

Undocumented

Irregular

**First
and Foremost
WORKERS**

Unauthorised
migrants

Clandestine



European Trade Union Confederation (ETUC)



First and Foremost WORKERS

CONTENTS

1. Foreword	3
2. Irregular Migration in Europe EU policies and the Fundamental Rights Gap	5
3. Fundamental and Human Rights Framework Protecting Irregular Migrants in the EU	23
4. Economic and social context of the irregular migration of unskilled labour in Europe: specific features	37
5. Fighting against exploitation of the workforce and for stricter application of labour standards, access to justice and cooperation with labour inspectorates	51
6. Ensuring fair wages and working conditions for undocumented migrant workers in Europe: Are fair trade strategies the answer?	57
7. The impacts of irregular migration	71
8. “What price the tomatoes?!” project: fighting exploitation of workers and ensuring that undocumented migrant workers’ fundamental social rights are recognised and protected in Europe through trade union actions	89

FOREWORD

“WHAT PRICE TOMATOES?!” AND THE WAY AHEAD

Through the project “What price tomatoes?!”, the ETUC has succeeded in shedding some light on the controversial issue of irregular migrants.

It is difficult to work out how many third-country nationals reside irregularly on the territory of the European Union. Estimates put the figure close to 5 million. It is even more difficult to work out how many of them are engaged in irregular jobs.

Too often, especially in recent times, all irregular migrants have been grouped, without any distinction, into the category of *sans papiers*, *clandestini*, *illegal persons*, even at European level. Too often, they are marked out as criminals and therefore subject to heavy repressive measures, without any distinction as to what makes them irregular.

The ETUC rejects the idea of a person being labelled “illegal” regardless of the infringement of law he/she is responsible for. Too often, an irregular position stems from an infringement of administrative rules. Many migrant workers fall into an irregular position against their will as a result of factors such as delays in delivering permits, difficulties in family reunification, excessive costs of administrative files, etc., caused by employers. Unfortunately, irregularity suddenly turns into the exploitation of workers in irregular administrative situations and/or the recruitment of migrants under precarious working and social protection conditions.

Many of these cases could be corrected. Turning all forms of administrative faults into criminal offences (as recently envisaged by many Member States) is harmful in terms of respect for human dignity and questionable from a legal point of view. Too often, governments neglect the potential of well managed bridges to regularity, thereby making the situation even worse. A repressive approach would serve only to make people more vulnerable, pushing them into the grey zone of

society and leaving them open to abuses, labour exploitation and exposure to criminal organisations.

We call upon the European Union and all Member States to show respect for the human dignity of all persons settled on their territories. We ask the European Union to recognise the fundamental social rights of all workers and to favour social cohesion by preventing the creation of two-speed migration channels and the exploitation of workers in irregular administrative situations and the recruitment of migrants under precarious working and social protection conditions.

The EU institutions, often pushed by the rigorosity of Member States, have prioritised forced returns (e.g. employers’ sanction directive or return directive, enhancement of the Schengen Borders Code, Entry-Exit System, Frontex and EU border defence, etc.). However, such measures have not been very effective in tackling the difficult situations in which irregular migrants live and work in Europe.

This situation is at odds with the more comprehensive urgent objectives dictated by forecasts on demographic change, labour market shortages, business succession, and the EU2020 strategy more generally. Is it credible that the imminent demand for workers that results from demographic change could be compatible with a large-scale return of irregular migrants? It is true that the EU should encourage migrants to undertake clear and reasoned migration projects, well founded along legal channels. That is why the ETUC has opened an intensive dialogue with the EU institutions to enforce the European plans aimed at improving procedures to release residence and work permits, making them more transparent and supported by minimum social protection. But it is also true that most migrants in an irregular situation did not cultivate projects of irregular migration, but have found themselves in an irregular situation after settling in the territory of the EU.

We should also be aware that Europe is a destination area for refugees, people escaping from war and hunger.

FIRST AND FOREMOST WORKERS

It is right to prevent irregular migration, even to reinforce EU borders or improve bilateral agreements with the country of origin/transition, but these measures are not the ultimate solution. The fleet of boats crossing over the Mediterranean Sea in the last months has shown, once again, that the idea of Fortress Europe is misleading. It must be possible to discourage irregular arrivals while abiding by duties of international protection, safeguarding human dignity and offering hopes of a better life within the EU.

The European Pact on migration and asylum has delivered the misleading message that migrants entering EU territory could be chosen one by one, cultivating the illusion that migration flows could "algebraically" respond to labour market needs.

More than an illusion, this approach entails the undesirable consequence of hiding the actual situation of millions of people residing on EU territory and working irregularly. Through "What price tomatoes?!" we have once again demonstrated that labelling irregular migrants as "illegal entities" does not solve the problem of their precarious life and work. Neither does it relieve the Member States of their presence.

With this project, the ETUC has shed some light on the situation of these millions of unfortunate people. Some questions remain unanswered: How to transform an irregular position to a regular one? How to protect migrant workers? How to protect their families?

ETUC members and partners from civil society have worked together to unveil stories and concerns that we consider worthy to be further disseminated. That is what this publication stands for.

In years to come, irregular migration will remain an issue for European trade unions, as well as for Europe as a whole.

We regret that the action plan implementing the Stockholm strategy insists on the illegal status of migrants, and reiterate its bias in favour of repressive measures. We are aware that irregularity in conditions of residence and work becomes an overwhelming obstacle

to proper integration and full civil, political and social inclusion of migrants.

This is not an attempt to show benevolence to those who have infringed the law. As it clearly emerges from experiences witnessed during this project, those we define as "illegal" are often people who have lost their regular status against their will. That is to say, people who wish to re-state their regularity, people who already have a job, people who contribute to the wealth of their employers and the community at large. People who deserve a better reaction from EU, national and local institutions.

Some other questions remain unanswered.

Trade unions, as mainstreaming organisations in European society, have already shown that it is possible to operate on the ground to help those who are in need. Unions in Member States work with migrants every day, offering them assistance, services and membership. Thanks to widespread presence on the ground, they are able to reach individuals and operate a policy of proximity with disadvantaged categories, especially in urban, rural and cross-border areas. Thanks to their support, migrants can escape the pitfalls of irregularity or regain full legal status.

From this project we have learned that the ETUC has a role to play in enhancing these experiences and networking them to encourage exchange of know-how, multiply good practices and, when possible, increase the range of services provided by its affiliates.

This is our agenda. Of course, the ETUC feels the duty to cooperate with the EU institutions, but it must be a two-way process in which the voice of the strongest player in organised society in Brussels could become strong and influential.

This is the message that the ETUC wants to launch at the end of the project "What price tomatoes?!".

Finally, I would like to take this opportunity to thank the project partners for their generous cooperation and all participants for their fruitful contributions.

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REPORT

**IRREGULAR MIGRATION
IN EUROPE**
EU POLICIES
AND THE FUNDAMENTAL RIGHTS GAP

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This publication falls within the scope of the project "*What Price the Tomatoes?!*", funded by the DG Employment, Social Affairs and Equal Opportunities of the European Commission and coordinated by the European Trade Union Confederation (ETUC).

Introduction	7
1. Undocumented migrant workers in the EU: setting the context	8
1.1. Who is an irregular migrant?	
1.2. Ways into irregularity	
1.3. How many irregular migrants in Europe?	
2. The EU Political and Legislative Framework on Irregular Migration	10
2.1. EU legislative framework	
2.1.1. Treaty of Lisbon: implications for irregular migration	
2.1.2. EU secondary law addressing irregular migration	
2.1.3. EU secondary law on labour migration	
2.2. The Stockholm programme and the EU policy on irregular migration	
2.3. Irregular Migration policies in the European Commission	
2.3.1. DG Home Affairs	
2.3.2. DG Employment, Social Affairs and Equal Opportunities	
2.3.3. DG SANCO	
3. Undocumented workers and access to fair working conditions	17
Conclusions	19
List of References	20

INTRODUCTION

The labour exploitation of undocumented workers needs to be understood within the broader context of the vulnerability of third country national TCNs lacking a regular status of entry or stay. The negative impact of certain immigration policies, hindering or denying access by undocumented migrants to employment and fair working conditions and to basic socio-economic rights more generally, has been found to compound this vulnerable status. This problematic has been repeatedly underlined by academics and civil society actors across the European Union. This report aims to provide an overview of undocumented migrant workers in the EU, drawing on current policy making, academic texts and the results of EU funded research projects on undocumented migration. It addresses some of the core issues at stake when trying to understand the broader context of irregular migration: Who are we talking about when we refer to irregular migrants, how is this group addressed within the legal and policy frameworks of the European Union and what are the practical issues affecting their access to employment related rights?

The paper should be read in conjunction with the CEPS paper *“Fundamental and Human Rights Framework:*

Protecting Irregular Migrants in the EU”, which sets out the broader EU and international legal framework of rights accorded to undocumented migrants. Together, these reports aim to provide a starting point for the “What Price the Tomatoes?!” project, offering a broad legal and policy framework in which to locate issues surrounding the labour exploitation of undocumented migrant workers.

The first section sets the context by shedding light on basic questions surrounding irregular migration: who is an irregular migrant, how do individuals fall into irregularity and what is the size of the irregular migrant population in the EU. The second section examines how irregular migrants are addressed by the legal and policy framework of the European Union. Special attention is paid to the policies, programmes and projects of the European Commission implicating undocumented migrants, leaving the legislative framework to be developed in greater depth in the second CEPS paper.¹ The third section examines evidence of the barriers faced on a day-to-day basis by undocumented migrants in their access to basic social and economic rights – particularly concerning employment and fair working conditions.

¹ Merlino, M. and Parkin, J. (2011), *Fundamental and Human Rights Framework: Protecting Irregular Migrants in the EU*, CEPS Report.

1. UNDOCUMENTED MIGRANTS IN THE EU: SETTING THE CONTEXT

1.1. WHO IS AN IRREGULAR MIGRANT?

Despite the high profile of irregular migration in public discussion, the question of *who* constitutes an irregular migrant is seldom examined. Guild notes that definitions of illegal entry or stay are rarely specified in the national laws of EU Member States.² At EU level, the Return Directive (2008/115)³ defines “illegal stay” “the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry (...), stay or residence in that Member State”.

Under this broad definition, there are three primary ways through which individuals may be classified as irregular: First, through irregular *entry*, where a foreigner arrives clandestinely on the territory of a state; Second, through irregular *residence*, where a foreigner lacks the authorisation to stay in a country; and third, through irregular *activity*, where a non-national engages in employment when not permitted to do so or takes on employment in a manner that is inconsistent with his or her immigration status.⁴

These criteria can combine in many ways and produce many forms and ‘degrees’ of irregularity. For example, an individual may enter a Member State clandestinely, but subsequently gain a recognised legal status through filing an application for asylum. Likewise, they may enter legally, only to fall into irregularity upon the

expiration of their residence permit. It is also important to note that irregular migrants do not necessarily engage in irregular employment. Many migrants reside irregularly in a country, but work legally and pay taxes.

1.2. WAYS INTO IRREGULARITY

There is no typical profile of an irregular migrant and the ways through which individuals may fall into a situation of irregularity are highly varied. Popular images of “illegal” migrants give weight to those who cross EU borders undetected or with falsified papers with the clear intention of residing and working irregularly. Without doubt, the clandestine entry of migrants into Europe is a reality, one that has been variously linked to macro-phenomena including globalization, regional underdevelopment, environmental degradation and conflict.

However, this image leaves aside alternative routes into irregularity, such as failed asylum seekers who feel they cannot return to their country of origin, rejected candidates for family reunification, children born to undocumented parents, as well as students that have lost their study permit or tourists overstaying their visa.⁵ Indeed, it is more common to see the transition from regular to irregular status than vice versa.

For many labour migrants, continuation of a residence permit is tied to a work contract. This means that should workers lose their job or be refused a renewal of their employment contract, these individuals undergo a change in their legal status which leaves them facing the threat of expulsion and places them in a very vulnerable situation with regard to access to rights. This demonstrates the extent to which the status of irregularity is not fixed, but subject to changes over time, often related to developments in an individual’s personal circumstances which renders their presence “illegitimate” in the eyes of the state. Foreigners become irregular because they do not fit into any legal administrative category. Their presence therefore challenges the authority of

2 E. Guild (2004) “Who is an irregular migrant?” in B Bogusz, R. Cholewinski, A. Cygan and E. Szyszczak (eds.) *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Leiden, Martinus Nijhoff Publishers.

3 Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals, (OJ 2008 L 348/98).

4 See E. Guild (2004) “Who is an irregular migrant?” in B Bogusz, R. Cholewinski, A. Cygan and E. Szyszczak (eds.) *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Leiden, Martinus Nijhoff Publishers, p.3. Also B. Ghosh (1998) *Huddled masses and uncertain shores: insights into irregular migration* Martinus Nijhoff Publishers p.3-4.

5 PICUM (2003), *Book of Solidarity: Providing Assistance to Undocumented Migrants. Vol. I-III*. Brussels, PICUM. (Retrieved from: <http://www.picum.org/article/reports>.)

TERMINOLOGY

Different terms are used to denote different facets of irregular migration: *illegal or irregular* (with no regular/legal status), *clandestine, undocumented* (without the appropriate papers) or *unauthorised*.

The term 'illegal' is employed in several EU policy documents framing the debate on irregular migration, such as the Stockholm Programme (2009) and the European Pact on Immigration and Asylum (2008).

The use of terms such as "illegal" and other criminal categories to describe undocumented migrants has been widely criticised by academics, civil society and several European actors, including the Council of Europe, the EU Parliament, the Fundamental Rights Agency, and others.

These criticisms have begun to effect a change in the discourse of the European Commission (DG Home). In particular it is noteworthy that the Commissioner for Home Affairs, Cecilia Malmström now uses the term "irregular migration".

the state to govern legitimate means of movement and residence. The response is to characterise such individual as "illegal" and a security risk.⁶

It is important to highlight the fact that the use of certain terminology has deep implications for the way in which public policies are justified, developed and implemented. Both at EU and national level the debate about undocumented migration has been framed in an *insecurity continuum* that ranges between irregular migration and criminality.⁷ This insecurity process allows for repressive measures such as detention and expulsions as well as the use of criminal law for the management of irregular migration. The Council of Europe's commissioner for human rights highlighted that there is an increasing trend in the EU towards the criminalisation of undocumented migrants. He asserted that such a method of controlling international movement is "a *disproportionate measure* which exceeds a state's legitimate interest in controlling its borders" and that it "corrodes established international law principles, it also causes many human tragedies".⁸

1.3. HOW MANY IRREGULAR MIGRANTS IN EUROPE?

Besides terminology, the lack of reliable data and the use of inflated figures concerning undocumented migrants in the EU have been used as a basis for justifying increasingly restrictive policies and practices.

Wide ranging estimates from 2 million to 8 million people have appeared in EU policy documents. According to the CLANDESTINO project - Undocumented migration: Counting the uncountable data and trends across Europe) funded by the European Commission (DG Research) - estimates of undocumented migrants in the EU are based on numbers which are not derived from reliable sources and which do not specify any time frame.⁹ On the basis of a detailed review of selected Member States, the project found that the undocumented population in 2005 more likely ranged from between 2.8 and 6 million persons. A recent estimation conducted by the project indicates that the size of the undocumented population in the EU in 2008 declined to 1.9 – 3.8 million (for the EU 27).¹⁰

6 E. Guild, (2009), *Security and Migration in the 21st Century*, Polity Press, Cambridge.

7 D. Bigo, "Security and Immigration: Toward a Critique of the Governmentality of Unease", *Alternatives: Global, Local, Political*, Vol. 27, Special Issue, February 2002, pp. 63-92.

8 T. Hammarberg, "It is wrong to criminalise immigration", in *Human Rights in Europe: Time to Honour our Pledges, Viewpoints by T. Hammarberg*, Commissioner for Human Rights, Council of Europe, Strasbourg, 2009.

9 M. Jandl, D. Vogel and K. Iglicka, *Report on Methodological Issues*, CLANDESTINO, Athens, October 2008, p. 4 (retrieved from http://clandestino.eliamep.gr/wp-content/uploads/2009/02/clandestino_report-on-methodological-issues_final1.pdf).

10 Kovacheva, V. and D. Vogel (2009), The size of the irregular foreign resident population in the European Union in 2002, 2005 and 2008: A dynamic aggregate country estimate, Working Paper No. 4/2009, Database on Irregular Migration, Hamburg Institute of International Economics, Hamburg (retrieved from <http://irregular-migration.hwwi.net/>). P. 9

The fact that there are fewer irregular migrants than previously assumed and that number of irregular migrants has been declining is also confirmed by the data provided by FRONTEX, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. According to the report by the Frontex Risk Analysis Network (FRAN) the first three months of 2010 showed significant drops in all indicators concerning the detections of irregular external border crossings which were down 36% on the fourth quarter of 2009 and 39% on the same period a year earlier.¹¹

The misinformed use of statistics can have a negative impact, fuelling political and public fears that the EU is in the process of being flooded by irregular migrants and at times forming a basis for the trend towards restrictive practices and “emergency” led policy responses.¹² Consequently they can serve to exacerbate the vulnerable position of irregular migrants as targets of exclusionary policies and discriminatory practices.

One of the principal forms of migration today is labour migration. Hundreds of thousands of undocumented migrants work in the EU and their presence in various sectors of the economy – such as agriculture, construction, domestic work and others – has been tolerated by many governments in the EU. Undocumented workers represent an exceptionally vulnerable category and their labour, which in most of the cases is cheap and unprotected, has been a key factor for the development of shadow economies. Up to date and reliable statistics concerning the number of undocumented migrants currently working in various sectors of the EU economy are central in order to construct evidence based policies attentive to the protection of human and labour rights of undocumented workers.

2. THE EU POLITICAL AND LEGISLATIVE FRAMEWORK ON IRREGULAR MIGRATION

2.1. EU LEGISLATIVE FRAMEWORK

2.1.1. Treaty of Lisbon: implications for irregular migration¹³

The entry into force of the Lisbon Treaty in December 2009 has brought important changes in the EU’s Area of Freedom Security and Justice (AFSJ). In particular, there are three innovations which are significant for reinforcing the protection of fundamental rights, including those of irregular migrants:

The attribution of a legally binding status to the Charter of Fundamental Rights;

The provision of a legal basis for the EU’ accession to the European Convention of Human Rights (ECHR);

The expansion of the jurisdiction of the European Court of Justice.

Firstly, the existence of a legally binding Charter obliges the EU institutions and Member States’ authorities to respectively adopt and transpose EU law in conformity with fundamental rights. The majority of the rights enshrined in the Charter are accorded to *everyone* independently of the migration status and can be claimed before relevant institutions and courts.

Secondly, with the accession of the EU to the ECHR, those who consider that their rights have been infringed by the EU institutions or Member States implementing EU law will have the opportunity to take their cases before the ECtHR. The EU in this way will be subject to a more rigorous external control and monitoring in human rights matters.

The third innovation introduced by the Treaty of Lisbon consists of the repeal of the disposition limiting to higher courts the possibility to refer interpretative questions to the CJEU. This measure is likely to increase the number of preliminary rulings and – as the interpretation provided by the CJEU is binding on both national administrations

¹¹ http://www.frontex.europa.eu/situation_at_the_external_border/art15.html

¹² E. Guild and S. Carrera (2010) ‘Joint Operation RABIT 2010’ – FRONTEX Assistance to Greece’s Border with Turkey: Revealing the Deficiencies of Europe’s Dublin Asylum System Centre for European Policy Studies, November 2010.

¹³ A more detailed description of the implications that those changes will have in the upholding of the rights of irregular migrants is provided in the paper titled “Fundamental and Human Rights Framework: Protecting Irregular Migrants in the EU”.

EMPLOYERS SANCTIONS DIRECTIVE (2009/52/EC)

One of the core objectives of the Directive is to deter irregular immigration by tackling undeclared work. According to the directive, employers who cannot show that they have undertaken certain checks before recruiting a third-country national will be liable to fines and other administrative measures. The use of criminal penalties is foreseen in the following cases: repeated infringements, simultaneously employing a significant number of persons, particularly exploitative working conditions, knowingly using work or services exacted by a person who is a victim of human trafficking, and illegally employing a minor.

and courts across the EU Member States – to enhance a more uniform application of EU immigration law.

2.1.2. EU secondary law addressing irregular migration

In 1999 with the entry into force of the Amsterdam Treaty, the EU has acquired shared competences in the field of “visas asylum and immigration”. Since then the EU has adopted several secondary legislative measures dealing with diverse aspects of irregular migration. The body of the EU *acquis* on irregular migration is summarised in the **table 1**.

The above table demonstrates the primary objective in the EU’s strategy towards irregular migrants: that of “fighting illegal immigration”. The key measures which have been adopted in the field of irregular migration have been primarily aimed at increasing the control and surveillance of the EU external borders, at enforcing the return irregular migrants (through the organization of joint flights and the conclusion of readmission agreements with countries of origin and transit), and in establishing administrative and *penal* sanctions for third parties – including facilitators, carriers, and employers – involved in the irregular migration process. This legislative effort aimed at countering the phenomenon of irregular migration has increased the vulnerability and marginalisation of irregular migrants, because it has not been accompanied by complementing measures addressing fundamental rights protection. Several academics have highlighted that the development of a comprehensive EU immigration policy is still missing the fundamental rights component and a strategy towards its practical delivery.¹⁴

In particular, at EU level the use of criminal law sanctions for individuals directly or indirectly involved in the irregular migration process has raised concerns. Cases in point are, the Facilitation Directive (2002/90/EC), which imposes on states the duty to penalise those who, for financial gain, intentionally assist an irregular migrant to enter and/or reside in the EU (this could in principle also include landlords who rent flats to irregular migrants) and the Employers Sanctions Directive (2009/52/EC), which lays down common minimum standards on sanctions to be applied by the EU member states to employers infringing the prohibition of employment of “illegally staying third-country nationals”.¹⁵

The application of a greater number of punitive measures and administrative burdens, as well as criminal sanctions, raises concerns as to whether such measures are compliant with the proportionality test and when examining their implications on irregular migrants’ access to rights. For instance, it has been pointed out that the Employer Sanctions Directive may have counterproductive effects on employment and working conditions.¹⁶

Martinus Nijhoff Publishers, p.182; E. Guild, S. Carrera and A. Faure Atger (2009), *Challenges and Prospects for the EU’s Area of Freedom, Security and Justice: Recommendations to the European Commission for the Stockholm Programme*, CEPS Working Document No. 313, April.

15 The deadline for the EU member states to transpose the provisions of the Employers Sanctions Directive is 20 July 2011.

16 See European Trade Union Confederation (ETUC), Platform for International Cooperation on Undocumented Migrants (PICUM) and Solidar, “Joint Comments on Expected Commission Proposals to Fight ‘Illegal’ Employment and Exploitative Working Conditions”, ETUC, PICUM and Solidar, Brussels, 26 April 2007 (retrieved from <http://www.picum.org>); see also European Network Against Racism (ENAR), Platform for International Cooperation on Undocumented Migrants (PICUM) and Solidar, “Employer’s Sanctions Directive: Will migrant workers pay the price of their exploitation?”, Joint Statement, ENAR, PICUM and Solidar, Brussels, 15 April 2008 (retrieved from <http://www.enar-eu.org>).

14 See R. Cholewinski (2004), ‘European Union Policy on Irregular Migration’, in B. Bogusz, R. Cholewinski, A. Cygan and E. Szyzszak (eds.) *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* Leiden:

TABLE 1. EU LEGALLY BINDING MEASURES ON IRREGULAR MIGRATION

Subject	Measure
Carrier Sanctions	Directive 2001/51 on carrier sanctions (OJ 2001 L 187/45)
Employers sanctions	Directive 2009/52 on sanctions for employers of irregular migrants (OJ 2009 L 168/24)
Expulsion/removal	Directive 2008/115 (Returns Directive) (OJ 2008 L 348/98)
	Decision on European return programme (OJ 2007 L 144)
	Decision on costs of expulsion (OJ 2004 L 60/55)
	Decision 2004/573 on joint flights for expulsion (OJ 2004 L 261/28)
	Directive 2003/110 on assistance with transit for expulsion by air (OJ 2003 L 321/26)
	Conclusions on transit via land for expulsion—adopted 22 Dec. 2003 by Council
	Directive 2001/40 on mutual recognition of expulsion decisions (OJ 2001 L 149/34)
External Borders	Regulation 1988/2006 on SIS II, amending Reg. 2424/2001 (OJ 2006 L 411/1)
	Regulation 1987/2006 establishing SIS II (OJ 2006 L 381/4)
	Regulation 2424/2001 on funding SIS II (OJ 2001 L 328/4)
	Regulation 871/2004 on new functionalities for SIS (OJ 2004 L 162/29)
	Decision 2001/886/JHA on funding SIS II (OJ 2001 L 328/1)
Exchange of Information/ Data	Decision 2005/267 on early warning system (OJ 2005 L 83/48)
	Directive 2004/82 on transmission of passenger data (OJ 2004 L 261/64)
	Regulation 378/2004 on procedure for amendments to Sirene manual: (OJ 2004 L 64)
Human Smuggling	Directive 2002/90 on the facilitation of unauthorized entry, transit, and residence (OJ 2002 L328/17)
	Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit, and residence (OJ 2002 L 328)
Readmission	Readmission Agreements: concluded with Hong Kong (entered into force in 2004), Macao (2004), Sri Lanka (2005), Albania (2006), Russia (2007), Ukraine, Moldova, Bosnia and Herzegovina, Montenegro, Serbia and FYROM (on 1 January 2008), Georgia (2010), and Pakistan. 5 Current mandates are at various stages of negotiation: Morocco, Algeria, China, Turkey, Cape Verde and Belarus.
Trafficking in persons	Directive 2004/81 on res. permits for trafficking victims (OJ 2004 L 261/19)
	Framework Decision on trafficking in persons (OJ 2002 L 203/1)
Visa policy	Regulation 453/03 amending Reg. 539/01 listing TCNs who must be in possession of visas when crossing external borders and those who are exempt (OJ 2003 L69/10)

RETURNS DIRECTIVE (2008/115/EC)

The Return Directive aims at providing minimum standards and procedures at EU level for the return of immigrants staying irregularly on the territory of a member state. The Directive establishes a harmonised procedure, leading to the termination of the irregular stay and the consequent expulsion of the irregular immigrant.

Regarding the Returns Directive (2008/115/EC), this instrument does foresee a number of safeguards for irregular persons pending removal.¹⁷ However it has to be stressed that the Returns Directive constitutes minimum common standards that do not altogether prevent risks of human rights violations following transposition by EU Member States.¹⁸ Particularly important will be the way in which Member States will implement the period of voluntary return and the procedural guarantees concerning forced return and detention.¹⁹

2.1.3. EU secondary law on labour migration

Despite the fact that undocumented workers represent an important component of the labour force of several sectors of the EU economy, the EU secondary law on labour migration is only addressed to regular migrants and protects only their rights. For instance, the Blue Card Directive adopted in 2009,²⁰ aims at attracting only high-skilled immigrants. It regulates the conditions of entry and protects the rights – equal treatment with nationals concerning employment conditions and socio-economic rights – only for this specific category of workers.

Similarly, the yet to be adopted Seasonal Workers Directive also excludes irregular migrants from its personal

scope.²¹ The proposed Directive establishes a fast-track procedure for the admission of third-country seasonal workers, based on a common definition and common criteria, in particular the existence of a work contract or a binding job offer that specifies a salary equal to or above a minimum level. Seasonal workers will be issued with a residence permit allowing them to work for a specified maximum period per calendar year. Provision is also made for facilitating the re-entry of a seasonal worker in a subsequent season.

The stated purpose of the legislation is to meet gaps in the labour market which are often filled by irregular migrants, to ensure minimum standards that will prevent exploitation and protect the health and safety of third-country seasonal workers, and to ensure return and prevent overstaying of seasonal migrant workers. While the fundamental rights safeguards contained in the proposal would signify a welcome step forward, the proposed legislation nevertheless builds on the piecemeal, sectoral approach adopted by the EU with regard to regular immigration.²² This approach has been criticised by the European Trade Union Confederation (ETUC, 2007) for the risk that it may “increase the divergence in rights for several groups of workers and may contribute to a two-tier migration policy with less or no rights and protection for the lower skilled and low-paid migrants”.²³

17 For further details see the accompanying report of M. Merlino and J. Parkin (2011) *Fundamental and Human Rights Framework: Protecting Irregular Migrants in the EU*, “What Price the Tomatoes?!” Working Paper.

18 The deadline for transposition of the Returns Directive was 24th December 2010.

19 See A. Baldaccini, “The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive”, *European Journal of Migration and Law*, Vol. 11, No. 1, 2009, pp. 11-17.

20 Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155/17, 18.06.2009.

21 Commission Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, COM(2010) 379 final, 13.07.2010.

22 Sergio Carrera and Anaïs Faure-Atger, (2010), *Impact of the Seasonal Employment of Third-Country Nationals on Local and Regional Authorities*, Report for the Committee of the Regions.

23 European Trade Union Confederation (ETUC) (2007), ETUC Position regarding the European Commission’s Proposals on Legal and ‘Illegal’ Migration, ETUC, Brussels, 7 December (retrieved from www.etuc.org).

Finally, the proposal for a Directive on a single application procedure for a single permit for Non-EU Member Country should be highlighted.²⁴ Again this directive, if adopted, would grant a common set of socio-economic rights to third country national workers equal to that of EU nationals. However, as it stands, the proposal not only excludes irregular migrants, but also other categories of workers such as refugees, seasonal workers, and intra-corporate transferees.

The concern arising from such a legislative approach to EU labour immigration is that these directives would lead to the application of different rights to different categories of workers, a sectoral approach to rights allocation that could give rise to discrimination.

2.2. THE STOCKHOLM PROGRAMME AND THE EU POLICIES ON IRREGULAR MIGRATION

The Stockholm programme, adopted by the Council in December 2009, is a key political document laying down the priorities and guidelines for a five-year period for the construction of an area of freedom security and justice. Its adoption, which coincided with the entry into force of the Lisbon Treaty, could have served to recognise that undocumented migrants are among the most vulnerable groups and to make the protection of their fundamental rights and their social inclusion a priority for EU policies. Regrettably, this has not been the case. As reflected in its title, "An Open and Secure Europe Serving and Protecting the Citizens", the Stockholm programme remained focused firstly on the rights of

the "citizens" and secondly on the rights of "legally residing" TCNs. With the sole exception of "unaccompanied minors", there is no express reference to irregular migrants in the programme under section 2.3 entitled "living together in an area that respects diversity and protects the most vulnerable". On the contrary, the insecurity language of "illegality", to refer to the lack of documentation of people who are on the move and are perceived as a threat, is widely used throughout the programme.

The control-oriented approach on irregular migration, which is based on criminalisation, return and readmission, has been the prevalent one in the Stockholm programme and the one which has been translated into the Action Plan elaborated by the Commission. The following are the priorities put forward in the Stockholm programme:

monitoring the transposition of the Directives on Returns and Employers' Sanctions;

increasing cooperation among member states on the return of irregular immigrants by chartering joint flights;

fostering the external dimension of Europe's irregular immigration policy by developing information on migration routes, promoting cooperation on border surveillance and border controls, and facilitating readmission and capacity building in non-EU countries;

concluding "effective and operational" readmission agreements, developing monitoring mechanisms for implementation and a common EU approach against non-cooperative countries;²⁵

developing an action plan on unaccompanied minors, focused on prevention, protection and assisted return.²⁶

²⁴ Commission Proposal of 23 October 2007 for a Council Directive on a single application procedure for a single permit for Non-EU Member Country nationals to reside and work in the territory of a Member State and on a common set of rights for Non-EU Member Country workers legally residing in a Member State, COM(2007) 638, Brussels, 23.10.2007.

²⁵ See J.P. Cassarino, *Readmission Policy in the EU: Drivers and Implications for Human Rights Observance*, Study commissioned by the Policy Unit C of the European Parliament, Brussels, September 2010.

²⁶ This constituted one of the key priorities of the Spanish presidency during the first half of 2010. The European Commission presented the action plan in May 2010. See European Commission, Communication on an Action Plan on Unaccompanied Minors (2010–2014), COM(2010) 213 final, Brussels, 6 May 2010. In June 2010 the Justice and Home Affairs Council adopted the Council Conclusions on Unaccompanied Minors – Council of the European Union, Council Conclusions on Unaccompanied Minors, 3018th Justice and Home Affairs Council meeting, Luxembourg, 3 June 2010.

2.3. IRREGULAR MIGRATION POLICIES INSIDE THE EUROPEAN COMMISSION

The European Commission has often recalled that measures to fight irregular immigration shall respect the dignity, fundamental rights and freedoms of the persons concerned and has highlighted the need to ensure irregular migrants' access to services which are essential to guarantee their fundamental rights.²⁷ However, its central approach in policy making procedures addressing irregular migration has been control-oriented. The corresponding development of a rights-oriented approach has been marginalised, and limited only to "legally resident" TCNs.

Yet, within this overarching policy approach, a closer examination of the Directorates-General (DGs) within the Commission that directly or indirectly deal with the issue of irregular migration, reveals a more nuanced picture. Commission DGs have adopted different approaches to irregular migration which are not necessarily compatible.

2.3.1. DG Home Affairs

DG Home Affairs is the main Commission department dealing with irregular migration. Its approach, which has been the prevailing one within the Commission, reflects the predominant approach to immigration policy taken by national Ministries of Interior.

DG Home makes a clear distinction in its policies and programmes between 'legally residing' and 'illegally residing' third country nationals (TCNs). This was evident in the Communication entitled "An area of Freedom, Security and Justice serving the citizen: Wider freedom in a safer environment", which served to feed into the Stockholm programme.²⁸

27 See European Commission, Communication on Policy Priorities in the Fight against Illegal Immigration of Third-Country Nationals, COM(2006) 402 final, Brussels, 19 July 2006, at 2.8; European Commission, Communication on a Common Immigration Policy for Europe: Principles, Actions and Tools, COM(2008) 0359, Brussels, 17 June 2008, pp. 11 and 13.

28 Refer to European Commission, Communication on an Area of Freedom, Security and Justice serving the citizen: Wider freedom in a safer environment, COM(2009) 262, Brussels, 10 June 2009. For an assessment refer to E. Guild and S. Carrera, *Towards the Next Phase of the EU's Area of Freedom, Security and Justice: The European Commission Proposals for the Stockholm Programme*, CEPS Policy Brief No. 196, Centre for European Policy Studies, Brussels, August 2009.

The Communication was largely addressed to 'the citizen', and to a more limited extent, 'legally residing TCNs'. It only addressed undocumented migrants within the scope of the "challenges ahead," highlighting the need to ensure policies "for combating illegal immigration".²⁹ It has to be highlighted that regrettably the Stockholm Programme omitted to include the Commission's proposal for establishing common EU standards for dealing with non-removable irregular immigrants.

2.3.2. DG Employment, Social Affairs and Equal Opportunities

The remit of DG Employment, Social Affairs and Equal Opportunities includes labour migration, however it is primarily through coordinating the EU's anti-poverty agenda and social inclusion strategy that undocumented migrants are addressed by the work of this DG. Within the policies and programmes of DG Employment, undocumented migrants are categorised as a 'vulnerable' or 'disadvantaged' group and this DG does not make distinctions based on legal status.

The EU has no official competence to legislate in the field of social protection and social inclusion and Commission intervention comes largely through the coordination of member states' actions based on the establishment of common objectives and indicators (the so-called 'Open Method of Coordination' or Social OMC).

'Immigrants and ethnic minorities' form a specific priority group within the Social OMC and the position of migrants has been a growing focus over the last years, with member states identifying important gaps between third country nationals and EU citizens as regards poverty, income, health, employment and education. Although it is for the Member States to determine which categories of migrants to target, given that the social inclusion agenda has a needs-based approach, beneficiaries within this priority group are often the most vulnerable, and include undocumented migrants (as well as other groups such as asylum seekers and unaccompanied minors who are not targeted by the EU

29 See p. 4 of the Communication.

integration agenda or other mainstream programmes).³⁰ The joint reports and national actions plans assessing progress within the OMC include references to irregular migrants. For instance, the Joint Report on Social Inclusion and Social Protection 2010 points to the increasing presence of irregular migrants among the homeless in several member states.³¹

A selection of financial instruments managed by DG Employment and intended to support Member States actions implementing the Social OMC such as the European Social Fund include actions to examine and support the situation of undocumented migrants.³² Under the PROGRESS programme, DG Employment has concluded a three-year partnership agreement with The Platform for International Cooperation on Undocumented Migrants (PICUM) for supporting its operational costs. The active partnership between DG Employment and PICUM includes efforts to develop reporting tools which will better enable local actors such as NGOs and healthcare providers to provide input into the National Action Plans on Social Inclusion and thereby increase the visibility of problems affecting undocumented migrants within the Social OMC.³³

The Social OMC is currently being reviewed and its future will be decided by the end of 2011 following consultation with relevant stakeholders. The re-evaluation may offer an opportunity to raise the vulnerability of irregular migrants higher on the Commission's social inclusion agenda. However, this objective has recently seen a major setback with the launch of the "Europe 2020 strategy," (the Commission's flagship initiative

for growth and jobs) in which the so called "social inclusion" guideline 10 of the Employment guidelines refers only to the integration of legal migrants.

2.3.3. DG SANCO

DG Health and Consumer Protection (SANCO) has traditionally considered migrants as a target group of policies relating to communicable diseases, in the context of the risks that immigration is perceived to pose to public health. For instance, the Commission has targeted migrants in regard to the prevention of HIV infections, highlighting the need for non-discriminating access to information and prevention, treatment, care and support.³⁴ More recently, migrant health has become an increasingly central theme of this DG's work, in light of the often poor health conditions and difficulties that migrants face when gaining access to healthcare facilities.

During the Portuguese presidency of the EU Health Council, the conference on "Health and migration on the EU: Better health for all in an inclusive society", organized with the support of DG SANCO, gave particular attention to migrants health. Among the general conclusions produced by the conference, it has to be highlighted that:

- 1) migrants represent a disadvantaged group requiring particular services;
- 2) more data and knowledge on migrants health is necessary and there is a need to share it across EU member States;
- 3) migrant health needs to be included in the European Health Strategy and the Health Service Framework.

It is relevant to underline that access to health care is presented by DG SANCO as a basic human right. In this way, all migrants independently of their legal status are targeted in policy intervention as are the needs of particularly vulnerable groups, such as victims of trafficking.³⁵ Many of the projects that DG SANCO has

30 Kate, A-M and Niessen, J. (2008), Guide to Locating Migration Policies in the European Commission, II edition, Report published by EPIM and MPG.

31 Commission staff working document – joint report on social protection and social inclusion accompanying document to the Commission Communication on a Proposal for the Joint Report on Social Protection and Social Inclusion 2010, SEC(2010) 98 final, 5.2.2010, Brussels.

32 For instance, the report "Access to Healthcare for Undocumented Migrants in Europe" was supported by the Community Action Programme to Combat Social Exclusion (now known as the PROGRESS Programme). DG Employment has also funded a series of reports by PICUM titled "Book of Solidarity: Providing Assistance to Undocumented Migrants (Volumes I-III) in 2003. DG Employment also supports the "What Price the Tomatoes?!" project, within which this report is produced.

33 See the official website of PICUM – Social Inclusion Process: Reporting Templates: <http://www.picum.org/article/social-inclusion-process-reporting-templates>

34 Communication (2005) 254 final on "Combating HIV/AIDS within the EU and in the neighbouring countries (2006-2009)".

35 Kate and Niessen, Guide to Locating Migration Policies in the European Commission, EPIM and MPG, October 2008.

funded (or co-funded)³⁶ specifically address undocumented migrants. For instance, the project *Health Care in NowHereLand* (2008-2010)³⁷ aimed to improve the level of health protection for undocumented migrants as an especially vulnerable group and as a group posing difficulties for health care providers and health policy. The *HUMA Network* (formerly called *AVERROES network*): *Health for Undocumented Migrants and Asylum Seekers* (2008-2011)³⁸ aims to improve asylum seekers' and undocumented migrants' access to health care by promoting exchange of knowledge and expertise on migrants' health in 19 EU member states. DG Sanco has also supported the AMAC project *Assisting migrants and communities: Analysis of social Determinants of Health and Health Inequalities* (2008-2009)³⁹ which consolidates the results of European initiatives addressing health and migration, and promote multi-stakeholder engagement in the dialogue on health inequalities linked to migration, as well as MIGHEALTHNET⁴⁰ which promotes exchange of expertise, information and good practices on healthcare for migrants and minority populations.

3. UNDOCUMENTED WORKERS AND ACCESS TO FAIR WORKING CONDITIONS

Irregular migrants are holders of human rights. As it is shown in the paper "Fundamental and Human Rights Framework: Protecting Irregular Migrants in the EU",⁴¹ the Charter of Fundamental Rights together with a framework of other regional and international human rights instruments enshrine a set of universal rights

which apply to everyone, including undocumented migrants. However, a gap has been identified between the formal recognition of the principle of universal human rights protection and the practical delivery and access to such rights by undocumented migrants. Several research projects funded by the European Commission provide evidence of the multiple barriers faced by undocumented migrants in their access to basic social and economic.⁴²

This section focuses in particular on *access to fair working conditions*, which is a right whose attainment has direct implications for undocumented workers' access to other basic socio-economic rights such as health care, housing and education. A number of EU funded projects have revealed that fair working conditions rarely apply to irregular migrants who are particularly vulnerable to exploitative working conditions. It has been highlighted that working conditions are strictly related to administrative status of the individual and that undocumented migrants usually hold jobs at the bottom of the ladder (agriculture, cleaning, construction, domestic work, etc.). In particular those who are not self-employed usually experience unpaid wages, no holidays, dangerous conditions and are not covered by work insurance in case of accidents.⁴³

The European Trade Union Confederation (ETUC) has expressed profound concerns regarding the exploitation of irregular immigrants in the EU and has called for more active social policies to end unfair competition between companies and Member States at the expense of workers' rights.⁴⁴ The lack of legal channels for low-paid works creates a vicious circle of no rights, fear of expulsion and practices of subcontracting chains through which enterprises avail themselves of cheap products and services.⁴⁵

36 See list of projects at: http://mighealth.net/eu/index.php/1._Projects_co-funded_by_DG_SANCO

37 <http://www.nowhereland.info/>

38 <http://www.huma-network.org/>

39 Presentation available at: http://ec.europa.eu/eahc/documents/news/technical_meetings/Assisting_Migrants_and_Communities_IOM.pdf

40 http://www.mighealth.net/index.php/Main_Page

41 M. Merlino and J. Parkin (2011) *Fundamental and Human Rights Framework: Protecting Irregular Migrants in the EU*, "What Price the Tomatoes?!" Working Paper.

42 See S. Carrera and M. Merlino, *Undocumented Immigrants and Rights in the EU: Addressing the Gap between Social Science Research and Policy-making in the Stockholm Programme*, CEPS Liberty and Security in Europe Series, Centre for European Policy Studies, Brussels, 2009.

43 Undocumented Worker Transitions (<http://www.undocumentedmigrants.eu/>); *The Book of Solidarity* (<http://www.picum.org/Publications/bos1.pdf>); *L'accès aux soins un droit non respecté en Europe* (http://www.mdm-international.org/index.php?id_rubrique=1).

44 European Trade Union Confederation (ETUC), "Illegal immigration: ETUC calls for enforcement of minimum labour standards and decent working conditions as a priority", ETUC, Brussels, 2006 (retrieved from <http://www.etuc.org/a/2699>).

45 Irina de Sancho Alonso (2010) "Access to labour rights for undocumented workers" in Carrera, S. and Merlino, M. (Eds) (2010), *Assessing EU Policy on Irregular Immigration under the Stockholm Programme*, CEPS, October 2010, p.10.

FIRST AND FOREMOST WORKERS

PICUM has highlighted that, when looking at fair employment conditions, four rights are central for the protection of undocumented workers: fair wages; compensation for work accidents; access to labour courts; and the right to organise. Trade unions can play a central role in the protection of these very basic rights for *all* workers.

The ILO's Committee on the Freedom of Association has stressed that undocumented workers are entitled equally to the fundamental trade unions rights which are established in the ILO convention 87 on the Freedom of Association and Right to Organize.⁴⁶ However undocumented workers face several barriers to joining unions: the cost of the yearly or monthly membership fees; fears of their personal data being passed on to immigration authorities; unawareness of the benefits of joining a union; threats from the employer; and the reluctance of certain unions (mainly in Nordic countries) to organise undocumented workers.⁴⁷

Despite these barriers numerous unions have incorporated undocumented workers.⁴⁸ In fact, *all* workers, independently of their immigration status, should have access to fair employment conditions and should be treated with dignity. Secondly, it has to be stressed

that it is in the common interest of *all* workers to protect undocumented workers. They are attractive for employers (and therefore can substitute national workers) in light of the fact that they are vulnerable to exploitation. The most effective way to counter the tendency to lower labour standards and wages is therefore to unionise and strengthen the rights of undocumented migrant workers.

The Action Plan adopted by the Executive Committee of the ETUC stated its intention to work with its affiliates to organise undocumented workers in the unions.⁴⁹ Furthermore the plan pointed out the following priorities: to establish common criteria to grant legal status to undocumented workers; to work toward a more proactive EU migration policy that is geared to managing (not preventing) migration; to intensify efforts (at EU and national level) for the ratification and application of international and national conventions and instruments for the protection of all migrant workers; and to support policies that recognise the fundamental social rights of *all* workers and which favour social cohesion by preventing the creation of two-speed migration channels and the exploitation of irregular workers.

46 For instance, in 2005, ILO's Committee of Experts requested that Spain amend the law because it violated Convention No. 87, since "workers must be accorded the right, without distinction whatsoever, to join organizations of their own choosing."

47 PICUM (2005) Ten Ways to Protect Undocumented Migrants Workers, available at: <http://www.picum.org/article/reports>

48 See list of union initiatives to protect undocumented workers in PICUM (2005) Ten Ways to Protect Undocumented Migrants Workers, pp. 56-58.

49 ETUC, Action Plan for an ETUC policy on migration, integration, and combating discrimination, racism and xenophobia, adopted by the ETUC Executive Committee in their meeting held in Brussels on 16-17 October 2003, (<http://www.etuc.org/1944>), last access 22/02/2011.

CONCLUSIONS

This report has aimed to establish the broad context of the treatment of irregular migration in the EU. It has shown that despite the fact that irregular migration is a central issue in political debates at both national and EU level, there is still a great deal of misinformation and misunderstanding regarding the profile and proportions of this group, with the policies implemented being far from “knowledge based”.

The report highlights that since the EU acquired, in 1999, shared competences in the field of “visa, migration and asylum” a control-based approach based on criminalisation, expulsion and readmission has prevailed and has underpinned EU policies on irregular migration. This approach is revealed to be highly problematic for the construction of a “comprehensive” common EU policy on immigration, one which takes due account of the fundamental socio-economic rights of irregular migrants which are enshrined in the EU Charter and in other regional and international human rights instruments.

The Stockholm Programme represented another missed opportunity to address the human rights gap of EU policies on irregular migration and to bring them in

line with the findings of independent research projects which have highlighted the vulnerability of this group. The programme continues to make use of negative terminology that links undocumented migration with illegality, criminality and (in)security. This official discourse justifies repressive immigration measures and attempts to perpetuate the invisibility and marginalisation of undocumented migrants.

Indeed, despite being holders of fundamental human rights, this report has shown that undocumented migrant workers represent a particularly exploited and vulnerable group. The fact of not having access to fair working conditions has deep implications preventing undocumented migrants’ access to other basic social and economic rights, including healthcare, housing and education. The denial of basic rights makes irregular migrants victims of social exclusion and increases their vulnerability in diverse areas of life.

Trade unions can play a central role in the protection of the labour rights of undocumented workers. Unionising undocumented worker would serve to make them less vulnerable to exploitation and in turn would serve to improve the employment conditions of all workers.

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Centre for European Policy Studies (CEPS)
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REPORT

FUNDAMENTAL AND HUMAN RIGHTS FRAMEWORK

**PROTECTING
IRREGULAR MIGRANTS
IN THE EU**

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Introduction	25
1. The European Union framework for the protection of fundamental rights	26
1.1. The EU Charter of Fundamental Rights	
1.2. EU secondary immigration legislation	
2. Human rights in the Council of Europe framework	27
2.1. European Convention of Human Rights and Fundamental Freedoms (ECHR)	
2.2. European Social Charter	
3. International Human Rights Law	30
3.1. International Bill of Human Rights	
3.2. Thematic Human Rights Treaties	
3.3. International Labour Organisation (ILO)	
Conclusions	34
List of References	35

INTRODUCTION

Thousands of irregular migrants are living and working in the European Union in situations of acute vulnerability: denied basic labour protection, they tend to work long hours in sub-standard conditions for low pay in precarious employment. Many struggle to meet the most basic human needs: shelter, food, healthcare and education, and face the constant possibility of deportation.

Yet irregular migrants are holders of human rights and are protected by a multi-level human rights framework. This report aims to provide an overview of the fundamental and human rights applicable to irregular migrants in the European Union territory. It summarises the basic labour standards as well as the social and economic rights guaranteed within three different legal frameworks: the European Union (EU), the Council of Europe (CoE), and the international human rights treaties.

Section one analyses the set of fundamental rights granted by the EU level legal framework. It focuses particularly on the protection accorded by the EU Charter of Fundamental Rights to irregular migrants, which since acquiring a legally binding status with the entry into force of the Treaty of Lisbon in December 2009, has become the key instrument for the protection of fundamental rights for irregular migrants within the EU legal order.

Section two focuses on the human rights framework developed at regional level within the system of the

Council of Europe. It examines the two primary human rights instruments of this protection regime – the European Convention on Human Rights (ECHR) and the European Social Charter – to which every EU member state is a contracting party. The application of these rights to irregular migrants will be examined against the backdrop of ongoing negotiations for the EU's accession to the ECHR with is set to reinforce the relevance of the ECHR for the EU.

Finally, section three sets out the framework of protection accorded to irregular migrants at international level. It presents the most relevant provisions of the universal human rights instruments of the UN, including the International Convention on the Protection of the Rights of all Migrant Workers and their Families (ICRMW), and of the International Labour Organisation (ILO).

Each section analyses the extent to which texts enshrining human rights can be applicable to irregular migrants and the mechanisms for the legal enforcement of rights. It does not examine the obstacles facing irregular migrants' access to rights in practice, which can be significant. This paper should therefore be read in conjunction with the accompanying CEPS report: *Irregular Migration in Europe: EU policies and the Fundamental Rights Gap*.

1. THE EUROPEAN UNION FRAMEWORK FOR THE PROTECTION OF FUNDAMENTAL RIGHTS

1.1. THE EU CHARTER OF FUNDAMENTAL RIGHTS

The Charter of Fundamental Rights of the EU (hereinafter 'the Charter') constitutes the core instrument for the protection of fundamental rights in the EU.¹ It lays down in a single text the range of civil, political, economic and social rights granted to European citizens and all persons resident in the EU. Following the entry into force of the Lisbon Treaty in 2009, the Charter is now legally binding. The result should see a strengthening of the fundamental rights framework in the scope of EU law.

All rights within the Charter apply to irregular migrants, unless explicitly stated otherwise.² Nevertheless, the Charter does accord some leeway to Member States to restrict the application of certain articles, by qualifying that rights are provided "under the conditions established by national laws and practices."

Regarding labour rights, Article 15 of the Charter enshrines the right to work and Article 12 provides the right of everyone to form and join trade unions. A further set of labour rights are provided by the Charter in Title IV "Solidarity", including Article 31 which provides the right of every worker to fair and just working conditions, including conditions which respect the health and safety of the worker. Article 31 limits maximum working hours and provides the right for rest periods and paid leave.

The Charter also provides a further set of social and economic rights, including the right of everyone to education and access to training (Article 14) and the right of access to preventive health care and to medical treatment (Article 35), although the latter is to be provided "under the conditions established by national laws and

practices". Social security benefits are limited to individuals *residing or moving legally* within the EU (Article 34.2). Also relevant to note are the Charter provisions which stipulate that everyone has the *right to an effective remedy* and *to a fair trial* before an independent and impartial tribunal, including the provision of legal aid for those who lack sufficient resources (Article 47). These procedural rights should be central to preventing violations of irregular migrants' wider fundamental rights.

The Charter specifies that the meaning and the scope of the fundamental rights which it foresees shall be the same as those laid down by the ECHR, but that this provision should not prevent EU law from providing more extensive protection (Article 52.3). This means that the Charter both guarantees as minimum standards of protection the rights established by the Council of Europe system (see section 2), while at the same time allowing for Union law to provide still higher standards.³

1.2. EU SECONDARY IMMIGRATION LEGISLATION

A number of secondary legislative instruments have been adopted by the EU in the domain of immigration.⁴ However, the focus of EU immigration policy has primarily been one of migration control, manifesting in instruments for the removal of irregular migrants or penalising those who assist them, rather than rights protection. Those initiatives which do accord minimum rights to immigrants are reserved for legally residing third country nationals.

Nevertheless, provisions of the following two EU legislative instruments partially address the rights of irregular migrants:

- » The **Returns Directive** (2008/115/EC)⁵ provides minimum common standards and procedures for member states' removing irregular third country nationals from their

1 The Charter of Fundamental Rights of the European Union O.J. (2010/C 83/02), 30.03.2010.

2 Only a limited number of rights provided in the Charter (concerning for instance, the right to vote in European Parliamentary elections or the right to consular protection abroad) are restricted to citizens or lawful residents only.

3 O. De Schutter (2007), *Promoting and Protecting Fundamental Rights in the European Union: The Relation between the European Convention of Human Rights, the European Charter and the EU Member States Constitutions*, Briefing Paper, European Parliament, DG Internal Policies of the Union, Brussels.

4 See the CEPS Report "Irregular Migration in Europe: EU Policies and the Fundamental Rights Gap"

5 Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals, (OJ 2008 L 348/98).

APPLICATION AND MONITORING

The Charter applies to the laws and policies of the EU institutions, and can be used to scrutinise Member States' actions only when they are implementing EU law (Article 51). Therefore the Charter has no jurisdiction in areas over which the EU has no competence.

With regard to the rights' protection of irregular migrants, the limitation on the Charter's scope of application should not be too restrictive given the transfer of several aspects of immigration policy from the national sphere to (shared) EU legal competence.

The European Commission is responsible for ensuring that EU policies are compliant with the Charter and publishes an Annual Report on the Charter's application to monitor the progress achieved. The Commission may also use the charter to challenge member states if it thought fundamental rights were being violated.

The Court of Justice of the European Union (CJEU) will also play a role in enforcing the Charter, through requests for preliminary rulings from national courts. The CJEU has developed a solid jurisprudence in rights protection, and can be expected to continue to develop fundamental rights through its case law.

territory. Though controversial, particularly provisions providing for extended detention periods, the Directive does provide a number of safeguards for irregular persons pending removal, for instance, the right to appeal or seek review of decisions related to return (Article 13) and to receive essential health care and, in the case of children, to access education while removal is pending (Article 14). Furthermore, the directive states that when using coercive measures for non-voluntary removal, the member states are obliged to carry them out in a proportionate manner and in accordance with fundamental rights (Article 8.4) and foreseen the possibility for Member states to grant an autonomous residence permit for compassionate, humanitarian or other reasons, to an irregular immigrant (Article 6.4).

- » The **Directive on residence permits for trafficking victims (2004/81/EC)**⁶ defines the conditions for granting residence permits of limited duration to non-European Union (EU) nationals who are victims of human trafficking and (optionally) to "third country nationals who have been the subject of an action to facilitate illegal immigration to whom the residence permit offers a sufficient incentive to cooperate with the competence authorities" (para 9, preamble). Member states are obliged to offer victims of trafficking a reflection period during which time they are exempt from expulsion and granted access to accommodation, medical treatment and legal aid.

2. HUMAN RIGHTS IN THE COUNCIL OF EUROPE FRAMEWORK

Within the comprehensive human rights framework of the Council of Europe, which includes about 200 legally binding treaties or conventions, there are two core human rights instruments: the European Convention of Human Rights (ECHR) and the European Social Charter (ESC). Both instruments provide a framework of protection which is also applicable to irregular migrants. The proactive case law of both the European Court of Human Rights (ECtHR) and the European Committee on Social Rights – bodies charged with monitoring the application of the ECHR and the ESC – has been central to extend their respective reaches in protecting the fundamental rights of irregular migrants. However, the

2.1. THE EUROPEAN CONVENTION OF HUMAN RIGHTS

The ECHR is of general application, meaning that its rights and freedoms apply to *everyone* within the jurisdiction of the contracting parties.⁷ It covers primarily civil and political rights, such as prohibition of slavery and forced labour, right to respect for private and

⁶ Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (OJ 2004 L 261/19).

⁷ See Article 1 of the ECHR which states that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention."

APPLICATION AND MONITORING

All 27 EU member states are contracting parties of the ECHR. *Everyone* within the jurisdiction of a contracting party, after having exhausted all national judicial remedies, can lodge complaints against any of those contracting parties before the ECtHR in Strasbourg.

The judgments of the ECtHR are legally binding on the signatory states. Where the ECtHR rules that there has been a violation of the ECHR, the member state responsible can be compelled to pay compensation to the victim whose rights have been infringed and required to take adequate remedial measures to comply with the legal obligations following from the judgement. It is then for the Council of Europe's Committee of Ministers to ensure that these remedial measures are properly implemented by the state in question.

The European Union is currently not party to the Convention. This means that if an individual feels that their rights have been infringed by acts and bodies of the EU institutions, including when EU Member States are acting in compliance with EU law, the ECtHR is limited in the scrutiny it can exercise. This has risked creating a gap in the European framework for the protection of fundamental rights.

This mismatch should be rectified once the EU becomes a signatory of the ECHR, as foreseen by the Treaty of Lisbon (Article 6 TEU). Accession to the Convention should ensure that the EU is subject to more rigorous external control and monitoring in human rights matters.

family life, freedom of association and free assembly, right to an effective legal remedy and prohibition of discrimination.

Among this set of rights, two articles in particular are central for the protection of irregular migrants in the EU: Article 3, the right not to be subject to torture or inhuman and degrading treatment and Article 8, the right to family and private life.

Article 3 ECHR, which prohibits torture as well as cruel, inhuman or degrading treatments is relevant for irregular migrants for three reasons. First, it provides safeguards for irregular migrants in detention condition.⁸ Second, it restricts the authorities of the contracting states from proceeding with expulsions which would lead to prohibited treatment. Here, both conditions in the country of destination, as well as the personal characteristics of the foreigner (relating to age, pregnancy, health, etc.) are taken into account when determining the legality of the expulsion. Third, Article 3 is relevant for the protection of basic social and economic rights. The denial of basic social services (such as food, shelter

or medical treatment) may bring the individual to conditions of destitution which could amount to inhuman and or degrading treatment.⁹

Article 8 ECHR on the right to family and private life has also been invoked to limit the scope of a contracting state's power to expel or refuse entry to a third country national. The European Court of Human Rights (ECtHR) has developed an extensive jurisprudence on the basis of Article 8, with which it may constrain national admission or expulsion decisions, contending that deportation would lead to an unjustified interference with the right of family life in the country of residence.¹⁰

Indeed, in taking a proactive approach to interpreting the provisions of the ECHR, the European Court of Human Rights (ECtHR) has played a decisive role in the development of an extensive body of jurisprudence drawing on the foundations provided by the Convention. In this way, it has expanded the reach of the Convention beyond political and civil rights, to include also the protection of certain social rights. For instance, the ECtHR has considered the legal position of the individual

8 In the *Saadi* case the ECtHR considered that the detention of a foreigner "can be to prevent his effecting an unauthorised entry" but provided guidelines to avoid arbitrariness, specifying that the place and conditions for detention should be appropriate, "bearing in mind that the measure is applicable not to those who have committed criminal offences but to aliens who have fled from their country". ECtHR *Saadi v. United Kingdom*, No. 13229/03, 29 January 2008, paragraph 74.

9 Invoking Article 3 for the protection of basic social and economic rights has tended to be reserved for the most severe cases of destitution, such as those involving the withdrawal of medical treatment for the medically ill.

10 See for instances the cases: ECtHR *Berrehab v. the Netherlands*, No. 10730/84, 21 June 1988; ECtHR *Moustaquim v. Belgium*, No. 12313/86, 18 February 2001.

APPLICATION AND MONITORING

All 27 EU member states are signatories of the European Social Charter.

To ensure the effective enforcement of social rights, the Social Charter is monitored through the system of “collective complaints”. This system permits social partners and non-governmental organisations to lodge collective complaints of violations of the Charter with the European Committee of Social Rights. Admissible complaints are forwarded to the Committee of Ministers. The Committee of Ministers may then adopt a resolution recommending the state to take action to meet its obligations to the Charter.

in social security law as ‘ownership’, with any disproportionate interference constituting a violation of the right to property as established by Article 1 of the first protocol to the Convention.¹¹ This could be relevant for irregular migrant workers who may have accrued social security rights and who are granted the right to property under the ECHR.

2.2. THE EUROPEAN SOCIAL CHARTER

The European Social Charter (ESC)¹² complements the ECHR by offering further guarantees of economic and social human rights, including housing, healthcare, social security and education. However, the personal scope of the Social Charter is more limited than that of the ECHR. The Appendix of the ESC stipulates that the Charter is limited to “... foreigners only in so far as they are nationals of other Parties *lawfully resident or working regularly* within the territory of the Party concerned ...” (emphasis added).

Despite the fact that the wording of the ESC excludes irregular migrants from its scope of application, there are examples of exceptions, particularly where cases relate to children. In the formal complaint *FIDH v. France*¹³ the European Committee on Social Rights (the body charged with overseeing complaints received concerning violations of the Charter) stated that “legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party,

even if they are there illegally, is contrary to the Charter”. The Committee stressed that health care is a prerequisite for the preservation of human dignity, which is a fundamental value in European human rights law.¹⁴ Similarly, in the complaint *Defence for Children International v. the Netherlands*,¹⁵ the European Committee on Social Rights call attention to the fact that the right to shelter is directly linked to the right to life, social protection, and respect for the child’s human dignity and best interests. Consequently, the Committee concluded that: “states parties are required, under Article 31.2 of the revised Charter, to provide adequate shelter to children unlawfully present in their territory for as long as they are in their jurisdiction”.¹⁶

11 See K. Kapuy (2009), ‘European and International Law in Relation to the Social Security of Irregular Migrant Workers’, in D. Pieters and P. Schoukens (eds.) *The Social Security Coordination Between the EU and Non-EU Countries*, Oxford: Intersentia, pp. 129-30.

12 First adopted in 1961, the European Social Charter was revised in 1996. In this Chapter we refer to the Revised European Social Charter.

13 See the European Committee on Social Rights, *International Federation for Human Rights (FIDH) v. France*, Collective Complaint No. 14/2003, Decision on the merits of 8 September 2004, available at: http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC14Merits_en.pdf (14.06.2010).

14 European Committee on Social Rights, *International Federation for Human Rights (FIDH) v. France*, Collective Complaint No. 14/2003, Decision on the merits of 8 September 2004, paragraphs 31 and 32.

15 *Defence for Children International v. the Netherlands*, Complaint No 47/2008, European Committee on Social Rights.

16 *Defence for Children International v. the Netherlands*, Complaint No 47/2008, European Committee on Social Rights, paragraph 64 of the Decision.

3. INTERNATIONAL HUMAN RIGHTS LAW

International human rights law comprises the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and two Covenants) and a further six core UN human rights treaties, known as thematic treaties. Together, these instruments represent the set of international norms and standards for the protection and promotion of human rights.¹⁷

International human rights norms are generally applicable to every person as a consequence of being human, irrespective of their migration status. Therefore, as a general rule, human rights apply to irregular migrants unless they are expressly excluded from the personal scope of application of the provision.

3.1. INTERNATIONAL BILL OF HUMAN RIGHTS

The **Universal Declaration of Human Rights (UDHR)** sets out in 30 articles the human rights entitled to every individual. It clearly stipulates that everyone is entitled to the rights and freedoms set forth in the Declaration, “*without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth “or other status”*” (emphasis added).¹⁸

As the UDHR is of a declaratory nature, it is not legally binding. To give the standards in the UDHR legal force, the Covenant on Civil and Political Rights (ICCPR)¹⁹ and the Covenant on Economic Social and Cultural Rights (ICESCR)²⁰ were developed. They provide a set of political and civil rights (ICCPR) and economic, social and cultural rights (ICESCR) which are legally binding on

those States which ratify them. The two covenants and the declaration are known as the International Bill of Human Rights.

The **Covenant on Civil and Political Rights** is applicable to everybody, including irregular migrants, although certain rights (such as the right to vote or to be elected) are limited to citizens and others stipulate that only apply to lawfully residing aliens.²¹

The **Covenant on Economic Social and Cultural Rights**, which enshrines rights including those relating to just and favourable conditions, to social protection, education, an adequate standard of living and the highest attainable standards of physical and mental health, does not make any distinction on the basis of nationality or legal status.

However, the interpretation of the personal scope of the ICESCR’ social rights (in particular social security, social services, medical care and health protection) has proved controversial. In 1985, the UN Declaration on “The Human Rights of Individuals who are not Nationals of the Country in which They Live” limited the application of social rights only to migrants *lawfully* residing in the territory of the State. Afterwards, the Committee on Economic, Social and Cultural Rights (CESCR)²² specified in two General Comments that irregular migrants are also entitled to the right of health care.²³

3.2. THE OTHER THEMATIC HUMAN RIGHTS TREATIES

In addition to the International Bill of Human Rights, five further so-called “thematic treaties” have been developed in order to protect specific groups:

The **International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW)** is the most important universal

17 The Office of the High Commissioner for Human Rights has defined these 9 Conventions as “Core Human Rights Instruments”. List available at: <http://www2.ohchr.org/english/law/> (04.06.2010).

18 Universal Declaration of Human Rights, G.A. Res. 217A (III), Articles 2 and 3, U.N. Doc A/810 at 71 (1948).

19 International Covenant on Civil and Political Rights. United Nations General Assembly Resolution 2200A [XXI]. 16 December 1966.

20 International Covenant on Economic, Social and Cultural Rights. United Nations General Assembly Resolution 2200A (XXI). 16 December 1966.

21 Such as the right of movement and to choose his residence (Article 12) and the limits on the expulsion of aliens (Article 13).

22 The CESCR is the monitoring body of the ICESCR. For a full explanation of how the monitoring bodies operate, see the text box on page 12 on Application and Monitoring.

23 CESCR, General Comment N.14: the right to the highest attainable standard of health (Article 12), E/C.12/2000/4, paragraph 34; CESCR, General Comment N.19: the right to social security (Article 9), E/C.12/GC/19, paragraph 37.

FIRST AND FOREMOST WORKERS

INTERNATIONAL BILL OF HUMAN RIGHTS	Date	Monitoring Body
Universal Declaration of Human Rights (UDHR)	1948	
The Covenant on Civil and Political Rights (ICCPR)	1966	CCPR
The Covenant on Economic Social and Cultural Rights (ICESCR)	1966	CESCR
THEMATIC HUMAN RIGHTS INSTRUMENTS	Date	Monitoring Body
The International Convention on the Elimination of All Forms of Racial Discrimination (CERD)	1965	CERD
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	1979	CEDAW
The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	1984	CAT
Convention on the Rights of Child (CRC)	1989	CRC
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW)	1990	CMW
Convention on the Rights of Persons with Disabilities (CRPD)	<u>2006</u>	<u>CRPD</u>

instrument concerning immigrant workers. Adopted in 1990, it entered into force in 2003 and offers a common supranational framework of basic norms and principles on how to develop labour immigration policies.²⁴ The fact that no EU Member State has yet ratified the ICRMW (alongside the other major immigrant receiving states such as the US and Canada) creates an important gap in the framework of protection for migrant

workers, particularly those in an irregular situation.²⁵ The ICRMW applies to all migrant workers and members of their families “without distinction of any kind” (Article 1). It offers a comprehensive and non-discriminatory definition of a migrant worker as “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which s/he is not a national” (Article 2.1).

²⁴ For a more detailed overview of the ICRMW see V.A. Leary (2003), ‘Labour Migration’, in A.T. Aleinikoff and V. Chetail (eds.), *Migration and International Legal Norms*, The Hague: TMC Asser Press, p. 234.; R. Cholewinski, P. de Guchteneire and A. Pecoud (eds.) *Migration and Human Rights: The United Nations Convention on Migrant Workers’ Rights*, Cambridge: Cambridge University Press.

²⁵ See the International Steering Committee for the Campaign for Ratification of the Migrants’ Rights Convention, *Guide on Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, available at: www.migrantsrights.org (14.06.2010).

The rights included in Part III (Articles 8 to 35) of the ICRMW are addressed to *all migrant workers and their family members irrespective of their administrative status*.²⁶ Article 25(1) guarantees equal treatment (including in relation to nationals) in respect of remuneration, other conditions of work and other terms of employment. The following two paragraphs of Article 25 specify that it is not lawful to derogate from the above principles in private contracts and that the irregular status of the worker does not alter in any way the legal or contractual obligations of the employer. Irregular migrant workers and their family members are also granted the right to join trade unions (Article 26) and, with respect of social security, "...shall enjoy in the state of employment the same treatment granted to nationals..." (Article 27).²⁷ Beside employment rights, the ICRMW also grants minimum procedural rights in case of detention (Articles 16 and 17) or expulsion (Articles 22 and 23). Further to the ICRMW, rights enshrined in the other thematic treaties could also be relevant for irregular migrants:

» **The Convention on the Elimination of All Forms of Racial Discrimination**²⁸ calls on state parties to undertake a policy of eliminating racial discrimination, which is defined as:

"any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life" (Article 1(1)).

The CERD stipulates that it does not protect against discrimination on the grounds of citizenship, that is

between citizens and non-citizens (Article 1(2)). However, this does not mean that "non-citizens" are completely excluded from protection by the Convention. As highlighted by the CERD's monitoring Committee in its General Comment N.30 on "Discrimination against non citizens",²⁹ guarantees against racial discrimination apply also to non-citizens regardless of their immigration status.³⁰

» **The Convention on the Elimination of All Forms of Discrimination Against Women**³¹ has interpreted by its relevant Committee as granting basic human rights (such as access to legal remedies and justice; and for rights whilst in detention) to undocumented women migrant workers.³²

» The Convention on the Rights of the Child³³ also applies a broad personal scope, stating (in Article 2) that its provisions apply to every child in a signatory state: "*without discrimination of any kind* irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or *other status*" (emphasis added). The General Comment No. 6 of the Committee on the rights of the Child has further specified that the rights enshrined in the CRC, if not explicitly stated otherwise, apply to all children irrespective of their status.³⁴

26 Part IV (Articles 36 to 56) only covers those who are documented or in a regular status/situation.

27 Article 27 guarantees equal treatment between migrants and nationals in respect of social security "in so far as they fulfill the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties." Although it is in Part III (applicable to all workers) the state could apply exceptions for undocumented not to be covered in 'its applicable legislation'.

28 For more detailed overview of the CERD see P. Thornberry (2005), 'Confronting Racial Discrimination: A CERD Perspective', in *Human Rights Law Review*, Vol. 5, No. 2, pp.239-269.

29 Committee on the Elimination of Racial Discrimination, General Comment No. 30: Discrimination against non-citizens, 01/10/2004, paragraph 7.

30 K. Kapuy (2009), 'European and International Law in Relation to the Social Security of Irregular Migrant Workers', in D. Pieters and P. Schoukens (eds.) *The Social Security Coordination Between the EU and Non-EU Countries*, Oxford: Intersentia, pp. 124-125.

31 UN Committee on the Elimination of Discrimination against Women, General Recommendation No. 26 on women migrant workers, CEDAW/C/2009/WP.1/R, provides for the rights of undocumented women migrant workers to; Right to enjoy the highest attainable standard of health and facilities for the treatment of illness and rehabilitation of health; right to education; etc.).

32 K. Kapuy (2009), 'European and International Law in Relation to the Social Security of Irregular Migrant Workers', in D. Pieters and P. Schoukens (eds.) *The Social Security Coordination Between the EU and Non-EU Countries*, Oxford: Intersentia, pp. 124-125.

33 Convention on the Rights of the Child, General Assembly resolution 44/25, 20 November 1989.

34 Committee on the Rights of the Child, General recommendation No. 6: Treatment of unaccompanied and separated children Outside their country of origin, CRC/GC/2005/6. Cited in PICUM (2007) *Undocumented Migrants Have Rights! An Overview of the International Human Rights Framework*, p.13.

APPLICATION AND MONITORING

In general, all EU member states have ratified and are subsequently bound to comply with the above international treaties (with the exception of the ICRMW).

Each of the above-mentioned international treaties has established a committee of experts tasked with monitoring the execution of its provisions (and eventual protocols) by the signatory states.* Each state party must regularly submit reports detailing its implementation of the rights envisaged in the relevant convention. The monitoring committees then send comments and recommendations to the state parties drawn up on the basis of the national reports.

The reporting procedure is complemented by three other monitoring mechanisms:

- » **Individual complaints** can be submitted (under certain conditions) by anyone alleging a violation of treaty rights by a state party to the following treaty monitoring bodies: HRC, CERD, CAT and CEDAW.
- » **Inquiries** may be initiated by the CAT and the CEDAW in case of well-founded information indicating serious or systematic violations by a state party.
- » **Inter-state complaints**, concerning alleged violations of the treaty by another State party, are foreseen by some human rights treaties – such as the CAT, the CMW, the CERD, the CCPR and the CEDAW – but have never been used.

* For a list of the core international human rights instruments and their monitoring bodies see the web page of the Office of the United Nation Commissioner for Human Rights: <http://www2.ohchr.org/english/law/index.htm> (14.06.2010).

3.3. INTERNATIONAL LABOUR ORGANISATION (ILO)

The ILO sets minimum standards of basic labour rights through the adoption of conventions and non-binding recommendations.

In 1998 the ILO adopted the **ILO Declaration on Fundamental Principles and Rights at Work**.³⁵ This declaration establishes that all member states, even if they have not ratified the ILO conventions, are nevertheless obliged through their membership of ILO to respect the basic labour rights contained within them, including freedom of association and to collective bargaining; elimination of forced or compulsory labour; abolition of child labour and elimination of discrimination with regard to employment.

The principal ILO instrument addressing irregular migrant workers is the **Migrants Workers Convention N.143**. According to Article 1 of the convention, each state signatory should undertake to respect the basic human rights of *all* migrant workers. The convention

stipulates that migrant workers should not be regarded as irregular due to the loss of employment (Article 8), nor should they be deprived of their rights in respect of the work they have performed. According to Article 9, the migrant worker shall enjoy equality of treatment for him or herself and family in terms of the rights accrued in past employment, such as remuneration, social security and other benefits.

Aside from Convention 143, the other ILO conventions partially apply to irregular migrants, unless explicitly stated otherwise. This position was affirmed in the 2004 **Resolution Concerning a Fair Deal for Migrant Workers in a Global Economy**, which stated:

“It is important to ensure that the human rights of irregular migrant workers are protected. It should be recalled that the ILO instruments apply to all workers, unless otherwise stated. Consideration should be given to the situation of irregular migrant workers, ensuring that their human rights and fundamental labour rights are effectively protected, and that they are not exploited or treated arbitrarily.”³⁶

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

36 International Labour Organisation “Resolution concerning a fair deal for migrant workers in a global economy”, extracted from the Report of the Committee on Migrant Workers, Geneva 2004.

APPLICATION AND MONITORING

The ILO foresees two kinds of supervisory mechanisms for the application and promotion of international labour standards:

- » The regular supervision which consists of a regular examination of periodic reports submitted by Member States.
- » Special procedures, which are based on the submission of a representation or a complaint.

CONCLUSIONS

This report has synthesised the human rights framework covering irregular migrants in the EU. In doing so it clearly demonstrates that, contrary to popular assumptions and the practices of certain legislatures, irregular migrants are holders of fundamental rights. The European and international human rights instruments enshrine and enforce rights which, unless expressly stated otherwise, are applicable to everyone independent of a person's status. The fact of not complying with the conditions for entry, stay or residence in a Member State should not deprive an individual from certain basic rights which are shared by all human beings.

At EU level, basic labour standards as well as a range of socio-economic, cultural and civic rights are now protected within a legally binding Charter. Those who would feel their rights threatened by measures adopted by the EU institutions and by the EU Member States may challenge them before national courts and the CJEU.

Within the framework of the Council of Europe, both the ECtHR and the European Committee on Social Rights have played a central role in expanding the reach of the provisions of the ECHR and the ESC and upholding the

fundamental rights of irregular migrants. Future accession of the EU to the ECHR should empower the ECtHR to reinforce its scrutiny of the EU institutions and of Member States when implementing EU law.

Finally, the international human rights instruments established within the UN and the ILO frameworks provide a set of international norms and standards for the protection and promotion of human rights, including labour rights that are applicable to irregular migrants. However, ratification by the EU member states of the UN Convention on the Protection of the Rights of All Migrants Workers and Members of their Families would provide a much needed reinforcement of the protection framework for this group.

More generally, despite being covered by a comprehensive framework at EU and international level, irregular migrants encounter important obstacles to realising the basic rights to which they are entitled. Wider awareness of their rights, coupled with a stricter monitoring of their application by the relevant bodies would go some way to ensure a stronger enforcement of rights for irregular migrants in the future.

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REPORT

**ECONOMIC AND SOCIAL CONTEXT
OF THE IRREGULAR MIGRATION
OF UNSKILLED LABOUR
IN EUROPE:
SPECIFIC FEATURES**

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Introduction.....	39
1. Evaluation of the number of illegal immigrants and a discussion of the concept of illegality.....	40
2. The concept of unskilled labour	41
3. A reminder of the rationale currently governing our economies, plus an examination of its relationship with the realities of illegal work	42
4. Foreigners do jobs that nationals do not want to	43
5. In times of crisis, foreign workers act as a sort of protective buffer for national workers.....	43
6. Work by foreigners in irregular situations allows the 'on-site offshoring' mechanism to function	45
7. A special case: manufacturing	46
8. Subcontracting.....	47
9. People smugglers in the villain's role.....	48
10. Community solidarity	48
11. Subcontracting practices within the European Union and cross-border recruitment agencies.....	48
Conclusion.....	50
References and Bibliography.....	50

INTRODUCTION

The following presentation is made up of eleven sections and a conclusion.

Firstly, after a brief review of the figures, we will discuss two concepts used in our study: that of illegality (first section) and that of unskilled labour (second section).

Next, we will look at the rationale currently governing our economies and the relationship this has with the realities of illegal work (third section).

We will then examine the three roles performed by the work (particularly illegal work) done by foreigners in our economic and social system: foreigners do jobs that nationals do not want to (fourth section); foreign workers act as a sort of protective buffer for national workers (fifth section); work by foreigners in irregular situations allows the 'on-site offshoring' mechanism to function (section six). The manufacturing industry is a special case (seventh section).

We then move on to consider various aspects without which our study would not be complete: subcontracting (eighth section); the issue of people smugglers (ninth section) and that of the community solidarity which ensures, despite the odds, the survival of undocumented workers (tenth section). The eleventh section deals with outsourcing within the European Union and cross-border recruitment agencies.

Finally, in conclusion, we will emphasise that the issue of the work done by foreigners in an irregular situation is felt in the very heart of our economic and social system. The question asked of us is this: are we willing to accept the long-term presence of a group of workers without rights in our countries?

1. EVALUATION OF THE NUMBER OF ILLEGAL IMMIGRANTS AND A DISCUSSION OF THE CONCEPT OF ILLEGALITY

How many foreigners reside illegally in the territory of the European Union? According to the *Atlas des migrants en Europe* (Atlas of Migrants in Europe) (Clochard 2009: 130):

“in 2005, according to the European Commission, there were between 4.5 and 8 million irregular immigrants in the first twenty-five member states of the Union, which is between 0.97 and 1.73% of the population.”

We can see that the figure is far from precise. Furthermore, according to the *Atlas des migrations* (Atlas of Migrations) published by *Le Monde* and *La Vie* (Blandin 2009:122):

“illegal migrants entering Europe [...], according to estimates by the European Union, amount to about 500,000 people each year, including 14% by sea.”

We mention these figures to call to mind the ‘orders of magnitude’: in reality, they must be treated with extreme caution. This is not only because it is always very difficult to measure the phenomena of illegality which, out of necessity, tend to be relatively secretive, and which, by definition, evade enumeration. In George Tapinos’s contribution to *Combating the illegal employment of foreigner workers* (OECD 2000: 19), there is an overview of the various sources and methods used: they are all based on applying a certain extrapolation coefficient to the data, and this coefficient is determined in a manner that is ultimately arbitrary.

Moreover, as Georges Tapinos stated, the very concept of illegality is itself complex. At least three elements may be deemed illegal: entry into the country, residence there and work performed there. However, there is not necessarily any connection between these three elements, and we can even find significant discrepancies between them. For example, legally resident migrants may have an undeclared job, and the reverse is also true, through in this case it would require the use of counterfeit or borrowed documentation. Moreover, many illegal residents entered the country legally, with a tourist visa or an asylum application: the survey conducted in

2008 among regularised undocumented immigrants in Lille (CSP 59.2008: 74) revealed that 68% of respondents came to France *with a valid visa*, with their situation only becoming irregular when it expired. Moreover, 12% of them said they had lost their passports, which in most cases means that they filed political asylum applications. In total, nearly 80% of those reviewed came to France legally: judging by this example, migrants mainly seem to become undocumented once they reach the destination country.

Illegality is ultimately a legal concept, and can be seen as a binary distribution: an individual either *is* or *is not* in a legal situation. But if we take a look at the economic and social context, then it becomes clear that we are dealing not with two clearly defined categories, but rather with an ongoing scale of situations ranging from relatively legally acceptable to less legally acceptable, and correspondingly from less to more precarious. In France, the levels on this scale are as follows:

Irregular situation:

- » *Undocumented workers performing undeclared work, paid by cash in hand, without employment contracts or pay slips.*
- » *Undocumented immigrants performing declared work, using borrowed or counterfeit documentation: their employment is subject to the standard regulations, but their immigration status leaves them vulnerable, and they often have to work unpaid overtime, work during holidays, and so on.*

Intermediate situation:

- » *Those holding a temporary residence permit without a work permit: they are viewed as perfectly legal by the police for a few weeks or so, but they are forced to work illegally.*
- » *Asylum seekers whose applications are under consideration: their residency is legal, but they are not allowed to work so their situation is identical to that mentioned above.*
- » None of the groups of migrants mentioned above is able to travel outside France.

Legal migration situation:

- » *Those holding a temporary residence permit with a work permit:*
- » *legality is obtained but only for a few months.*

- » Those holding a renewable one year temporary residence permit.
- » These people are considered as being in a legal situation. Although the limited duration of their residence permit leads to them living with a certain level of insecurity, this is actually inconsistent with the conditions required for the permit to be issued. One of the conditions required by the authorities for such permits to be issued is an **open-ended** employment contract duly signed by the employer.
- » Those holding a residence card or refugee status:
- » Only the last two groups have real stability and freedom which is comparable to that of nationals.

In short, what is economically and socially significant is not the legal concept of illegality, it is the precariousness it causes; it is clear that the 'scope' of precariousness goes far beyond that of illegality; in other words, legality in no way solves the problem of precariousness. We should keep this in mind when discussing the status and role of foreign workers.

Nowadays in France, the decisive factor expressed through the recent strikes by undocumented workers (2008-2011) is the ability to obtain a work permit through a trade union process and not only through an administrative procedure. Obtaining a work permit is no longer solely dependent on the goodwill of the employer or the government; rather, it is now one of the demands in the struggle for equal treatment of employees, a struggle being fought by trade unions and undocumented workers. And as is always the case in trade union activity, this permit, initially designed as an administrative tool to be used in a migration framework policy, is likely to improve in quality in response to changing relations between the trade unions and the political powers.

2. THE CONCEPT OF UNSKILLED LABOUR

The concept of unskilled labour also requires close examination. To put it concisely, it is not the workforce that is unskilled, but rather the jobs they are allocated. All migration sociologists have noticed the same thing: among today's migrants, there are fewer and fewer

people who are poor and lacking in qualifications, people who in any case would probably not be able afford to pay the travel costs. There is a growing number of people who have, on the one hand, at least some resources available to pay for their transportation, and on the other hand, are skilled and have a profession, or more generally, to quote Pierre Bourdieu, have social and cultural capital, which makes them hopeful of succeeding in terms of their employability in the country of destination. In other words, migrants are increasingly coming from the middle classes of their countries of origin: they are employed as craftsmen, merchants, technicians, managers, health professionals, and similar.

However, in the country they arrive in, migrants are banned from doing almost all of the jobs corresponding to the level of qualifications they hold, as long as they remain in an irregular situation, and they soon realise that even obtaining a one-year residency permit does not really help their chances. For this reason, migrants in irregular situations generally suffer from severe and widespread professional downgrading: engineers end up working as chefs and technicians as security guards, the doctor take cleaning jobs and teachers become carers, to name but a few examples. We can only reiterate the loss of skills that this downgrading leads to - to the detriment of the country of origin as well as the host country - and the disappointment and bitterness this causes to those who suffer from it must not be underestimated.

To illustrate this point, we will again look at the Lille study (CSP 59, 2008: 98-101). In terms of qualifications, the population studied was categorised as follows:

Without qualifications	35
Vocational training	17
Secondary school	28
Bachelor's degree	11
Master's degree and above	8
No comment	1

Using a scale developed according to the subjective ranking of professions, we obtain a downgrading rate of 54.5%. To focus on just one example, 70% of workers are employed in their home country while only 47% find employment in the host country. With regard to merchants, the respective figures are 1% and 15%.

Moreover, the key issue is the fact that these migrants are **young**. That is to say that an extremely dynamic

workforce enters the labour market of the host country with the sole concern of making money, regardless of the working and payment conditions imposed by employers. In any case, their earnings will be far higher than what they would earn from working in their own countries.

3. A REMINDER OF THE RATIONALE CURRENTLY GOVERNING OUR ECONOMIES, PLUS AN EXAMINATION OF ITS RELATIONSHIP WITH THE REALITIES OF ILLEGAL WORK

We will agree to consider that our economies are currently governed by a liberal rationale. It can therefore be stated that the following trends occur within them:

- a/ A desire for maximum flexibility to enable the most precise adaption possible to economic fluctuations. This entails the spread of just-in-time management to prevent the sterilisation of capital represented by stocks. It also involves the spread of precariousness: the number of jobs is determined by daily variations in demand.
- b/ Minimising labour costs: these costs are the decisive strategic issue in competition. The reduction of the workforce is therefore an ongoing objective, which requires working hours to be extended and those who manage to retain their jobs to work harder.
- c/ The increasing specialisation of companies, which are encouraged to focus on their core business area. This results in the systematic outsourcing of peripheral activities, and the corresponding responsibilities and risks, so the practice of subcontracting is accelerated. As outsourcing effectively consists of recruitment and staff management, it results in the growth of temporary employment agencies.
- d/ The relationship between employees and employers is gradually becoming more individualised, which leads to the erosion of collective agreements and

safeguards. In some respects, we are moving towards the old contractor agreements, which classed both parties involved as separate and equal.

Ultimately, it is clear that European countries are not trying to counter these trends: they simply attempt to limit their most socially corrosive features.

It is clear from this rationale that foreign workers in irregular situations are the ideal employees:

No limits are imposed on the duration or intensity of the work they can perform;

- » They are paid a piece rate, no matter how long they work. This rate is set by mutual consent, without reference to any regulations, and it is clear that the two parties are not on equal footing when they discuss the rate;
- » Since these workers have no contracts, they may be dismissed overnight without compensation or notice;
- » Undocumented workers do not have access to unemployment benefit or the minimum wage, so they are effectively forced to accept any available jobs;
- » The workers' vulnerable immigration status effectively prevents them from disputing their pay and working conditions: the conditions are very much on a 'take it or leave it' basis;
- » No tax or social security contributions are paid for their work. They receive no protection and no guarantees against risks (unemployment, accidents, illness, old age).
- » Overall, workers in irregular situations function entirely outside of the law in force. Flexibility and precariousness are total, and the freedom of the employer is virtually unlimited; the worker is thus enslaved.

Of course, this is an ideal model which could lead to the introduction of deregulation policies, but its widespread application would undoubtedly encounter insurmountable obstacles.

During the post-war boom of the 1930s, national workers were provided with a number of advantages in terms of regulation and protection which constituted what Robert Castel has referred to as the "wage society".

Even if liberal policy has created several holes in the wage society structure, it is unlikely to ever be able to destroy it: such an undertaking would be met with determined resistance from employees, and would lead to a serious political crisis.

Foreign workers are, of course, not able to use voting rights to fight these practices and are therefore more vulnerable than national workers; however, as long as a preference for national workers does not develop, those migrants who work legally are entitled to equal rights; in legal terms, they are therefore protected in the same way as their national counterparts.

With regard to irregular migrants, however, the application of an ultra-liberal model has only one limitation: when the work involves the implementation of know-how acquired through practice and over time, it is in the employer's interest to retain experienced workers, particularly if they were trained in-house. This requirement therefore ensures that the worker concerned benefits from some stability, but it is nonetheless a *de facto* sort of stability, which may easily come to an end.

Under these circumstances, the employment of foreigners, and particularly those in irregular situations, performs three functions or responds to three needs in our economic and social system.

Of course, the distinction proposed here is analytical; in reality, roles may overlap, and a single worker or a group of workers may fulfil several of them.

4. FOREIGNERS DO JOBS THAT NATIONALS DO NOT WANT TO

Here we encounter the problem of 'three D' jobs: *dirty, difficult* and *dangerous*. This sort of work is increasingly carried out by foreigners, and gradually, as their quality deteriorates, they are given to foreigners in increasingly precarious situations, including those in irregular situations.

We are therefore seeing the development of reserved industries, which are becoming enclaves: because of low pay and unpleasant working conditions, the construction, public works, hospitality, cleaning and personal care sectors are increasingly being deserted by national workers.

This is giving rise to segmentation of the labour market, which is being divided into multiple independent markets and separated by increasingly impenetrable partitions. Hence, there can simultaneously be a long-term shortage of labour in one sector and unemployment in another, without an equilibrium being established (with

such an equilibrium requiring communication between the two sectors). Consequently, in France, employers the catering and construction sectors repeatedly complain about the persistent existence of unfilled job vacancies, even though there are three million unemployed people registered in the country.

This demonstrates how misleading the polemical cliché of foreigners 'taking jobs' from nationals is. Whether expressed in a straightforward ("an immigrant is just one more unemployed person") or a more watered-down manner ("in times of high unemployment, we cannot accept new immigrants"), the error being made is the same: far from taking work from nationals, foreigners are actually taking the jobs that nationals do not want to do.

5. IN TIMES OF CRISIS, FOREIGN WORKERS ACT AS A SORT OF PROTECTIVE BUFFER FOR NATIONAL WORKERS

This phenomenon has notably been highlighted by Claude-Valentin Marie, specifically in an article published in April 1996 by the magazine *Plein Droit* (*Plein Droit*, No. 31, p.14 to 21) eloquently entitled: *En première ligne dans l'élasticité de l'emploi* (The frontline in employment elasticity).

Claude-Valentin Marie established that between 1975 and 1990, there was a massive reduction in the number of foreigners working in industry. This reduction is analysed sector by sector, and the table below, based on the **Table I** from the article, presents the results.

Commenting on the pace of evolution over time, Claude-Valentin Marie wrote:

"the reductions in the proportion of foreigners in the workforce first (1982-85) occurred in the large establishments (over 500 employees) primarily affected by restructuring, and spared, for a time, the construction, printing, publishing and clothing textile industries. Over the next three years (1985-88), lay-offs spread to all secondary industries. At this time, medium-sized establishments were also affected, since the orders made by service outsourcers to subcontractors were reduced or stopped altogether.

PROPORTION OF FOREIGNERS AMONG TOTAL NUMBER OF EMPLOYEES IN THE SECTOR

Industrial sector	October 1973	December 1991
Nonferrous minerals and metals	16,5	8,2
Ferrous minerals and metals	13,3	8,9
Construction materials	15,6	10,5
Metalworking	15,4	9,9
Automobile construction	24,8	11,4
Rubber	16,3	8,8
Construction, civil engineering	31,1	21,1
Clothing textiles	9,6	7,8
Overall	11,9	7,7

In total, over fifteen years (1973-1988), industrial enterprises have reduced the proportion of jobs held by foreigners by about 40%, representing (at the lowest cost) the dismissal of more than half a million employees. *Foreigners have undoubtedly suffered more than nationals as a result of the crisis and the restructuring of the industrial sector.*" (own emphasis).

What happened to the qualified foreign workers? A small number of them, who were (rightly) sceptical about the chances of a turnaround in the trend, applied for assistance to return to their countries of origin. But above all, we are seeing a massive shift towards the tertiary sector. This shift is linked to the increasingly popular trend of outsourcing work which was formerly performed internally in the large industrial facilities. Finally, we have also noticed a significant expansion in foreign production.

It is important to examine the social and political reasons behind these developments:

Claude-Valentin Marie wrote that "across the board, the dismissal rate of foreigners was (in relative terms) two times higher than the dismissal rate of nationals, with the most significant number recorded in the sectors which had in the past hired the largest number of foreign workers (mining, steel industry, automobiles) and which, during the crisis, have made foreign workers suffer the consequences of the collapse of their business. [...] (foreigner works) have contributed as much

to offsetting the social consequences of the crisis for nationals (massive lay-offs in the industry) as they have to facilitating the restructuring of the production system (large-scale migration to the tertiary sector)."

Claude-Valentin Marie, said in passing that "reducing by half the number of foreign employees in the intermediate goods and capital goods industries [...] has been of no benefit to nationals, contrary to the predictions made" (own emphasis). This also confirms what was said above about the lack of communication between the foreign and national segments of the labour market.

Claude-Valentin Marie is even more explicit in his conclusion:

"In the contemporary period, and despite the waning influence of unions, it has never been completely possible to underestimate the resistance provided by employees faced with corporate liquidations, the questioning of social rights or redeployment and downgrading. The presence of foreigners was - at least initially - very useful in this context, *perfectly playing its role as a shock absorber against the contradictions of the system*. Bearing the brunt of the most negative consequences of the developments described, on the frontline, *they have actually reduced social tensions within the world of work, and prevented the impact from being too immediate and too severe for civil society as a whole*. This socio-political dimension of their contribution to the 'modernisation' of our society has been, and we cannot emphasise this

enough, just as important as their economic role.”

To this critical analysis, we would like to add two comments. Firstly, it is mainly because they do not have the right to vote that foreign workers were forced to play this buffer role: it is politically easier to get rid of them because nationals are always able to retaliate through elections. Here again, we can clearly see the benefits to be derived from equality of rights.

Moreover, Claude-Valentin Marie's study dates to 1996, but it is clear that it remains valid today. In particular, it explains why the unemployment rate in France for employees from countries outside the European Union is double (20%) that of nationals and EU citizens (10%). The buffer effect obviously still exists today.

6. WORK BY FOREIGNERS IN IRREGULAR SITUATIONS ALLOWS THE 'ON-SITE OFFSHORING' MECHANISM TO FUNCTION

This third role is the prerogative of foreign workers in irregular situations.

The sectors where we find the vast majority of these workers are essentially the same in all countries of the European Union: construction and public works, hospitality, manufacturing, cleaning, security, personal care and agriculture. We will focus on and explore the case of manufacturing. All other sectors share a common characteristic: because of their 'physical' nature or the equipment used, they cannot be relocated. A construction site must be situated on the premises where the completed building will be located. Catering, cleaning, security and personal care are performed where those using the services are located and cannot be relocated. So the presence of foreign workers in irregular situations enables these industries to find a workforce, on their doorstep, which can be exploited under labour conditions approximating those in the third world and can be recruited by businesses wishing to 'outsource' their jobs: there is the same flexibility, precariousness, lack of rights, responsibilities and protection and the same kind of obedience, and so on.

As mentioned elsewhere (Terray 1999), 'on-site offshoring' is based on two factors; to be more precise, two conditions must be met simultaneously for it to be possible. The first is the 'administrative vulnerability' of foreigners without residence permits. This vulnerability is effectively created by the legislation governing the entry and residency of foreigners in the national territory and the punishment of offenders. These laws vary slightly from country to country, but the outcome is the same: the foreigners in irregular situations are likely to be continuously monitored, then arrested and placed in a detention centre and eventually deported. In general, the procedure is subject to some judicial review, but this is most often just a formality and provides the immigrant caught up in the system with very few real opportunities. In legal terms, a foreigner without a residence permit is therefore deprived of any protection and all effective rights. He is effectively delivered bound hand and foot to the authorities, which may decide overnight that he should be deported. His administrative situation is therefore extremely fragile, and this is what continually exposes the immigrant to the possibility of being blackmailed by informers among which his employer, his landlord or anyone else with whom he may have a dispute.

It is precisely here that the second condition comes into play. If the legislation against illegal residence was strictly and fully implemented, if all the necessary means were allocated to ensuring its implementation, and if those in charge of it were not constrained by any political or humanitarian scruples, there would be only a very small number of foreigners without residence permits in France, and consequently 'on-site offshoring' would not be possible. In reality, the law is applied in a selective and graduated way; foreigners without residence permits are undoubtedly in a vulnerable situation which makes them an easy target for exploitation, but allowing their continued presence in sufficient numbers in this country - regardless of the individual turn-over -, is what is providing employers engaged in 'on-site offshoring' with the staff they need. The two components are highly complementary: without repressive legislation, there would be no administrative vulnerability enabling exploitation, but without the flexible application of that legislation, there would be no workers at all to be exploited.

Consequently, the application of the law is what must be examined. With regard to employers, the conclusion is clear: although the law punishes them with very severe penalties in theory, a whole series of different processes effectively allow 'illegal' employers to escape this punishment. Firstly, finding proof of the laws being broken is generally falls to the authorities and mechanisms like cascade subcontracting, which we will return to later, are often employed to hinder the completion of their investigations. Moreover, the policy implemented by criminal prosecutors does not focus on employers as a target.

Finally, only a small amount of financial and human resources are allocated to monitoring and punishing infringements, meaning that the cracks are too wide and most of the predators get away. Only a few scapegoats – usually foreigners themselves – are ever punished by the law.

As regards to the workers themselves, tens of thousands of them are deported each year - more than 700,000 between 2005 and 2007 (Clochard 2009: 93) - and each of these deportations is a tragedy in itself. Nevertheless, statistically, this figure represents a relatively small share of the foreigners without residence permits living in Europe, especially as the departures are probably at least offset by the number of arrivals; indeed, the figure is both high enough to ensure that foreign workers without residence permits feel insecure and fearful, and low enough that a significant number of them are still available to illegal employers. Once again, if the law was properly implemented, foreign workers without residence permits would be entirely eliminated, but if it was not implemented at all, blackmailing by informers would become ineffective, the workers would not feel threatened, and they would be safe from administrative vulnerability and would therefore become a source of indefinitely exploitable labour. The solution currently in use is a sort of middle ground: anyone who has had contact with undocumented immigrants is aware that they all live in constant fear of arrest and deportation, and behave accordingly. But most of them manage to survive, often for many years, and during this time work for the benefit of illegal employers.

Two concluding remarks: firstly, such a system can only function with the support of the government: it is the government that determines the laws in force (with the approval of parliament), organises their implementa-

tion, and exacerbates or reduces repression. In other words, whatever the official line may be, 'on-site offshoring' requires the complicity or complacency of the authorities.

Secondly, 'on-site offshoring' is the weapon used to introduce radical discrimination into the workplace: because of their illegal immigration status, undocumented workers are deprived of almost all rights they should be entitled to as workers, i.e. the rights to which their national counterparts are entitled. In other words, the struggle for their legalisation is in reality a struggle against discrimination and for equal rights.

7. A SPECIAL CASE: MANUFACTURING

The case of manufacturing is unique, because it is a highly mobile industry: in fact, many companies in the textile and clothing sector have been relocated in recent decades. In these circumstances, one wonders how and why factories manufacturing clothing have managed to remain in various cities in Europe.

International competition primarily forces employers to minimise their labour costs in order to remain competitive: in Europe, this is only possible through the extensive use of illegal labour. When this first condition is met, factories located in Europe have two advantages over their rivals in Africa and Asia: they are saving on transportation costs which offshore production requires; moreover, they are able to respond much more rapidly to demand fluctuations. Of course, this ability to adapt quickly requires a highly flexible workforce, which is, again, only found among undocumented workers. It is actually the extreme version of the just-in-time production system used which requires the involvement of the undocumented workers. But here too, the conditions are the same; endless working days, dreadful working conditions, random and uncertain and extremely low pay. Furthermore, the workers in the factories had to borrow money to be able to afford to emigrate and so arrived in Europe heavily indebted: until they have repaid their debts, they remain highly dependent on their employer, which means that they are in a condition similar to slavery.

8. SUBCONTRACTING

As Claude-Valentin Marie has shown, the crisis and the restructuring which took place in the 1980s have resulted in two closely related consequences: the massive growth of outsourcing and subcontracting, and an equally massive decline in foreign employees in businesses created in this context. The production line is then broken down into separate segments and each segment is assigned to an individual specialised business: as we know, the division of labour increases productivity. But the completion of the activity requires a manager capable of harmonising everyone's contributions: This role is understandably performed by the general contractor who has obtained the contract and distributes the work involved among subcontractors. The problem is that the game is not played out equally, because on the one side we have a monopoly and on the other competition. The general contractor is able to manipulate the subcontractors so that they are in a situation where they are in competition with one another and to select the bid it deems to be the most advantageous. Thus each subcontractor is forced, if he wants to win the contract, to reduce costs, margins and deadlines as much as possible; reduced salaries, more intense work, objectives which are impossible to achieve without a workforce willing to accept these sort of conditions. Foreign workers, especially those in irregular situations, are the perfect recruits.

The division is clear from the outset: the general contractor keeps most of the profits from the contract; the subcontractor takes on the risks associated with its implementation, as well as the responsibilities and risks associated with managing the workforce. In the construction industry in France we know of an extremely powerful and prosperous company, which only hires nationals or legal immigrants, yet still derives enormous profits from the work of undocumented workers employed by its subcontractors.

It is true that, in turn, the subcontractors outsource the recruitment and management of their workers to a second set of subcontractors: temporary employment agencies. As indicated by Nicolas Jounin (N. Jounin, in A. Morice and S. Potot 2010: 76), the temporary product is a "specific form of bribery, which uses the daily threat of dismissal", in other words, it also guarantees limitless flexibility and precariousness.

In the same article, Nicolas Jounin indicates, however, that faced with an increasing crackdown on illegal immigration, some construction companies began "to substitute their undocumented employees with posted workers through the transnational provision of services, where development is permitted by the liberalisation of services on a European and international level" (*ibid.* p.70). What is the advantage of this substitution? "The use of posting can bring the work back into the realm of legality with regard to the employment of undocumented foreigner workers" (*ibid.* p.87). Of course, this advantage is theoretically offset by the fact that the state is entitled to impose the application of the French minimum wage and statutory working hours legislation (*ibid.* p.83), but the monitoring of this is so sporadic that the risk of punishment is virtually nonexistent.

As noted by Nicolas Jounin, "the term 'onsite offshoring' may even apply more accurately to posting than to the employment of undocumented migrants. The idea is one of a transfer carried out and controlled by the company: in the absence of a transfer of activity [...] there is a transfer of labour. The undocumented immigrants crossed the border just as posted employees do; but the mobility of the latter group is directly controlled by their employers." (*ibid.* p.70) (see eleventh section).

A mention should be given to 'cascade outsourcing', which was briefly mentioned above. This is a procedure which is designed to ensure the impunity of contractors who have used illegal workers. The process consists of inserting five or six shadow companies between the contractor and the production site, which often consist of nothing more than a manager with a telephone, at most. The contractor is supposed to ensure that the subcontractors it uses do not employ undocumented workers; it therefore does this with the first company in the series which provides the required proof: and this is of course real, since it does not employ anyone! The next company does not concern the contractor. As for the police, they have entered factories and sometimes manage to make it up one or two rungs of the ladder, but they are never able to reach the contractor. In an industry like manufacturing, the established companies are never investigated: only very small intermediary companies have been arrested and prosecuted.

9. PEOPLE SMUGGLERS IN THE VILLAIN'S ROLE.

In official rhetoric, illegal migrants are often referred to as the innocent victims of unscrupulous, predatory smugglers, whose 'chains' are condemned as cynically exploiting the misery of immigrants. These idealised images are far from reality.

On the one hand, it is these illegal immigrants, regarded as victims, who are hunted down by border guards or pursued by the speedboats of the Frontex agency. Regarding smugglers, Alain Morice and Swanie Potot find that "the number of infringements recorded and punishments which occur is paltry" (A. Morice et S. Potot 2010, p. 19). In addition, those smugglers arrested generally operate independently and on a small-scale, bribing drivers or fishermen as required: clearly they have nothing in common with the networks using modern equipment that we have enthusiastically been told about.

On the other hand, the tightening of border controls, the implementation of increasingly sophisticated monitoring and detection techniques and the construction of increasingly insurmountable walls make the smuggling networks clearly necessary. How could migrants, isolated in a foreign land, succeed in overcoming the obstacles facing them without the help of 'professionals'? We can impose any sort of moral judgments we want on this situation. The fact remains that their 'work' generally lives up to the expectations of migrants, since most of them eventually arrive safely. A reminder of a figure cited above: 500,000 illegal immigrants per year manage to enter the territory of the European Union; this figure demonstrates both the effectiveness of the smugglers and the ineffectiveness of the measures used against them. However, we shouldn't be ambiguous about their role: it is not the smugglers that create illegal immigration; is the closure of borders that forces people to illegally try their luck by using the services of a smuggler.

10. COMMUNITY SOLIDARITY

Our study would be incomplete if we did not discuss the solidarity that enables undocumented workers to overcome the trials they go through. We have seen that undocumented workers find themselves in a hostile environment; they are often severely exploited and are constantly under threat of being denounced or arrested. In overcoming these obstacles, undocumented workers are fortunately not alone: they may make use of various solidarity networks, some based on links with family and friends, others on a common origin and others still on shared religious beliefs. Through these networks, they are able to find physical and financial assistance, advice and information which are useful in navigating their new lives. New relationships are forged, often marked by paternalism or cronyism, from which workers will eventually find it quite difficult to free themselves and which will probably make their integration into the host society more difficult. But here again, it is repression that these workers suffer cause them to be rejected and imprisoned within their communities.

11. SUBCONTRACTING PRACTICES WITHIN THE EUROPEAN UNION AND CROSS-BORDER RECRUITMENT AGENCIES.

- a) The practice of subcontracting among firms belonging to different countries of the European Union has occurred for many years; subcontractors were permitted to work within the national territory of the commissioning company, with their employees being regarded as posted workers.

FIRST AND FOREMOST WORKERS

The decision of the Court of Justice of European Communities of 27 March 1990 (Bouygues Rush-Portuguesa Case) set certain terms regarding this practice:

- » foreign employees must return home upon completion of their work and will not have access to the labour market of the host country.
- » the subcontractor must be registered in their country of origin.

Under these two conditions, posted workers do not need a work permit; their contract of employment with the company and the subcontracting contract it must sign are sufficient.

- b) With regard to the status of posted workers, they are subject to the social legislation of the host country in a number of areas which are: individual and collective freedoms; discrimination and equality between men and women; maternity protection and parental leave; the right to strike; working hours, holidays; weather conditions; minimum wage; overtime; health insurance; illegal labour.

In the mind of the legislature, this is to prevent any form of social dumping.

There are, however, two key areas in which the employee remains subject to the laws of his country of origin:

Terms of breach of the employment contract and the right of termination,

Membership of a social security system (if the period of the contract is under 24 months).

However, there are two loopholes through which social dumping can take place: more flexible termination law leads to a more precarious situation for the employee, and a less favourable protection system would make the work cheaper.

- c) The requirement that the subcontractor must be registered in their country of origin aims to exclude companies whose sole business is the provision of manpower.

However, the criteria to claim this 'registration' are very vague: is the presence of some administrative staff sufficient to signify that the company is established? Also we have seen examples of subcontractors who supplied workers without any equipment. Considering the facts, it closely resembles the provision of labour.

Moreover, it is now permitted for a foreign temporary employment agency to give its employees contracts in another EU country. All that is required is that it registers its employees with the authorities and presents a financial guarantee equal to that of the domestic firms. It can even assign tasks to employees from countries outside the EU: if these workers are normally employed by the company, work permits are not required for them. Temporary employees enjoy the same status as the other posted workers: as is the case with the national representative, they may be dismissed overnight by the user company.

In the case of conflict, a court - in France, the Industrial Tribunal - decides the outcome. It is doubtful whether temporary foreign workers, acting on their own initiative, without a sound grasp of the language of the host country, would lodge a complaint in court.

Protection rules are therefore strict in theory. But the application of the laws remains very arbitrary.

CONCLUSION

From the study above, we can draw at least one conclusion: in our economic and social system, foreign labour, especially the work of foreigners in irregular situations, does not constitute an epiphenomenon or a peripheral or marginal reality which would be resolved by simple administrative and policing measures alone. Quite the contrary: this phenomenon goes to the very heart of our system, within which it performs structural functions. This means that we will not be able to reach a resolution without directly confronting those who defend the established order. But the question we are faced with is less economic and social than political, and it could be summed up as follows: are we willing to accept the

long-term presence of a group of workers without rights in our countries? Workers who are ripe for overexploitation, and even slavery?

If we accept this situation, it is obvious that it would act like a cancer and would produce metastases. It would cause a downward trend in remuneration for everyone; it would function as a battering ram to erode our achievements and our rights. In fighting for the legalisation of undocumented workers and for equal rights, we are defending everyone.

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REPORT

**FIGHTING AGAINST EXPLOITATION
OF THE WORKFORCE AND
FOR STRICTER APPLICATION
OF LABOUR STANDARDS,
ACCESS TO JUSTICE
AND COOPERATION
WITH LABOUR INSPECTORATE**

AUTHOR: JEAN-RENÉ BILONGO / CGIL

Introduction.....	53
1. Illegal hiring and the need to punish it with an ad hoc penal provision.....	54
2. Monitoring, inspections and sanctions.....	54
3. The Italian Confederations' strategic plan for fighting undeclared work.....	54

INTRODUCTION

According to estimates, the underground economy (of which undeclared work is a significant part) accounts for around 17% of Italy's gross domestic product, while the average in other, more advanced European countries varies between 15% and 4%. So it would not be going too far to say that the underground economy is a structural element of the Italian economy and is rooted in sectors where there is the most deconstruction, where small businesses dominate the scene, where interest and control by criminal organisations is most widespread and, consequently, where monitoring and combating undeclared work is most complex.

This situation has particularly severe effects on two areas of the economy, namely agriculture and construction, and the services sector should be added to the list. These are the three sectors that are most affected by the spread of undeclared work, a type of work that not only deprives the tax authorities of a considerable sum of money but is also an especially fertile breeding ground for accidents, which are often severe or even fatal. [The International Labour uses the term "undeclared work"

and defines it as underground or hidden labour, clandestine employment, 'black' labour, moonlighting or, commonly, illegal work. These terms are for the most part used in industrialised countries and refer to kinds of work whose activities are covered by labour law, but are not in conformity with its administrative requirements. For example, workers are paid below the minimum wage, employers do not register workers with the social security authorities, taxes and social security contributions are not paid on employment earnings.]

Two more factors should be added to this picture, which is already far from encouraging. Firstly, workforces on building sites and in agricultural concerns are increasingly made up of migrants from outside the EU. Secondly, the emergence of the 'crime of irregularity' means that such workers are under pressure and feel blackmailed since they cannot complain to law enforcement officers about being exploited because doing so would expose them to a tragic boomerang effect whereby they would risk immediate criminal prosecution for irregularity and could be deported.

1. ILLEGAL HIRING AND THE NEED TO PUNISH IT WITH AN AD HOC PENAL PROVISION

CGIL and its sectoral organisations for agriculture (FLAI) and construction (FILLEA) are currently promoting a national campaign entitled *STOPCAPORALATO* (which could be translated as STOP ILLEGAL HIRING) and have drafted a bill to make illegal hiring a criminal offence. Illegal hiring is currently punished with an administrative fine of scarcely €50 for each worker hired.

Anyone who has been keeping a watchful eye on the situation of immigrant workers in Italy is bound to remember the raids carried out by the *Guardia di Finanza* (Financial Police) in Rosarno (Calabria) in April 2010. These raids resulted in a number of company owners being put behind bars for other crimes, such as enslavement.

And what about *female workers* in such situations? Generally speaking, women's working conditions in the informal economy are worse than men's working conditions. Women are hired to do less independent work, they earn less and do undeclared work out of economic necessity and in some cases (becoming increasingly common), forced labour goes side by side with undeclared work.

CGIL believes that there is a greater need than ever before to move beyond the clear limit set in current criminal law, which is why we are advocating a bill directed at and for discussion by all institutional stakeholders, starting with political powers and parliamentary committees. We are convinced that a new precept urgently needs to be added to the criminal code: illegally hiring workers is an offence, and as such, it must be punished!

Against this backdrop, we should also consider another factor that we believe to be essential, namely the protection of the thousands of workers currently at the mercy of *caporali* (illegal labour contractors), particularly workers from outside the EU. Our reason for this is as follows: before irregularity became a crime, foreigners could demand that their rights as workers be respected, even if they did not have residence permits, but now that irregularity has been made an offence,

foreigners without residence permits are viewed as criminals for the sole reason that they are in the country irregularly, and so they cannot fight for their rights as workers. This has led to strange, paradoxical situations such as the case of an immigrant worker who reported those exploiting him – the illegal labour contractors (*caporali*) employing him – and was served with a deportation order.

We can see from this that there is a need for legal clauses protecting non-EU workers, clauses that could break the twofold connection between victims and their tormentors and would be integrated into important agreements drawn up in cooperation with certain local institutions and the prefectures.

2. MONITORING, INSPECTIONS AND SANCTIONS

A close look at data from various European countries reveals a framework in which action against undeclared work takes the form of inspections, with consistent investment in the structures that are meant to perform the inspections, coordination between the authorities responsible for inspections and, of course, redefining the system of sanctions. Now more than ever, priority should be given to the capacity of social security institutions, labour inspectorates and trade unions to inspect and monitor.

3. THE ITALIAN CONFEDERATIONS' STRATEGIC PLAN FOR FIGHTING UNDECLARED WORK

Faced with the challenges posed by the scourge of undeclared work, the Italian trade union confederations have worked together to develop a joint strategy focusing on a number of elements, with the following being the main points:

1/ launching a large-scale information campaign that could become rooted in society and create a common heritage

Undeclared work must be disvalued. For this to happen, all of the institutional, entrepreneurial and social driving forces in Italy must join forces and take action. A good way of making this happen would be to organise a permanent campaign to fight undeclared work by promoting information and awareness-raising initiatives involving social institutions, public bodies, chambers of commerce, job centres, schools, prefectures and the different systems in place for monitoring and curbing undeclared work. This permanent campaign would run parallel to various measures designed to instil a culture of legality and promote 'healthy work' within a 'healthy company'.

2/ actions to govern and link up activities fighting undeclared work at national level

For undeclared work to be combated effectively, there must first be shared systems for interpreting the phenomenon and opportunities to discuss matters and cooperate with the government. In any case, it would be helpful to:

- » have a permanent national institution for discussion of such matters, such as a 'control room' for social bodies and regional and central government institutions. Its aim would be to foster initiatives and boost the visibility of the network of organisations fighting undeclared work throughout Italy and in each sector of the economy;
- » develop a system for connecting and evaluating the results of studies and system monitoring;
- » develop a system connecting the databases of the relevant ministerial departments (finance, interior, labour), the pensions and social security institutions and the regions;
- » create a single database of (Community, national and local) facilities for companies;
- » establish a closer link between development policies and specific processes for regularising undeclared work by bolstering actions against irregularity.

3/ new efforts to reform inspectorates and cut down on bureaucracy

There is still insufficient monitoring capacity, which, in turn, determines the probability of companies being able to avoid checks by inspectorates. It would therefore be a good idea to encourage:

- » increased coordination between the various inspectorates and between the inspectorates and other stakeholders responsible for fighting irregular work, while respecting the independence of pensions and social security institutions;
- » providing inspectorates with more financial and technological resources;
- » more checks focusing on certain ways of concealing dependent work;
- » improvements to the collection process with a view to shortening timeframes and boosting efficiency with an accelerated administrative and judicial procedure.

4/ creating congruity indices

The Italian confederations suggest implementing a new method of interpreting and checking the actual work done within companies. For this to be possible, congruity indices must be created (these indices concern the relationship between the quantity and the quality of the work and the number of hours worked proportionate to the number of workers). Compliance with these indices should be the main condition for identifying where action should be taken by the inspectorates of the different institutions, among other things.

5/ establishing new standards for irregular workers

A considerable share of undeclared work is characterised by the presence of irregular immigrant workers (from both within and outside of the EU). Without wanting to repeat the Italian confederations' many proposals on immigration, it would be a good idea to:

- » give all workers who have applied for a work permit the status of workers;

- » create a mechanism to protect immigrant workers and, once the employers exploiting them have been reported, have this mechanism support them in their move away from undeclared work until the potential regularisation of their employment relationship. This could be done by granting immigrant workers a residence permit that would act as a guarantee until they are able to establish employment relationships that comply with the relevant standards.

6/ establishing new standards for agriculture

There are many forms of undeclared work in agriculture, so appropriate ways to combat them must be developed. This is why the sector's Joint Opinion must be implemented immediately. It is especially important that suitable legal provisions be adopted to:

- » define an extraordinary national plan to make a list of employers in the sector (with a distinction being drawn between agricultural operators/businesses, companies working with related activities, companies that do not own land and farmers who are producing for their own consumption);
- » change the system for the payment of [social] contributions by agricultural businesses;
- » introduce a *single code* for application by agricultural businesses in their dealings with all public services.

7/ creating a national fund for the regularisation of undeclared work and rationalising resources for fighting undeclared work

The Italian confederations also suggest creating a national fund for the regularisation of undeclared work and the bolstering of companies that have reg-

ularised their undeclared workers. The details of the fund's operation should be defined in close cooperation with the regions and the relevant social bodies. The fund's purpose would be to:

- » link up some of the resources for increasing the bonus targeting workers who are moving away from undeclared work and for companies involved in local schemes for regularising undeclared work;
- » provide some support for the reconstruction of previous construction periods (workers involved in the process for moving away from undeclared work) for the years preceding involvement in the local scheme for regularising undeclared work.
- » Moreover, with a view to implementing a single strategy for fighting undeclared work, it would be worthwhile to set up ways of coordinating and rationalising national and EU resources for combating the phenomenon. Emphasis should be placed on mechanisms to 'reward' areas where local schemes for regularising undeclared work have proved particularly effective.

It is clear that nobody can claim to have a cure-all solution that can immediately eradicate the plague that is undeclared work.

However, implementing certain measures would make it possible to considerably reduce the amount of undeclared work, using an approach that would see trade unions cooperate closely with the workers enduring undeclared work.

The key issue is the will to turn proposals into legal provisions that would apply to all stakeholders in the matter, first and foremost companies and employers.

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REPORT

**ENSURING FAIR WAGES
AND WORKING CONDITIONS
FOR UNDOCUMENTED MIGRANT
WORKERS IN EUROPE:
ARE FAIR TRADE
STRATEGIES THE ANSWER?**

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Introduction and background.....	59
1. Labour rights and working conditions.....	60
2. Ensuring equity	65
3. Fair trade strategies. Migration and development.....	66
4. Proposed methodologies and tools.....	69
Questions for further debate.....	70

INTRODUCTION AND BACKGROUND

Addressing the issue of irregular immigration in the EU on the basis of tighter border security, criminalisation and repression, is a mistaken approach, which can lead us to waste the potential benefits of immigration in social, economic and development terms, in addition to fuelling racism and xenophobia. If we truly wish to avoid this kind of situation, Europe must move beyond the concept of the “legal and administrative status” of its immigrant population and uphold the human and labour rights of all workers, regardless of their status. The pressing need to migrate experienced by some populations and the absence of legal avenues to do so are the main reasons which will continue to drive irregular immigration, and this is why we must set up coordinated and effective mechanisms to prevent the exploitation of these groups of workers who are in a particularly vulnerable situation. To this end, we must develop appropriate welfare policies, enforce labour standards, promote social integration, and give priority to prevention and the fight against exploitation by strengthening the channels for regular migration and enabling undocumented immigrants to achieve legal status.

According to a report published by the European Commission’s CLANDESTINO Project (2009)¹, “keeping the geographical space of the EU15 constant, the aggregate estimates indicate that the irregular migrant population has declined considerably in the EU15, with an estimated 3.1 to 5.3 million in 2002 and 1.8 to 3.3 million in 2008. Rules of thumb do not indicate this effect but point to an increase of the irregular foreign resident population. Looking at the enlarged EU27 in 2008, the aggregate results in that estimate are not much higher than the estimate for the EU15. It is estimated that about 1.9 to 3.8 million irregular foreign immigrants reside in the territory of the EU27 in 2008.” However, the media have indicated that the latest estimates put the number of

irregular migrants in Europe at between 4.5 and 8 million. Yet, there are serious difficulties in obtaining accurate data, as well as estimation methodology problems that should be solved as soon as possible. If we wish to develop effective strategies for this population, we need to have a more accurate idea of what we are talking about, both in quantitative and qualitative terms.

The European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX) has published an interesting report² on the levels of both legal and illegal migration into the EU. According to this report, the fact that illegal migration increased between the second and third quarters of 2010 is almost exclusively the result of increased migration pressure in Greece. The report also mentions an increase in the number of asylum applications in the EU: asylum applications submitted by nationals of Serbia and FYROM also more than doubled in the EU compared to the previous quarter, following visa liberalisation for these nationalities at the beginning of 2010. More recently, on 14 January last, the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament published an EU policy document³ in which it urged the Commission to develop a permanent monitoring system for all FRONTEX activities linked to managing migration flows. Beyond the issue of border controls, Europe needs to find a balance between the need to maintain certain restrictions to safeguard the European area and the need to protect the fundamental rights that characterise our welfare state. On 15 December 2010, the European Parliament published a Resolution⁴ on the situation of fundamental rights in the European Union (2009) and their effective implementation following the entry into

1 http://clandestino.eliamep.gr/wp-content/uploads/2010/03/clandestino-final-report_november-20091.pdf

2 http://www.frontex.europa.eu/situation_at_the_external_border/art22.html

3 <http://www.europarl.europa.eu/activities/committees/draftOpinionsCom.do?language=EN&body=LIBE>

4 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0483+0+DOC+XML+V0//EN&language=EN>

force of the Treaty of Lisbon. In addressing this issue, the European Parliament stressed the need to protect human rights and fundamental freedoms as an essential condition for the consolidation of the European area of freedom, security and justice, and it reaffirmed its commitment to the Charter of Fundamental Rights as an essential means of strengthening the EU as a community of shared values and protecting human rights in the EU. That links exist between the formal and informal economies and the presence of illegally employed workers is fairly obvious. In this context, Directive 2009/52/EC of the European Parliament and of the Council⁵ of 18 June 2009, providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, is particularly relevant but, so far, a lack of resources and inadequate coordination between labour inspectorates in the European area have drastically limited the Directive's effectiveness in practice. Applying the law to irregular migrant workers implies enforcing it also on irregular employers. Finding a balance between workforce demand and supply at European level is one of the challenges that we have to meet to solve the issue of irregular migrants, and for this purpose we need an instrument or mechanism to overcome imbalances in the labour market.

One major aim of this Project is to draw up proposals to achieve decent working conditions for irregular migrant workers – comparable to those that apply to other workers – as well as fair wages and access to social protection systems. Furthermore, the Project aims to propose alternative development policies, based on fair trade strategies that could be developed jointly with other organisations. These strategies should inform the ETUC's future policies and back-up its commitment to safeguarding the labour and social rights of undocumented migrants and combating exploitation. Being a "regular" or "irregular" worker is not a permanent legal status. In fact, some legal immigrants end up being illegal when their work permits expire, while other immigrants become legal as a result of changes in their residence status and/or employment status. The European trade union movement must campaign for regularisation as the best means of preventing "rights-based segregation" and the continuing existence of different statuses for workers within the EU.

⁵ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:168:0024:0032:EN:PDF>

1. LABOUR RIGHTS AND WORKING CONDITIONS

Migrant workers and posted workers are in similar situations in that they enjoy fewer rights in the host country and are socially much more vulnerable – and the situation is even worse in the case of undocumented immigrants. It is an objective of the ETUC to uphold the rights of these groups of workers, also in view of the fact that these rights are recognised by numerous international treaties⁶ and laws which are not always recognised or observed in practice. The ETUC must monitor developments and promote – through institutional participation – the inclusion of these rights in public policies, in addition to promoting compliance by means of collective bargaining and the trade union activities of its member organisations.

Our immigration is essentially economic in nature. Ensuring respect for migrant workers' labour and social rights should top the agendas of the EU as well as of European governments, trade unions and social organisations. Europe must at the same time meet the requirements of its traditional "welfare state model" and ensure respect for human rights. However, although the latter are considered basic and inalienable rights, they are no longer "absolute" in that they are eroded by the freedom to conduct business, the requirements of competitiveness, the re-emergence of racism and xenophobia as a result of unemployment, inequalities and the lack of genuine integration of the immigrant population, and an inability to manage and take on board the new, diversified collective identity of the European population. As part of this picture, the segmentation of the labour market into different categories of workers governed by a maze of Directives – aimed at facilitating mobility and enabling companies to cut labour costs – deprives migrant workers of their fundamental rights and fosters labour and social dumping among European countries.

⁶ *International Pact on Civil and Political Rights, International Pact on Economic Social and Cultural Rights, International Convention on the Protection of the Rights of All Migrant Workers and their Families, International Convention on the Elimination of all Forms of racial Discrimination Racial, Convention on the Elimination of all Forms of Discrimination against Women, Convention on the Rights of the Child, ILO Convention on Migration for Employment, ILO Convention relating to the Status of Refugees, etc.*

It is the legal status of the individual worker in the host country which, basically, determines the level of rights which he or she enjoys. Looking at the broader picture, however, it is apparent that national as well as supranational policies relating to migrant workers have suffered a setback over the past twenty years. The economic downturn and the fact that the migrant workforce has functioned in a globalised context have led to harsher conditions for migrants and a generalised curtailment of workers' rights. However, their status as undocumented migrants should not deprive them of their human dignity or their rights, as highlighted in the Declaration adopted by the Global Migration Group (GMM)⁷ in September 2010. The GMM is an inter-institutional group which brings together 14 bodies (12 UN bodies plus the World Bank and the International Migration Organisation) to promote the implementation of the international instruments and standards applicable to migration and to foster the adoption of more coherent, broader and more effectively coordinated approaches to international migration. In this connection, it should be noted that, if we look at the world map, we find that most of the countries which have ratified the international conventions established to assist or protect migrants are "sending (home) countries" and only a very few are "receiving (host) countries"⁸.

This is why the ETUC must continue to call for the Convention on the Protection of the Rights of All Migrant Workers and their Families⁹ to be fully ratified by all governments as a matter of urgency, and it must also demand a review of the situation as regards proper transposition of the EU Directives on non-discrimination into national legislation (i.e. Directives 2000/43/EC, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and 2000/78/EC, establishing a general framework for equal treatment in employment and occupation). In practice, the complexity of national legislations or their non-conformity with EU provisions, as well as a

lack of appropriate infrastructures and the specificities of national labour markers, combined with the current economic crisis, have prevented or delayed consideration of these issues, in spite of the fact that they are of the utmost importance if we wish to ensure that the rights of migrant workers are effectively protected.

When a person arrives in the host country as an undocumented immigrant or becomes an "irregular immigrant", his or her precarious employment situation often leads to poverty resulting from the lack of material and financial resources as well as the lack of social status, and social exclusion. Furthermore, these circumstances can give rise to so-called "aporphobia" (an attitude of rejection towards the poor) among the native population, with potentially very dangerous consequences which are interrelated with other issues such as public safety, cultural identity and competition for limited resources. In this way, depending on their legal status, people find themselves on either side of a dividing line, as far as the enjoyment of rights is concerned: more rights for native people; fewer rights for "regular" immigrants and even fewer rights for "irregular" immigrants.

One key issue is the establishment of some sort of "census" or "register" in which, regardless of the migrant person's administrative status, his or her actual presence in a locality or territory can be recorded. Such a register is the only way to make sure that immigrants can enjoy a minimum set of rights, and it can also help public authorities to plan welfare and resource-allocation policies.

Some specific cases:

In Germany, immigrants are required to register at the local town hall soon after arrival and to provide various details, including their full name, gender and religion. This registration is used as the basis for personal taxation purposes. But only EU nationals or persons who have a legal tourist's visa may register. Unless the person is registered, no further administrative procedure is possible since proof of registration will be requested at every step, and public authorities have an obligation to report any illegal immigrant to the police in order for the latter to proceed to expulsion. However, all immigrants are entitled to urgent medical care and may be able to access education on an unofficial basis.

In Italy, having no papers is an offence, punishable by a fine of €5,000 to €10,000. In addition to expulsion from

7 <http://www.globalmigrationgroup.org/pdf/GMG%20Joint%20Statement%20Adopted%2030%20Sept%202010.pdf>

8 <http://www.december18.net/article/world-map>

9 [http://www.unhcr.ch/tbs/doc.nsf/c12563e7005d936d4125611e00445ea9/a0d5b166ec404486c1256fe0004ad28a/\\$FILE/G0540821.pdf](http://www.unhcr.ch/tbs/doc.nsf/c12563e7005d936d4125611e00445ea9/a0d5b166ec404486c1256fe0004ad28a/$FILE/G0540821.pdf)

No EU Member State has as yet ratified this Convention. Only one candidate country (Turkey) and four other European countries (Albania, Bosnia-Herzegovina, Montenegro and Serbia) have done so.

the country, undocumented immigrants face the risk of imprisonment. Marriage with illegal immigrants is prohibited and nobody can register in the municipal register unless he or she has a residence permit, which is required to obtain a medical card and enrol in a school, and also entitles the holder to a few other basic rights.

In France, the census is a statistical tool which provides for universal registration of all people living in the country, wherever they live and regardless of their legal status. Confidentiality is guaranteed. Healthcare is universal, but irregular immigrants are only entitled to emergency care, although they are required to enrol their children in school. If it is established that an immigrant is in the country illegally, he or she will be expelled.

In the UK there is no identity document and no municipal register as such. Any document that proves a person is living in the country may be used in lieu of an ID card. It is up to the public authorities to establish the immigrant's legal status and decide whether or not to grant admission.

In Spain, immigrants may enrol in the "municipal register", whether or not they are registered as regular immigrants with the Ministry of the Interior. This registration entitles them to urgent medical care and comprehensive healthcare for pregnant women and minors, free compulsory education for all children aged 6 to 16, and some basic social services, depending on the Autonomous Community concerned. Immigrants enrolled in the municipal register also have the right to freedom of assembly and association as well as trade union rights.

In general, in the EU: irregular immigrants have practically no rights; they must work in the hidden economy; they only receive medical care in the event of an emergency and they are forced to keep a low profile, withdrawing into a "shadow existence". Those who are included in a census will be able to access the healthcare system and education, but they are still forced to work in the hidden economy; and of course, there is always the threat of expulsion, which will discourage these workers from using services out of fear of being expelled. Yet, effectively implementing universal human rights implies disregarding a person's legal status and attaching paramount importance to meeting his or her basic needs and preventing social exclusion.

But why do we have undocumented immigrants in the first place? Because the various Ministries of the Interior refuse to give them any papers – it is as simple as that, as A. Unzueta pointed out in "La construcción

social del inmigrante irregular" (The social construction of an irregular immigrant)¹⁰ (2002), where he refers to an article in "Le Monde" concerning an interview with Nicholas Sarkozy when he was the French Minister of the Interior. This way of looking at things flows from a logic where the world is divided into States and "areas" bound by borders, and people enjoy certain rights or are refused certain rights depending on whether they "belong" to the State or area in question. A person is not entitled to any rights by virtue of being a person, but only as a result of "belonging" to a given territory – and undoubtedly this state of affairs runs counter to the declared intentions and provisions of many international treaties that have been ratified by the States concerned. One major problem is that this non-compliance cannot be reported to any supranational body, so that we are left with the contradiction involved in being entitled to leave a particular country but not being entitled to enter another country (as a general rule).

As far as working conditions and employment relations are concerned, the numerous ILO Conventions relating to migrant workers (which have been ratified by European countries) state that all workers are entitled to equal conditions and that, while national labour laws may limit these rights, workers' fundamental rights should in no case be curtailed. The latest ILO report on this issue, "International labour migration: a rights-based approach"¹¹, is particularly relevant in this connection, given that it puts forward proposals to develop and implement migration policies and practices based on rights, and highlights current problems in terms of the lack of decent work, inadequate protection and non-payment of wages, unsafe workplaces, lack of social protection, lack of trade union rights and labour rights in general, discrimination and xenophobia. According to Ibrahim Awad, chief of the ILO's International Migration Branch, "international migration is primarily a labour market, employment and decent work issue, and less a security and asylum-seeker/refugee issue." The challenge is to govern migration in such a way that it can serve as a force for growth and prosperity in both origin and destination countries, while protecting and benefiting migrant workers themselves," he stated.

¹⁰ http://www.mugak.eu/ef_etp_files/view/Agustin_Unzueta_La_construccion_del_inmigrante_irregular.pdf?revision_id=10125&package_id=10109

¹¹ http://www.ilo.org/public/english/protection/migrant/download/rights_based_approach.pdf

FIRST AND FOREMOST WORKERS

In light of the above, and speaking from a legal point of view, all the conditions laid down in the collective agreements applicable in different countries should be complied with, and even though workers might be in an irregular situation, they should receive the wages agreed in the convention. The same applies to working hours, leave and holidays. This, however, is not what happens in most instances. Although a worker might be able to bring his/her case before a labour court, in view of the difficulties involved in proving that an employment relationship exists and submitting documentary evidence/testimonies, it is most likely that the claim will be dismissed. This in turn entails the threat of expulsion on the grounds of illegal residence, or the worker might even be convicted for a serious offence so that, in addition to not having access to social protection systems or to any financial compensation, he or she shall

be the subject of an expulsion order and banned from the Schengen Area for a period ranging from three to ten years.

A recent study conducted by CC.OO's 1st May Foundation¹² and entitled "La integración laboral de las personas inmigrantes en España" (Immigrants' integration into employment in Spain), proposes a system of indicators to analyse the integration of immigrants into employment. In the case of irregular immigrants, serious methodological difficulties prevent these workers from being included in the general systems designed to determine the level of social integration, given that the municipal register is an essential tool to be able to reach an approximate estimate of the level of integration. However, the above-mentioned study does provide some useful indicators to estimate the approximate number of irregular immigrants:

INDICATORS OF THE APPROXIMATE NUMBERS OF IMMIGRANTS RESIDING ILLEGALLY

Approximate ratio of irregular immigration to the immigrant population as a whole

Definition	Source	Frequency	Data disaggregation possible by	Remarks
No. of immigrants residing in the country – No. of immigrants with a residence permit. No. of immigrants residing in the country x 100	Statistical analysis of the Municipal Population Register ¹³	Annual	Place of residence, gender, age and nationality	
	«Anuario Estadístico de Inmigración» (Immigration statistical yearbook)	Annual and quarterly	Gender, age group, nationality, residence status, place of residence.	The reliability of this indicator is only relative, given the methodological differences between registers. There are discrepancies between the two registers, possibly due to the fact that the family members of immigrants were not included in the figures for residents.

¹² <http://www.1mayo.ccoo.es/nova/files/1018/Informe20.pdf>

¹³ Register, used in Spain, which only includes foreigners who hold a passport.

INDICATORS OF APPROXIMATE NUMBERS OF IRREGULAR WORKERS

Approximate ratio of irregular immigrant workers to total number of immigrant workers

Definition	Source	Frequency	Data disaggregation possible by	Remarks
No. of employed immigrants (EPA) ¹⁴ – No. of immigrants registered with the Social Security Department No. of employed immigrants (EPA) x 100	EPA (Micro-data).	Quarterly	Statistical definition of «immigrant», nationality (10 most significant nationalities), age group, gender	
	Social Security Statistics	Monthly plus yearly compilations	Gender, age group, nationality	The reliability of this indicator is only relative, given the methodological differences between registers.

A record of the details of immigrants who reside *de facto* in a country, combined with an estimate of the number of immigrants who have a residence permit, may allow us to reach an approximate estimate (albeit with certain limitations) of the number of irregular immigrants. However, without a record of these basic details it will be very difficult to evaluate social integration into society or employment with any degree of accuracy.

The above-mentioned study proposes a number of quantitative variables and indicators to evaluate immigrants' employment situation on the basis of a comparison with data relating to the native workforce. Again, in the case of undocumented workers, these indicators cannot be applied, from which it is apparent that **regularisation is the only possible means of evaluating the employment situation of these groups of workers and ensuring equal rights**. The variables concerning the employment conditions are the following:

Employment variables and indicators

Comparison between immigrant and native populations

- A. Worker. Activity indicator
- B. Occupation in the labour market. Employment indicator

- C. Professional status. Salary indicator
- D. Concentration in specific sectors. Weighted indicator of breakdown of employment by sector
- E. Concentration in specific occupations. Weighted indicator and indicators of breakdown of employment by occupation
- F. Duration/temporary employment. Temporary employment indicator
- G. Differences in the extent of part-time employment. Part-time employment indicator
- H. Comparison between levels of overqualification. Overqualification indicator
- I. Salary/Wage differences. Pay gap indicator
- J. Differences in working hours. Indicator of above-average working hours
- K. Comparison between levels of long working hours. Indicator of working hours above legally established limit
- L. Differences in occupational accident rates. Occupational accident indicator
- M. Differences in participation in further training activities. Further training indicator
- N. Comparison between unemployment levels. Unemployment indicator
- O. Weighted comparison between long-term unemployment rates. Long-term unemployment indicator

14 Encuesta de Población Activa (EPA – Labour Force Survey)

- P. Comparison between job demand rates. Job demand indicator
- Q. Comparison between recipients of unemployment benefit. Unemployment benefit indicator
- R. Difference in recruitment levels. Recruitment indicator
- S. Differences in participation in vocational/professional training activities. Vocational training indicator.

Regularised access to the labour market is the only means of ensuring equity in immigrants' working conditions, wages and access to civil rights and welfare benefits. Back in 1999, in the Report from the Director-General, the ILO defined "decent work" in terms of adequate employment, social protection, welfare rights and social dialogue. Since the year 2000¹⁵, the EU has been focusing on the quality of employment, and this issue has been included in its Social Agenda. The EU set itself the priority objectives¹⁶ of achieving full employment and strengthening social cohesion and integration, but the current global crisis (originally a financial crisis but now also an employment crisis) has had a highly negative impact on working conditions and the segmentation of the labour market. In this context, undocumented migrant workers, handicapped by their legal status, are victims of job insecurity, all kinds of abuses, and serious discrimination. Although the Employment Strategy promoted measures to encourage the integration of immigrants in the labour market – and these measures were included in the National Action Programmes for Employment and national Reform Plans – the issue of undocumented immigrants has not, to date, been effectively addressed, while the subordination of employment to (liberalised) market rules and economic competitiveness has resulted in the expansion and further segmentation of the hidden economy and an increase in irregular employment.

2. ENSURING EQUITY

In order to achieve equity, we need to describe and map out the qualitative and quantitative characteristics of the labour market as it exists in the real world. The

European Commission has pointed out the importance of creating a multidimensional and common measuring system by developing indicators to effectively evaluate labour-market policies, developments and trends. The Migrant Integration Policy Index (MIPEX)¹⁷ structures the 140 indicators for integration policies into six policy areas: labour market access, family reunion, long-term residence, political participation, access to nationality, and anti-discrimination. In addition, there are policy areas relating specifically to the labour market: access to the labour market, job security and employment-related rights.

Structural indicators relating to employment in the EU¹⁸

- » Employment rate by gender
- » Employment rate of older workers by gender
- » Average exit age from the labour force by gender
- » Gender pay gap
- » Tax wedge on labour costs
- » Tax rate on low wage earners by marginal effective tax rates on employment incomes
- » Implicit tax rate on labour
- » Life-long learning by gender
- » Serious accidents at work by gender
- » Fatal accidents at work by gender
- » Unemployment rate by gender

Proposed common indicators for integration in the labour market and employment, in the short term:

- » Employment rate
 - » Employment rate among immigrants
 - » Unemployment rate among immigrants
 - » Income level (and/or pay level) of immigrants
 - » Number and types of employment contracts among immigrants
 - » Sectors for the insertion of immigrants in the labour market
 - » Percentage of immigrants who are self-employed or employers
 - » Accidents at work in comparison with native workers.
- (These indicators should be interpreted comparatively in relation to the native population by age group and gender and, possibly, by group of origin. For some indicators,

15 Lisbon Summit and Council of Nice (2000)

16 Employment Policy Guidelines (2003)

17 <http://www.integrationindex.eu/>

18 Eurostat, 2009

reference should be made specifically to the so-called “second generation” or descendants.)

If we lack tools that can be generalised to the EU as a whole to gain a genuine, comparative understanding of regular immigration, this is even truer in the case of undocumented immigrants. There is a dire lack of data and reliable information on them, so that their evaluation, in both quantitative and qualitative terms, is left to subjective judgment.

The latest Summit on equality, organised in Brussels by the Belgian Presidency of the EU, focused on the fight against discrimination and the need to promote equality in employment, but this goal cannot be achieved unless we take undocumented immigrants into account and raise employers’ awareness of equity and diversity issues. As is also apparent from an ETUC Resolution¹⁹ on equal treatment and non-discrimination for migrant workers, adopted by the ETUC Executive Committee on 1-2 December, European trade unions are addressing this issue, but there are some major obstacles that stand in the way of achieving equality between all workers. This is strongly impacting labour markets, leading to social dumping, particularly as a result of loopholes in our current legal framework.

The ETUC’s lobbying activities against the proposed Directive on a single application procedure for a single permit for third-country nationals (COM-2007-638) had a positive impact on the first plenary vote at the European Parliament on 14 December 2010. However, we must continue to exert all the necessary pressure to ensure the proposed Directive is not adopted. The Directive aims to establish a uniform framework of rights for third-country nationals living in the EU, but it excludes major groups of immigrants, particularly the most disadvantaged who are facing the most difficult conditions, including temporary workers, posted workers, those transferred by companies from third countries and workers of service-providing companies under a contract, as well as certain groups of trainees. The Directive would therefore establish significant differences between the rights enjoyed by European workers and those enjoyed by workers from third countries, thus further segmenting our labour market, enshrining a lower level of social and labour rights for immigrant workers, and contravening the UN Convention on the Protection

of the Rights of All Migrant Workers and their Families as well as the Council of Europe’s own Convention on migrant workers which establishes certain rights for them as regards working conditions, social security and housing. However, the biggest hurdle in the way of equal rights for undocumented immigrants is the hidden economy, which exerts a strong downward pressure on working conditions and, essentially, exploits this group of workers through irregular employment, particularly in certain sectors, including domestic work, fashion, textiles and shoe-making, agriculture and the service sector. The plight of undocumented workers is the worst of all possible situations in the broad spectrum of precariousness and job insecurity. Furthermore, it is a form of unfair competition between employers, has a major negative impact on European economies in that it involves fiscal and social-security fraud, and contributes to undermining the Welfare State.

3. FAIR TRADE STRATEGIES. MIGRATION AND DEVELOPMENT

“Because of the lack of a social dimension to globalisation, competition within each individual country and between countries to attract multinational companies and foreign investment is mainly based on keeping wages low and using production methods that are unsustainable and harmful for the environment,” says Kwasi Adu-Amankwah, General Secretary of the ITUC African Regional Organisation. As long as there is a significant development gap between Europe, on the one hand, and Asia, Africa and Latin America, on the other, Europe will have to deal with the arrival of immigrants. This migration pressure originates mainly from Africa, whose geographical borders are also the dividing line between the greatest inequalities in the world.

We start from the premise that migration and development are closely interrelated and interdependent processes, which can decisively influence each other. Migration does not merely involve the movement of people, and development does not merely involve economic growth. The concept of globalisation encompasses more than just the integration of economic activities. Today’s migration flows are no longer unidirectional and permanent, as they were in the past, but temporary and

19 <http://www.etuc.org/a/7954>

circular. The South-North axis, marking the traditional direction of migration flows, is becoming increasingly blurred, giving rise to new and diverse geo-economic maps. Making decent work available is an essential prerequisite for the eradication of poverty. Endogenous, self-sustainable and fair development is impossible unless workers' rights are protected, and this includes the right to a decent wage as well as other labour rights such as freedom of association and the right of workers to protect their interests through collective bargaining. For this to be possible, trade union organisations are needed which are strong, independent and free from external interference. This means we must strengthen trade union structures and integrate them in the global unions.

For the purpose of defining our strategic approach, some points made in a recent study entitled "The Current Global Economic Crisis and Migration: Policies and Practice in Origin and Destination", issued by the Development Research Centre on Migration, Globalisation and Poverty in May 2010²⁰, could be very useful, given also that they coincide with our own analysis in the present document:

- » The need to distinguish long-term from short-term migration trends and to gain a better understanding of the relationship between migration and development;
- » Migration will continue as a result of the profound disparities in the global system, but the direction of migration flows will change because of the emergence of the new fast-growing economies in areas which previously formed part of the developing world (the destination of migration will increasingly shift from North America and Europe to Asia, the Middle East, Southern Africa and some parts of Latin America);
- » Migration will resume in both areas when the current crisis comes to an end (?);
- » Most probably, because of these changes, restrictive policies will become ineffective;
- » A large-scale return of immigrants to their countries of origin, resulting in a decrease in workers' remittances, is very unlikely to happen;
- » No simple or single policy response can be appropriate. Huge variation exists among both destination and

origin countries in terms of their patterns of migration and levels of development. Thus:

- » There is a need for data sharing so that policy response can be based upon the best available evidence.
- » Partnerships between countries of origin and destination countries may be appropriate in order to coordinate the management of migration more successfully.
- » Countries should consider the impact of the downturn on the migration and development nexus in their ongoing development work, and in their existing and planned future partnerships.

These vitally important questions – particularly in view of the current crisis and its effects on development and migration – lead us to reconsider a number of other issues which were discussed not so long ago at the International Meeting on Migration and Development²¹, held in Seville in 2007. These include the traditional North-South divide as the key underlying factor driving social and economic inequalities, and its influence on immigration; and **well-meaning, altruistic proposals aimed at regulating global trade on the basis of Fair Trade principles or establishing jointly agreed, fair financial systems** (e.g. in relation to the double taxation of migrant workers' remittances). Something more than just the global economy has been rattled by the crisis: Conventional perceptions of the socioeconomic system are being replaced by a new outlook, based on more realistic, broader parameters. Some European multinational companies are conducting aggressive campaigns, even hiring specialist union-breakers, in an attempt to prevent workers in other countries from organising and engaging in collective bargaining. In so doing, they are contravening international standards and, in some cases, the laws of the countries concerned.

On Tuesday 7 December, the Second European Report on Development²² was published under the auspices of the European Commission and seven EU Member States, namely Finland, France, Germany, Luxembourg, Sweden, the UK and Spain. The Report, which advocates a new approach to development cooperation with Africa, argues that social protection can contribute to reducing

20 http://www.migrationdrc.org/publications/working_papers/WP-T32.pdf

21 http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l33207_en.htm

22 http://www.eusa.org.za/en/PDFdownload/Development/European_Report_on_Development_2010.pdf

poverty and vulnerability, and promote socially-inclusive development and growth. The Report highlights the role of workers' remittances and financial transfers as well as their limitations in terms of achieving adequate social protection. The report makes some interesting considerations about the need to provide social protection not only for migrants in the host countries but also for the families that are left behind in the countries of origin.

In the today's markedly neoliberal context, global trade is all but fair. The increasing liberalisation of trade is forcing poorer countries – under the provisions of free trade agreements – to operate in deregulated markets as part of a system which still enables wealthy countries to protect their own exports. An interesting study published by Trade-Human Rights-Equitable Economy (3D) and Sur-Red Universitaria de Derechos Humanos (Human Rights University Network), entitled "Practical Guide to the WTO and Other Trade Agreements for Human Rights Advocates"²³, analyses the negative repercussions of WTO rules and practices for human rights around the world, and also puts forward proposals and actions to redress the balance in global trade:

- » Use the tools available to uphold human rights;
- » Intervene in the countries concerned;
- » Intervene during the negotiation process;
- » Request an assessment of the impact of liberalisation on specific groups;
- » Ensure that human rights are taken into account in the settlement of disputes;
- » Ensure that human rights are included in the analysis of trade policies;
- » Consider the possibility of including human rights in WTO rules;
- » Closely examine other aspects, such as sustainable development and labour standards.

Fair trade – as promoted by the United Nations and various NGOs and social and political movements – involves an alternative approach whereby the trade relation between producers and consumers takes place on a voluntary, equitable basis. The main principles of fair trade are the following:

- » The producers form part of cooperatives and voluntary organisations that function democratically;
- » Initiative and freely-performed work; non-reliance on subsidies and financial assistance;

- » Rejection of child labour;
- » Gender equality;
- » Decent work, respect for human rights;
- » A fair price is paid to producers, enabling them to enjoy decent living conditions;
- » Buyers usually pay for the products in advance so that the producers will not have to seek other means of financing production;
- » Value is attached to quality and sustainable production;
- » Concern for the environment;
- » Effort to eliminate intermediaries between producers and consumers;
- » Consumers are informed about the origin of the products;
- » The process (including the relationship between producers, distributors and consumers) must be voluntary.

Fair trade promotes equitable conditions in commercial transactions and the lifting of discriminatory restrictions on goods (raw materials, manufactured products, technology) from developing countries. In addition to eliminating discrimination and protectionism, fair trade also aims to narrow the excessively large gap between consumer prices in the First World and the money paid to producers in the country of origin, thus preventing the exploitation of workers (which amounts to virtual slavery in many countries). Furthermore, fair trade does not rely on government intervention or subsidies. A set of international Fair Trade principles and requirements have been established by Fairtrade Labelling Organizations (FLO International). Fulfilling these principles and requirements enables operators to obtain a FAIRTRADE label, which guarantees the origin of the product concerned. The label has contributed significantly to the global growth of fair trade products.

Fair trade has achieved a high degree of consumer acceptance in Europe, in many cases outperforming conventional trade. Europe is the main destination of Fair Trade products and Latin America is the main area of production. Most fair trade Products are sold through supermarkets, while fair trade importing companies are those with the highest number of employees, and labelling companies those with the highest turnover. In Europe, fair trade is a major market niche – indeed one of the most dynamic, with an increasing presence of large multinational companies, particularly in the food processing industry. Within Europe, the United Kingdom, Switzerland, France and Germany have the highest

23 http://www.3dthree.org/pdf_3D/Guia_Practica_OMC.pdf

volume of retail sales. For its part, Switzerland has the highest consumption per capita.

In Africa, 60 per cent of the population lives and works in rural areas, but subsidised products from Europe and the United States (milk, sugarcane, cotton, fruit, etc.) are destroying the local markets, thus spurring a massive exodus to the cities and swelling the ranks of irregular migration. Promoting rural development in these areas, on the basis of food sovereignty and a fair price for local products, could improve the livelihood of many African farmers, thus sparing them the need to set out on a quest for the "European paradise". But in order to offer low-priced products to European consumers, many companies resort to child labour, slavery and exploitation. Oil and mining companies, as well as companies in the chemical and pharmaceutical sectors, buy raw materials cheaply in Africa by supporting and financing arms trafficking, civil wars and dictatorial military regimes that oppress the people.

Strengthening fair trade can be an effective strategy even in the short term, but only a bold and effective European policy against irregular migration can contribute to reducing migration flows. This means a policy which is not centred on border security and further segmentation of the labour market, but which regards the development of the countries of origin as a decisive factor of success in the medium and long term.

4. PROPOSED METHODOLOGIES AND TOOLS

In light of the above, we shall outline, in the following, what we believe should be the basic premises of any proposed methodology or instruments aimed at ensuring fair working conditions for undocumented migrant workers, as well as of any fair trade strategies that we might put forward:

- 1/ Global trade is not following the principles of fair trade but, on the contrary, so-called "free trade" is largely characterised by cynical protectionism and is negatively impacting progress in less-developed countries, thus fuelling poverty and migration towards the more developed countries.
- 2/ Any fair trade strategy put forward by the European trade union movement, jointly with other organisa-

tions, should be based on a set of "rules of fair trade" and promote the rights of workers in the countries of origin. To this end, we must strive to strengthen the international trade union organisations as much as possible and effectively lobby national governments.

- 3/ Respect for human rights, regardless of a person's legal status, is an absolute principle. Equal rights for undocumented immigrant workers in Europe can only be achieved if these workers become fully-fledged "regular" workers in both legal and administrative terms. European trade unions must avoid further segmentation through the granting of "low-level rights" to irregular immigrant workers.

Proposed types of action:

- » Establish forums and timetables to develop joint strategies and monitor/evaluate existing agreements relating to development and migration;
- » Actively participate, through national and international trade union organisations, in policymaking that has a bearing on migrant workers;
- » Develop comprehensive policies and programmes to assist migrants who return to their countries of origin;
- » Promote alliances to achieve regular and protected migration, developing, to this end, bilateral and multi-lateral agreements to regulate migration flows and protect the rights of migrant workers and their families in accordance with the relevant ILO and UN Conventions. The regularisation of migrants should not be regarded as a factor that negatively affects host countries, but rather, as the main tool to tackle the problem of vulnerability;
- » Join trade union action to promote democracy, political stability, the eradication of slavery and other forms of human exploitation;
- » Avoid the depletion of human resources and "brain drain" in the countries of origin, striving to prevent a two-tier migration policy;
- » Promote agreements on social security and other acquired rights in the host countries so as to transfer these rights to the countries of origin;
- » Cooperation between trade unions to monitor the workforce selection and recruitment processes in the country of origin in order to ensure that they are carried out fairly and transparently, without the involvement of any intermediaries or organised crime networks;
- » Cooperate to promote the organisation of migrant workers and their active involvement in unions;

FIRST AND FOREMOST WORKERS

- » Develop specific campaigns aimed at promoting the following: compliance with the ILO Conventions and Standards; gender equality in employment; the eradication of child labour; social inclusion; quality education and vocational training; occupational health; the eradication of informal work; equal treatment and equal working conditions; decent work, and so on;
 - » Strive to include social and environmental clauses in multilateral and bilateral trade agreements;
 - » Combat racism, xenophobia and all forms of discrimination and promote the integration of immigrants in the labour market and society at large in the host country, respecting cultural diversity and recognising its positive contribution to society;
 - » Moving beyond the focus on border security and expulsions, we must identify innovative approaches to irregular immigration, including the development of major channels for legal, regular migration, preventive and protective measures, and a greater emphasis on the protection of human rights;
 - » Consider the feasibility of developing circular or temporary migration schemes, offering pathways to achieve permanent residence and citizenship.
- » Strengthening of inspections, investigations and control;
 - » Make it easier to report abuses;
 - » Establish an obligation to improve national administrative cooperation;
 - » Law-enforcement measures;
 - » Creation of a new "EU Social Intelligence and Investigation Agency (EU-SIIA), which will be responsible for preventing and detecting illegal work.

Up until now, the European Commission has pursued a migration policy based on making the most of scant resources and enforcing border controls, but it should now recognise the importance of orderly, legal migration. This involves channelling migration flows through appropriate mechanisms to ensure that immigrant workers are integrated into the labour market with full rights and duties and enjoy full social protection. The ETUC should campaign for the inclusion, in future EU legislation in this area, of the following provisions, which were recently proposed by the European Federation of Building and Wood Workers with the aim of preventing, identifying and penalising illegal work in the building sector, but which, in view of their general characteristics, can also be applied to other sectors:

Scope of the agreed measures;

- » Concrete definitions of the European Union;
- » Specific regulations to deal with providers (gang masters) and employers of irregular workers;
- » Specific regulations to deal with fictitious companies;
- » Introduction of a European social identity card;
- » Several and joint responsibility of the main contractor;
- » Specific preventive measures;

The observable correlations between pay levels and migration flows explain the specific and distinctive processes of migration in Europe. The aging of the population is a key contributory factor to the increase in social costs. A "demographic renewal" is necessary to maintain and increase our production capacity, and therefore we need immigrants. However, the specific characteristics of different European countries and the peculiarities of immigration in each of them have greatly hindered the development of an adequate common immigration policy in Europe. Thus, while the various forms of interdependence generated by the Single Market promote a measure of agreement to tackle immigration and asylum issues at Community level, the existence of different national legislations relating to the actual contents of the integration process hinder the establishment of clear and binding agreements. The evolution of migration issues on the European Agenda betrays the very substantial weight carried by different national interests when it comes to taking concrete decisions.

The ETUC should reject a complex maze of EU Directives targeting different groups of workers, usually the most vulnerable ones. It should combat the growing liberalisation and segmentation of the labour market – which greatly hinder the effective integration of immigrants – and, above all, it should combat social dumping, extreme competition and the division of the working class.

QUESTIONS FOR FURTHER DEBATE

1. The legal consequences of irregularity. Are there any alternative solutions to regularisation that can bring about equal rights for all workers?
2. How can fair trade influence global trade as a whole and at the same time promote respect for workers rights? The WTO.
3. What kinds of actions can trade unions undertake in the European context to uphold the rights of undocumented immigrants?

Centre for European Policy Studies (CEPS)
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REPORT

THE IMPACTS OF IRREGULAR MIGRATION

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Executive Summary.....	73
1. Introduction	74
2. Definitions.....	74
3. Estimates of irregular migration.....	76
4. Impacts of irregular migration.....	79
5. Policy challenges	83
References.....	87

EXECUTIVE SUMMARY

Across Europe, undocumented or ‘irregular’ migrant workers are a particularly vulnerable group. Most irregular migrants lack access to basic social protections and workers’ rights, and are frequently the victims of exploitative labour practices. They are also the subject of a great deal of political controversy, with publics and policymakers in many European countries calling for tough action to remove and return irregular migrants to their countries of origin. However, to date, this debate has been complicated by a lack of clear data on the size of irregular populations and on the range of impacts – both economic and social – that they may be having on destination countries. This short paper therefore aims to set out the best evidence on what is currently taking place, focusing particularly on the situation in the UK.

Despite the considerable difficulties involved in gathering evidence on irregular migrants, recent estimates have suggested that there may be more than 600,000 such individuals currently living in the UK – and potentially more than 800,000. The profile of these migrants is highly varied, with a relatively small proportion falling into the category of ‘clandestine entrants’ who come to the UK without proper documentation. It is more common for migrants to become irregular as a result of non-compliance with the terms of their visas or changes in the visa regime itself.

Although the dominant public image of irregular migrants is of free-riders who take jobs from native workers and access public services without paying their fair share in taxes, the reality is likely to be more nuanced than this. Since most irregular migrants do not have access to social benefits it is likely that a high proportion of them work in order to survive, suggesting that they may be having a significant impact on the economy through their contribution to the labour market. Irregular migrants are also consumers, and thus increase demand and generate economic growth

through their spending. Some key points about the economic profile and impacts of these migrants include:

- » Irregular migrants largely work in low-skilled, low-paid jobs. While they often work in the same sectors as recently-arrived legal migrants, they may remain in those sectors for longer than other workers due to the lack of opportunities for professional development.
- » Irregular migrants tend to work in sectors which have many hard-to-fill vacancies and which have trouble retaining staff.
- » Irregular migration may be having a negative impact on wages in certain sectors in the UK, since irregular migrants may be more willing to accept low wages and poor working conditions. However, this impact is limited to a certain extent by the National Minimum Wage (NMW), which protects those UK-born or migrant workers who are able to claim their employment rights
- » Many irregular migrants work in the informal or illegal economy, but ippr research suggests that many are paying at least some tax.
- » Although irregular migrants likely pay less in tax than those working legally, it is also the case that they do not claim as many benefits, or access public services to the same degree. This means that fiscal losses resulting from irregularity through reduced tax revenue must be offset at least to some extent by savings through reduced public spending.

Irregular migration does, however, pose a significant social and political challenge, even if its economic effects are not as problematic as is often thought, and in our view, it is neither credible nor progressive for governments to tolerate large irregular migrant populations – not least because irregularity has negative consequences for irregular migrants themselves. But neither is it feasible to reduce the problem to zero, as

some governments (including the UK) seem to want to do. We believe that a better objective for policy would be to implement a range of complementary measures to deter future irregular migration, while taking a realistic approach to addressing the existing stock of irregular migrants.

1. INTRODUCTION

In many European countries, irregular migration has become one of the most contentious and emotive issues in public and policy discourse around migration. This is particularly true of the UK debate, which tends to be dominated by demands for the government to take strong action on irregularity. As a consequence, policy discussions have mainly focused on the enforcement of immigration rules and on the return or removal of irregular migrants. However there has been relatively little debate about the impacts of irregular migration on UK communities, or about the impact of irregularity on migrants themselves.

The latest attempt to estimate the number of irregular migrants in the UK puts the figure at more than 600,000 (Gordon et al 2009), and a high proportion must work in order to survive. Irregular migrants therefore form a part of the labour market, and have an impact on it. This means that there is a clear need for a better understanding of who these migrants are, how they cope with irregularity, and what their effects are on others.

This paper starts by defining the types of migrants that we would classify as being in a state of irregularity, and setting out the most up to date estimates of how many irregular migrants there are in the UK. It then goes on to consider the economic role of irregular migrants, and some of the major impacts of their irregular status. Finally, it explores the policy implications of this issue, and suggests some different strategies for responding to it in a progressive way.

The major difficulty in analysing the economic drivers and economic impacts of irregular migration is the lack of data and evidence in this area. We do not claim to have overcome these limitations. Rather, what we seek to do here is to present a framework for economic analysis of irregular migration, and to pull together existing data and research in order to draw new conclusions.

2. DEFINITIONS

For many, the dominant image of irregular migrants will be of those individuals who attempt to enter a country by concealing themselves on lorries or boats. However, while some migrants do reach the UK in this way, the evidence suggests that they are not the only, or indeed the largest group of those who could be classed as irregular. In recent years, the UK's irregular migrant population has become increasingly diverse, and includes people who are irregular in different ways.

In this paper, we use the term 'irregular migrant'¹ to describe people without a legal right to abode in the UK, or who, while subject to immigration control, are in breach of their visa conditions. This definition covers a number of different categories of people, including those who:

- » have entered the country illegally (by avoiding migration inspection or by using false documents);
- » have broken visa conditions (for example, by overstaying or working more hours than is allowed);
- » are *sans papiers* (for example, a person's passport may have been destroyed or taken by an employer);
- » and those who have had a claim for asylum refused.
- » At different times, the same migrant may fall into different categories if policies on border control, visa regimes, work permits or other areas change. In other cases, the categories overlap. For instance, asylum seekers often use similar routes of entry to clandestine entrants, since there is no visa system in place to allow people to travel for the purposes of claiming asylum (Reynolds and Muggerridge 2008)

For the sake of clarity, we will use a classification system which divides irregular migrants into three non-excluding groups (Tapinos 2000):

- » clandestine entrants
- » clandestine residents
- » clandestine workers.

¹ The words 'illegal' and 'irregular' are often used interchangeably in this debate. While they refer to the same groups (as by definition, all irregular migrants are in some sense acting outside the law), we have chosen to use the concept of irregularity, since it is less value-laden.

CLANDESTINE ENTRANTS

Clandestine entrants are defined in this paper as migrants who cross the UK's border without complying with the requirements for legal entry. This group are mainly migrants from outside the EU who need a visa to enter the UK. Currently, nationals from 108 countries are in this position. Nationals from about 50 per cent of those countries also need visas to transit through the country (UK Border Agency 2009b).

The most common ways for clandestine entrants to enter the country are through being smuggled or trafficked. Smuggling has been defined as: 'procurement of illegal entry into a State of which the person is not a national or permanent resident for direct financial or other material gain' (UNODC 2010). Smuggling differs from trafficking in that migrants consent to it, the final objective is not necessarily exploitation, and it always involves a transnational movement. Trafficking in persons, in contrast, is defined as: 'the action of recruitment, transportation, transfer, harbouring, or receipt of persons by means of the threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or payments or benefits to achieve the consent of a person for the purposes of exploitation' (UNODC 2007).

Internationally, stories of migrants dying in the deserts on the US-Mexico border or trying to cross the Mediterranean in leaky boats from Africa have highlighted the risks taken by those who are desperate enough to enter other countries without the proper authorisation. These stories also show how much effort governments are putting into controlling their borders - it has become very difficult to enter many countries, the UK included. Indeed, these efforts appear to have paid off from the point of view of the state, as migrants who enter the UK clandestinely make up a relatively small proportion of the UK's irregular migrant population.

CLANDESTINE RESIDENTS

Clandestine residents in the UK are defined in this paper as those who enter the country legally but have no current permit to reside in the UK. Migrants classified as clandestine residents include:

- » asylum 'over-stayers' who remain in the country after their asylum application is refused
- » non-EU nationals who can enter the country without a visa but stay longer than allowed
- » non-EU nationals who get the visa required to enter the country but stay after their visa expires
- » children born to irregular migrants.

CLANDESTINE WORKERS

Clandestine workers in the UK are defined in this paper as migrants who are legal residents but fail to fully comply with the work-related requirements of their visa/route of entry. This category comprises a diverse group of migrants including:

- » asylum seekers who are not allowed to work unless they have special permission
- » migrant workers from outside the EU who entered the country as general visitors or any other category under which work is not permitted
- » migrants who work more hours than allowed, such as students who work more than the maximum 20 hours per week allowed during term time
- » migrants from the new EU accession states who have no work authorisation (A8 nationals must register in the Worker Registration Scheme if working and employed in the UK for more than three months. Nationals from Bulgaria and Romania (with some exceptions) need to apply for an accession worker card and, in some cases, their employer needs to issue a work permit (UK Border Agency 2009a)).

3. ESTIMATES OF IRREGULAR MIGRATION

A frequently-cited estimate of the number of irregular migrants in the UK (which is often used as a baseline for new estimates) suggested that in 2001 there were around 430,000 ‘unauthorised (illegal) migrants’ in the country, with possible values ranging from a minimum of 310,000 to a maximum of 570,000 (Woodbridge 2005). Note that this estimate included clandestine entrants and clandestine residents (excluding children born to irregular migrants), but *not* clandestine workers.

The methodology used for this estimation is the US residual method, where figures are estimated from the difference between the total foreign-born population and the total number of migrants captured in immigration records. Total foreign-born figures in the UK were taken from the 2001 Census and the total number of migrants was estimated using Home Office records of immigration, asylum applications and visa extensions. However, the estimation is only a rough indication of the number of irregular migrants in the UK, not only because of the data limitations acknowledged in the methodology, but also because it excludes clandestine workers (who may be a substantial proportion of the UK’s irregular migrants). It is also fairly out of date, given that the 2005 estimate was based on 2001 figures, and a number of developments suggest that the number of irregular migrants may have risen in recent years.

The most important of these is that there have been large inflows of migrants into the UK over the past decade. Inflows from the new EU states have significantly contributed to this trend, but net migration from outside the EU has also remained positive, as shown in **Figure 1** below. While few EU migrants are likely to fall into the ‘irregular’ category, a proportion of the non-EU migrants who have either remained or arrived since 2001 are likely to be irregular.

Although asylum applications fell by around 66 per cent between 2001 and 2009 (from 71,025 to 24,285), the proportion of initial decisions refused has remained fairly constant over the period, as shown in **Figure 2**.

Note: These figures show all asylum decisions made between 2001-2009 (including backlog cases), so do not

correspond exactly to the number of asylum applications made in each year. These figures also do not include the dependants of asylum seekers.

Moreover, the latest data available on the total number of persons removed for asylum cases (from 2007) showed that they represented only 79 per cent of initial decisions refused in that year – this suggests that the ‘stock’ of asylum over-stayers is continuing to rise, albeit at a slower rate than in previous years (National Audit Office, 2009).

Migrants classified as clandestine workers were not included in the 2005 estimate, but evidence suggests that this may be a significant group of irregular migrants. For example ippr research in 2008 found that that 47 per cent of Poles who had returned to Poland did not register in the Worker Registration Scheme while working in the UK, with only 25 per cent not registering because they were self-employed or worked for less than three months – this suggests that up to 22 per cent of this group were working illegally while in the UK.

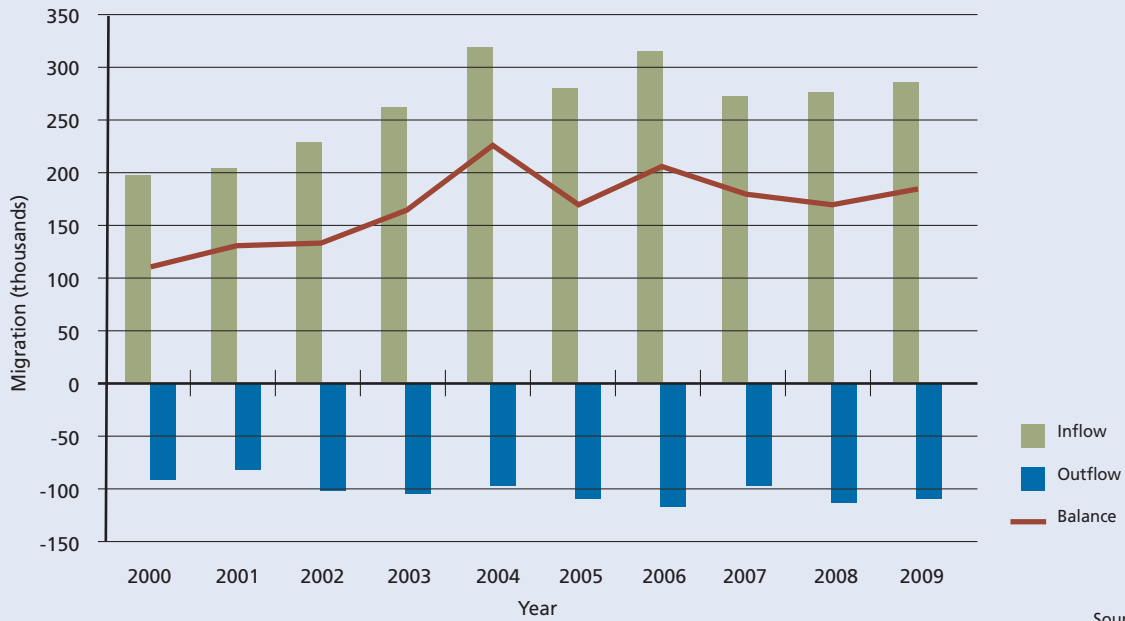
Moreover, Labour Force Survey data suggests that between 5 per cent and 10 per cent of full time non EU international students are working full time. However, there are also some indications that the UK population of irregular migrants may have declined since the 2005 estimate.

Nationals from the countries that joined the European Union in 2004 who may have been breaching immigration rules in the UK automatically gained the right to stay and work in the country after EU enlargement. The evidence suggests that this group represented a fairly significant proportion of irregular migrants in the UK before 2004. Figure 3 shows removals from the UK in the period before and after EU accession, and shows that EU accession states made up 10 per cent of removals from the UK in 2003, just before their membership of the union. The proportion is even higher if Romanians and Bulgarians, who have been allowed to remain in the UK without a visa since 2007 (although with restrictions on their ability to work), are included.

Some irregular migrants can move into regularity. Clandestine entrants and clandestine residents who have lived in the UK for 14 years can apply to a scheme called ‘long residence’ whereby they are allowed to obtain legal residence (Home Office 2000). Since 2006, the

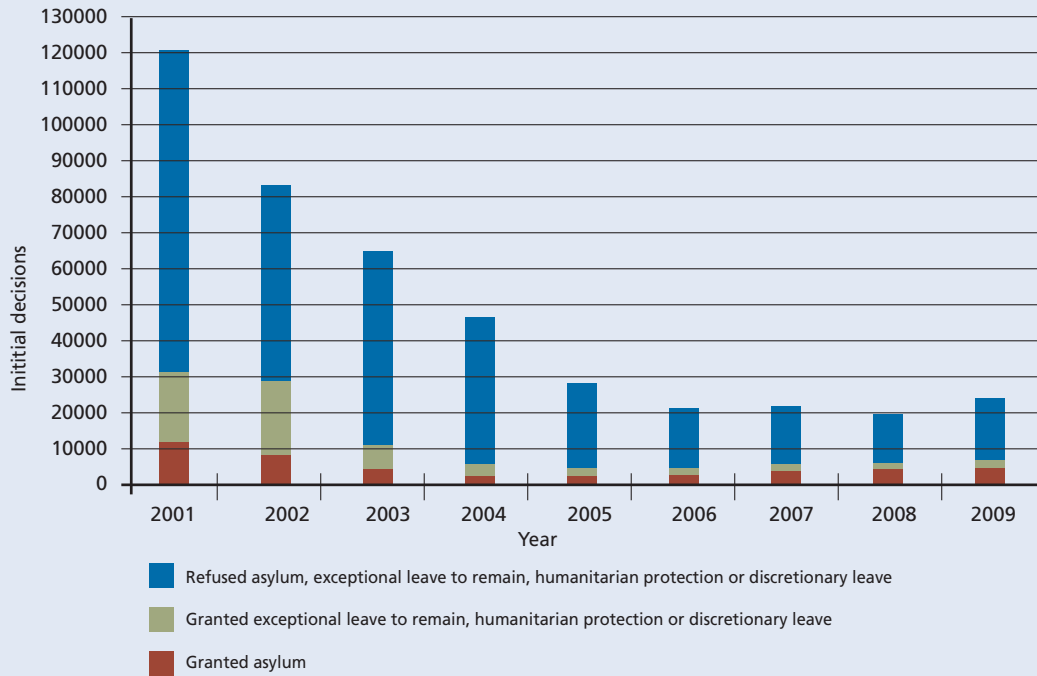
FIRST AND FOREMOST WORKERS

Figure 1: Long-term international migration to and from the UK of non-EU nationals, 2000-2009



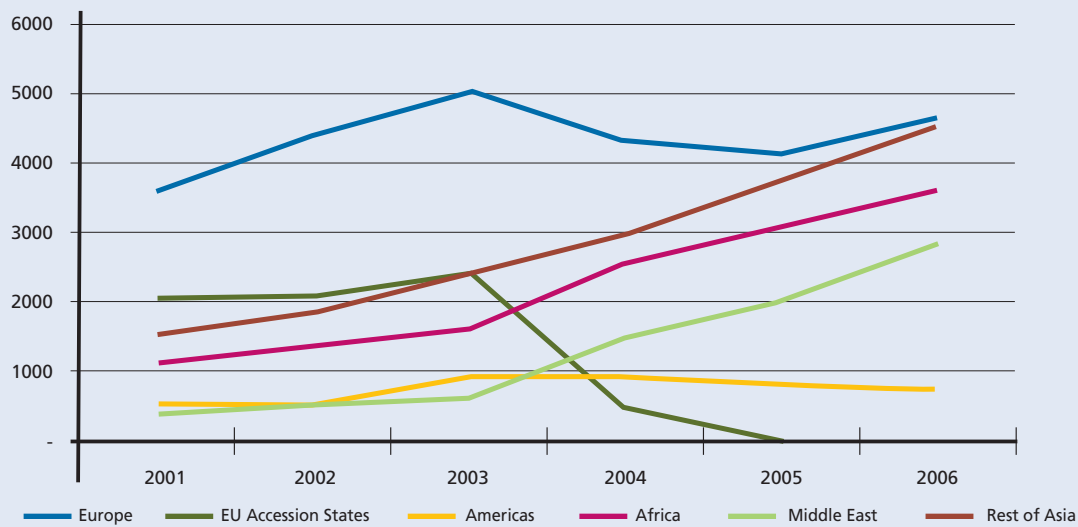
Source: ONS 2010

Figure 2: Initial decisions made on applications for asylum in the UK, 2001-2009



Source: Home Office, 2010

Figure 3: Removals from the UK by region of nationality



Source: Home Office

UKBA has also been running a 'case resolution' process to clear a backlog of an estimated 450,000 asylum cases by 2011. By July 2008, 90,000 cases had been concluded - with 20,000 removals (22 per cent), 39,000 decisions to grant some form of leave to remain (43 per cent), and in 32,000 cases the case record was closed. This suggests that a fairly large number of asylum over-stayers have been regularised in the last three years (Immigration Law Practitioners' Association 2008).

A more recent estimate of the UK's irregular migrant population by the London School of Economics (Gordon et al 2009), using the 2005 Woodbridge estimate as a baseline, suggests that there were between 417,000 and 863,000 irregular migrants in the UK in 2007, with a central estimate of 618,000. This central estimate is based on the assumptions that since 2001 there are some 220,000 additional failed asylum seekers in the

UK, around 50,000 additional visa over-stayers and illegal entrants, and around 85,000 UK-born children of irregular migrants, but more than 165,000 regularised migrants (including from EU accession countries).

This estimate does not include those who are legally resident, but working illegally (clandestine workers). As discussed above, this may be a significant group. On balance, therefore, it seems likely that the number of irregular migrants in the UK has grown since the 2005 estimate, and it may even be higher than LSE's estimate once clandestine workers are taken into account.

In sum then, while the nature of irregular migration means that data will always be uncertain, the total number of irregular migrants in the UK certainly runs into many hundreds of thousands of people, and likely is coming close to one million, when all categories of irregularity are included.

4. IMPACTS OF IRREGULAR MIGRATION

The patchiness of official data on irregular migration makes it very difficult to be certain about the impacts, both positive and negative, that irregular migrants may be having on the economy. However, it is likely that they make a significant contribution to the economy through their participation in the labour market. The employment rate of irregular migrants is thought to be high: because most do not have access to benefits, they are very likely to work in order to survive. For example, a study on illegal migrants in detention in the UK found that three quarters of those interviewed (83 migrants detained in three immigration facilities) had worked illegally in the UK (Black et al 2005). Many irregular migrants who work are confined to the informal or illegal economy, but ippr research suggests that many are paying at least some tax. Irregular migrants are also consumers – they increase demand, and generate economic growth, through their spending.

In this section we consider some of the impacts that irregular migration may be having in the UK, looking first at a range of economic impacts, and then discussing some of the social impacts.

ECONOMIC IMPACTS

Labour market impacts

It appears that many significant sectors of the economy depend in some way on irregular migrants (Pinkerton et al 2004). However, the evidence on the sectors where irregular migrants work is mostly anecdotal. According to Wright and McKay (2007) undocumented migrants in the UK mainly work in construction, agriculture, textiles, hotels and restaurants, cleaning, care work and domestic work.

These are sectors that often face problems in recruiting UK-born workers, particularly when employers offer low wages and temporary contracts. These sectors are also characterised by short-term work, including by legal migrants who may work in these sectors when they arrive in the UK, but then move on to other jobs. It also seems to be the case that irregular migrants tend

to work in sectors which have many hard-to-fill vacancies and which have trouble retaining staff (probably because of pay and conditions).

If this is the case, it suggests that irregular migrants may make an economic contribution to the UK by allowing firms to overcome bottlenecks caused by recruitment problems. In particular, irregular migrants may make a significant contribution to small businesses that rely on a foreign workforce, but who may have limited access to legal migrant workers (for instance, if they cannot afford the costs of sponsoring a worker). This seems to be true for small ethnic restaurants and care homes, for example. Care assistants and home carers is the occupation with the largest number of vacancies in the UK (9 per cent). Chef and cooks are the twelfth largest group with 5 per cent of total vacancies in 2008 (Office for National Statistics 2008).

Some irregular migrants do not fit this labour market profile, however, and have highly-skilled jobs, potentially playing an important role in filling skills gaps at this end of the labour market. In particular clandestine workers who work more hours than the time allowed in their visa, or who work without authorisation, (but who are legally resident in the UK) may participate in higher-skilled sectors. For example, previous research has shown that more than 50 per cent of non-EU students working full time (which is illegal) are employed in public administration, education and health and financial services, which are sectors that often employ higher-skilled workers (Mulley, Chappell and Latorre, unpublished).

Turning from skills gaps to wage effects, recent research on the impact of migration on the UK labour market shows that migration has little or no negative effect on the wages of UK born workers (Reed and Latorre 2009; Dustmann *et al* 2005). Irregular immigrants may, however, have a different impact. Previous ippr research and work by others (for example Krenn and Haidinger 2008) suggests that the vulnerable situation of irregular immigrants means that they more willing to accept low wages. They are also less likely to complain about their work conditions or their levels of pay because they fear being reported to the immigration authorities. As a result, employers are under less pressure to improve pay and conditions or to spend money on training or other types of benefits.

However, these problematic impacts for irregular migrants themselves will not necessarily affect the wages of others. The impact that irregular migrants are having on wages other than their own is limited to a certain extent by the National Minimum Wage (NMW), which protects those UK-born or migrant workers who are able to claim their employment rights. In effect, the NMW segments the labour market and reduces the transmission of wage effects from those working below it to those above. In the absence of the NMW the impact of irregular migrants on wages might be greater.

The separation of many of the jobs undertaken by irregular migrants and others in the labour market by the NMW, and as a result of the fact that many irregular migrants are concentrated in sectors with high vacancy rates also implies that most irregular migrants will not be having an effect on unemployment. Rather than irregular migrants displacing regular migrants and British citizens from jobs they might otherwise hold (as is often feared), it seems likely that many of the low wage, low productivity jobs held by irregular migrants might simply not exist without irregular migration.

This doesn't mean that irregular migrants' employment circumstances have no effect on the wider UK economy, however. The lower wages paid to irregular migrants also affects total economic output. Gordon *et al* estimate that irregular immigrants earn twenty five per cent less than other migrants, and eliminating irregularity, allowing these immigrants access to the minimum wage (along with some changes to their employment rates) could raise UK GDP by £3 billion (Gordon *et al* 2009). In this respect their irregular status is a lost opportunity for the UK economy.

Structure of the economy

There is also potential for irregular migrants to contribute to a changed structure of UK labour markets, with many concerned that they perpetuate the existence of a substantial informal economy in the UK². And indeed

evidence suggests that irregular migrants are a source of labour for the informal economy, particularly where social networks are developed. Evidence on Pakistani and Afghans smuggled into the UK, for example, suggests that well-established networks give them employment prospects (Ahmad 2008). However, while it is sometimes easier for employers in the informal economy to recruit irregular migrants, these migrants are neither a driver nor the unique source of labour for this part of the economy. For example, groups such as young school leavers are particularly likely to be employed in the informal economy.

Moreover, it is also important to note that the informal economy is not always as problematic as is sometimes suggested, and makes a significant contribution to the wider UK economy. As well as providing employment in its own right, the informal economy supports parts of the formal economy. The formal and informal are often linked through services that informal businesses provide for formal businesses, or through employees hired in formal business under informal employment relations (Baldassarini 2001). Therefore, those irregular migrants working in the informal economy are, at least indirectly, contributing to the formal economy too.

However, saying this, it is important to acknowledge that irregular migrants with severe restrictions on their ability to work legally are not only found in informal work, but also in illegal and underground sectors, which is a more problematic issue. In some cases, the demand for workers in these sectors can foster trafficking in persons. This is often the case of sex workers and drug-trafficking businesses where migrants remain underground and become highly vulnerable.

A final effect that irregular migrants can have on the structure of the economy is that their availability at very low wages may de-incentivise some firms from investing in technology or capital that would increase the productivity (and wages) of their staff (migrants and others), or simply lead to capital being tied up in low-productivity activities which would otherwise cease to exist in the UK. If irregular immigrants are less able to move jobs than other workers (including in the extreme cases where smuggling or trafficking is involved), this may also remove the competitive pressure that might otherwise push employers to increase wages and/or improve production methods.

² Jobs in the informal economy are usually small or unregistered self-employed, or involve wage employment without secure contracts or social benefits (Chen 2007). It is important to note that the informal economy is not the same as the illegal economy – firms in the informal economy may be providing legal goods and services, even though they are not compliant with employment law or other regulation of their activities.

Fiscal impacts

Although irregular migrants contribute significant amounts to the exchequer through indirect taxation, the fact that they are often employed in the informal economy implies that they (and/or their employer) may not pay direct taxes, generating losses for the exchequer.

Gordon et al (2009) estimate that an earned regularisation scheme (affecting around 400,000 irregular migrants) might net the exchequer around £850 million per year (including by increasing wages and employment rates in line with other migrant groups). Using the same methodology, and the most recent estimate of irregular migrants in the UK, we estimate that the equivalent figure today would be over £1.1 billion.

If irregular migrants pay less in tax than those working legally, it is also the case that they do not claim as many benefits, or access public services to the same degree. This means that fiscal losses resulting from migrants' irregular status and resulting reduced tax revenue must be offset, at least to some extent, by savings through reduced public spending. However, it is hard to establish the extent to which irregular migrants do use public services and claim welfare benefits.

Some analysts have argued that irregular migrants tend to consume more public resources than they pay in tax (Epstein and Weiss 2001). However, on the other hand, arguments against regularisation are often based on the presumed cost of providing public services and benefits to migrants who are currently irregular, and therefore assumed not to be claiming benefits or using public services (see for example Migration Watch 2009), or not consuming more than they currently pay for in tax.

The truth is probably more complex. Some public services (like education) are available quite openly regardless of immigration status. Others are not strictly available to irregular migrants, but in practice are often used by them (such as primary health care). The cost of other services (like roads) is unlikely to be significantly affected either way by the UK's irregular migrant population. And some public services (such as Accident and Emergency health services) may be over-used by irregular migrants because of their lack of access to other services (in this case registration with a GP). Moreover, there can be indirect pressures on public services because of irregular migrants' status (for example, a lack of access

to primary healthcare for irregular migrants could lead to an outbreak of TB).

Gordon et al suggest that the costs placed upon public services by irregular migrants are probably around £410 million per year less than if those migrants were living in the UK with regular status – generating a public service 'saving' as a result of irregularity.

Turning from services to benefits, data from the Labour Force Survey show that very few non-EU migrants claim benefits (see **Table 1** below). Irregular migrants are even less likely to do so (almost by definition they are not entitled to do so). Black et al suggest that benefit take up by irregular migrants is thought to be "very very low" (Black et al 2005). This suggests that the benefit costs imposed by irregular migrants on the UK is very small.

As with public services, the corollary of this is that irregularity generates a 'welfare saving' relative to a situation in which the same migrants had legal status that would provide them with access to benefits. Gordon et al estimate this 'saving' at up to £1bn per year.

Putting this together, it is very difficult to draw firm conclusions about the fiscal impacts of irregularity in the UK (for example, many migrants have legal status but only limited access to benefits, which means that much depends on assumptions about what kind of legal status irregularity is compared to). It seems clear that irregular migrants in the UK do not impose significant fiscal burdens on the taxpayer, but it is hard to assess what the net impact of their irregular status per se is (i.e. whether the same group of migrants would make a greater or lesser fiscal contribution if they had legal status).

The final potential fiscal effect generated by irregularity is the cost of detention and deportation. The UKBA does not disaggregate the costs of enforcement, including detention or deportation, from its overall budget. However, it does supply a range of figures for the cost of removal (National Audit Office 2009). These are between £7,900 and £17,000 excluding accommodation and support costs, and between £12,000 and £25,600 including accommodation and support costs. This suggests that the total cost of removing the 618,000 irregular migrants estimated to be in the UK by the LSE would be up to £10.5 billion, excluding accommodation and support, and up to £15.5 billion including these costs. However, given that rates of removal are in practice very

TABLE 1: PERCENTAGE OF NON-EU MIGRANTS CLAIMING BENEFITS, 2008

Benefit	Percentage of non-EU migrants
Unemployment related benefits, NI credits	1
Income support (not as unemployed person)	4
Sickness or disability (excluding Disabled persons Tax Credit)	2
State pension	2
Family related benefits (excluding child benefits & tax credits)	0
Child benefits	14
Housing/council tax (GB), rent/rate rebate (NI)	5
Other	1

Source: Labour Force Survey and ippr calculations

low (in the low tens of thousands per year), in reality removal is not a major burden on the British state. It is worth noting, incidentally, that an earned regularisation programme for non-asylum seeking irregular migrants, for example, is estimated to cost £300 million (Gordon et al 2009), very much substantially less than a complete programme of removals.

Social impacts

In this section we consider briefly the social impacts of irregular immigration. Popular discourse around irregular migrants tends to focus on issues of crime and security, and it is of course true that some irregular immigrants do get involved in crime, not least because their status makes them vulnerable to criminal exploitation. The extent of the security threat posed by irregular immigration is much more contestable, and while immigration has certainly been 'securitised', since 9/11 in particular, there is little evidence that terrorist networks use irregular immigrants to further their aims (Chappell unpublished). Indeed migrants often feel particularly threatened by terrorist activity and the public's fear of it (see Rudiger 2007 for example).

More generally, the direct impacts of irregular immigration on most people in the host society are likely to be minimal. A number of studies have shown that irregular migrants tend to locate themselves in 'marginal niches', blending into the society in ways that make them almost unnoticed (particularly in big global cities like London) and generally living lives that are indistinguishable from others around them (Massey et al 1998; Reyneri 2003; Papademetriou 2005; Sassen 1991; Duvell and Jordan 2002; Sassen 1998).

In interviews for an ippr research project on irregular migration, we were struck that one of our key informant interviewees said to us that the government department responsible for community cohesion (the Department for Communities and Local Government) does not have irregular immigration on its radar as an issue at all. Moreover, irregular immigration as a specific component of overall immigration has, apparently, never been discussed at the Migration Impacts Forum (MIF) the *ad hoc* ministerial body, which looks at the social and community issues raised by migrant inflows.

There have, of course, been examples of social tension and breakdown involving immigrant communities. But

given the scale of immigration into the UK into recent years such instances have been surprisingly small in number, and there is no evidence that irregularity has been an important factor in sparking trouble – indeed the 2001 riots in Bradford, Burnley and Oldham involved clashes with long settled, but poorly integrated, immigrant communities (BBC 2001).

However, while the links between irregularity and crime, security and cohesion seem weak, there are a couple of social impacts of irregularity which do seem problematic. First, it could be suggested that the most serious costs of not returning people who have no legal right to be here come through the its effects on the integrity of our migration and border control systems. If the government is unable to return those who have no right to be here, this compromises the idea that they are in control of our borders. This causes the government of the day political damage and it violates a key aspect of sovereignty which the UK public place great priority upon.

While incredibly difficult to measure, recent ippr research on public attitudes³ suggested that whilst British people do not distinguish greatly between different forms of immigration, a high premium is put on 'playing by the rules' and 'making a contribution to society'. The importance of 'giving something back' perhaps explains why a poll for the Strangers into Citizens in 2007 found relatively (and perhaps surprisingly) high support for an earned regularisation programme for irregulars with a proven record of working.⁴ Despite this finding, however, it is our judgement that on the whole, irregular immigration increases negative public reactions to migration, making it more difficult for politicians and policy makers to pursue policies which are economically and socially beneficial to the UK. To put it another way, if irregularity could be significantly reduced there would be greater space to pursue rational and balanced migration policies.

Second, the simple existence of a large 'shadow' population who are disconnected from the normal patterns of

community life is clearly a social ill. Any country that values active, integrated citizens is damaged by the prevalence of large numbers of people who are excluded. And to the extent that migrants themselves live difficult, and sometimes miserable lives, this is a stain on the composition of British social life.

The most comprehensive attempt to amalgamate estimates of the social and economic costs of irregular migration (an internal study for the Home Office in 2003 (Dubourg & Prichard eds 2003)) gives a very approximate total figure of the costs imposed by those smuggling trafficking (so note that this does not cover the full scope of irregular migration in the UK) at £2.4 billion. This, at best, is a very broadly indicative figure, and doesn't take into account any labour market estimates, or the political and public opinion effects, or crucially any of the benefits of irregularity and so is very clearly only one side of the picture. However, the size of the estimate does give a sense of the importance that policymakers should give to the issue, so that the costs of irregularity are minimised - and benefits maximised.

5. POLICY CHALLENGES⁵

While many of the negative effects of irregular migration may be overstated, the existence of irregularity is problematic both for the migrants themselves and for the European countries that host them. Tolerating a substantial irregular migrant population with the negative consequences this has for both vulnerable migrants and wider society, does not seem to us to be a credible policy. Civilised governments cannot turn a blind eye to the existence of hundred of thousands of highly at risk and marginalised people within its borders. But neither is it feasible to reduce the problem to zero, as some governments (including the UK) seem to want to do. We believe that a better objective for policy would be to try

3 Communicating Migration – a series of public meetings and deliberative workshops in the West Midlands in 2009. For research findings contact s.mulley@ippr.org

4 <http://www.independent.co.uk/news/uk/politics/illegal-migrants-right-to-work-wins-support-of-public-in-poll-446103.html>

5 These policy issues are explored in greater depth in ippr's forthcoming report: No Easy Options: Reducing irregularity in the UK immigration system, Tim Finch with Myriam Cherti

and minimise the costs of irregularity and maximise the contributions of irregular migrants.

In this section, we briefly discuss a range of options that might help to achieve a more strategic approach towards tackling irregular migration, looking both at deterring future irregularity and dealing with current stocks of migrants.

REDUCING FUTURE IRREGULAR MIGRATION

Over the long term, levels of irregular migration will only fall if there is a concerted effort to tackle the disparity between economic conditions in many countries of origin – and in particular wage levels and employment opportunities – and those in the UK or other European destination countries. However, there are other steps that European governments can take in the short and medium term to reduce the supply of irregular migrants. No single policy can be effective in isolation, however: policymakers need to implement a range of options as a coherent package. We consider a few of these options below:

a/ Improving the provision of information to potential irregular migrants

Most irregular migrants do not know what economic opportunities are available to them in countries of destination such as the UK. Expectations of outcomes are the basis upon which people make their decisions to move, meaning that the information that people use to form their expectations are vital. So while addressing the real economic disparities between countries is key, it is also important to try to shape people's expectations – irregular migration won't be prevented if people there continue to believe that London's streets are paved with gold. Providing people with more information on what life as an irregular migrant can be like, as well as what dangers may lie in the way of reaching Britain is something that the UK government has pursued to some effect. More efforts of this kind could discourage clandestine entrants and entry for the purposes of irregular residence.

b/ Tightening border controls

In recent years, the UK government has greatly increased border security, utilising both traditional methods (such as increased numbers of officers and greater intelligence sharing) and new technology (bio-metrics and e-borders). This has led to some success in tackling clandestine entry and entry for the purpose of irregular residence or work. Indeed nearly 50 per cent of those included in the 2008 removal figure of 66, 275 people – a 5 per cent increase on the year before – were in fact stopped at the port of entry.

Tightening border controls certainly go some way to meeting public concerns about immigration – and it is entirely legitimate for the state to know who is coming and going and why, particularly given the international security situation. However, we would argue that tighter border controls are very unlikely to eliminate irregular migration, given the relatively small proportion of irregular migrants who enter the UK clandestinely, and given the strong supply and demand factors at work. Border controls are necessary, but not sufficient.

c/ Boosting legal channels for migration and work

A significant reason why a migrant may be irregular rather than regular is that they may not be eligible to enter, live or work in European destination countries. For example, in the UK, the current points-based immigration system will only allow people from outside the EU into the UK to work if they are high-skilled (and even these opportunities are increasingly limited). This means that those people who are not classed as skilled currently have no routes of entry apart from asylum and family reunion. The fact that many irregular migrants work in low-skilled jobs suggests both that they may be ineligible for skill-based migration routes, and that there is demand for low-skilled migrant labour which is not being met by current routes. The supply of irregular migrants could therefore be reduced by allowing some unskilled workers from outside the EU to come to the UK.

Limitations on working are often what encourage migrants to violate the terms of their visas and move into a state of irregularity, so we would also argue that where possible, government regulations in European

destination countries should be revised in order to give legally resident migrants the opportunity to work legally.

d/ Making irregularity less attractive

Another way of deterring irregular migration is by making life in the UK for irregular migrants so difficult that far fewer migrants come, fewer migrants become irregular, or more return to their countries of origin.

There have been a number of initiatives in this area in the UK, including removing all support from asylum overstayers, and denying access to free health care, except in emergencies, to irregular migrants. However, these policies appear to have had limited impacts, while, according to NGOs and others, they have caused significant suffering. Other countries, such as Germany, have also tried creating 'difficult environment' to discourage irregularity, with a similar lack of success (Stobbe 2000). Quite aside from the inhumane nature of this approach, it presupposes (falsely in our view) that irregular migrants are drawn to the UK because of their awareness of access to benefits and services; and that the withdrawal of these encourages their return or deters future illegal migration⁶.

e/ Tackling migrant vulnerability and employment regulation

Some employers employ irregular migrants because they want to breach employment regulations (such as by paying very low wages). Recent research (Burnett and Whyte 2010) has shown the kinds of exploitative practices that these employers use – such as driving wages far below the minimum wage, docking wages dramatically for minor infractions such as lateness, and not paying employees for time worked. In order to tackle this exploitative demand for irregular migration, it is essential that governments enforce employment regulations rigorously.

In the UK at present, the government's focus on enforcing immigration rules, including by punishing migrants and employers for immigration offences, may be limiting their ability to enforce employment regulation. It is currently very difficult for irregular migrants and workers to enforce any employment rights (in effect, their irregular status means that they have very few employment rights), and while they operate under threat of deportation, they are unlikely to cooperate with the authorities to provide information about employers breaching employment rules in any case. Governments should make sure that all irregular migrants and workers have the same employment rights as other workers in the UK. Information on employment rights for migrant workers should be made accessible to the most vulnerable groups, including irregular migrants. In recognition that irregular migrants are likely to remain reluctant to make complaints about their working conditions, more resources should be made available for proactive investigations, based on third party reports and wider risk analysis as well as individual complaints. The Gangmasters' Licensing Authority is a good model which should be expanded to further sectors, and the lessons from its success explored for their relevance to the wider economy.

At the same time, exploited irregular migrants need reassurances that they will not be penalised if they provide information about breaches of employment regulation by their employer. We believe the government should consider a process of regularisation for irregular migrants who assist policy enforcement in this way. There is an important role here for trade unions and civil society organisations in promoting and supporting the rights of irregular migrants (and other vulnerable workers).

REDUCING THE STOCK OF IRREGULAR MIGRANTS

a/ Regularisation

As well as responding to the drivers of supply and demand for irregular migration, governments need to come up with policies which reduce the size of existing populations of irregular migrants.

⁶ These measures may also be put in place to reduce the fiscal costs that the existing stock of irregular migrants create for receiving countries. The effectiveness of is discussed in the following sub-section.

Looking particularly at the UK, we would argue that removing or deporting all irregular migrants is not a realistic goal. As mentioned above, the cost of removals is disproportionately high, even if it was possible to identify and round up all irregular migrants living in the country. The current situation – whereby government makes some removals and some marginal reductions in the costs of irregularity (by making work harder and services harder to claim), but broadly simply tolerates a substantial irregular migrant population – does not seem to be a credible policy either.

ippr has long backed earned regularisation as an option for dealing with the issue of the large irregular stock built up in recent years – and we remain of the view that properly managed it would be useful policy tool (though regularisations do create their own problems). There are strong moral and practical arguments in favour of regularisation given the UK's recent history of immigration management, and excluding it as an option certainly makes the task of reducing irregularity that much harder. However, we believe that the current political climate, and in particular the outcome of the General Election in 2010 has ended any prospect of a large scale regularisation programme in the UK.

Instead we would argue for strictly limited measures which will provide status and leave to remain for some irregulars. The 'case resolution' process for refused asylum seekers which has been running for the last few years provides a model. There should be some scope in the system for 're-compliance' – which would allow 'low

risk' irregular immigrants to come back into compliance for a time-limited period.

b/ Return

Measures to support, encourage, and (where necessary) enforce the return of irregular migrants need to be a key part of the policy framework for responding to irregular migration. Governments could encourage return by: working with irregular migrants and trusted agencies on humane return programmes; further developing voluntary return packages; and developing circular migration projects which allow some irregular migrants to return to the UK legally in the future.

Enforced return has a part to play in any government response to irregular migration – this is an uncomfortable, but inevitable conclusion. That said, enforced return does not have to mean dawn raids, arbitrary detention, being taken in handcuffs to the plane (though, sometimes, it will come to that.) Rather, it should involve impressing on irregular migrants that return is going to be enforced and that the process cannot be endlessly spun out, but that within certain limits the system will always include scope for the sorting out an individual's affairs in the UK and the availability of a package of financial help to aid reintegration in the home country. To that end we propose that all irregular migrants should receive some package of support and incentives to return, with the extent of that package being determined on a sliding scale according to the level of cooperation shown.

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Centre for European Policy Studies (CEPS)
Centre d'étude des politiques européennes

REPORT

“WHAT PRICE THE TOMATOES?!”

PROJECT:

**FIGHTING EXPLOITATION OF WORKERS
AND ENSURING THAT UNDOCUMENTED
MIGRANT WORKERS' FUNDAMENTAL SOCIAL
RIGHTS ARE RECOGNISED
AND PROTECTED IN EUROPE
THROUGH TRADE UNION ACTIONS**

AUTHOR: LAURA FALLAVOLLITA

Summary of the documents presented at the round-table discussions and the actions suggested for reaching out to, protecting and organising undocumented migrant workers and establishing connections.

Introduction.....	91
Who are undocumented workers really?.....	92
Impact on Europe’s societies.....	93
Fundamental rights.....	93
EU policies.....	94
Growing hostility towards migrants and terminology.....	94
ETUC positions.....	95
Reference	97

INTRODUCTION

The aim of the project “What price the tomatoes?!” is to raise the European trade union movement’s awareness of the phenomenon of the exploitative conditions suffered by irregular migrant workers and the relationship between the current economic situation and the realities on the labour market. The project intends to supply ETUC’s member organisations and trade union activists with suggestions and examples of good practices for taking appropriate action against the exploitation of workers at all relevant levels and ensuring that trade unions establish connections with irregular workers to enable them to have their fundamental social rights recognised at work, including their right to freedom of association. The project mainly consists of two days of round-table discussions, which were held on 2 and 3 March 2011, with a view to raising the key issues affecting undocumented workers and being able to put forward proposals for joint actions by European trade unions and NGOs at the final conference.

During the round-table discussions, we were able to examine together various aspects connected to work by undocumented migrants in Europe, allowing us to get a clearer picture of the situation and its implications for trade unions.

The various experts who prepared background papers for the discussions helped us to sketch an outline of the situation in Europe: who undocumented workers are, how they become undocumented, what Europe’s policies are, what impact undocumented migrants have on Europe’s economies and societies, which fundamental rights concern them and what terminology is used to refer to them. We also had the opportunity to listen to numerous examples of good practices. These examples

comprised actions by trade unions and joint actions by trade unions and NGOs.

Why did ETUC feel it was necessary to conduct an awareness-raising project on undocumented workers? There is one clear answer to this question: it believes that European trade unions should pay more attention to this phenomenon (which is present to varying extents in all European countries) and that a coordinated action should be carried out at European level, with the involvement of other civil society stakeholders. The project is being managed in partnership with CEPS (Centre for European Policy Studies) and PICUM (Platform for International Cooperation on Undocumented Migrants).

This is not the first time that ETUC has worked with PICUM. Back in 2007, ETUC, PICUM and SOLIDAR made a joint declaration on irregular migration and fighting illegal employment. The declaration’s main areas of focus were as follows: the need to assert the fundamental rights of all workers, the existence of ‘illegal employment’ but not ‘illegal immigrants’, meaning that the struggle should concentrate on exploitation of workers and not on irregular migrants themselves; the need to step up sanctions against those who take advantage of the existence of irregular labour, and not sanctions against the workers themselves and the need to strengthen the role of trade unions and other civil society stakeholders together. At present, ETUC is reasserting the ideas put forward in this document, with just as much force as before.

This document aims to summarise the arguments presented during the round-table discussions and recommend some possible joint actions, which will then be discussed during the final conference on the project.

WHO ARE UNDOCUMENTED WORKERS REALLY?

We do not need to perform an in-depth study to know that undocumented workers make up the most vulnerable category of workers. They are continually exploited and are at the mercy of their employers, who often force them to work exhaustingly long hours in unacceptable safety conditions while being paid a pittance. Moreover, undocumented workers are often required to stay with their employers (especially in the case of workers who have fallen victim to human trafficking). They have virtually no social protection, they are denied freedom of association and workers' rights and they suffer social exclusion. They live in constant fear of being deported. They are three primary ways through which individuals may be classified as undocumented. First, through irregular entry, when a foreigner arrives clandestinely on the territory of a state. Second, through irregular residence, when a foreigner lacks the authorisation to stay in a country. Third, through irregular activity, when a non-national engages in employment when not permitted to do so or takes on employment in a manner that is inconsistent with his or her immigration status.

People who fall into irregularity after losing their jobs constitute a very large share of undocumented workers. For many migrant workers, continuation of a residence permit is tied to an employment contract. When their employment contracts end, many third-country nationals find themselves without papers, and so in an irregular situation. However, these people have often lived in Europe for a long time and have families and children here.

There are other ways of ending up in an irregular situation. Examples include asylum seekers, children born to undocumented parents, students who have lost their authorisation to study and tourists who extend their stay beyond the expiry date of their tourist visas.

As neatly expressed by Emmanuel Terray in the document presented at the round-table discussions of 2 and 3 March, foreign workers in irregular situations are the ideal employees. He provides the following reasons for his statement:

- » no limits are imposed on the duration or intensity of the work they can perform;
- » they are paid a piece rate, no matter how long they work. This rate is set by mutual consent, without reference to any regulations, and it is clear that the two parties are not on equal footing when they discuss the rate;
- » since these workers have no contracts, they may be dismissed overnight without compensation or notice.

In short, such workers have no bargaining power and they are unable to rely on any instruments to protect their rights. Or at least, that is what they think. We have seen that a wide range of fundamental rights are recognised regardless of a person's status. Nevertheless, the ability to exercise these rights is another matter entirely.

Migrant workers in general, and undocumented workers in particular, often hold low-skilled jobs in the agricultural sector, the construction industry, hotels and restaurants and domestic work – cleaning and personal care. The jobs they take are often referred to as “3D jobs”, i.e. dirty, demeaning and dangerous jobs. And yet *“migrants are increasingly coming from the middle classes of their countries of origin: they are employed as craftsmen, merchants, technicians, managers, health professionals, and similar [...] migrants in irregular situations generally suffer from severe and widespread professional downgrading: engineers end up working as chefs and technicians as security guards, doctors take cleaning jobs and teachers become carers, to name but a few examples. We can only reiterate the loss of skills that this downgrading leads to - to the detriment of the country of origin as well as the host country - and the disappointment and bitterness this causes to those who suffer from it must not be underestimated.”* (Terray)

Like all other human beings, the overwhelming majority of migrants would prefer to have regular employment contracts, pay taxes and contribute to the social security system than to live outside of the legal system, under constant threat of deportation. In most cases, they end up in irregular situations despite themselves, and others take advantage of their circumstances.

IMPACT ON EUROPE'S SOCIETIES

Although the exploitative working conditions suffered by undocumented workers are obvious and easy to envisage, the same cannot be said of the contribution of their work to the economies and societies of the host countries.

The main reason it is difficult to evaluate the impact of undocumented workers on host societies is that it is hard to measure the number of irregular immigrants. According to an estimate performed by the CLANDESTINO project, the undocumented migrant population in the EU in 2008 comprised between 1.9 and 3.8 million people (EU-27).

During the round-table discussions, we looked at the case of the United Kingdom, presented by the Institute for Public Policy Research (IPPR). While it is difficult to make an exact measurement of the wealth generated by undocumented workers, it is very probable that it exceeds their use of resources in their host countries.

In spite of that, a considerable share of the population still views undocumented workers – and migrants in general – as parasites, people who have come to steal nationals' jobs, are willing to work for less and are involved in criminal activities.

In most cases, undocumented workers work in the informal or illegal economy, but IPPR's research shows that many of them pay at least some taxes. Irregular migrants are consumers too – their expenditure increases demand and generates economic growth. They pay indirect taxes through their consumption – and more rarely, direct taxes. It is also true that they are not entitled to social benefits and that they do not have the same degree of access to public services, which makes up for the loss of tax revenue caused by their irregular work.

Their impact on unemployment is considered negligible, since undocumented workers are often employed in jobs that Europeans no longer want to do or can no longer afford to do because they are too badly paid. In the United Kingdom, undocumented workers are paid on average 25% of what other migrants earn. It was

calculated that the GDP of the United Kingdom could rise by £3,000,000,000 if this difference was made up.

There are also analysts who believe that undocumented workers consume more resources than they bring. In short, there is no consensus among researchers when it comes to comparing what migrants contribute to host country economies and the resources they consume, but it has been calculated that the cost of deporting undocumented migrants is far higher than the cost of regularising them.

The underground economy that emerges due to irregular work (not only performed by migrants, of course) results in unfair competition vis-à-vis companies that abide by the rules, but this problem cannot be solved by expelling migrants. What is required is harsher sanctions against those who exploit cheap labour and more stringent checks of subcontracting companies.

FUNDAMENTAL RIGHTS

The entry into force of the Treaty of Lisbon in December 2009 triggered some significant changes in the EU's area of freedom, security and justice (AFSJ). One of those changes was increased protection of individuals' fundamental rights, including those of irregular migrants.

The Treaty of Lisbon makes the Charter of Fundamental Rights, which constitutes the core instrument for the protection of such rights in the EU, legally binding. The Charter declares that all the rights mentioned in it are applicable to all individuals on EU territory, regardless of their status, unless explicitly stated otherwise.

The fundamental rights set down in the Charter include the right to decent working conditions, the right to freedom of association, the right to form and join trade unions, the right to a minimum living wage and the right to legal aid. All of these rights are granted to undocumented migrant workers through these international instruments.

The Charter is not the only document to recognise rights regardless of a person's status. The United Nations and

ILO conventions on human rights and essential labour standards and the thematic conventions on migrants also recognise a number of minimum standards that are applicable to all workers, whether nationals or migrants, whether they have papers or not: freedom of association and actual recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; effective abolition of child labour and the elimination of discrimination as regards occupation and employment.

Nevertheless, there is a big difference between the existence of rights and their application.

This is where trade unions can play a key role. Trade unions, along with NGOs, are in a special position that allows them easier access to undocumented workers.

We should prioritise supplying information and assistance for the recognition of undocumented workers' rights and a spirit of solidarity among all workers. Solidarity between unionised and non-unionised workers and inclusive trade union policies and strategies could guarantee better protection of all workers.

EU POLICIES

In Europe, the situation of migrant workers from third countries is mainly dealt with in migration policies, and the main goal of European migration policies has been border control with a view to reducing the number of people entering or residing illegally in EU countries.

CEPS summarises the current legislative framework for undocumented migrants in a table in its document *Irregular migration in Europe: EU policies and the fundamental rights gap*. The table shows that the primary objective of the EU's strategy towards irregular migrants is fighting illegal immigration. This translates into measures to control and monitor the EU's external borders, measures to return irregular migrants to their countries and measures to establish administrative and penal sanctions against third parties – including smugglers, transporters and employers – involved in the irregular migration process.

We have seen that most undocumented migrants hold low-skilled jobs in the agricultural sector, the construction industry, hotels and restaurants and domestic work – cleaning and personal care.

And yet we can observe that there is a dearth of legal migration channels for low-qualified, low-paid labour, which creates a vicious circle based on a lack of rights and a fear of expulsion, which, in turn, results in the emergence of an easily exploitable workforce and generates enormous profits. The tomatoes from which the project takes its name often hide a long history of exploitation behind their excessively low price.

Even in the Stockholm Programme, the policy document adopted by the Council in December 2009, which sets out priorities and guidelines for building an area of freedom, security and justice for the five years to come, the main approach to irregular migration is based on criminalisation, return and readmission. Moreover, Europe continues to concentrate first and foremost on the rights of its own citizens and, in second place, on the rights of non-EU nationals residing legally in the EU. The priorities of the Stockholm programme include transposing the Returns Directive, (also known as the 'directive of shame') and the Employer Sanctions Directive; increasing cooperation among Member States on the return of irregular immigrants by chartering joint flights and promoting cooperation on border surveillance and border controls.

Closing the borders is not the right way to deal with the problem, since as long as there is a big difference between the economic and social conditions in countries of origin and host countries, no measure will really be able to halt the influx of 'irregular' migrants.

GROWING HOSTILITY TOWARDS MIGRANTS AND TERMINOLOGY

Feelings of hostility towards migrants in general and undocumented migrants in particular are becoming more and more evident. In times of crisis, social tensions rise and policies, rather than dispelling the conflicts, often help to perpetuate them. Besides, during electoral campaigns, certain political groups link up the idea of "migrants" with that of "threats to national security".

The existence of irregular immigrants, which is linked to the lack of appropriate policies to deal with the phenomenon, and a situation where Member States concentrate on criminalising irregular migration and implementing

repressive measures result in potentially dangerous states of affairs of growing racism and xenophobia.

This is why the different terminology used to refer to undocumented migrants is becoming even more significant. The terms used are *undocumented*, *illegal*, *irregular*, *clandestine* and *unauthorised*.

The term *illegal* is often used in European documents. The text of the Stockholm Programme uses this term, thus contributing to the perception of migrants as a threat.

The use of terms such as *illegal* and other criminal categories to describe undocumented migrants has been widely criticised by academics, civil society and several European actors, including the Council of Europe, the European Parliament, the Fundamental Rights Agency, and others.

Although it is true that in several European countries, the very fact of being in a country without the appropriate documents now constitutes a crime, it is preferable to use the term *irregular*, since this emphasises the administrative aspect of the migrant's status.

ETUC POSITIONS

ETUC advocates fair and equal treatment for all migrant workers in Europe. It is convinced that trade union organisations must play a key role in the struggle for the protection and equal treatment of all migrant workers, regardless of their status, in terms of access to social protection, fighting labour insecurity and exploitation and promoting labour rights and fundamental social rights for all migrants, by creating bridges allowing them to escape irregularity and access justice.

ETUC has expressed its deep concern about the exploitation of irregular immigrants in the EU and would like more active social policies with a view to ending unfair competition between companies and Member States to the detriment of workers' rights. In the action plan adopted by the Executive Committee back in 2003, ETUC voiced its intention to work with its affiliated organisations to organise undocumented migrants.

Besides, ETUC is not in favour of the 'package' of directives on migrants (namely the Single Permit Directive, the Seasonal Work Directive and the Directive on Intra-Corporate Transfers).

At its Executive Committee meeting of 1 and 2 December 2010, the European Trade Union Confederation (ETUC) adopted a Resolution on equal treatment and non-discrimination for migrant workers. In this document, ETUC calls for a Social Progress Protocol to be included in the treaties, to state very clearly that economic freedoms and competition rules cannot have priority over fundamental rights and social progress.

First of all, ETUC expressed its consternation about the legal basis of the package, which is immigration rather than employment.

The directives in question are:

- » the Directive establishing a single request procedure with a view to the issue of a single permit authorising nationals from third countries to live and work on the territory of a Member State and establishing a common floor of rights for third-country workers living legally in a Member State;
- » the Directive establishing conditions for entering and remaining for third-country nationals for the purposes of seasonal work;
- » the Directive establishing conditions for entry and residence of third-country nationals in the framework of an intra-corporate transfer.

These directives, which have a major impact on the European labour market, cannot be proposed and discussed by European lawmakers without consulting the social partners and holding a real debate on the consequences of the proposals for the labour market. In ETUC's view, we need a horizontal instrument to regulate the issues of principle for workers within the EU and for workers migrating into the EU, on the basis of the principle of equal treatment and the struggle against discrimination. Furthermore, ETUC has already taken actions to improve the conditions of migrant workers through its *WORKPLACE EUROPE* project.

This project, which was concluded in 2010, aimed to design and implement a range of activities to examine and collect the experiences and current practices of trade unions throughout Europe in the aim of reaching out to transnational mobile workers and finding new ways of informing, assisting, protecting and organising migrant/mobile workers and their families. The project focused primarily on cross-border workers, who often have trouble finding people and organisations they

FIRST AND FOREMOST WORKERS

can trust to give them useful information and proper support. Trade unions can and must play a key role in providing this information and support by developing appropriate visible, available and accessible tools and instruments to reach out to these workers.

In its final report, the Workplace Europe project laid out recommendations on the actions that should be taken to improve migrants' situation. These recommendations also apply to undocumented migrants.

The first level of action is normally focused on direct intervention with mobile and migrant workers and their initial need for support. This is carried out mainly by federations and local branches. Helping workers at this stage means:

- » offering information about their rights, the labour market and the country in different languages to overcome the initial communications barriers that may exist ;
- » supporting work-related complaints;
- » giving advice and providing legal services where legal representation in work-related judicial processes is needed;
- » helping workers to organise and fight for their rights;
- » incorporating workers into the union.

To these measures, which are already mentioned in the Workplace Europe document, we can add the following:

- » investing in training and implementing awareness-raising measures to inform labour inspectors, undocumented workers and those assisting them (e.g. NGOs, trade unions and local authorities) of the possibilities for lodging an official complaint;
- » cooperating more closely with NGOs, and especially with PICUM;
- » promoting solidarity among all workers and fighting the spread of intolerance towards migrants;
- » strengthening the role of workplace inspection to ensure that undocumented workers can lodge a complaint without having to worry about expulsion;
- » creating a trade union network on immigration.

Of course, there are obstacles to unionising undocumented workers, primarily the insecurity that characterises migrant workers' living and working conditions: fixed-term contracts, irregular situations, fear of contacting institutions and fear of reprisals should they decide to join a trade union.

There are other problems connected to the absence of a trade union tradition or the former inclusion of trade unions in state structures in some countries of origin. Consequently, trade unions must train and inform migrants of the benefits of trade union membership.

Unionisation of migrants in irregular situations is particularly problematic as in some countries, it is impossible for such workers to join trade unions. Furthermore, they constitute the most vulnerable of all groups of workers, which is why unionising them is especially difficult. Since the system does not allow trade unions to recruit these workers, they can support them by other means.

It is widely acknowledged that NGOs do vital work by assisting migrants in difficulties, people in irregular situations and homeless people, but when it comes to work-related problems, trade unions play a key part in helping migrant workers.

With this in mind, ETUC decided to work more closely with PICUM, the NGO platform specialising in assisting irregular migrants. As for the future, ETUC plans to continue this cooperation and make it more fruitful by implementing joint actions.

At the same time, ETUC is constantly calling on the European institutions to develop a regulation system for migration issues that takes account of the labour market and the fundamental rights of individuals in the European Union. It urges the Member States to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

ETUC is absolutely convinced that there is a need to strengthen solidarity among all workers, regardless of their status, and that recognising the rights of undocumented workers is crucial for a fair labour market.

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