residents leads to demonstrations of solidarity, the public authorities implement a regularisation on a large scale. How-

⁷⁵ The call was signed by more than 100 organizations in 11 different countries in Europe. Signatories can be viewed at: <http://www.gisti.org/dossiers/sans-papiers/en/appel.html>.

ever, this is replaced once again by the abuse of the rights of those who appear to be slaves of the 3rd millennium.

The political institutions of the European Union prepare texts concerning, for instance, the right to family reunification or the minimal norms for the reception of asylum seekers. But even if they mention the fight against racism and xenophobia they do very little for the rights of foreign residents and nothing for the rights of illegal residents, who are the creation of discriminatory regulations.

Thus, it is time to address, on the European level, the issue of adequate rights for immigrants.

Their presence is a reality. A few tens of thousand, maybe even a few hundred thousand, are present within Europe. One might refer to them as a drop in the ocean compared to the disorder present in the rest of the world. However, this drop in the ocean is presented as a tidal wave or an insupportable movement which is used to feed xenophobia and racism.

These citizens of third world countries which are unstable or in a state of war have chosen or been forced to come to Europe, either permanently or for a few years. Most of the time they work here, sometimes raise children here, consume here and certain amongst them work within their community helping to develop their immediate environment. Many of them have a major role in the support and development of their village or region, or simply in the survival of their friends and family who have stayed in their country. They contribute thus to the economic and cultural richness of Europe and to the development of the rest of the world.

It is inadmissible that these people, some of whom have lived amongst us for several years, should be excluded from all that constitutes citizenship, living in permanent fear of being expelled from the country, being denied elementary rights and being subject to the actions of all sorts of criminals: illegal employers, disreputable landlords, pimps, etc.

The argument of impracticality used against those who criticise this treatment has been deconstructed for several decades: illegal residents in Europe are here because they have found employment and if they had real rights they could subscribe to the systems of social protection and many could create activities and thus create employment. The risk of the provocation of an 'influx' has never been proven and nothing indicates that the favouring of free circulation through European borders would not encourage movement in both directions with the spontaneous departure of some who came here to try back home to create a new life.

What is sure, on the other hand, is that the respect for the values of a state which operates within a framework of rights rests upon the fight against all forms of ine-

quality and cannot accommodate the sub-status conferred upon certain of its members.

This is why we believe it to be just to ask that:

- All de facto residents within the European Community obtain, within the country where they are, a durable residence status.
- The European political institutions oblige the member states to protect these people against exploitation and to guarantee access to the rights which result from their presence and their employment.
- The states of the European Union create measures targeted at the eradication of the situation of foreigners with neither status nor rights by creating the status of European resident which encompasses security of residence.
- Europe integrates into its principles the right and liberty of circulation for all persons, whether nationals of European states or states outwith the European Community.
- In the immediate future the status of current illegal residents be resolved through a directive which would oblige the member states to proceed to a regularisation of all such persons.

13th September 2002

CHAPTER 11

THE DEVIL IS IN THE DETAIL: LESSONS TO BE DRAWN FROM THE UK'S RECENT EXERCISE IN REGULARISING UNDOCUMENTED WORKERS⁷⁶

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In July 1998 the UK government announced that they were going to give visas to a particular category of migrant domestic workers who were undocumented. They were also going to change the immigration rules pertaining to domestic workers accompanying their employers to the UK:

We have been concerned for some time at reports of abuse of domestic workers accompanying their employers to the United Kingdom. Stories of physical abuse, virtual imprisonment, low or no pay and appalling working conditions in a minority of cases are evidence of the need to act ... We also propose to regularise the stay of those overseas domestic workers who, because of the shortcomings of the provisions in the past, find themselves in an irregular position through no fault of their own.

(Immigration Minister, Mike O'Brien, quoted in Home Office Press Release 23 July 1998.)

This followed a ten-year campaign by Kalayaan, an organisation supporting the rights of migrant domestic workers in the UK and Waling Waling, a formidable organisation of undocumented domestic workers whose membership numbered some 4,000. Fifteen months later, however, less than 200 workers had been regularised. The Home Office had built up an unwieldy backlog of cases and applicants were despondent and depressed. The spirit of the announcement it seemed had been lost. What are the lessons to be drawn from this experience of regularisation, for states, policy makers, campaigners, legal representatives, and undocumented migrants themselves?

⁷⁶ This article was written in 1999.

1. The Concession

The group that the Home Office committed to regularise were Third Country Nationals, mainly, but not exclusively, women, who had entered the UK as domestic workers accompanying their wealthy employers.

Looking at our national interest, if wealthy investors, skilled workers and others with the potential to benefit our economy were unable to be accompanied by their domestic staff they might not come here at all but take their money and skills to other countries only too keen to welcome them.

(Lord Reay speaking in House of Lords debate on overseas domestic workers, 28th November 1990. Hansard col. 1052.)

To allow for this demand, the government devised a concession for wealthy employers that would enable them to continue bringing their domestic workers to the UK even though work permits for resident domestic workers had been phased out by 1979. Under this concession the employer could bring in their worker under one of two categories, as 'visitors' or as 'persons named to work with a specified employer'. Immigration officials were issued with the following guidelines:

A person engaged abroad as a domestic servant, who has been in the service of the employer for more than twelve months abroad may accompany the employer to the United Kingdom to continue the employment. The employer must undertake to provide maintenance and accommodation for any dependants and the Immigration Officer must be satisfied that the person intends to continue in the employment. Domestic workers may be allowed to benefit from this arrangement even if they are outside the normal age limits or have dependent children. Leave to enter should be given on Code 4 for up to twelve months. (Code 4 gives leave to enter on condition that the holder only engages in employment for a particular named person; the holder is required to register with the police.)

Domestic servants, chauffeurs, private secretaries and other employees who render personal service may be allowed to enter with their employers if only a visit is intended in which case leave to enter as a visitor on Code 3 for the period of the employer's authorised stay is appropriate. (Code 3 gives leave to enter for a specified period on condition that the holder does not enter employment paid or unpaid; again, the holder has to register with the police.) If the employer is to remain in the United Kingdom other than as a visitor e.g. for settlement or to set up in business, such employees require work permits.

Here then was a contradiction embedded in the immigration guidelines: 'Domestic servants' were 'employees', they had 'employers', yet they were not in employment. Indeed in practice the stamp given was largely a matter of chance, and many were given a stamp under Code 5N, namely 'Leave to enter, employment prohibited' (see Anderson, 1993). So, these workers had all entered the UK legally accompanying wealthy employers as their cooks, cleaners, nannies, and carers, but they had not been given an immigration status independent of their employers. As

the then Home Office Minister, David Waddington stated in a letter to Lord Avebury:

Admission in such cases is on the basis that the employee will be expected to leave the country with the employer, or on prior termination of the employment.

(Cited in the booklet accompanying Kalayaan's Open Space film Domestic Slavery, broadcast on BBC2 16th November 1987.)

Moreover, although applications for extensions to remain with the original employers were usually granted, applications to change employers were routinely refused on the basis that no work permit was held on entry.

It is important to point out, that although the concession appeared to give some structure to the immigration status of domestic workers accompanying their employers, the reality was very different. Not only were those entering with visitors given visitors' visas (Code 3) even though they were entering for employment, but there was a 'concession culture' under which domestic workers accompanying their employers were admitted to the UK with a wide variety of visas. There were even workers entering the UK who did not come through immigration controls at all. Two Filipinas were staying in Europe with a Saudi princess who decided to come to London for a visit in her private plane. She brought the domestic workers with her and on landing they were simply ushered through the VIP lounge with no passport formalities for either the employer or her workers. Many were given entry clearance on the basis of being family members, thereby opening themselves to accusations of deception and therefore illegal entry, even though their immigration status was entirely a matter for their employers and the UK immigration authorities. V. is typical:

I don't know what is exactly in my passport. She (the employer) brought back two pieces of paper and asked me to sign ... So when I did that the driver took the two pieces of paper back and for a week after that the passport was ready. I do not know how they make it or what happen, even my age ... So the passport was ready and it was time now to get the visa ... So she answered the questions, she said, yes she is coming with me and she will look after, she will help me to care for the children when I go out, and she's going to do some studying ... So I really have nothing to do with the visa and the paper.

(From an unpublished interview with Old Street Films, 1996.)

Those entering as a family member are usually from the same country of origin as their employers, often from Africa. After 1990, domestic workers had to attend an entry clearance interview with a British representative abroad to determine what kind of visa they were to be given. But these interviews were typically held with the employer or an employer's representative present, so even if the worker were minded to complain or ask questions, it was extremely difficult. Finally the domestic workers accompanying diplomats were not technically admitted under the

concession but under the category of 'permit free employment' listed under the immigration rules.

Whatever the stamp on the passport, there was an alarming similarity to the descriptions given by domestic workers of their living and working conditions.

February 26, 1990, they had planned to go to a party. The smallest things which did not please my madam resulted in abuse, shouting and slapping of my face. One dreadful occasion I washed a jumper in too hot water, this caused shrinkage. I was not only hit, but almost choked to death. The combined attack by the husband and wife left me beaten up on the floor. So I decided this is the time I had to save my life, for me, I am a prisoner, I can't go out, no day off, can't talk to anyone, they pay me £120 a month but I don't receive it. Only if I tell them I have to send money to my family, they give me one month, they owe me five months or more then. So I decided I had to run away.

As soon as I came to London and to her house I feel like she brought me to jail ... I have to sleep on a shelf, which is made to keep all things and the suitcases, everything ... So morning 4:30 to midnight I have to be up. I have no rest and I have no place to sit. She ask me not to sit on the chair, not to be near the children. Every time I go to the toilet I have to wash with the dettol and all and not touch anything about the children. She treat me as if I have bad disease. And always she calling my name, and when I say 'yes madam, I am here', she shouts, 'what are you doing here? go and do the work'. ... and then in September after two and a half months she passed me to her friend. So I have to work to her friend and she asked her friend not to pay me anything and not to let me go out. My madam said not to talk to anybody. She kept me locked in the house and not even to open the window. All the time the curtains are closed.

(Conference papers 1995 Slavery Still Alive Kalayaan, London.)

In 1990 Kalayaan began to keep statistics detailing the kinds of difficulties faced by workers they interviewed who had escaped from the employers whom they had accompanied to the UK. Kept annually these figures are more or less constant from year to year. In 1996-1997 195 workers were registered at the centre, and they had worked for employers from 30 different countries. Eighty four per cent reported psychological abuse, 34 physical abuse and 10 per cent sexual abuse. Fifty four per cent were locked in, 55 per cent did not have their own bed, and 38 per cent had no regular food.

The difficulty pinpointed by Waling Waling and Kalayaan was that of immigration status: workers were dependent on the employer they entered with for their immigration status, they could not change employers legally, and if forced to run away (often without their passport) they could not work for anyone else. Moreover, once their original visa expired they would lose all right to be in the UK. This meant that, having escaped from one abusive situation, workers were very vulnerable to exploitation by secondary employers (usually British), who could take advantage of their immigration status with poor working conditions, low pay etc.

For her MA thesis the then Kalayaan staff worker, Margaret Healy, interviewed ten women before and after their change of employer. She found that two months after the first interview, six had left their British employers. Problems included:

The negotiated salary was not adhered to. Likewise with the hours of work. For example when asked to change a day off or to do overtime, if the worker said she had an appointment with the doctor, the employer would say, 'well I can always call the Home Office' ... The treatment of the employers ranged from shouting at them, insults to their person, passing derogatory comments; constant complaints. One woman said she was treated 'as if I'm nothing'. One of the six had to sleep on the living-room floor and wasn't given any place to put her personal belongings. She had to keep everything in her bag. One of the women experienced overt racism by the employer making personal derogatory remarks about her, not allowing her to sit on the settee in the sitting room ... Another of the women complained that her male employer was constantly sexually harassing her by making suggestive comments and even offering her money for sexual favours.

(Healy 1994: 29.)

In 1998 Cecile Divino interviewed 39 workers on their working, accommodation and access to health services after leaving their primary employers. She found that over 81 per cent of live-in workers were working nine hours or more a day, and that nearly 30 per cent worked more than 12 hours a day, many working up to 16 hours a day. Most were 'on call' in the night - i.e. had to be permanently available. It was common for employers to deduct room and board from workers wages. In short:

The wages paid and hours worked in secondary employment by the majority of overseas domestic workers in this sample have improved in comparison with the experiences in primary employment recorded in Kalayaan statistics, but only slightly.

(Divino 1998: 17.)

Before coming to power, following intense lobbying by Waling Waling, Kalayaan and the Transport and General Workers Union, the Labour party committed itself to changing the system under which domestic workers entered the UK. Key party members had also undertaken to regularise those workers who had entered under the old system and who had been forced to leave their primary employers because of abuse, thereby becoming undocumented.

2. General Difficulties

The government's announcement was greeted by those who had campaigned for it with great enthusiasm. Yet, over one year since the announcement was made, under 2,000 workers had registered with Kalayaan to apply for regularisation. This was in part to do with the lack of publicity around the regularisation exercise. The 'spin' put on the announcement was obviously informed by fear that the gov-

ernment would be criticised for 'opening the floodgates', and reassured the public that the policy change represented a tightening of immigration regulations while downplaying the regularising of undocumented workers. This strategy seemed to pay off.⁷⁷ Far from arousing controversy the regularisation did not even attract much comment. There was no television or radio coverage of the issue, despite the previously high profile of the campaign. This risked the possibility that those undocumented workers living outside of the capital, those who did not speak English, and those who did not read and write, might well not hear about the possibility to regularise their status, particularly since those migrants who work in private households are isolated and are often cut off from regular community contacts. An informal publicity campaign by Kalayaan with the support of the TGWU generated a significant response from agencies outside London, particularly legal firms and Citizens Advice Bureaux. Articles in the black and ethnic minority press also resulted in people contacting Kalayaan for further information. However, not only must people hear of the opportunity to legalise their status, they must also feel confident enough to take it up. In interviews conducted with undocumented domestic workers before regularisation, they commonly described their immigration status as leading them to live in fear, as outsiders:

I feel in my heart illegal. No tax, no insurance, no my home, no my family (started crying). Like I'm outside. Everyone saying why not going home, but I don't want to lie, so I don't speak, only work. Thinking not going home, not respected. Respect is when you look eye to eye, you have a free mind, speaking mind, but I am little, low ... sometimes if I make a mistake my boss say, as a joke, 'I am calling the police'. Our boss will joke to me, 'You're under arrest'. We have a security bell at work, and if they know it is me who is answering, when I ask who it is they say they are the police.

For people who have lived such lives, often for years, to bring themselves, voluntarily, to the attention of the authorities, clearly requires a tremendous leap of faith, and confidence that it will not result in deportation. Even among members of Waling Waling, whom one might expect to be among the most well informed of undocumented workers, alarming rumours circulated. Solicitors' letters containing a disclaimer that applicants could not be guaranteed of a successful result were the source of considerable alarm. Even when people began to get their papers the suspicion continued. So for example, one person who had returned to her home country for a visit having successfully obtained her visa was phoned in the middle of the night by her compatriots who had 'heard' that she had been detained, questioned, and deported by UK immigration authorities as she left the country!

77 Independent 25.7.98 "Overseas domestics granted basic rights"; Guardian 25.7.98 "Government acts to stop abuse of foreign domestic servants"; Daily Telegraph 25.7.98 "Rules on overseas staff are tightened".

3. The Devil Is In the Detail ...

The criteria for regularising domestic workers were unclear until January 1999, meaning that advisers and their clients were reluctant to submit all but the most iron cast of applications. By December 1998 only 150 people had put in papers to the Home Office, and only three decisions had been made (all positive). Given that the original deadline for submission of applications was 23 July 1999 - later extended to October 1999 - this represented a serious problem. Moreover, when the criteria were finally clarified they resulted in considerable difficulties for many bona fide applicants, despite significant concessions from the Home Office. The requirements for 'straightforward cases' at first sight seemed relatively simple: a valid passport; proof that one currently is employed as a domestic worker and able to support and maintain oneself without recourse to public funds (a letter from the employer stating salary details and other 'in kind' payments); and proof that one entered as a domestic worker. These documents, together with a standard application form for variation of leave to remain, and a photograph were to be sent to the Home Office. These would be processed by the Initial Consideration Unit (ICU) and, providing there were no further queries, Mike O'Brien, the Immigration Minister of the time felt that, by Easter 1999, they would be dealt with within 48 hours. More complicated cases, including those without sufficient documents would be passed to the Case Allocation Unit (CAU) where they would have to join the notorious backlog of cases.

In practice the first problem arises with having a valid passport. Domestic workers who entered the UK under the concession typically did not hold their passport. Of those 195 workers approaching Kalayaan in 1996-97, 69 per cent had their passports taken by their employers and those who had managed to hold on to their passport had not renewed it on expiry. One of the first steps for applicants therefore was to get a new passport from their embassy. Some embassies, noticeably the Philippines Embassy, were supportive of their citizens' applications for new passports. They required an affidavit of loss, a birth certificate and marriage certificate and four photographs. Filipino citizens who work abroad are required to pay tax on their earnings to the Philippines government and regularisation applicants were retrospectively liable, but, in a special concession this was reduced to £15 a year. Other embassies however were less than helpful. The Indian High Commission for example was initially unwilling to provide replacement passports. A worker had to produce 12 photographs, a statutory declaration authorised by a notary public (approx. cost £30), pay a fee of £125 and come up with a police report that the original passport was lost or stolen. Even then it was often required that the Home Office give the visa before they would issue the passport. The first Indian workers to report their missing passports to the police, found themselves arrested and held overnight until their lawyer was able to argue them out. This scarcely encouraged people to go to the police station. The problem was not only

with police stations. It must be remembered that many people find their embassies intimidating places, and there are particular problems for domestic workers, many of whom have worked (and been maltreated by) embassy staff. Of the cases known to Kalayaan, about 10 per cent entered the UK accompanying diplomats. One worker who left his diplomat employer several years ago, was extremely anxious that he might bump into him at the embassy. In the event, not only did he bump into him, he found that his former employer was in charge of issuing his new passport. The employer went so far as to tell him that he would inform the police that the man had lied in claiming the passport was lost - 'You know where it is. I have kept it!'

Proof of current employment and that applicants were able to support themselves also in reality became extremely problematic. At first, as indicated above, the suggestion was that workers should obtain letters from their current employers as proof of employment. However, this proved very difficult. Employers were reluctant to furnish this proof because they did not want to jeopardise their own position. Fears of laying themselves open to prosecution because of employing 'illegal immigrants' were partly to blame, but the main concern seemed to be that they would render themselves liable to paying tax and national insurance. Some employers refused absolutely to sign. The migrant then had to leave their job and look for a new one, running the very real risk of unemployment since jobs were in short supply because they were a regularisation requirement. Of 141 people questioned about the regularisation process, 27 (19 per cent) had had problems getting their employer to sign a confirmation of employment, and of these, 16 (11 per cent) had consequently left their employer. These figures exclude those deterred or delaying applying because of not having employers' letters. One of the purposes of the exercise was to free domestic workers from dependence on their employers for their immigration status, yet the necessity of a letter from their employer only reinforced this dependency. The majority of those questioned (111) were Filipinas, and if one examines only the non-Filipino applicants, difficulties with confirmation of employment are more acute: eight out of 30 (26 per cent) had problems, and five (16 per cent) had left their employers. Nine (30 per cent) of the 30 had other problems, generally difficulties with passports. It should be remembered that these applicants for regularisation are likely to be among the best supported and most well informed of those able to apply, since they were all people who attended Waling Waling meetings.

The applicant did not only have to prove that she was in employment. She had also to prove that she could support herself 'without recourse to public funds'. Most undocumented migrants do not have a bank account and are paid in cash. It was often, therefore, once again incumbent upon employers to reveal details of the salary they paid their worker, the applicant's word was not sufficient proof. This was actually rather ironic, since domestic workers claimed that the amount de-

clared was rarely accurate, typically one week's salary was declared as the salary for an entire month, because of employers' concerns about tax. Workers who lived out had particular difficulties with the no recourse to public funds requirement because of their accommodation. They had to prove that they were living 'within their means', and that they were not occupying council accommodation. A rent book was suggested as adequate proof. However, being undocumented the majority had been forced to live for years in the shadow economy through no fault or choice of their own. Accommodation arrangements were often rather irregular. Typically they lived in sub-let council accommodation, or in accommodation let by landlords who did not want it revealed that they had 'harboured' illegal immigrants or that they were renting properties that were legally overcrowded. Amy, for instance, was living in a room she had rented having found it from an advertisement in a newsagent's window. Her landlord refused to give her receipts for her rent or any rent book. The only 'proof' of accommodation he would give her was to sign his name in her diary on the date that she moved in. She had no proof even of address, because council tax was included in the rent, and all facilities were paid by metre, and the telephone was a call box. In such circumstances how does one prove that one is able to maintain and support oneself? Many women moved out of the accommodation they had occupied for years simply in order to have the requisite documents.

Even more difficult than all these requirements however, was the provision of proof that one had entered as a domestic worker. This difficulty arose when the Home Office moved to stating explicitly 'This only applies to those who were originally admitted to the UK with the correct entry clearance for employment as a domestic worker'. This notion of 'correct entry clearance' was extremely problematic when applied to the concession. Indeed, arguably, one of the main problems with the concession was precisely that there was no specific entry clearance granted to domestic workers. Some non-visa nationals who entered before 1990, for instance, did not have to have any entry clearance at all. As noted above, there was no single correct entry clearance for domestic workers, and the concession allowed for domestic workers to be given visitors' visas, but it seems that what was considered 'correct entry clearance' was when the worker had the employers' name written on their passport i.e. code 4. As discussed above the exact stamp on their passport was something that was completely out of the workers' control. As far as the applicants were concerned it was particularly invidious because some nationalities were more likely to have code 4 visas than others. In particular African women seem to have been given code 3 visas. How then could one allow for such instances, of which there were many, and exclude the thousands of other overstayers who had entered on visitors' visas - which presumably the Home Office would want to do? The immigration minister responded by allowing that those workers with proof that they were working as a domestic worker when they entered the UK would be eligible for regularisation. Crucially, registration with

Kalayaan, the support organisation for migrant domestic workers, would count as such proof. The registration form recorded details such as when the person first made contact, when and how they entered the country and who they were working for. This was a significant concession by the Home Office, but again many people were excluded: Kalayaan had no idea at the time of introducing such forms that they would become such valuable documents. Indeed it was precisely because of that, that the Home Office were able to give such weight to those forms, knowing that they were not falsified. Those who had registered with the group before 1990 had not had their details formally recorded, while some registration sheets had gone missing. The Home Office declared that registration after May 1997 would carry less weight, on the grounds that the Labour Party had come to power that month, and that other migrants wishing to legalise their stay could well have noted their commitment to migrant domestic workers, and registered with Kalayaan in anticipation of the regularisation announcement. In fact an analysis of the organisation's monthly statistics reveals that there was no unusual increase in registration with the group until July 1998, the month of the government's announcement.

These difficulties pertaining to documentation were generally related to the particular problems around 'proof' for undocumented migrants in general, and those working in private households in particular. But there were also difficulties of process, related to the much publicised difficulties of the Home Office around the failure of its new computer system, and moving to new offices which clearly had very real implications for those depending on its efficiency. Much was made in the UK press about the long waiting time for UK citizens who wanted to get new passports, but for those non-UK citizens caught up in these difficulties the consequences were more than mere inconvenience. Visitors to the new offices described rooms piled high with boxes of papers and rotting, unopened mail, and files stacked in corridors. The Initial Consideration Unit, supposed to be up and running by March 1999 was not operative until several months later. These Home Office problems had consequences across the board - even recognised refugees needing to leave the country to see dying relatives were not given papers on time. Regularisation applicants had papers lost by the Home Office, and experienced long delays. Of 141 of those who had submitted applications, 57 described themselves as extremely concerned about the length of time taken to consider their cases. This time matter was dismissed by the immigration minister as of little consequence, after all, as long as people who deserved it got their visas in the end, what was in a matter of a few months? However, for the migrants themselves, months were very important. Having contacted relatives whom they had not seen for many years, to tell them that they would be visiting soon and that they were going to be able to regularise their stay, people found that they were soon in the position of being disbelieved. Rosalind first contacted her family in August 1998 to tell them that she would be coming home soon. Her mother fell ill later that year.

She died in June 1999, convinced that her daughter had lied to her. Rosalind finally got her visa in August that year. Her father had also died while she was undocumented in UK, so she was unable to go to either of her parents' funerals. Veronica's daughter had postponed her marriage three times in anticipation of her mother being able to attend ... Each applicant has a story to tell of family disruption and the immense stress they experienced and continue to experience as they wait to hear the result of their application.

Home Office caseworkers were not well informed about the regularisation. This had many consequences, even for those who successfully obtained visas. Some for instance, found that they were given a stamp on their passport, authorising them to work with the name of their employer written on it i.e. precisely the stamp that was the cause of so many problems and which the Home Office were concerned to abolish. Of those workers who, by September 1999 had been given visas, many who were eligible for Indefinite Leave to Remain had been given only one year extensions. Different Home Office caseworkers required different proofs from the regularisation applicant, some requested employers' bank details, and even employers' passports, which understandably created difficulties for their workers.

There were also problems of representation. Unregulated 'immigration advisers' as well as registered law firms offering bad and expensive advice, are a serious problem for the migrant and refugee communities generally. Many seized on news of the regularisation to offer their services, and applicants paid between £1,500 and £4,000 to submit their papers through them. More reputable firms such as Winstanley Burgess and Douglass Luu Simons were charging between £150 and £500. However, their waiting lists were extremely long because of their specialised knowledge, and those unwilling to wait, in the first instance up to six weeks for an initial appointment, were easy prey to unreliable and expensive practitioners. One woman who fell behind on her instalment payments of £4,000 was told that if she did not come up with the money, the immigration advisers would inform the Home Office that she was 'illegal'. Even reputable solicitors were often put in the position of being perceived as Home Office proxies: in their concern to ensure that applicants put in the best possible case they made requests that, to the applicants, seemed totally unreasonable - moving accommodation, as mentioned above, for example. One woman who had lived in her council flat for twelve years was told that she should find other accommodation, since technically she was having recourse to public funds. She felt that the solicitors were thereby making totally unreasonable demands on her. Problems of communication with legal representatives were significant - 10 per cent of those questioned said that they had not heard enough from their solicitor. But there were also difficulties, particularly around language, so solicitors would write to clients requesting further information, and clients would not respond because they had not understood. Differences of approach between different solicitors soon became apparent. So hundreds of

domestic workers were adopting all kinds of strategies in order to convince an employer to sign a letter confirming employment, when one well respected solicitor affirmed that he did not think that it was so important, that a statutory declaration or a covering letter from the legal representative reporting any conversations held with the employer. These differences of approach caused some confusion among applicants, particular when combined with delays from the Home Office and the apparently random nature in which some cases were dealt with faster than others. Moreover, the stronger some cases were made the weaker others were made to appear.

4. Conclusions and Recommendations

Although there have been many regularisations and ‘amnesties’ for undocumented migrants across Europe, and some states - most notably perhaps Italy, have extensive experience in these processes, there has been no comprehensive sharing among non-governmental agencies, and migrant and refugee support groups about the lessons that can be drawn from these experiences. Unless they are to be everlastingly inventing the wheel, this needs to be prioritised at a European level.

From the UK experience 1998/99 there are many lessons to be learned. Firstly the importance of publicity to maximise the take up of any regularisation programme. NGOs should bear in mind the possibility of government’s reluctance to take this on because of the public hostility to undocumented migrants. There need to be clear guidelines for the procedure for amnesty/regularisation applicants at the time that the announcement is made. However, I would argue that, in retrospect, a more satisfactory process from the point of view of the migrants themselves, the Home Office and campaigning organisations, would have been in this instance to organise a blanket amnesty rather than a case by case approach to applicants, at least for those who had records of being granted entry clearance as a domestic worker (which would have included some of those with visitors visas) or who had registered as domestic workers with Kalayaan prior to the 1998 announcement. This would have saved much needless and expensive bureaucracy, surely unnecessary for such a small number of cases, which currently are contributing to the Home Office’s backlog of cases to be dealt with. More generally the difficulties of proof of non-recourse to public funds by undocumented migrants need to be recognised. People who have been living in a cash economy, often under false names are likely to have a dearth of official documentation. From the point of view of organisations working with undocumented migrants, this highlights the importance of recording details of their clients. Clearly this is a contentious issue, and many groups are against maintaining such records because of fears of police raids. However, Kalayaan’s experience demonstrates that there are some good argu-

ments for finding an acceptable way of minimising and taking this risk. This is particularly important given the fact that it is not only the employers of domestic workers who hold their employees' passports and this is a matter for the migrant's country of origin as well as the host state and the migrant themselves. Under intense lobbying from the Filipino migrant community in Europe, the Philippines government undertook an official Congressional Consultation in Rotterdam, Amsterdam, Barcelona and Rome in April-May 1999, and the attitudes of embassy and mission officials have been reported to have changed considerably. Certainly in the UK they have been supportive of their undocumented fellow citizens and this has made an importance difference to their experiences of the process of regularisation.

It is still too early to determine how many undocumented migrants will be regularised as a result of the Labour government's announcement of July 1998. Let us hope that it is more than two hundred.

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PART 4

ROLE AND POSITION OF VARIOUS ACTORS

CHAPTER 12

SOCIAL INSPECTION: A BLESSING OR PUNISHMENT FOR THE UNDOCUMENTED WORKER?

Didier Verbeke, Labour inspector, Belgium.

The 1994 report of the Belgian Parliamentary Commission on Human Trafficking stated that an approach based on the application of social and fiscal laws in fighting human traffic in prostitution would be highly efficient. Following these conclusions, the Social Inspection Service focused part of its activities on fighting human trafficking. It was felt that this approach would have potential direct and significant financial consequences for the trespassers, thereby hurting them directly in their ultimate goal of making a profit (indeed, infringement of the Belgian social laws means huge fines in various forms).

The Social Inspection Service concluded that its contribution in fighting human trafficking would be to emphasise inspection of the 'demand' of illegal employment, being the employers in the broadest sense. Social inspection is by no means a hunt for illegal workers, but a service set out to check employers concerning the application of social laws in force. It especially focuses on the perpetrators of labour exploitation.

Moreover, Belgian social law never punishes employees; it is protective legislation to the benefit of employees. Thus, one may say that if there are sanctions against workers, they should be considered as collateral damage.

Inspection of illegal employment puts the Social Inspection Service in a strange position. On the one hand, our inspection is aimed at protecting the worker (either legal or illegal) by forcing the application of various social laws via his/her employer. This means correct payment of salary, respect of working hours, declaration of activities to the social security office and offering access to health care services, unemployment benefits, and so on. In each of these cases the employer is sanctioned for an incorrect application, even in the case of employment of a worker who does not have a working permit. On the other hand, we sanction the illegal worker in so far as illegal employment invalidates his/her stay and therefore means deporting him/her.

The Social Inspection Service aimed to be competent concerning the legislation on residence and settlement, not for the sake of checking the application of this legislation, but for the famous Article 77 bis of the Law of 15 December 1980 which was specially written to grant more possibilities for specific actions in the combat against human trafficking. At the same time it also meant that the Social Inspection Service was competent for the whole of this legislation.

Article 29 of the Penal Code clearly stipulates that every public servant who takes note of a crime in carrying out his/her function is obliged to immediately inform the public prosecutor. Thus, agents of the service do have legal obligations, which means that contraventions will be automatically signalled to the police or eventually taken care of by our service.

In a few cases, and this is a very cynical statement, the only way to give a swift and decisive blow to a trespasser's activities is to take away his workforce. If the workforce is made up of illegal workers, this is easily done and incapacitates the employer in continuing his activities, which means a direct financial loss. The illegal worker is then subject to sanctions.

Social inspection is not only competent for checking foreign employees, but also for checking foreigners who are self-employed with the same link to legislation on residence and settlement. In this we seek a righteous approach for every participant.

On the whole, the approach of the service is to guarantee the rights of the individual illegal worker, even by forcing the employer to pay the due salary on the spot for the deported worker, to deliver him/her documentation on the system of aid to victims of trafficking, even to make sure s/he understands the meaning of it, deportation being the legal consequence of a particular behaviour, illegal employment.

In conclusion we must admit that on the whole a repressive attitude is the norm in the approach to employment of workers of foreign nationality, and certainly in the case of illegal employment. We are also aware that a sole repressive attitude will not resolve the problem and we therefore seek partners in developing a preventive strategy in countries of origin. We do not stand alone in this repressive approach. On the whole, European inspection services have developed repressive strategies.

CHAPTER 13

REPRESENTING UNDOCUMENTED MIGRANT WORKERS IN INDUSTRIAL TRIBUNALS: STIMULATING NGO EXPERIENCES FROM GERMANY

Norbert Cyrus,⁷⁸ Polish Social Council, Berlin.

The existence of ILO and UN Conventions underline the protection of workers' rights and social standards as accepted targets of international human rights policy. But the problem remains – as we all know - with implementation. One problem is connected with the refusal of many nation states to ratify conventions and a narrow interpretation of provisions with a tendency to exclude undocumented immigrants (Cyrus, 1999). Another problem of implementation arises from the weak awareness of civil society and immigrants of legal provisions already in force that offer protection to those in vulnerable situations. In this paper I will deal with the last aspect of supposed exclusion.

1. Supposed Exclusion: An Obstacle to the Implementation of Workers' Rights

Despite transnational approaches to obtain legal protection of migrant workers, the conviction that undocumented workers have no rights at all is common and widespread. It is a taken for granted assumption that migrant workers in irregular situations are excluded from all social and legal protection. Undocumented migrant workers themselves assume that they are not entitled to claim their rights due to their lack of regular residence status and work permit.

This is particularly true for Germany. Here, a sophisticated control system of cooperating public institutions and authorities is keen to tease illegally employed workers out of labour markets – with a particular stress on undeclared employment of foreign workers (Cyrus & Vogel, 2001 and 2002; Vogel, 2000 and 2001).

Immigrants' organisations, social workers and even labour inspection officers agree that undocumented migrant workers detected on work sites face very unfavourable treatment: they are immediately arrested and soon deported. They have

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no chance to make a claim against their employers for payment of outstanding wages for work already done. Even worse, in some cases police confiscate their financial means to cover the costs of deportation.

Meanwhile, some labour inspectors assume that in some cases the illegal employer informed labour inspection shortly before the date of payment in order to get rid of the employees and to increase profits.

Taking into account this general framework, the conviction seems to be substantiated that undocumented workers do not receive any protection from public institutions and have to hide from public authorities.

2. Making a Claim: The Legal and Juridical Framework in Germany

However, some years ago I raised the question if this conviction corresponds with juridical provisions (Cyrus, 1998). Germany is a constitutional state and I simply asked which juridical provision excludes workers from their right to appeal to industrial tribunals in a situation of need.

To make a long story short: there are no such provisions in Germany. It turned out that employers are obliged to pay the wages for the work done – regardless of the residential or work permit status (Wissenschaftlicher Dienst des Deutschen Bundestages, 2000). According to this understanding, undocumented work sets up a ‘factual employment relation’ equivalent to a contract of employment with mutual rights and obligations for both sides. The employer is not allowed to withhold usual conditions of work and pay or to escape from obligations to pay the remuneration by using the argument that the worker is in an irregular situation. Concerning the lack of a residence and work permit, the law only allows the dismissal of the worker. To summarize: even undocumented workers have the right to be paid for their work done. So far, so good.

But to have a right is one thing, to realise this right, is another. A legal provision of German Foreigners Law (Section 76) binds all public offices to notify the Foreigners Office with information on undocumented immigrants received during the course of public service.

Therefore, the taken for granted assumption is that undocumented workers cannot appeal to industrial tribunals because the court has to inform the Foreigners Office and this will finally lead to the detection and deportation of the plaintiff.

But again, juridical provisions are more neatly defined and open opportunities for undocumented migrant workers to make a claim in this field too. We have to remember that industrial tribunals are civil courts. An industrial tribunal does not

investigate in cases but deals with the information the plaintiff, i.e. the worker, and the defendant, i.e. the employer, provide. The industrial tribunal concentrates on a few questions: Has the employment existed at all? Which rights and obligations derived from the employment? And which claims brought forward by the plaintiff have not yet been settled?

The industrial tribunal is confined to the information both parties introduce in the proceedings. If neither party mentions the residence and work permit status, it will not be considered in an industrial tribunal proceeding.

According to juridical expertise (Fodor, 2002), industrial tribunals would be obliged to inform the Foreigners Office about undocumented workers (Übermittlungspflicht – duty to transmit information on the residential status), but they are not obliged to investigate the residence and work permit status⁷⁹ (Ermittlungspflicht - duty to examine the residential status). This distinction between the obligation to transmit but not to examine the status opens an opportunity for undocumented workers to present a case in industrial tribunals.

However, this interpretation is not generally accepted. An opposing position underlines that industrial tribunals have to notify the public prosecutor in charge of combating illegal employment of every case of illegal employment. All in all, the question of transmitting information is not settled and there is still some founded fear that industrial tribunal judges may inform the Foreigners Office even when they are not obliged to. There is a particular uncertainty about how a judge will proceed.

Experiences reported by German NGOs active in the field of legal and social protection of immigrants underline that de facto most immigrants are afraid of making use of their rights as workers because of the well-founded fear of being reported to the Foreigners Office and subsequently deported.

Thus, considerable legal obstacles prevent the implementation of already existing human and social rights for undocumented migrant workers. It is urgently necessary to remove these obstacles.

3. Empowerment: NGO Experiences

In spite of the assumption of the general deprivation of rights (Rechtlosigkeit) and in spite of the still pertaining juridical uncertainty, the 'Polish Social Council', an immigrants' rights NGO in Berlin, succeeded in convincing undocumented work-

⁷⁹ Section 2 No 3 a Arbeitsgerichtsgesetz (ArbGG).

ers to make their claims against employers through the legal channel (Cyrus, 2001).

In some cases, Latin American undocumented cleaners were encouraged to appeal to industrial tribunals and demand withheld remuneration. In other cases Polish undocumented workers brought an action against construction enterprises and received the right. Between 1997 and 2001 the 'Polish Social Council' dealt with eleven cases in which employers had deceived 27 undocumented migrant workers. The organisation encouraged the workers to demand the withheld remuneration from their employers and in nine cases the workers appealed to industrial tribunals. In some cases an industrial tribunal hearing took place with a final judgment in favour of the illegally employed workers (Projekt ZAPO, 2001).

Recently an outstanding industrial tribunal hearing took place in Hannover with a final decision issued on 15 January 2003. This case concerned a Polish domestic worker who had been dismissed after an occupational accident without medical care and was subsequently withheld remuneration by her employers, a German-Polish physician family. The Polish household worker had cut one of her fingers and the fingertip had to be amputated. When the employers refused to pay and denied any responsibility, the 'Polish Social Council' recommended and supported a charge and got a lawyer who presented the case to the competent industrial tribunal in Hannover. The plaintiff received legal aid and finally won. The employers had to pay the withheld wage of €1,700. Moreover, the professional organisation (the accident insurance) accepted to pay a small pension because of the amputated fingertip, which was recognised as a partial inability to work.⁸⁰

All in all, these path-breaking experiences underline that the support of undocumented workers works. We argue that supporting undocumented workers will not increase the volume of the shadow economy, but reduce it. Most of all, unscrupulous employers will be deterred by the strengthening of legal certainty (Rechtssicherheit) and the workers' ability to deal with conflicts (Konfliktfähigkeit). In my view the supportive approach is an effective instrument to reduce the incentives for exploitative employment of undocumented migrant workers, to reduce unfair competition and thus to protect the rights of all workers (Cyrus, 1998 and 2001).

⁸⁰ See the national newspaper Die Tageszeitung (taz) from 18.01.2003. The case has the file no. 13Ca268/02 with the Hannover industrial tribunal. The decision is not final.

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CHAPTER 14

TRADE UNION PRACTICES IN EUROPE

Trade unions can play a very important role in assistance to undocumented workers by providing advice and legal assistance for claims of non-payment of wages, exploitation, abuse, accidents at the work place, etc. On the international level, two trade union confederations have expressed their support towards undocumented migrants. The ICFTU (International Confederation of Free Trade Unions) urges unions to demand governments to legalize undocumented workers, to lobby for legislation to protect those working in the underground economy, to work with communities to provide support and legal assistance for undocumented workers, and to undertake special campaigns to organize migrant workers, including those who are undocumented. The ETUC (European Trade Union Confederation) has issued statements favoring the legalization of undocumented migrant workers already residing in Europe rather than granting work permits to workers from abroad.

The degree to which trade unions support and become involved in labour issues faced by undocumented workers varies substantially amongst the various EU member states. In France, Spain and Italy, for example, it is common for trade unions to openly support undocumented migrants. The Ley de Extranjería (Migration Law) was introduced in Spain in August 2000, forbidding undocumented migrants from the right to assembly, demonstration, association, unionization, and going on strike. In January 2001, three major trade unions in Spain, the UGT (Union General de Trabajadores), CCOO (Comisiones Obreras) and CGT (Confederación General de Trabajo) made a public announcement that the law goes against immigrant workers. The trade unions stated that they would not follow the law that states that undocumented migrants cannot join, and thus allow undocumented migrants to be members of their trade unions.

Major trade unions in France such as the CGT and SUD-PTT support undocumented migrants that come together in the *collectifs des sans papiers*. These and other unions have actively endorsed their struggles by providing legal assistance to help process requests for regularization, and by offering material help in arranging for food and shelter for undocumented migrants engaged in sit-ins. Unions also support undocumented migrants by participating in demonstrations and

raising awareness amongst union members of the exploitation faced by undocumented workers.

In Italy, trade unions have been active in denouncing exploitative working conditions of undocumented migrants. CISL-CESIL will support a worker and will denounce exploitative conditions, even if the worker is undocumented. Many employers don't want to regularize employees who work irregularly, so the trade union has opened up a lot of files to criticize these employers to convince them to regularize their workers. When faced with a case of exploitation, CISL-CESIL tries to reach a compromise between the employer and employee to avoid the case being brought to court. CGIL also provides help for undocumented migrants to be paid for work, and provide legal assistance in cases of exploitation.

The British trade union T&G has a special interest in protecting undocumented migrant domestic workers and has extended its support in various ways, including: encouraging migrant domestic workers to join and participate in branch activities; providing assistance to recently regularized migrant domestic workers to keep their jobs; accompanying undocumented workers in their claim for wages; and campaigning and lobbying on issues faced by migrant domestic workers.

In 2002, FNV, one of the biggest trade unions in the Netherlands, made a proposal for trade unions to represent the interests of undocumented employees. FNV proposed to offer them advice and legal support, and provide them with the opportunity to lodge complaints concerning abuses at work. In Belgium, trade unions and organizations providing assistance to undocumented migrants are gradually coming together to negotiate on possible cooperation.

Trade unions in other EU Member States such as Germany, Sweden, Denmark and Austria are not entirely supportive of undocumented workers. For many union members, undocumented workers represent a threat, as their presence at the workplace and the working conditions they accept are not according to the collective agreements. The response by unions has not been very positive, and many times has been to alienate them from trade unions. A negative aspect of trade unions' policies concerning undocumented labour has been to crack down on employers who exploit undocumented migrants, which usually has the effect of immediate deportation of the undocumented worker. While some trade unions have carried out some positive measures towards undocumented workers, these unfortunately appear to be an exception rather than the rule.

CHAPTER 15

WHAT A UNION CAN DO FOR UNDOCUMENTED WORKERS

Ghassan Saliba, Head of Department of Migration of CCOO-Catalonia and President of CITE-CCOO Catalonia.

CITE, the Foreign Workers' Advice Center, is a service of the CCOO trade union that provides free advice concerning the legal and administrative situation of foreigners (residence permit, work permit, family reunification, nationality, etc.). We organize language classes (in Catalonia, classes are given in Catalan and Spanish), and we assist migrants in their societal orientation. Our assistance is specifically focused on facilitating the same opportunities and possibilities for immigrants as for other citizens. All of the other themes that deal with labour rights, affiliation, and trade union activities are dealt with by the trade union as they would be for all workers, without any distinction or segregation.

CITE has been in operation since 1987, after the approval of the first foreigners' law in Spain. The first office was located in Barcelona. In Catalonia we currently have 32 offices, and nearly 200 in Spain. In 2002, we served nearly 21,000 people in Catalonia, with nearly 56% being undocumented migrants.

The issue of undocumented migrants is a priority for our trade union. This is not only due to humanitarianism or solidarity, but also to the social and labour responsibilities of our trade union:

1. After winning national elections by an absolute majority in March 2000, the central government of the People's Party (Partido Popular) started an unjustified campaign to change the migration law adopted a year before. According to the Partido Popular, the law was too flexible, had a 'magnet effect', and reflects too much the idea of open borders. A dangerous discourse was used, linking immigration with security and portraying it as a threat against European identity and values. With the absolute majority, the PP was able to change the law, especially leaving out basic rights for undocumented migrants such as the right to have meetings, to join a trade union, to associate, to strike ... these are basic rights recognized by the Constitution regardless of the administrative situation. They also took out Article 29, which allowed for a

permanent regularization of undocumented migrants who could prove two years of residence in Spain.

2. Since March 21, 2001, after three years of application of the new law, the number of undocumented migrants in Spain has increased. There are now more than 500,000 undocumented migrants in Spain, of which 150,000 are in Catalonia. The majority of these migrants work in the underground economy. They are exploited and work in subhuman conditions. There are cases of slavery, of workers who have worked for several months and haven't been paid, who work for 12-14 hours per day in i.e. construction and agriculture, with the situation in the sector of domestic work being even worse. But this situation does not only affect undocumented migrant workers. It causes a general downgrading of the labour conditions and wages of all workers, both immigrants and nationals. Of the 20,749 people who received assistance from the CITE offices in Catalonia in 2002, nearly 12,000 people worked, and of these 12,000 who worked, 53% worked without a contract. Extrapolating these figures would mean that the number of immigrant workers without a contract in Spain is about 35-40%.
3. The fraud that is caused by the underground economy is enormous. Millions of euros are not fed into Social Security, and this affects the whole social welfare system.

Here are some examples of the work that we do in the Department of Migration at CCOO as well as at CITE:

- The CCOO trade union brought forth an anti-constitutional appeal against the law.
- We haven't stopped allowing undocumented migrants to become affiliated to our trade union. In Catalonia, there are presently more than 5,000 immigrants affiliated to the trade union, and nearly 20% are undocumented migrants.
- We intervene to defend the rights of undocumented migrant workers, and have legally won some cases in favor of workers who were not paid their salaries.
- We have reached an agreement with the Labour Inspection and the delegation of the central government in Catalonia to regularize undocumented migrants who denounce their situation, based upon an article in the law ('regularization through collaboration with the administration'). This tool is however very limited and selective and there are very few migrants that dare to denounce their situation.
- We are the heartbeat of several mobilizations for regularizing undocumented migrants. Recently we achieved consensus with employers' associations and the autonomous government (Department of Labour) on the need for regularization of immigrant workers in the underground economy.

- We believe that it is necessary to reinstall the permanent measure for regularization. I repeat that this is a question of social responsibility, and as a trade union we cannot accept the fact that there are exploited workers in an underground economy.
- Our daily work involves free and individualized counseling, and processing of residence permits, work permits, family reunification, suspension of visa and renovation of permits. We try to avoid that these migrants fall into the hands of the mafia, private agencies or people who take advantage of the situation of undocumented migrants for their own financial gain.

The presence of large numbers of undocumented migrants is not due to mafias. Mafias take advantage of the presence of undocumented migrants and especially profit from the absence of a real, agile and flexible policy on residence and work permits. In Spain, the quota policy has failed. In 2002, the government established a quota of 11,000 people for fixed permits, of which 4,400 in Catalonia. In reality, the Catalan government did not even issue 10% of these permits: in the entire year of 2002 only 300 permits were granted to new migrants. Besides this quota system, there was no other way in 2002 to enter the country legally.

The quota policy has also not worked in 2003. For this year, the quota policy is for 4,400 offers for all of Spain. After five months of operation, only 800 offers have been approved and 500 of these 800 offers (60%) are for three companies.

All of this shows the need to rethink the entire European policy in the area of immigration. The policy of zero immigration has failed and the policy of threats, deportation and removal does not work in limiting the number of undocumented migrants. On the contrary, especially in European countries such as Spain, there is a high rate of workers in the underground economy. A more open and flexible policy needs to be made to have working and residence permits issued in countries of origin, always managing the offers of work through the public employment services. We are aware that it is impossible for the circumstances of several immigration producing countries: social despair, liquidation of public services, etc. It is impossible to control the entry of people for different means and it is thus necessary to grant a permanent mechanism of regularization for undocumented migrant workers. At the same time it is necessary to have stricter measures against companies that employ and exploit and take advantage of the presence of undocumented migrant workers.

1. CITE – Foreign Workers’ Advice Center

The Foreign Workers’ Advice Center is a unit set up by the Workers’ Commissions (CCOO) to provide support to immigrants.

CITE provides the following free services:

- Advice and guidance concerning foreigners’ law;
- Applications for work and/or residence permits, family reunification and nationality;
- Catalan language classes;
- Communication between the family and school in Catalonia in different languages.

CITE organizes and participates in:

- Awareness raising campaigns against racism;
- Making proposals in the area of social integration policies;
- Specialized publications on immigration.

CITE is a reference for all foreigners in Catalonia.

There are 32 offices in Catalonia where one can receive free information.

PART 5
CONCLUSIONS AND RECOMMENDATIONS

CHAPTER 16

CONCLUSIONS

The articles in this report correspond to three main lines of analysis in respect to undocumented migrant workers. First, they present an overview of the situation of undocumented migrant workers in Europe and offer an explanation of the various factors that have contributed to the presence of a large irregular workforce. Second, strong emphasis is made throughout the report to standards of basic social rights outlined in international treaties and conventions, with a particular focus on standards for fair working conditions. The third line of analysis offers a comparative perspective by evaluating the current situation of undocumented migrant workers in Europe and international standards. Possible solutions to the problem of general degrading of workers' rights are also presented.

1. The Situation of Undocumented Migrant Workers in Europe: General Deterioration of Workers' Rights

Patrick Taran and Alain Morice reveal in Chapter II how the phenomena of globalization, human mobility and labour exploitation are all interlinked. Individuals pushed out of their countries by the effects of globalization seek ways to maintain their survival elsewhere. Yet due to the difficulties in legally entering the European Union, many migrants enter illegally, or enter legally and become 'illegal' after their visa/residence permit expires. They do not hold the right to work due to their lack of an official work permit, and face difficulties in surviving in Europe, where they are often confronted with racism and xenophobia.

By denying them fair working conditions, employers are able to respond to the growing demands of consumers to have inexpensive goods and services accessible at any time. To ensure a good profit margin, companies often resort to cutting costs by lowering the standards of working conditions. Nationals are not always willing to accept such work, and according to the logic of supply and demand, such jobs are often filled by undocumented migrants who are forced to accept substandard working conditions.

1.1 How Do the Authorities React To This Situation?

Policy makers become involved in this phenomenon in contradictory ways. As mentioned above, they opt for continually stringent policy measures to restrict the entry and residence of foreigners on their territories. Yet on the other hand, they are well aware of the benefits undocumented labour brings to their economies and unofficially tolerate their presence. Nonetheless, official policies are indeed strict towards undocumented migrants as they make it extremely difficult for them to obtain a working permit. Various authors in this report point to the same explanation, which at first sight appears to be a contradiction: official policies remain strict and repressive because what employers really need is to rely on submissive workers. This can be explained more in detail by looking at some sectors.

1.2 Why Are Undocumented Migrant Workers So Desired?

Various European economic sectors rely on undocumented workers to fulfill their needs for work. The percentage of work done by undocumented workers varies according to the country and sector, but it is observed that undocumented work is nonetheless a common element of European countries' economies.

This has come into being for a variety of different reasons. Regarding the agricultural sector in general and the fruit and vegetable production in particular, Nicholas Bell explains that they are heavily affected by climatic uncertainties that make it difficult to plan the workforce. Supermarket chains also exert an enormous amount of pressure on producers to deliver fruits and vegetables on very short notice at competitive prices. In domestic work, Bridget Anderson underlines that employers are frequently looking for carers who can be called to duty outside of working hours whenever their services might be needed, at a moment's notice. Employers in the construction sector also heavily rely on undocumented labour, due to price pressures as well as labour shortages for this type of work in some parts of Europe. But Bernd Honsberg highlights two other elements at stake in the construction sector: first of all, employers in this sector can earn profits of up to 70% if they hire undocumented workers, which leads him to observe that market forces are not the real reason why employers resort to undocumented labour, but merely greed. Secondly, he argues that the role of the consumer, who is often unwilling to pay just prices for goods or services, should also not be overlooked.

Availability and flexibility are two important qualities in workers sought out by employers in these sectors. The aim is to make the workforce a variable that can be reduced in periods of economic downturn. Employers want workers who should be available when needed, are flexible, and will accept poor working conditions. Undocumented migrants are the perfect workers to respond to this demand. They rarely assert their right to fair working conditions due to their dependence on their earnings and fear of other possible repercussions.

According to Alain Morice, the present immigration law, which at the same time tolerates and represses undocumented migrant workers, encourages a system of dependency and can be considered a de facto employment policy. Xenophobia allows this to happen and also keeps it going by reinforcing the isolation of undocumented migrant workers. Nicholas Bell adds that racism and discrimination form part of the recipe.

1.3 Danger of a General Downgrade of Workers' Rights

Several authors underline the risk inherent in tolerating a situation in which a certain group of workers is denied their rights. Alain Morice states that migrants and undocumented migrants have often been the experimental ground for the profound restructuring of the economic fabric and work models. In his view, the new orientation of capital-work relations can be described in two words: flexibility and externalization. All of the present trends of temporary work, precarious contracts, subcontracting, mobile schedules, dependency of employees and undeclared employees have all been tried out first on foreign workers. Ghassan Saliba also states that the substandard situation of undocumented migrant workers causes a downgrade of labour conditions and wages of all workers. Along the same line, Nicholas Bell warns of being aware when new statuses are established: in this sense it appears that governments try to institutionalize this situation by providing legal contracts without providing rights. 'Have work but not the worker' will be the core of the whole future labour policy, if it is not stopped in its present stage.

2. Standards: Models to Guarantee Workers' Rights

Being undocumented is not synonymous to having no rights whatsoever; on the contrary, various international conventions set out rights for all persons and workers, regardless of their administrative status. Instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention for the Protection of the Rights of All Migrant Workers and the Members of Their Families (ICMW), and the ILO Convention No. 143 all aim to promote equality amongst migrant workers and nationals. The ICMW, which went into force on July 1, 2003, is a particularly important instrument not only for the protection of documented workers and their families, but for undocumented workers as well.

Protection from forced labour is also an important element of various international conventions, notably those issued by the International Labour Organization (ILO). In recent years there has also been more emphasis on making broader definitions of trafficking, to not only include sexual exploitation but other forms of trafficking, including labour exploitation and forced labour. Roger Plant's article focuses on

these issues within the context of the ILO's new global program against forced labour, which combines research, community development, awareness raising, victim identification and support, labour market analysis and the strengthening of labour institutions in an integrated action plan in origin and destination countries. International standards regarding forced labour need to be creatively adapted to the needs of the present day, in which private agents and enterprises (who are often linked to organized crime and work in the shadow economy) have important influence.

3. Reaching the Level of Standards: How to Protect Undocumented Workers

Although some European states have adopted protective measures towards undocumented workers by incorporating them into the legal system, this seems to be the exception rather than the rule, and undocumented migrants remain legally excluded in most countries. What are the reasons for this? From an employer's point of view, as explained above, it is advantageous for them to maintain migrant workers in a weak position. This situation is reinforced by the current climate of xenophobia that prevails in Europe. Within this context, it is noteworthy to examine the possibilities of what could and should be done to protect undocumented migrant workers.

3.1 Basic Social Rights

The bottom line is that international instruments indicate that certain rights are inalienable and must be respected, regardless of one's legal status in the country of residence. National and international policy measures should be put into place based upon the existence of international instruments. The ILO suggests several policy elements for viable, sustainable migration management.

Several authors refer to the difficulties that undocumented migrants face in realizing their rights. As mentioned above, many fear possible consequences of revealing their status to public authorities. Legal obstacles are also an important impediment to achieving protection guaranteed through rights. Anna Gallagher points out undocumented workers in the United States have many of the same rights as legal residents, such as the right to a minimum wage, overtime pay, disability pay and compensation and safe worksite conditions. But an unfavourable Supreme Court decision in 2002 concerning undocumented workers is a strong dissuasion for undocumented workers to pursue claims against employers and exercise their labour rights. Norbert Cyrus adds that there is a weak awareness of civil society and undocumented migrants in general of the latter's basic social rights.

3.2 Regularisation

A solution could be envisaged through regularization, which is a possibility for undocumented migrants to achieve protection by the legalization of their residence status. However, regularization campaigns are not always a panacea for all undocumented workers, who may not easily meet the various requirements. Even if they may be potential candidates, they may have difficulties in gathering all of the necessary documentation and proof. The 1998 regularization campaign of migrant domestic workers in the United Kingdom required applicants to show proof of a valid passport, current employment, entry as a domestic worker, etc. Yet such requirements proved to be very restrictive for many migrant domestic workers whose situation required them to live in conditions in which proof was very difficult to obtain. In addition to the complications in meeting all of these criteria, there were problems with the process. It should also be underlined that undocumented migrants are generally afraid of coming into contact with public institutions, which is a necessary requirement of applying for regularization.

Claudia Cortes Diaz also raises some questions about the value of regularization campaigns. She states that regularization has some limitations in that it generally leads to a precarious status in which the undocumented migrant remains vulnerable. Bernd Honsberg also notes that very often a worker who is regularized is fired and replaced by a new undocumented worker.

3.3 Actors

Traditional actors that support workers' rights can act as key players in safeguarding undocumented workers' rights. Trade unions in several EU countries have taken various initiatives to support undocumented workers, by denouncing restrictive laws, raising awareness amongst union members about exploitation and discrimination faced by undocumented workers, publicly denouncing their working conditions, providing legal, social and material assistance to undocumented workers and providing support in general. Ghassan Saliba discusses some of the particular ways in which CITE, the Foreign Workers' Advice Center that is incorporated in the CCOO trade union, has provided support to undocumented workers. CITE offers free advice and management concerning the legal and administrative situation of foreigners.

The role played by the social inspection service is often evaluated rather negatively. In many countries this service aims to fight the exploitation of workers, but usually results in a denunciation of the exploitative employer and deportation of the undocumented worker. Didier Verbeke's example of the Belgian social inspection service is no exception to this reality, but his article goes further to explain that social inspection aims to protect workers (both documented and undocumented) by forcing the application of various social laws by focusing on the em-

ployer. Social inspection thus plays a role in reinforcing the combat against human trafficking.

NGOs are also an important actor and play an essential role in raising awareness and making existing tools for the protection of undocumented migrant workers accessible. Due to their close relation to the target group, they can also empower workers to fulfill their own rights. Norbert Cyrus discusses the positive experiences of the Polish Social Council in convincing undocumented workers to use legal recourse to make claims against their employers to demand withheld remuneration. Some of the cases resulted in industrial hearings and positive decisions concerning the undocumented workers' claims.

Employers' organizations can also be influential in protecting undocumented migrant workers. Nonetheless, their contribution to the conference was minor and can most likely be explained by their general reluctance to speak out on the issue of protection of undocumented workers.

To conclude, an important point was made by Norbert Cyrus, who states that supporting undocumented workers will not increase the volume of the shadow economy, but will reduce it. Unscrupulous employers will be deterred by the strengthening of legal certainty and by workers' abilities to deal with conflicts. In this view the supportive approach is an effective instrument to reduce incentives for exploitation and unfair competition and thus to protect the rights of all workers.

CHAPTER 17

RECOMMENDATIONS

Acknowledging that all workers have the right to fair working conditions and decent living conditions;

Recalling the solid international basis for extending workers' rights to the informal economy;

Aware of the negative effect that the situation of vulnerable and exploited migrant workers has on standards for all workers;

The following recommendations are formulated to ensure protection of undocumented migrant workers:

1. National governments of European states are urged to ratify the International Convention for Protection of the Rights of All Migrant Workers and Members of Their Families (1990),⁸¹ which guarantees various basic social rights to undocumented migrant workers.
2. National and European governments should openly recognise that several economic sectors in Europe depend on a cheap and voiceless workforce and that this dependence is unlikely to change. On the other hand, migration to Europe will continue to occur. The firm recognition of these two facts should serve as the basis for developing further policies in the fields of migration, employment and social affairs.
3. National and European governments should undertake the following measures to ensure that undocumented migrants can effectively fulfill their basic social rights as outlined in the International Convention for the Protection of the Rights of All Migrant Workers and Members of Their Families:

⁸¹ This convention entered into force on 1 July 2003. As of 31 October 2003, Bosnia & Herzegovina is the only European state that has ratified the convention. For a full text of the convention and signatories, see: <http://www.december18.net/UNconvention.htm>.

- Appropriate and effective labour legislation with the necessary links to social security legislation should be developed. Informal workers are generally covered by existing labour legislation, although most are unaware of this and do not fulfill their rights. Social security legislation is usually inapplicable to undocumented migrant workers since the law excludes those that do not have formal employment. But it should be noted that in reality, the problem extends beyond situations in which the employment is clearly informal. There have been many changes in the labour market and in forms of work organization in the recent decade. Labour legislation has failed to keep up with the increasing flexibilisation and externalisation. It is important to adapt labour legislation without lowering core labour standards.
 - Since the repressive approach in dealing with undocumented migrant appears to have failed, governments should undertake a supportive approach. Such an approach could entail stimulating the legal assertiveness of informal workers and empowering them in their ability to deal with conflicts. Incentives for hiring this 'easily exploitable' workforce would then be reduced.
 - Legislation and policies should be formulated with special focus on the needs of undocumented women and children, who are particularly vulnerable.
4. National and European governments should take appropriate measures to reconcile flexibility with equity (as emphasized by the ILO), to protect workers and uphold their rights throughout the process of increasing productivity in the European economy. The Guidelines for the Employment Policies of EU Member States (as presented by the Council on 22 July 2003) are designed to help in reaching the Lisbon goals - the EU should become the world's most dynamic and competitive economy. Issues such as safety at work and quality of jobs are merely addressed in the name of enhancing productivity. It is, however, important that the European Union does not lose sight of its goals of social inclusion and solidarity. Indeed, striving for a competitive economy in Europe puts pressure on labour relations on the global level. This is why it is important for employment policies to ensure that measures taken to enhance production are never made at the expense of the worker.
5. To develop a sound policy on this issue, national and European governments should prioritize collecting and exchanging data.
- Research on undeclared work and the employment of undocumented migrants should have a global approach. Very little research has been done on the issue, but two studies that have been launched by the EC on undeclared work since its 1998 communication on this subject (reporting on the effectiveness of the different policies to combat undeclared work, and focusing on the measurement of undeclared work, the situation in the accession countries, the gender dimension and good practice) have a rather nar-

- row approach and do not take into account all of the relevant factors described in this report. A study on undeclared work should investigate both supply and demand of informal work, the role of all of the traditional partners and consumers, and should make the link to migration and migration policies.
- For the collection of data, a formal (governmental) or informal (NGO) ombudsman should be appointed to gather information on abuse, exploitation, and violations of rights.
6. It is important to rely on existing tools to protect undocumented migrant workers. Traditional actors in the field of labour are challenged to reconsider or reinforce their role.
- Trade unions have a great potential in protecting undocumented migrant workers. The present situation of exploitation of workers and lack of protection in labour legislation is the same phenomenon that occurred more than a century ago when unions were beginning to be established. If trade unions refuse to include undocumented migrant workers in their ranks, their power base will become smaller, and their opinions will no longer be seen as representative of all workers. Unions will end up defending a diminishing group of privileged, mostly male workers with permanent jobs in traditional industries, who feel threatened by the growing number of unprotected workers.⁸² The charter that is currently being drafted by the International Union of Farm Workers on the rights for documented and undocumented migrant workers in agriculture could serve as an example.⁸³
 - Instead of only talking about migrants in terms of a needed workforce to enhance productivity, employers' organisations should stimulate their members to debate relevant ethical issues. Employers' organisations should take a clear stand against exploitation of the workforce for the benefit of increasing profit.
 - Labour inspectors also play an important role in protecting undocumented migrant workers, as their mission is to protect all employees. Labour inspectors are urged to consider undeclared workers as victims, and to minimize the negative consequences that an apprehension might have for them.

⁸² FNV (2003), *From Marginal Work to Core Business*. European Trade Unions Organising in the Informal Economy, Amsterdam.

⁸³ International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF). "A Charter of Rights for Migrant Workers in Agriculture". 14 July 2003. http://www.iuf.org/cgi-bin/dbman/db.cgi?db=default&uid=default&ID=927&view_records=1&ww=1&en=1 (29 October 2003).

- Unions cannot meet the challenges of the informalization of the labour market alone. This is especially true where unions are still learning about how the process of informalization is occurring, or where they have difficulties in reaching and organising informal economy workers. Therefore, co-operation and alliances with researchers and with NGOs working in the field of labour are very important.⁸⁴ It is also imperative that individuals and NGOs that provide humanitarian support to undocumented migrant workers should in no way be penalized or criminalized.
7. Consumers can also play a role in combating the exploitation of undocumented migrant workers. Consumers seek the lowest price and are usually unaware of the social and environmental conditions in which the production of the goods they consume takes place. Through campaigns (e.g. the Clean Clothes Campaign),⁸⁵ they can be made aware of their responsibilities and the choice they have not to purchase certain products.
 8. In addition to adapting labour and social security legislation to guarantee undocumented migrant workers' fulfillment of their basic social rights, national and European governments should elaborate and implement anti-racism and anti-discrimination legislation, as racism and discrimination often contribute to the exploitation of undocumented migrant workers.

⁸⁴ FNV (2003), *From Marginal Work to Core Business*. European Trade Unions Organising in the Informal Economy, Amsterdam.

⁸⁵ Clean Clothes Campaign, <http://www.cleanclothes.org> (29 October 2003).

EPILOGUE

Wahid, Undocumented Migrant.

My name is Wahid from Morocco. I am the son of a well-documented immigrant who has been working five years in different countries in Europe, about forty years ago. After five years my father went back home to start a business.

Forty years later, fate has it that I came to Europe as well. Since my father saw to it that I learned many languages, I came to Europe with a lot of potential. Indeed I learned five European languages in private schools back home in my country. I have been living now for thirteen years in Belgium in an undocumented situation. During this time I have been working as a translator with a number of organizations, especially in the social sector, with refugees and 'clandestines'. I learned many things, and I find it very important to give something back to the society.

I see that, in what we are doing here, it is very important to work together, otherwise nothing will get done. The problem of undocumented migrant workers for example is a problem which transcends barriers and geographical locations. It's a universal problem, if you wish. I realize that there is no magic potion to solve this problem. There are many problems in the world that a humble human being cannot solve without really working together with other organizations, because it's so complex and it's of a very difficult nature.

Yet a journey of 1,000 miles starts with one small step. I think that the journey has started, and we should encourage further steps. It's encouraging to notice that people are becoming more and more aware of the issues. They don't really give a break to the politicians who want to abuse this issue, and I hope that this will continue. A word of thanks to the people of PICUM and the others who have enriched this conference, by their remarkable input.

I will read to you now some articles from the Universal Declaration of Human Rights. There's about thirty, but I'll just mention six. The first one is that 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 the spirit of brotherhood. The second article says that everyone is entitled to all the rights and the

freedoms set forth in this declaration without distinction of any kind such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The third article says that everyone has the right to life, liberty and security of person. The fourth article says that no one should be held in slavery or servitude. Slavery and the slave trade shall be prohibited in all their forms. This is a very important one. No one should be subjected to torture or to cruel, inhumane or degrading treatment or punishment. I move directly to the thirteenth: Everyone has the right to freedom of movement and residence within the borders of each state. Everyone has the right to live in a country, including his own, and to return to his country. The fourteenth: Everyone has the right to seek and to enjoy, in other countries, asylum from prosecution, and this right may not be involved in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principals of the United Nations.

I thank you all.

ANNEXES

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2. Resources on Undocumented Migrant Workers

2.1 Some Useful Websites

<http://www.picum.org>

Site of the Platform for International Cooperation on Undocumented Migrants, which aims at promoting respect for the human rights of undocumented migrants in Europe.

<http://www.december18.net>

December 18 is an online organisation for the promotion of the human rights of migrants worldwide.

<http://www.solidar.org>

SOLIDAR is an independent international alliance of non-governmental organisations (NGOs) involved in social service provision, international co-operation, humanitarian aid and life-long learning, which are historically linked to the free and democratic labour and trade union movement.

<http://www.civic-forum.org>

The European Civic Forum focuses on research and development of alternative lifestyles to the neo-liberal economic model; exercising citizenship through new forms of solidarity; direct exchanges; and conflict prevention through better mutual knowledge and intercultural contacts.

<http://www.conc.es/cite>

This is the website of the Foreign Workers' Advice Centre (CITE), which is part of the CCOO Spanish trade union. CITE provides support for foreign workers.

<http://www.gisti.org>

GISTI is an organization that specializes in foreigners' law. Its main services include free legal consultations to those in need, editing of publications and training sessions in the area of foreigners' law.

<http://www.ilo.org>

The International Labour Organization is the UN specialized agency which seeks the promotion of social justice and internationally recognized human and labour rights.

<http://www.bok.net/pajol/>

Historical site focusing on sans papiers in France, which contains numerous links and an annotated bibliography.

http://pajol.eu.org/rubrique.php3?id_rubrique=42/

Dynamic site with many links maintained by a collective of activists in France and abroad that wish to inform, reflect and act upon (and against) asylum policies and externalisation of camps for asylum seekers.

http://www.noborder.org/news_index.php

Website of the No Border Network, which contains information and links on deportation and detention.

<http://www.migpolgroup.com>

The Migration Policy Group publishes Migration News Sheet, a European monthly covering all major European developments in the fields of immigration and asylum policies, asylum-seekers, controlled migration, irregular and illegal immigration, racism and xenophobia, and issues arising out of the process of integrating ethnic minorities.

<http://www.statewatch.org>

This website provides excellent reporting on civil liberties issues in the European Union.

<http://www.irr.org.uk/>

The Institute of Race Relations (IRR) in London publishes the European Race Bulletin, a comprehensive quarterly digest of race relations in Europe, collating and summarizing news reports from papers, magazines, NGOs and campaigns in every European country.

<http://migration.ucdavis.edu>

This website is a good source of information on migration and integration issues. It publishes (electronically and in hard print) the monthly Migration News which reports on migration issues around the world.

<http://www.opm.gov/extra/investigate/IS-01.pdf>

This U.S. government published report contains information on citizenship laws from countries throughout the world.

<http://www.migrationinformation.org>

This migration information news service is part of the Migration Policy Institute based in Washington, D.C., a policy group focusing on immigration issues around the world.

<http://www.ilrc.org>

The Immigrant Legal Resource Center is a non-profit organization in the United States dedicated to the protection of migrants' rights.

<http://www.nationalimmigrationproject.org>

The National Immigration Project is a network of lawyers, law students, jailhouse lawyers and legal workers joined together to end unlawful immigration practices in the United States.

<http://www.nilc.org>

The National Immigration Law Center is North American non-profit organization dedicated to the promotion of the respect of the rights of low-income immigrants and their family members in the United States.

<http://www.aila.org>

This is the website for the American Immigration Lawyers Association composed of over 8,000 lawyers who represent immigrants and refugees in the United States. It is a powerful and influential voice in the immigration debate.

<http://www.maldef.org>

The Mexican American Legal Defense and Education Fund is a North American non-profit organization dedicated to the promotion of the rights of Mexican migrants in the United States. Founded in 1968, it is the leading Latino litigation, advocacy and education outreach institution in the United States.

<http://www.nclr.org>

This is the website for the National Council of La Raza, an important and powerful advocacy group for Latino immigrants in the United States.

<http://www.fairus.org>

This is the website of the Federation for American Immigration Reform (FAIR), one of the strongest and most vocal anti-immigration lobbying groups in the United States.

2.2 Selected Publications

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