*Dr. Attila Kun, Ph.D.*

senior assistant, Department of Labour Law and Social Security

# Fundamental Social Rights of Illegal Labour Migrants in the EU – With Specific Regard to the Employers' Liability[1]

## I. Introduction

Already for the first sight, there are plenty of ambiguities in the given research topic. As an introduction, let me just mention some of them, illustrating the fluidity of the subject matter.

Firstly, it is not easy to define who is actually an *illegal labour migrant*. As we will see, illegal migration can take many forms and in practice it is quite difficult to differentiate the various kinds from each other. Furthermore, "illegality" often equals to amorality and anti-sociality in the eyes of the public,[2] therefore it is very difficult to remain realistic and unbiased in the debates about "illegal aliens". Immigrants are mostly recognized as a social threat.

One must also cope with the obvious terminological confusion in the research-field of illegal migration: A broad spectrum of terms describing almost the same phenomenon is reflected in the literature on the subject matter and includes for instance: "illegal migration", "clandestine migration", "undocumented migration", "unauthorized migration". "status-less migration", "uncontrolled migration", "sans papiers" and "irregular migration". In this paper – for the purposes of simplicity – I will use these terms as more or less synonymous, but I will mostly stick to the most general one: illegal migration (and more specifically: illegal labour migration). However, it is important to note that it is certainly true that the term "illegal"

1 This paper is an edited and partial excerpt from the author's "Master Thesis", which was successfully submitted in the framework of the "Master of European Social Security" Programme in 2007 (EMSS, Katholieke Universiteit Leuven, Belgium, Institute of Social Law, 2005-07) The original title of the Thesis is as follows: "The Liability of Employers for the Social Protection of their Illegal Labour Force" (Cluster Illegal Migration in the European Union). The other part of the Thesis (which is not dealt with here) contained a comparative analysis about the best practices of some European states in the given field. (Closeing date of the manuscript: June, 2007).

2 For example, the famous label of "illegal ist unsozial" was a longstanding awareness-raising strategy in Germany in the fight against undeclared work.

may have some connotations with criminality and could create a "culture of mistrust" around the phenomenon. Moreover, stigmatizing categorization as "illegal migrants" might contradict fundamental human rights, especially the right to recognition before the law, and the right to a due process. That is why the complex phrase of "irregularity" is more often used by international and regional organizations (ILO,[3] IOM,[4] CoE,[5] GCIM[6] etc.). The notion of "undocumented" is quite popular as well, mostly among NGOs (e.g.: PICUM).[7] However, "undocumented" is a more specific and narrower (and quite ambiguous) concept.[8]

We should also remind ourselves that the very nature of "illegality"/"irregularity" makes it a difficult problem to deal with. Indeed, behind the varied migration policies of states "lay highly uncertain and contradictory public and governmental attitudes to irregular migration itself."[9]

Secondly, in a globalizing and more and more interdependent world, sometimes it is very complicated to monitor and identify the "real" *employers* of the illegal labour migrants. New patterns of complicated subcontracting arrangements and more fragmented working relationships make it easier for employers to circumvent labour and social security law. In many of the sectors where illegal labour migrants typically suffer from exploitation, through the use of subcontracting systems, the workers are mostly separated from the "hub" employer by numerous degrees along the supply chains. Further on, illegal migrants sometimes don't just have one employer, but they have multiple employers. Such complex networks of production may be able to overshadow or disguise responsibility and liability. There is a need for legal innovations, such as enacting laws that jointly penalize subcontractors as well as the real beneficiaries of the illegal labour. It is also common that illegal labour migrants are employed by "atypical" employers (see for e.g.: illegal labour migrants who are working for families in households). In the latter case it is almost impossible for the legal regime to shed light on these illegal employment relationships.

Thirdly, the notion of legal *liability* is also quite blurred in this context. Illegal labour migration is a hypersensitive problem, both politically and legally. Contemporary political discussion and policy responses regarding illegal migration centre primarily on reactive/restrictive policing and return programmes with not enough attention to the human and social rights of such people. On top of that, traditionally, the legal regime tries to criminalize and penalize illegal activities, and often forgets to find appropriate solutions for the pragmatic problems created by the phenomenon of illegal labour migration.[10] Among many others, such a pragmatic problem is for example the still largely unsolved question of the social protection of illegal labour migrants. In reality, labour exploitation and the denial of social security rights are usual in the daily life of illegal labour migrants. Contemporary legal orders can hardly offer explicit, comprehensive and satisfactory solutions for these problems. What is more, partial legal solutions for the social protection of illegal labour migrants are embedded in different clusters of national laws (such norms are often implicitly dispersed in fields of civil law, administrative law, immigration law, penal law, labour law, social security law, health and safety law, procedural law etc.).

---

3 International Labour Organization.

4 International Organization for Migration.

5 Council of Europe.

6 Global Commission for International Migration.

7 Platform for International Cooperation on Undocumented Migrants.

8 As regards terminology, see in details: Ryszard CHOLEWINSKI (2006).

9 Matthew J. GIBNEY p. 1.

10 According to Taran and Geronimi, the association of migration with criminality, and, recently, terrorism appear to be reinforced by usage of draconian language of "combating illegal migration." Patrick A. TARAN – Eduardo GERONIMI (2003) p. 1., 10.

The previously mentioned "tough" and quite superficial condemnatory (sometimes referred to as "closed-door policy")[11] attitude of the European legal orders makes it difficult to mitigate the real-life problems of illegal labour migrants. No matter the repressive policies, there will always be a huge number of illegal migrants present in Europe.[12] In other words: the presence of illegal migrant workers in Europe is a stubborn reality (this reasoning is in line with the complete "market model" of illegal migration, according to which "equilibrium forces predict a non-zero level of illegal migration.").[13] And what is more, it is a fact that restrictive and repressive (legal) immigration policies are even fostering illegal and undocumented immigration.

Illegal employment is indeed the almost only survival strategy of illegal immigrants.[14] That is why protection of illegal migrants is paramount in the employment context. Instead of illegally employed migrants, rather their employers should be held liable. Illegal labour migrants have almost nothing to lose, while employers are great beneficiaries of the phenomenon of illegal labour migration.

## II. The Phenomenon of Illegal Migration in the Context of Employment

The exact number of illegal migrants in Europe is – by definition – unknown. As regards some approximations ("guesstimates"), the total volume of illegal migration flows to Europe was estimated at 650,000 for the EU-15 and at 800,000 for the EU-25 in 2001. It was also estimated that each year between 400,000 and 500,000 migrants are smuggled into Europe.[15] According to the IOM there are approximately 3 million illegal migrants in Europe, while certain NGO talks about 5 million.[16] The ILO estimated that irregular migrants represent 10-15% of total migration stocks.[17] Owing to such ambiguous estimations, in the European countries "policy-making in the field of illegal migration is mostly based on guesswork and rumours rather than sophisticated methods of estimation."[18] Indeed, reliable statistics on illegal migration are mostly inexistent.

It is not the mission of this paper to reveal the underlying causes of illegal migration, but it seems to be useful to give some hints about this question. It is argued by Scott that irregu-

11 For a description of the European policy see: Commission of the European Communities (2006): Communication from the Commission on Policy priorities in the fight against illegal immigration of third-country nationals, Brussels, 19.7.2006. COM(2006) 402 final.
As a consequence of the "closed door policy", one can say ironically that the tighter the front doors have been closed, the stronger have been the attempts to use the back doors (i.e. illegal forms of migration and work).

12 "Immigrants are now so rooted in the Western economy that it is almost impossible to conceive of a situation short of war or economic catastrophe that would lower their number to any great extent." Jonathan Power (1979) p. 242.

13 Horst Entorf (2002) p. 1. In other words: the economically optimal level of illegal migration is almost certainly greater then zero. See in more details: Christina Boswell – Thomas Straubhaar.

14 Tamás Gyulavári – Éva Gellérné Lukács (2005) p. 52.

15 Peter Futo – Michael Jandl – Liia Karsakova (2005) p. 3.

16 CoE Parliamentary Assembly (2006) p. 1.

17 Quoted by: Ryszard Cholewinski (2006).

18 Michael Jandl (2004) p. 11.

lar migration is basically a logical outcome of three complex and inter-related processes: "the failure to introduce comprehensive labour migration policies in an age of increased economic need in Europe and growing global migratory pressures;[19] the unchecked forces and effects of globalisation; and the dismantling of the refugee protection system as the EU seeks to harmonise its asylum and immigration policies."[20] Of course, one can identify many other reasons ("push and pull" factors)[21] for illegal migration (e.g.: personal motives; political reasons; self-serving interests of criminal groups; slow, complex and bureaucratic work of state administrations; lack of transparency of procedures etc.), but the above-mentioned ones are indeed among the most important reasons.

It is also not a simple task to define the notion of illegal migration, which is an ambiguously broad "catch-all" category (without objective, authentic legal contours). In dealing with illegal migration, one should not forget that "where illegal migration begins and ends is a matter for each sovereign state to define"[22], which complicates the phenomenon further. One of the most comprehensive and persuasive definitions of illegal migration can be based on the classification reported by Jandl.[23] Jandl details eight categories, which can also be depicted in a two-dimensional table:

Relevant categories of illegal migration

| | Residence legal | Residence illegal |
|---|---|---|
| Entry legal | Work illegal | Work illegal |
| | | No Work |
| Entry illegal | Work illegal | Work illegal |
| | | No work |

*Source: Michael* JANDL *(2004) p. 2.*

According to Jandl, the eight categories are the followings (however, the seventh and eighth categories do not really amount to clandestinity):

1. Legal entry, legal residence but illegal work (e.g.: no work permit or no appropriate work permit).
2. Legal entry, but illegal residence and illegal work (e.g.: unauthorized "visa-overstays" combined with illegal work).
3. Legal entry, no work but illegal residence (e.g.: unauthorized "visa-overstays" without work; asylum seekers who have exhausted the asylum procedures and have eluded arrest or deportation; refugees with short term residence permits who lost their permits, but still stay in the country etc.).
4. Illegal entry,[24] legal(ized) residence but illegal work.
5. Illegal entry, illegal residence and illegal work (i.e.: total "illegality").

19 Taran and Geronimi also point to the fact that "with few options available for legal migration in the face of strong pull-push pressures, irregular migration channels become the only alternative." Patrick A. TARAN – Eduardo GERONIMI (2003) p. 7.

20 Penelope SCOTT (2004) p. 2.

21 This term is used by Jörg ALT (2005) p. 4.

22 Georges TAPINOS (2000) p. 1.

23 Michael JANDL (2004) p. 2–3. (Based on the works of TAPINOS).

24 Illegal entry is often carried out by using false or forged documents, and/or through the „help" of criminal networks (smugglers, traffickers).

6. Illegal entry, illegal residence but no work.
7. Legal entry, legal residence and no work.
8. Illegal entry but legal(ized) residence with no work.

Like Jandl, Gosh also makes a distinction between 'irregular entry', 'irregular residence' and 'irregular activity or employment'.[25] *Irregular entry* includes clandestine entry or entry without, or with incomplete, travel documents. *Irregular residence* refers to situations where non-nationals within a country have not complied with the formalities or obtained legal clearance to stay in the country. Individuals who overstay the period allowed by their residence permit or visa are a typical example. *Irregular activity or employment* occurs when non-nationals engage in activities within a country which are either unlawful or for which they do not have, or cease to have the necessary legal authorisation. Irregular employment can arise for example when a non-national enters a country on a tourist visa and starts working without legal permission, or a seasonal worker with a short-term work permit is employed beyond the period of their work permit etc.[26] In most countries, both authorisations to stay and to work are administered separately, which often creates difficulties.

Coming back to Jandl's concept, there are some inherent assumptions in his classification: for example, it is assumed that legal work can only be carried out when residence is legal or legalized.[27] As a continuation of this logic, we can formulate as a basic presumption that legal status in the social protection system (especially in the social insurance system) is only possible when the work is legal. So to conclude: most illegal migrant workers do not have a legal status in social protection systems.

Though illegal (or "black", or "undeclared", or "off the books") work is almost the only survival chance for illegal migrants, not all illegal migrants perform work. Of course, in our context – employers' liability – only the first (1.), second (2.), fourth (4.) and fifth (5.) categories are relevant, where illegal labour is actually performed. It is important to note that illegal residence and illegal work may have numerous connections: for example the detection of illegal work will often lead to a withdrawal of residency rights. (This is a well-founded reason for fear from deportation, and that is why illegal labour migrants are not really keen on to defend their basic rights publicly, for example on a court. In general, illegal labour migrants are usually not in the position to give voice to their possible exploitation.)

For the most part, illegal migrants are able to find work only in the hidden (or "shadow", "informal", "underground") economy. In the official documents of the EC, undeclared work is a widely used broad term. "Undeclared work" is defined as "any paid activities that are lawful as regards their nature but not declared to the public authorities, taking into account differences in the regulatory system of Member States".[28] According to the EC, the involvement of

25 Similar distinction is made in Article 5. of the ICMRW (see later in more details). Migrant workers and members of their families
(a) Are considered as documented or in a regular situation if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party;
(b) Are considered as non-documented or in an irregular situation if they do not comply with the conditions provided for in subparagraph (a) of the present article."

26 The analysis of Gosh is reported by: Penelope Scott (2004) p. 3.

27 However, Schoukens points to the interesting fact that it is not possible to fully exclude that a person illegally staying in the country, may be delivered a permit to work therein. Of course, this is very exceptional. Paul Schoukens (2004) p. 2.

28 European Commission (1998): Communication of the Commission on Undeclared Work, Brussels, COM (98) – 219. p. 4.

illegal immigrants in undeclared work is considered by all Member States as a serious problem to be addressed as part of their global strategy of combating illegal immigration. Although the employment of illegal immigrants is only one aspect of the hidden economy, possibilities for illegal employment constitute a considerable "pull" factor for illegal migration flows.[29] In Europe, there are good possibilities for undeclared work in some sectors, where original inhabitants do not prefer to work (these are principally the so-called "3 D" jobs – dirty, dangerous and demanding/degrading works,[30] in which occupations immigration is vital and obviously needed). This phenomenon serves as a "pull" factor for illegal migrants. In other words: employers are not just responding to the phenomenon of illegal migration by hiring them, but they are also creating the background for illegal migration by offering undeclared work possibilities. Although undeclared work is a structural (and much more complex) characteristic of current European labour markets,[31] employers bear a great social responsibility in fighting against this phenomenon, especially in relation to illegal labour migrants.

Leaving aside the above-mentioned complexity of definitions, Professor Schoukens offers a useful, much more compressed and operational synthesis-definition for "illegal labour migrants". According to Schoukens, illegal labour migrants are "non-nationals who are working in the country without them being allowed to stay in the country and/or without them being allowed to work in the country".[32] This definition is also compatible with the above described categorisation of Jandl.

One of the most striking features of illegal labour migrants is their extreme vulnerability ("de facto rightlessness"; so-called "civic dead" status).[33] The main reasons behind the vulnerability are the followings: fear from deportation; precarious economic situation; the pressing need to earn some money for survival; the motivation and moral obligation to send some money to relatives at home (in the country of origin); sometimes extreme dependency on employers ("commodification"); low bargaining power etc. This vulnerability allows cost-conscious and competition-minded employers to misuse this situation and hire illegal migrants on conditions which would be intolerable by other (e.g.: domestic) workers (e.g.: depressed wage-levels; frequent withholding of earnings; hazardous and/or precarious working conditions; arbitrary rupture of contract; unpaid overtimes; unforeseeable schedules; risk of forced labour; unforeseeable career–prospects; lacking "safety nets"; "brain-wasting"[34] conditions etc.). As a consequence of the undeclared nature of the work performed, illegal labour migrants typically remain uncovered by formal social security protection against social risks. Irregular migrants are habitually employed in rather unsafe occupations, such as in kitchens, agriculture, bakeries, or on construction sites. In addition, since their work is part of the black-market, employers have not too much motivation to secure at least basic health and safety standards, let alone to compensate workers for time off or costs due to injury.

We must reaffirm here that labour rights could be the main tools in the prevention of exploitation. Originally and historically, the so-called "protective" labour law is the law of subordinate or dependent labour. "The original purpose of labour law was to offset the inher-

29 European Economic and Social Committee (2004) 3.7.

30 These jobs are also often called as "3-B"-jobs: Boring, Below-standard and Badly paid. European Migration Network (2007) p. 27.

31 The overall problem of undeclared work has also been addressed in the EES (European Employment Strategy) since 2001.

32 Paul Schoukens (2004) p. 1.

33 The latter term is used by Matthew J. Gibney

34 "Brain-waste" means that illegal labour migrants are often ready to accept jobs beneath their skills level.

ent economic and social inequality within the employment relationship."[35] It is quite easy to conceive of that migrants in an irregular situation are even more vulnerable and dependent. One should not forget that "being illegal is seldom the migrant's deliberate choice". The advantages of illegality mostly tend to be on the side of the employer.[36]

Besides the detrimental effects on the illegally hired migrants themselves, illegal employment of migrants have plenty of additional disadvantages: undermines the credibility of legal forms of migration; erodes state revenues; distorts fair competition; pulls down overall wage-levels ("wage dumping"); perpetuates the informal labour market; crowds out the local workers; enhances discrimination and xenophobia; destabilizes social solidarity in general; possibly grinds down good external relations between origin, transit and destination countries etc.[37]

## III. The International Human Rights Framework for the Social Protection of Illegal Labour Migrants – With Specific Regard to the Liability of Employers

There are three fundamental approaches to deal with the problem of illegal labour migration:[38]

1. Repression, "Zero-tolerance".
2. Ignorance/De facto tolerance.
3. Recognition of the "real" problems and legalization, social inclusion.

While fully repressive measures (1.) are costly, financially unsustainable, administratively unfeasible and economically not realistic; ignorance (2.) is hypocritical and unacceptable from a moral and human-rights-based point of view. In the context of legalization and social inclusion (3.) of illegal labour migrants, a human rights-based attitude is a must. Especially since the beginning of the 21st century, more and more policy-makers, human rights advocates, academics and NGOs declare that it is "imperative that countries ensure some minimum standards of protection, including the basic human rights, for all migrant workers, whatever their status."[39] (It is also important to add that most illegal labour migrants are not criminals at all, the only "crime" most of them have committed is the relatively minor, civil offence of having entered the country without proper documentation.[40] Furthermore, migrants sometimes may not realize the infringement of the law.)[41]

35 European Commission (2006) Green Paper: „Modernising labour law to meet the challenges of the 21st century" (presented by the Commission) COM(2006) yyy final. p. 4.

36 See: Georges Tapinos (2000) p. 1.

37 For a more complete list about the undesirable consequences of irregular migration, see: Nilim Baruah – Ryszard Cholewinski eds. (2006) p. 40.

38 See in details: Tamás Gyulavári – Éva Gellérné Lukács (2005) p. 54. and Ryszard Cholewinski (2006).

39 Nilim Baruah – Ryszard Cholewinski eds. (2006) p. 29.; According to the Parliamentary Assembly of the CoE, "the increasing trend at an international level to recognise rights of irregular migrants, comes form the landmark Advisory Opinion of the Inter-American Court of Human Rights on the legal status and rights of undocumented migrants given in response to a request by Mexico. In this case the Court held that the migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment". (CoE Parliamentary Assembly (2006) Para. 31.)

40 Margo Alofs (2003) p. 14.

41 Ryszard Cholewinski (2006).

Even though there is no single specific piece of international or European law which deals exclusively with the rights of illegal migrants,[42] there are a plenty of international and European human rights instruments that provide for some protection for illegal migrants. However, as for example the Parliamentary Assembly of the CoE notes, "the large number of disparate instruments and the varying degree of signatures and ratifications, leave a web of uncertainty as to the minimum rights to be applied to irregular migrants."[43] It is also a widely recognized fact that in many countries the application of human rights instruments to non-nationals is "inadequate or seriously deficient and this is particularly so with respect to undocumented migrants."[44] This phenomenon is labelled by Cholewinski as "protection gap".[45] Taran and Geronimi remark sadly that "the protection of fundamental rights of migrant workers in an irregular situation is illusory if there in no precise definition of the basic rights of all migrant workers and if difficulties bar their access to appeal procedures."[46] Moreover, it is not so difficult to come to the conclusion that the phenomenon of illegal labour migration cannot simply be solved through legal (especially human-rights) measures, though human rights undoubtedly might and should play an important role in any related policy.

As regards basic social rights – which are the most controversial when applying minimum rights to illegal migrants –, the above-mentioned ambiguities are especially valid, though, in practice, some social rights (e. g: access to urgent, emergency or necessary medical treatment; some forms of social assistance)[47] are afforded to illegal migrant workers in a number of countries "unofficially" (e.g.: some social services in Belgium).[48] For instance, Mr. Thomas Hammerberg, the European Commissioner for Human Rights (Sweden, 2006–2012) concluded in one of his speeches that "there is a gap not just between international standards and national policies, but also between national legislation and the real practice of social services".[49] It is also argued by Paul Schoukens that "such an informal approach is 'dangerous' because it risks feeding a suspicion present in the general population, who are informed officially that irregular migrants are denied access to benefits and then learn that such benefits are being granted in some instances."[50]

In the next round, I would like to briefly overview the relevant human rights instruments of the UN, the ILO, the CoE and the EU. Where it is possible, I will concentrate on those aspects of the international instruments, which are significant in terms of the employers' liability. Although these instruments are not typically explicit and detailed concerning employers' liability, some principles can be read out of them. Here we don't have enough space to always quote the relevant articles, thus sometimes we only refer to them.

42 Similarly, there is no designated specific international agency to protect the rights of illegal migrants.
43 CoE Parliamentary Assembly (2006) A. para. 10.
44 Penelope Scott (2004) p. 6. (Based on Taran); Mr. Jorge A Bustamente, The Special Rapporteur on the Human Rights of Migrants (UN, Mexico, 2005-08) has also referred to the "de facto denial that undocumented immigrants have rights…". Reported by: PICUM (2007) p. 16.
45 Ryszard Cholewinski (2005).
46 Patrick A. Taran – Eduardo Geronimi (2003) p. 14.
47 However, these issues (health care, social assistance) are excluded from the scope of the present paper, because they have nothing to do with the "employers' liability".
48 Nilim Baruah – Ryszard Cholewinski eds. (2006) p. 156.
49 Reported by: PICUM (2007) p. 25.
50 Reported by: Ryszard Cholewinski (2003) p. 3.

### *III. 1. UN*

The central piece of modern international human rights regime, the *Universal Declaration of Human Rights*[51] (UDHR) covers a wide range of rights. The overall wording of the Declaration ('everyone has the right to…', 'no one shall be deprived of…') implies that illegal migrants are covered as well.

As regards *The International Covenant on Civil and Political Rights*[52] (ICCPR), Dux draws the conclusion that similarly to the Declaration the ICCPR also covers migrant workers in general. The Human Rights Commission has also stated that the rights listed in the covenant are granted to everyone regardless of reciprocity and nationality. However, the ICCPR, like the UDHR only grants the right of free movement to citizens and people lawfully on the territory of the state, so not to illegal migrants.[53]

The *International Covenant on Economic, Social and Cultural Rights*[54] (ICESCR) is stricter in granting rights to foreigners. The solidarity enshrined in these rights normally refers to a group of people who live on the same territory and have some kind of historical or cultural link with each other. So despite its importance the ICESCR can not fulfil its role in the case of migrant workers and especially not concerning illegal migrant workers.[55] However, the ICESCR recognises for example in Article 7 "the right of everyone to the enjoyment of just and favourable conditions of work…"

*Other international human rights instruments* addressing rather specific issues such as The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, 1965), The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979), The International Convention on the Rights of the Child (CRC, 1989), The Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT, 1984) all contribute to the legal protection of all migrant workers to some extent.

The innovative *UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*[56] (ICRMW) protects both "non-documented" or "irregular" migrant workers and "regular" migrant workers, but it protects the "regular" ones more (granting more rights to regular migrants was meant to discourage illegal migration). The protection of the human rights of irregular migrants was one of the main ideas behind this new UN instrument.[57] However, very few states have ratified the ICRMW (which came into force in July 2003), none of them major immigrant "receiving" countries (for e.g. the ICMRW has not been ratified by any EU member states).[58]

When we are searching for the ideological basis of the employers' liability in the ICRMW, it is useful to refer to its preamble: "workers who are non-documented or in an irregular situation are frequently employed under less favourable conditions of work than other workers and that certain employers find this an inducement to seek such labour in order to reap the benefits of unfair competition".

The Convention consists of nine Parts. From our perspective, Part II and III are especially relevant. Part II. contains a general non-discrimination clause, Part III. (Art. 8–35.)

---

51 UN GA Res. 217A (III), adopted 10 Dec. 1948
52 16 Dec. 1966; 999 UNTS 171
53 See in details: László Dux (2006) p. 7.
54 16 Dec. 1966; 993 UNTS 3
55 László Dux (2006) p. 7.
56 A/RES//45/158 (18 December 1990) UN General Assembly 69th Plenary Meeting.
57 László Dux (2003) p. 74.
58 PICUM (2007) p. 8.

enumerates the rights enjoyed by all migrant workers, regardless of their legal status (just for a clarification: Part IV. lists those additional, more extensive rights which only apply to regular migrant workers). Here, let me just indicate the most important articles from Part II, which are most closely related to the social policy field (and to the employers' liability more specifically).

- Art. 25 provides for equal treatment of all migrants (including irregular migrants) with nationals, concerning remuneration and other conditions of work. This innovative article places huge "social responsibility" on employers of illegal labour migrants (especially as opposed to previous and other international human rights instruments).[59] In principle, illegal migrants may not be deprived of these rights by reasons of the irregularity of their stay or employment.
- Art. 26 contains the right to establish or join trade unions. Unionisation could be an effective tool in the fight against unscrupulous employers.
- Art. 27 defines the right to social security. This article grants equal treatment as far as migrant workers (and their employers) fulfil the legal requirements. Thus in case the illegal labour migrant and his/her employer have regularly contributed to the system, he/she – as a principal rule – will be entitled to benefits regardless of the status of illegality (or at least the reimbursement of the amount of contribution made is recommended). However, in the more probable situations when no contribution payment has occurred ("black" work), the convention leaves us in uncertainty and offers great discretion to states. Unfortunately, even this quite pioneering convention does not regulate for the retrospective reimbursement of non-paid contributions from the side of abusive employers (e. g.: upon detection of the illegal employment relationship).

As regards access to health care in urgent medical cases, the equal treatment principle is formulated in Article 29 and 30.

- From a procedural aspect, Art. 18 is highly significant, because it lays down that "migrant workers and members of their families shall have the right to equality with nationals of the State concerned before the courts and tribunals." This means, for instance, that irregular migrants have the right to file complaints to labour courts against their employers (for example, in order to put into effect the rights stipulated in Art. 25, 26 or 27).

### *III. 2. ILO*

The International Labour Organization has adopted two legally binding instruments relating explicitly to migrant workers: Convention No. 97 of 1949 (C97) concerning Migration for Employment and Convention No. 143 of 1975 (C143) concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers. Both are complemented by non-binding Recommendations (Nos. 86 and 151.).

*C97* does not cover irregular migrants at all (see: Art. 11.1.). The scope of *C143* is much broader. This instrument devotes a separate section (Part I.) to irregular migration and to intergovernmental measures considered necessary to prevent it. It also imposes a general obligation on states "to respect the basic human rights of all migrant workers", confirming its general applicability to irregular migrant workers (Art. 1.). However, the convention does not specify the basic human rights of all migrant workers (and at the same time, the rights of regular

59 That is why, states with large number of immigrants, such as Austria or Germany strongly opposed the inclusion of this clause, but developing countries managed to put through their view on this point. László Dux (2003) p. 72.

migrant workers that are detailed in Part II. of the convention are not applicable to irregular migrants).[60] Exceptionally relevant are Art. 6. and 9. Art. 6 lays down the legal ground for employers' liability and for employer sanctions (administrative, civil and penal) in general, as an integral part of effective migration management. Art. 9 stipulates for the enforcement of certain rights arising out of past employment ("past employment" refers to past periods of both legal and illegal employment). This article sets down that the migrant worker employed illegally does have an equality of treatment with regular migrant workers in terms of labour rights. The convention also deals with social security benefits, but only those deriving directly out from past employment. Art. 9, 2. stipulates the access to due process.

The accompanying Migrant Workers Recommendation (1975, No. 151.) also contains a very important Article (Art. 34) concerning the employers' liability for their illegal migrant labour force. For example, it recommends that migrant workers, irrespective of their status, should be entitled to outstanding remuneration for work performed, employment injury benefits, compensation in lieu of any holiday entitlement acquired but not used, reimbursement of any social security contributions which have not given and will not give rise to rights under national laws or regulations or international arrangements. These rights are all granted even after leaving the country of employment.

From the perspective of the employers' liability, it is important to refer to other general ILO Conventions. For instance, C19 (1925) and Rec. No. 25 introduced the idea of equal treatment (also on the basis of nationality) to work accidents.[61] C121 on Employment Injury Benefits of 1964 has also maintained such a clause. However, it is very important to note that according to Schoukens, "the non-discrimination provisions of these instruments imply that illegal labour migrants should be treated equal with 'black workers' having the nationality of the country they work in."[62]

Reciprocity is an overriding principle of all social security related conventions of the ILO (e.g.: C102 from 1952; C118 from 1962), thus they are rather irrelevant regarding the protection of illegal migrant workers.

The quite low rate of ratification of the migration-related conventions (e.g.: only 18 countries ratified C143) and the poor practice of implementation have resulted in the development of alternative methods of the protection of (illegal) migrant workers' human rights: soft law measures; policy initiatives; capacity building; technical assistance; social dialogue etc. Such ILO measures are among others the followings: The ILO's general "Declaration on Fundamental Principles and Rights at Work and its Follow-Up" from 1998; the "Resolution concerning a fair deal for migrant workers in a global economy" adopted by the International Labour Conference in 2004 (92nd session)[63] and the recent "ILO Multilateral Framework on Labour Migration – Non-binding principles and Guidelines for a Rights-Based Approach to Labour Migration" from

60 Part II. deals with the issue of "equality of opportunity and treatment". However, "For the purpose of this Part of this Convention, the term migrant worker means a person who migrates or who has migrated from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant worker." (Art. 11.)

61 More than 120 countries have ratified this convention, what makes it one of the most widely recognized ILO convention concerning migrants.

62 Paul Schoukens (2004) p. 6.

63 http://www-ilo-mirror.cornell.edu/public/english/protection/migrant/download/ilcmig_res-eng.pdf, accessed on 01 June 2007. See especially: "It is important to ensure that the human rights of irregular migrant workers are protected. It should be recalled that ILO instruments apply to all workers, including irregular migrant 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." (para. 28.)

2006.[64] This instrument is part of the ILO's Decent Work Agenda. Within the 15 broad principles of the Framework, the 8th reads as follows: "The human rights of all migrant workers, regardless of their status, should be promoted and protected. In particular, all migrant workers should benefit from the principles and rights in the 1998 ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, which are reflected in the eight fundamental ILO Conventions, and the relevant United Nations human rights Conventions." Guidelines 10.7. and 11.4. call attention to the followings: "providing effective sanctions and penalties for all those responsible for violating migrant workers rights" and "imposing sanctions and penalties against individuals and entities responsible for abusive practices against migrant workers". These latter guidelines can be interpreted as "soft law" basis for employer sanctions.

### *III. 3. Council of Europe*

In general, "the level of protection of irregular migrants at the European level lags behind that which is potentially offered at an international level."[65] For instance, there is no corresponding convention at a European level to the innovative ICMRW.

As the basic human rights instrument of the CoE, the *European Convention on Human Rights*[66] (ECHR) defines its personal scope in a way that it covers every individual which happens to be within the jurisdiction (i.e.: on the territory)[67] of one of the member states. The ECHR also evokes the overriding principal of non-discrimination (Art. 14. and Art. 1. of Protocol No. 12.). As a result, the ECHR is a key instrument in the protection of all foreigners, mostly due to its well-developed case-law. (For instance, the European Court of Human Rights has interpreted the ECHR quite extensively in the well-known Gaygusuz[68] decision.).

The *European Convention on the Legal Status of Migrant Workers* (1977, ETS 93) can only be applied to migrants coming from countries which themselves have ratified the convention, and are officially allowed to take up employment in the host state. Therefore, this convention does not apply to irregular migrants at all.

The ESC – *European Social Charter*[69] – and the Revised Social Charter only extend their application to individuals coming from a member country of the CoE, which has also ratified these instruments and in the case of reciprocity and legality. The ESC's most significant contribution to protecting irregular migrants derives from its vibrant case-law.[70]

64 Adopted by the Tripartite Meeting of Experts on the ILO Multilateral Framework on Labour Migration (Geneva, 2005), (http://www.ilo.org/public/english/protection/migrant/download/multilat_fwk_en.pdf), accessed on 05 June 2007.

65 CoE Parliamentary Assembly (2006) Para. 32.

66 ETS No. 5 Rome 4th of Nov. 1950

67 Interpreted by: László Dux (2006) p. 23.

68 Gaygusuz v. Austria 39/1995/545/631 31st of Aug. 1996. The Court had to decide whether it is a breach of the ECHR that Austrian authorities have denied a contribution-based unemployment benefit from a Turkish citizen just because of his nationality. The Court finally found that Austria discriminated illegally (the decision was based on the "right to property" – Art. 1 of Protocol 1 to the Convention).

69 ETS No. 35, Turin 18th of Oct. 1961

70 For example, in the IFHR (International Federation of Human Rights) vs. France (Complaint No. 14/2003, decision of 8 September 2004), the European Committee on Social Rights held "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". At the heart of this decision was the significance of the right in question for the individual and for his or her dignity. In view of the fact that various other rights under the Charter are closely linked to the notion of human dignity, one can not exclude further dynamic interpretations. CoE Parliamentary Assembly (2006) Para. 35.

The *European Code on Social Security*[71] and its Protocol contain norms of a more technical nature. Illegal migrants are surely excluded from the scope of the Code.[72] In 1990 the Code was revised, however, the changes did not affect the parts dealing with the rights of foreign workers.

The goal of the *European Agreement on social security*[73] is to contribute to the integration and development of the CoE member states by providing equality of treatment to foreigners in terms of eight types of social security schemes. This instrument – like the most CoE instruments – is again only applicable in the case of reciprocity.

The *European Agreement on medical and social assistance*[74] extends the obligation of equal treatment between migrant workers and nationals to the fields of medical care and social assistance to the needy. The agreement once again is only applicable to documented or regular migrants in the case of reciprocity.

The *European Convention for the Prevention of torture and inhuman or degrading treatment or punishment* (ETS 126) is applicable to irregular migrants in some contexts (especially in terms of their detention on arrival, during their stay or in preparation for their expulsion from the country) and *The Convention on Action against Trafficking in Human Beings* (ETS 197) makes an important contribution to the protection of a particularly vulnerable group of irregular migrants as well.

As regards some more – rather "soft law" – measures of the CoE, The Committee of Minister has declared the foundations for promoting the rights of irregular migrants in Recommendation No. (2000) 3 to Member States on the Right to the Satisfaction of Basic Material Needs of Persons in Situations of Extreme Hardship. The Committee of Ministers recognises that certain rights should be open to all citizens and foreigners, whatever their status.[75]

The Parliamentary Assembly of the CoE has expressed the basics of its attitude towards employers hiring illegal migrants in its Recommendation 1211 (1993) on clandestine migration – traffickers and employers of clandestine migrants: "Employers thus save a large proportion of the cost of declared labour, since the clandestine migrant is not in a position to contest the proffered wage. This wage is very often lower than the legal wage, for long and irregular hours of work. The employment of clandestine migrants results in economic distortions which jeopardise the national economy as a whole." (Para 5.). The Parliamentary Assembly has also adopted a charter of intent on clandestine migration, which refers to the need to protect the basic rights of irregular migrants [Recommendation 1577 (2002)].

As regards social rights, the Parliamentary Assembly declared in its recent Report from 2006[76] that the following minimum rights should, inter alia, apply to irregular migrants as well:

- adequate housing and shelter guaranteeing human dignity (13.1.);
- emergency healthcare (13.2.);
- social protection through social security where it is necessary to alleviate poverty and preserve human dignity (children are in a particularly vulnerable situation and they should be entitled

71 ETS No. 48, Strasbourg 16th of April 1964

72 However, Schoukens cites Art. 73 of the Code, and states that as both "foreigners" and "migrants" are not specified in the given article, one might include illegal labour migrants under these terms. Art. 73. reads as follows: "The Contracting Parties shall endeavour to conclude a special instrument governing questions relating to social security for foreigners and migrants, particularly with regard to equality of treatment with their own nationals and to the maintenance of acquired rights and rights in course of acquisition." Paul SCHOUKENS (2004) p. 6.

73 ETS No. 78, Paris the 14th of Dec. 1972

74 ETS No. 14, Paris 11th of Dec. 1953

75 CoE Parliamentary Assembly (2006) Para 39.

76 CoE Parliamentary Assembly (2006) Para 13.

to social protection which they should enjoy on the same footing as national children) (13.3.);
- irregular migrants who have made social security contributions should be able to benefit from these contributions or be reimbursed, for example if expelled from the country (13.4.);
- in relation to irregular migrants in work, they should be entitled to fair wages, reasonable working conditions, compensation for accidents, access to the courts to defend their rights and also freedom to form and to join a trade union. Any employer failing to comply with these terms should be rigorously pursued by the relevant authorities in member states (13.5.) etc.

From the perspective of employers' liability, the last point is the most notable.

### *III. 4. EU*

In the EU, as Cholewinski points out, "the bulk of legally binding measures and 'soft law' that has emerged since 1999 [after the Treaty of Amsterdam] has neglected human rights and is mainly concerned with preventing migrants without the necessary documents from entering the EU or facilitating their return or expulsion if they do".[77] Similar conclusion is presented by Dux, who writes that "irregular and non-documented migrants are still without legal protection, which is on of the biggest deficits of the EU's human rights protection system".[78] Indeed, the fundamental intention of Member States to reduce the volume of illegal migrant workers seems to be in contradiction with a broad human-rights based approach.

In spite of the above-mentioned arguments, many times, the EU have also expressed officially (and "semi-officially") that the fundamental rights of irregular migrants must be protected and promoted somehow, "particularly as they are often victims of traffickers' networks and exploited by employers."[79] This phrasing is exceptionally remarkable in our context. In a Green Paper dealing with an EU approach to managing economic migration,[80] the Commission stated that "Community Directives on issues such as occupational health and safety or working conditions are in principle applicable to all workers, irrespective of their nationality" (however, this statement seems to be quite shallow). Moreover, the Charter of Fundamental Rights of the European Union can also be interpreted on a way that the universal nature of the rights collected in it, are accorded to everyone regardless of nationality or place of residence. According to PICUM,[81] this means that "all articles in the charter apply to undocumented migrants unless it is specified otherwise in the particular articles."[82] However, we must remind ourselves that the Charter is not (yet?) a legally binding document.

As a conclusion of this chapter we can reaffirm that it is reasonable and important to advocate for the protection of illegal labour migrants basic human (and especially social) rights, but one should not forget at least three major concerns:
- It is necessary to avoid exaggerations: illegal migrant workers should not enjoy more exten-

77 Quoted by: Michael Samers (2004) p. 27.

78 László Dux (2006) p. 27.

79 See for instance: Commission of the European Communities (2006): Communication from the Commission on Policy priorities in the fight against illegal immigration of third-country nationals, Brussels, 19.7.2006. COM(2006) 402 final. 8.

80 Commission of the European Communities (2005): Green Paper on an EU Approach to Managing Economic Migration, Brussels, 11. 1. 2005. COM (2004) 811 final. p. 10.

81 PICUM (2007) p. 26.

82 For instance, the scope of the article on social security and social assistance (Art. 34.) is specifically limited to lawful resident migrants, thus, according to PICUM, it does not conform with international standards.

sive rights than domestic illegal/black-workers or regular migrants.[83] These concerns are specific aspects of the overriding non-discrimination principle, and can be backed by strong ethical arguments as well.

- Extensive rights might serve to attract more and more migrants with illegal status ('magnet-effect'). In other words: "the goal of reducing irregular migration is potentially in conflict with the goal of improving the conditions faced by irregular residents."[84] Indeed, illegal migrants might be attracted by generous rights, but we should not forget that respecting basic human rights does not automatically imply the general regularisation of the illegal migrants.[85] It is also a possible way of thinking that instead of fighting for the protection of irregular migrants' rights, it would be more helpful to raise both the quantity and quality of regular ways of migration and employment. In this line of reasoning, from the context of employers' liability, employer sanctions seem to be more effective than naïve and solemn declarations about human rights. Overall enforcement of legal employment might be one of the best ways – but not the only way – in the fight against illegal employment of illegal migrants.
- Although full human-rights protection – and full social security coverage – of irregular migrant workers is morally and ethically quite reasonable, in practice it is not really feasible, and also contradicts the idea of state sovereignty to some extent. In this sense, it is quite probable that the traditional state-centred international human-rights regime won't be able to fully integrate illegal migrants. Thus, in my view, there is a need for such a paradigm-shift in the international human rights order, which places much more direct burden on private actors: increased corporate accountability and corporate responsibility is needed for human rights (of course, this paradigm-shift would be desirable from the aspect of many other policy-areas as well).[86] In this context, unscrupulous employers rather should be held liable for the social and human rights protection of illegal labour migrants, than sovereign states. Employers are benefiting considerably from illegal migration, while "receiving" states are just suffering from the burdens of illegal migration instead (see: undermined "rule of law"; costs of policing, diplomatic conflicts, costs of social inclusion of new communities etc.).

## IV. The Employers' Liability

### *IV. 1. Reflecting on the employers' liability in general*

The ILO has identified that employers confront numerous policy and practical challenges in employment of foreign workers, including: "identifying, recruiting and ensuring entry of foreign workers through regular channels; complying with complex and lengthy administrative procedures; addressing document control; facing risks of sanctions for employing migrant workers without authorization; managing relations in multi-ethnic workplaces; and assuring proper training and workplace protection in multilingual contexts."[87] It is not astonishing at

83 See: Paul Schoukens (2004) p. 3.

84 Matthew J. Gibney p. 23.

85 This idea is also confirmed by Art. 35 and 79 of the previously described ICMRW ("guarantees of sovereignty").

86 E.g.: the legal personality of multinational corporations.

87 Resolution concerning a fair deal for migrant workers in a global economy, adopted by the International Labour Conference in 2004 (92nd session). Para 14.

all that cost-conscious employers would like to escape these burdens through the undeclared employment of illegal migrant workers.

However, there is an emerging consensus in Europe that it is necessary to promote the basic social rights of illegal migrants, and among these rights, the right to fair working conditions is one of the most important ones. According to Michele LeVoy (Director of PICUM) fair working conditions are embodied by the right to receive a fair wage and compensation in the case of workplace accidents, the right to organize, and to right to have access to labour courts in the country of employment.[88] These four aspects of basic social protection are the ones, where the need for the employers' responsibility is the most evident. Moreover, in practice it is quite useful not to keep separate immigration and labour standards enforcement (because most illegal migrants are working).

One can ask why it is the employers' responsibility at all to take care about the basic social protection of their illegally employed migrant workforce, in spite of their basically illegal status. Although it is not easy to answer this question from a formal legal point of view, it is quite easy to answer it from economic and moral perspectives. The abundant supply of relatively low-cost, flexible, hardworking illegal migrants has made possible a degree of unfair competitive advantage for some employers in some sectors.[89] It seems to be reasonable to advocate for such a policy-change, where these employers should defray the social costs of their unfair profit. It is also a cliché that "illegal migration is a reflection of the needs of the market place".[90] Indeed, European employers' demand for illegal migrant workers is constant and structural, and it seems to be hypocritical that they do not want to pay the real "price" of this workforce. Taran and Geronimi note that this situation creates a so-called "*de facto employment policy*".[91] This means that despite all the repressive official political rhetoric about illegal migration, in reality, the practices of many states tolerate irregular migration in order to satisfy the desire of employers in some specific sectors for cheap, flexible, unprotected, informal, exploitable and seasonal labour force. (Other authors also confirm the assumption that although the threat of sentence generally exits in the context of illegal employment, the policing is not that thoroughly imposed in practice.[92] Straubhaar and Boswell label this phenomenon as the "gap hypothesis",[93] according to which governments have an interest in maintaining the gap between stated migration policy goals and their effective implementation in practice. More practically: the risk of being detected for abusive employers by the competent authorities is very low.)

From a moral/ethical (and human rights-based) standpoint, one can also argue that there is no such thing as an "illegal" human being ("*no human being is illegal*").[94] The term "illegal" migrant is a kind of oxymoron, being in fundamental contradiction with the spirit of all international human rights instruments.[95] Therefore it is evident that illegal migrant workers are also entitled to fair treatment from their employer. According to experts, when tackling the issue of illegal migration, greater attention should be paid to factors which cause illegal migra-

88 PICUM (2006): Protecting Undocumented Workers in Europe: Successes and Strategies, Conference Report p. 1.

89 Illegal migrants are mostly present in economic sectors which are labour intensive and imply low profits (sharp competition) such as construction, agriculture, retail trade, catering, domestic services etc.

90 Jonathan Power (1979) p. 246.

91 Patrick A. Taran – Eduardo Geronimi (2003) p. 6.

92 Marc Chesney – Bharat R. Hazari (2003) p. 260.

93 Christina Boswell – Thomas Straubhaar p. 1.

94 PICUM (2007) p. 4. (Based on the declaration of the NGO Solidar).

95 Patrick A. Taran – Eduardo Geronimi (2003) p. 10.

tion (instead of just punishing the phenomenon by repressive measures). In this context, we should remind ourselves that employers certainly have a huge role to play in creating the demand for illegal labour supply. Thus, it is rational to concentrate increasingly on the employers' liability when thinking about the fight against illegal migration.

Notwithstanding, when approaching the issue of employers' liability for the social protection of their illegal labour force, one will face a basic antagonistic *conflict of interests*. Both in theory and in practice, the very nature of undeclared employment of illegal migrants is incompatible with the notion of social responsibility. Rather, for employers, one of the most important motives of the phenomenon of illegal employment is to get rid of the costly burden of social protection and social responsibility. Indeed, "normal" (regular, usual) mechanisms of social protection are not functioning at all in these irregular situations. Therefore it is tempting to say that the social responsibility of employers is only enforceable through "hard" measures (i.e.: sanctions, deterrents) in the case of undeclared employment of illegal migrants. That is why the liability- and sanction-based approach is quite popular in current policies of European states. However, given the undeclared and illegal nature of such situations, it is quite difficult to implement effectively these employer sanctions. Thus, while the idea of the current "fashion" of employer sanctions is fully understandable, their factual effectiveness is largely debatable. Indeed, this whole issue is like a "vicious circle". One can argue that such a sanction-oriented approach should be complemented with a more "positive", broad awareness-raising and incentive-oriented approach based on the above described human rights paradigm.

Philip Martin and Mark Miller[96] have defined *employer sanctions*, the most common forms of employers' liability for the employment of their illegal labour force, as follows: "Employer sanctions are fines and other penalties imposed on employers who knowingly recruit, hire or retain unauthorized workers." They have also reported that such direct sanctions are a rather recent addition to labour and immigration laws in industrial democracies, existing only since the mid-1970s in western Europe (e.g.: since 1972 in France and Germany, but only since 1990s in the UK). According to Martin and Miller employer sanctions laws have two major purposes:

- to reinforce border and other migration control measures so as to discourage the entry and employment of unauthorized workers (this is the so called "deterrence" or "de-magnetizing" effect of employer sanctions); and
- to protect the labour market from unfair competition, so that for example some employers do not gain unfair advantages over others and unauthorized workers are not exploited.

Employer sanctions also have the advantage that they are explicitly recognizing the role employers play in fuelling irregular migration. Martin and Miller have also added that in most European countries, employer sanctions are enforced by labour department inspectors as a part of a general campaign against "illegal work" (while in the US, such sanctions are implemented by immigration inspectors). As a partial conclusion, they have stated (based on an OECD study) that such sanctions "appear to be of very limited effectiveness". All in all, these sanctions are by all means necessary but not sufficient in themselves. (This conclusion is also confirmed by the historical fact that these sanctions seem to be even less effective in the 90s than they were when first introduced in the 70s.)[97] Many human rights organizations and

96 The subsequent part draws heavily on this source: Philip Martin – Mark Miller (2000) p. 1–5.

97 The decreasing effectiveness could be explained by the following facts: the spread of false documents; the rise of subcontractors and other middlemen in more flexible labour markets; inadequate labour and immigration law strategies and enforcement budgets and insufficient cooperation between agencies; and a job-creation boom in western countries.

NGOs urges governments to invest more in measures penalizing employers who exploit workers, and especially irregular migrant workers.[98]

One specific detrimental and unintended side-effect of employer sanctions' is reported by Taran and Geronimi. They pointed out the following phenomenon in the US: Legal sanctions against employers who hired foreign workers illegally were found to have resulted in widespread discrimination in hiring against citizen and authorized resident blacks, Hispanics, Asians, and other non-white workers. Employers complained about difficulties in verifying work-authorizing documentation presented by applicants as reason for excluding some or all minority candidates from consideration.[99] In other words: we can dare to generalize and simplify this concern: firm employer sanctions could easily lead to increasing risk of discrimination against "suspicious" applicants. Owing to the fear from sanctions, employers could be generally deterred from employing foreigners. From another aspect, employer sanctions are also often criticized for "privatizing" immigration control.[100]

According to economic arguments, one can also claim that employer sanctions are not effective. In this sense, the best responses to the phenomenon of illegal labour migration are not sanctioning and policing, because the enforcement of such measures are very costly. Instead, on a pure economic grounds, it is reasonable to continuously flexibilise labour markets, so as to employers will have no incentives to cut costs through hiring irregular labour migrants. According to this reasoning, rigid labour markets increase incentives to employ illegal migrants, thus it is reasonable to flexibilise.[101] Of course, from a social-policy-based viewpoint, this pure economic approach is roughly one-dimensional. Even so it is certainly true that there is a link between the expansion of employment of illegal migrants and the emerging flexibility of labour markets. But from a social-policy-based viewpoint it is more reasonable to defend the conviction that improving the conditions for illegal migrant workers might serve to improve conditions for all workers.

Another argument against employer sanction is that it is quite easy to circumvent them through complex subcontracting arrangements. Moreover, employer sanctions are often insufficient to be a real disincentive, rather they are increasing bureaucratic burdens both on employers and on authorities. Of course, given the extreme complexity of the phenomenon of illegal migration, no policy by itself will be able to tackle the issue, and it is also true for employer sanctions. However, employer sanctions are by all means necessary.

A more specific and technical (however very important) aspect of employers' liability, namely the regulation of recruitment agencies (e.g.: private employment agencies, temporary work agencies, other labour providers) in countries of origin (and sometimes in countries of destination as well), will not be dealt with in details in this paper. (Such regulation measures are for example: monitoring mechanisms, pre-licensing checks, inspections etc.)[102]

98 See for example: PICUM (2005) p. 105.

99 Patrick A. Taran – Eduardo Geronimi (2003) p. 9.

100 Nilim Baruah – Ryszard Cholewinski eds. (2006) p. 168.

101 See: Christina Boswell – Thomas Straubhaar p. 1.

102 For a detailed discussion on this topic, see: Nilim Baruah – Ryszard Cholewinski eds. (2006) p. 166–169. According to this source, Ireland is an extremely interesting example of how a government adopted legislation (in 2006) on the operation of private employment agencies (PEAs) according to the changing nature of the labour market.

## *IV. 2. Various possible channels of the employers' liability*

### *IV. 2. 1. The liability of employers towards the employees themselves*

Besides the widespread substandard nature of working conditions, a very typical abusive practice of employers concerns the inability of illegal migrant workers to claim their rights arising out of past employment, such as payment of past wages, compensation in the case of workplace accidents etc. In principle, contractual rights resulting from a factual employment relationship are in force, even if the worker is undocumented. As we have seen before, in principle, ILO C143 also provides for equal treatment between irregular migrants and regular migrants in this area (Art. 9.), but effective implementation of this right against abusive employers is much more difficult. Nevertheless, theoretically, there are some possible procedural ways for illegally hired migrant employees to defend their rights.

In some countries, illegal labour migrants are entitled to file a claim to a labour (or civil) court against their employers (judicial enforcement). In many countries, labour courts/tribunals are more concerned about the investigation of fair labour conditions in general, than about the determination of the legal status of the worker. The typical objective of irregular migrant workers is to practise their right to reclaim before judicial authority any non-respect in previous employment of remuneration or social security. Illegal labour migrants – at least in principle – can start a legal case against their employers in the following countries for instance: Italy, Belgium, UK, France, Germany, Greece, Portugal. However, many practical obstacles (e.g.: risk of being fired, fear from expulsion, high legal fees, lack of legal knowledge and language skills, the difficulty to prove the employment relationship) deter illegal migrants from utilising judicial procedures. Legal assistance from trade unions, NGOs and human rights organisations is more than necessary in these procedures.

Besides the choice of going to a court, in some countries, collective labour rights of illegal labour migrants are also protected in line with international standards. This means that illegal labour migrants are free to form trade unions, or they can be a member of a trade union on an equal footing with domestic workers (for instance, this is the case in the UK, Belgium, Italy, Denmark, France, Portugal; however in Spain, for instance, undocumented migrants do not have the formal right to organize).[103] Unionisation is an important way to guarantee fair working conditions and to bargain with employers. In this sense, trade unions can be effective tools in enhancing employers' liability. However, many trade unions still rather consider irregular migrants to be a danger to the interests of national workers (e. g.: in Austria, the ÖGB is not supportive of undocumented migrants; unions in Nordic countries typically do not take up illegal migrants; the Belgian socialist trade union, the ABVV is clearly against illegal economic immigration as the solution for the needs of the labour market). Moreover, trade union membership fees often mean great barriers for undocumented migrants. Even for "open" trade unions it is not easy to organize illegal migrant workers, who often work in domestic services,

103 As regards Spain, see: PICUM http://www.picum.org/ (Basic social rights – Spain – Right to organize). According to Article 7 of Law 8/2000, the right to demonstrate, to public meeting and to associate are subject to the foreigner being a resident or being authorized to stay in the country. The same Act links the right to become a member of a trade union to a migrant's legal status. This also counts for the right to strike. According to PICUM, this violates Article 28 of the Spanish constitution, and ILO agreements. However, trade unions stated that they consider the law unconstitutional, and that they would continue to allow undocumented migrants to join. Indeed, many trade unions do so in Spain (e. g.: the SOC – Sindicato de Oberos del Campo; the CCOO – Comisiones Obreras etc.).

in SMEs or in complex subcontracting networks. Not to say, employers also try to hinder employees from unionisation. A notable positive example for unionisation was the so-called SHIP in the Netherlands. SHIP was created in 2002 and it was the "Illegal Workers' Union". Although it was dissolved in 2003, the phenomenon raised great public awareness about the exploitation of illegal migrants in the Netherlands.[104] In the Netherlands, undocumented migrants now have their own section (AbvaKabo) within the FNV trade union. A similar positive example from the UK is "Kalayaan", a quite successful association organizing foreign workers. According to PICUM, the first migrants' strike ever, was held in Vicenza, Italy, 2002.[105]

In some countries, alternative ways of rights-enforcement strategies are present, for example mediation and collective actions involving both unions and employers. Mediation, for instance, make irregular migrants less fearful about their possibility of defending their rights.[106] According to the ETUC, SOLIDAR and PICUM, besides traditional ways of enforcing rights (such as through courts), "complaint procedures should be established that provide for the establishment of an independent body, such as an Ombudsman, where migrant workers can report exploitative working and living conditions in a confidential manner. This is the only way to ensure that such situations are revealed and exposed."[107]

The procedural enforcement of rights (against employers, for instance) of irregular migrants could be hindered significantly by the existence of the general legal duty on public authorities and courts to denounce irregular migrants. Such duty is probably the most concrete in Germany (Article 76 of the Aliens Law, AusIG), but it also exits in other countries to some extent (for e. g.: In Spain, such a formal duty does not exist, although, as from 2003, public authorities are obliged "to collaborate" by providing the Ministry of Interior with information about immigrants who are registered in several services provided by such authorities.; In the UK, there is also no duty to denounce, but legislation permits the exchange of information among different authorities).[108] There is no such duty for example in the Netherlands and France. As a conclusion we can state that even if there is no formal duty to denounce in a particular country, by seeking access to justice the irregular migrant steps in contact with public authorities, which, in general, might be a reason for fear from reporting, sanctions and expulsion. In addition, many other difficulties are inherent in the situation of being a foreigner (e. g.: language barriers, inefficient knowledge of existing procedures etc.).

### *IV. 2. 2. The liability of employers towards labour inspectorates*

It is obvious that there may be no natural incentives for employers of illegal labour migrants for self-policing and self-enforcement of labour standards and social responsibility. That is why administrative, policing enforcement of such standards is essential. In most of the Euro-

104 Reported by: Luca Bicocchi (2007) p. 8.

105 PICUM (2006) p. 19.

106 There are numerous explanations why mediation can be valuable alternative to bringing disputes to courts. A judicial procedure is often more time-consuming and costly. Many undocumented workers are intimidated by making a claim through an official body owing to the general fear from deportation. This situation can be avoided by mediating with the employer. In mediation, the "weight" of an organization can have a positive impact on employers who prefer to avoid various official administrative procedures. Some organizations threaten to denounce the employer for illegal employment, a strategy which in many cases encourages the employer to the negotiation table. Collective actions such as public protests, demonstrations, strikes, and campaigns can be necessary and helpful in situations where mediation does not work. For more details, see: PICUM (2005) p. 68–73.

107 ETUC – PICUM – SOLIDAR (2007) p. 3.

108 See in details: Ryszard Cholewinski (2003) p. 12.

pean countries, labour inspectorates are entrusted with the specific task of enforcing regular employment standards and of sanctioning (fining) abusive employers. In many countries, labour inspection is also aimed at curbing the illegal employment of foreign workers. In many countries, undocumented workers can also directly contact such agencies in solving a workplace abuse.

The main "universal" problem with labour inspectorates is that the routine inspections do not constitute a reliable overview of all employers but – owing to under-funding and unsatisfactory (and low) staffing levels – concentrate only on "suspicious" sectors and employers. Further on, the scope of labour inspection usually does not cover individual households, domestic services for instance (where many illegal labour migrants are likely to work).[109] The absence of effective worksite inspection is also striking in such marginal sectors as agriculture or sex-work (in which sectors forced labour is common among illegal migrants). The "de-linking" of immigration status with workplace inspection would be also necessary to ensure that undocumented workers can safely file a complaint against an unscrupulous employer without being threatened with expulsion. In other words: inspections should be focused on working conditions (i. e: basic labour rights) and not on migration status. It is also problematic that labour inspectorates often collaborate with the police and they denounce irregular migrants.

### *IV. 2. 3. The liability of employers towards social security administrations*

As regards social security (and more specifically, contribution-based social insurance schemes),[110] there are two basic possibilities in case of the undeclared employment of illegal migrants:

- Firstly: the employer has paid the social security contributions during the employment relationship (i. e.: the employment relationship was "illegal" not because of the non-payment of indirect labour costs, but for other reasons, such as the absence of work permit or labour contract etc.). Of course this situation is rather atypical in the underground shadow economy, and it is quite unrealistic to imagine an illegal employment relationship which is indeed declared and registered to the social security administration. However, in many countries it is a theoretical legal reality, because any factual employment relationship may substantiate a socially insured status.[111]
- Secondly (and of course, more typically): the employment relationship has been fully illegal and undeclared, and the employer has not fulfilled the obligation to pay social security contributions.

In the first case, ILO C143 for example (see: III. Chapter) provides for equal treatment between irregular migrants and regular migrants with regard to the rights arising out of past employment. From a general legal reasoning as well, a strong argument can be put forward that in the event of contribution payment the worker concerned should be entitled to benefits from those

109 In such services as child care, long-term care for elderly, cleaning etc.

110 Here, I only concentrate on contributory social security benefits, because these are the ones, where the employers could have some kind of responsibility to social security organisation (i.e.: contribution-payment, retrospective reimbursement of the cost of out-paid social security benefits etc.). Thus, universal and social assistance benefits are excluded from the scope of this paper, because the employers have no direct responsibility in relation to them.

111 For example, in the Netherlands, before the Linking Act (1998) it was possible for undocumented migrant workers to obtain a social security number (SOFI number) and „build up" their formal social security rights. Until the Linking Act, employers also paid taxes and contributions for undocumented workers (at least in principle).

payments or at least to the repayment of those sums contributed. Nevertheless, in the absence of multilateral or bilateral coordination-style agreements (which, in any event, are normally only applicable to regular migrant workers), in practice it is not viable to recover contributions that have been paid. However, according to Baruah and Cholewinski, where social security contributions have been made by the employer, their reimbursement in these circumstances would give irregular migrants a financial incentive to leave the territory voluntarily.[112]

In the second case, even if it is not that "humanistic", the legal situation is much more clear: without contribution payment there is basically no right for contributory social security benefits. Notwithstanding, in this case one can theoretically argue for example for the sanctioning of employers or for the retrospective enforcement of non-paid contributions. However, these measures could only be applied by social security administrations upon the detection of abusive employers, which is quite rare in practice. Once again, this kind of inspection by social security administrations is very costly and difficult, and it would also duplicate the states' burden as regards inspection (see: the parallel inspection duties of labour inspectorates). Furthermore, the complex sanction of the occasional retrospective enforcement of non-paid contribution would have only a limited practical effect, because it would not help much to the illegal migrant (who maybe even left the country in the meantime and can not benefit from the retrospectively enforced contributions). Schoukens describes that in many states, at the occasion of inspection or an accident, "besides being sanctioned, the employer will have to pay the contributions due for the period he employed the (illegal migrant) worker". He explains that in many countries, only performing work (even in an illegal way) is the essential pre-condition to become socially insured.[113] In many countries, illegal employment can be also seen as insurance fraud (because in principle, employers are generally obliged to insure their employees).[114] Consequently, if the employer can be found, a regress can be considered.

The Parliamentary Assembly of the CoE has articulated an important and innovative principle: "Social protection through social security should not be denied [from irregular migrants] where it is necessary to alleviate poverty and preserve human dignity."[115] Although this guideline has no strict legal basis, its moral weight calls for serious consideration. In line with this reasoning, and in my view, even if the employer has not paid social security contributions, those contributory benefits which are really essential to alleviate poverty and preserve human dignity are due to irregular migrants as well. As a continuation of this line of reasoning, I would add that theoretically it seems to be very justified to shift the responsibility of such out-paid benefits (at least retrospectively) onto the abusive employers of the concerned irregular migrants. For example, in theory, I think it is morally reasonable to always provide for the medical treatment and compensation of irregular migrants in case of a work accident or occupational illness. However, the full costs of the treatment and compensation should be covered by employers (even if they have not paid contribution in advance) as a sanction, not by the state concerned (or by its social security funds). Given that most irregular migrants work in hazardous jobs (especially owing to the demands of employers), right for accident compensation is vital for them.

In spite of all the above described legal ambiguities, in reality, some states make available some kind of benefits to irregular migrant workers – most commonly: compensation benefits. Cholewinski points out for example that, "it was contended that if accident compensation

112 Nilim Baruah – Ryszard Cholewinski eds. (2006) p. 169.

113 Schoukens, Paul (2004) p. 12.

114 This is the case in Austria, for instance. National Contact Point Austria Within the European Migration Network (2005) p. 27.

115 CoE Parliamentary Assembly (2006) Para. 67.

benefits are payable to persons working in the "black" or "underground economy", in principle such benefits should also be available to irregular migrants."[116] In this context, it is quite interesting and astonishing to remind ourselves that the EU categorically stated still in 1998 that "of course, nowhere are undeclared workers covered by unemployment insurance or insurance against professional accidents"[117] (of course, in our context, only accident compensation benefits are relevant, not unemployment benefits).[118] The world has changed so much since then, and this is also confirmed by the CoE in 2006: "With regard to the specific category of irregular migrants in work, they should receive equal protection to that of nationals, including in respect of compensation for work accidents."[119] It is far easier to implement this idea in countries where such benefits are non-contributory in nature (e.g.: universal ones). However, in those countries where such benefits are contributory ones, and the respective employer has not contributed, it is more difficult to implement this principle in practice. In these cases, the retroactive sanctioning of employers seems to be reasonable.

Italy is a notable example, because according to the 1942 Italian Civil Code undocumented workers can have access to social security in case of illness and accidents.[120] From many other European counties, successful judicial procedures were reported in which undocumented workers obtained accident compensation from social security and/or from employers. Among others, such cases are reported from the following countries: France, Portugal, Spain, Belgium, Germany etc. Most of these cases were supported by local NGOs or human rights organisations (individual workers rarely have enough motivation and knowledge to bring such cases to courts).

### *IV. 2. 4. Other forms of the "liability" of employers*

Sometimes other state agencies/authorities are also entrusted to enforce some kind of responsibility on employers concerning their (illegal) migrant labour force. These authorities could be for example labour centres, tax authorities, immigration offices, customs offices, criminal courts etc. On top of that, effective enforcement of the employers' liability often requires good coordination among agencies with different missions, legal traditions and expertise, such as immigration, labour, and tax agencies. It is also important to note that Taran and Geronimi reveal some new tendencies in this respect: "In a considerable number of countries, migration management responsibilities have been shifted from labour ministries to interior or home affairs ministries, thus transforming contexts for policy elaboration and implementation from that of labour market regulation to that of policing and national security." However, Taran and Geronimi argues that labour/employment authorities must retain a central role in administration of migration policies, since the vast majority of migration is about work, and labour migration inevitably has direct implications on labour market regulation.[121]

As regards the role of labour centres for instance, sometimes employers in the Member States are responsible for applying for work permits on behalf of the migrant workers, and must be able to demonstrate that the worker will provide skills which are not available on the

116 Ryszard Cholewinski (2003) p. 11.
117 European Commission (1998): Communication of the Commission on Undeclared Work, Brussels, COM (98) – 219. p. 9.
118 Unemployment benefits are strictly restricted in scope to legal residents/legal workers nearly in every countries.
119 CoE Parliamentary Assembly (2006) Para. 69.
120 Reported by: PICUM (2006) p. 15.
121 See in details: Patrick A. Taran – Eduardo Geronimi (2003) p. 19.

domestic labour market.[122,123] Some Member States (e. g. France, Germany etc.) have also taken measures in order to oblige employers to verify the immigration status of third country nationals before hiring, through checks with the authorities responsible for issuing residence and/or work permits. These administrative burdens and liabilities on employers serve as preventive measures ("pre-checks") in terms of illegal employment of foreigners.

From time to time, Member States establish programmes to "regularise" illegal migrants. These regularisation campaigns are carried out in more or less frequent intervals.[124] The main pragmatic goal of such regularisations is the formal social inclusion of "illegals". They also serve to handle illegal employment by "pushing" illegal workers into the regular (documented) world of work in order to enable them to contribute to the welfare state. Owing to regularisations, the governmental revenues will increase through social security contributions and taxation. In this sense, from the viewpoint of employers, regularisation can be manifested as an indirect form of "sanction", because from the date of regularisation, employers will be obliged to "legalize" their previously undocumented workforce. (For the clear picture, it should be mentioned that on the other hand, it is also widely reported that regularisation can also facilitate further illegal migration and undocumented work.) In academic literature one can find an innovative theoretical suggestion with regard to post-regularisation. According to Power, "employers who employ the new legalized immigrant workers should be liable for a special tax." Most importantly, such a tax would help counter the depressing effect on wages of native workers. "It could be raised in years of high domestic unemployment as an incentive to employers to give priority to native workers." [125] Although the idea of such a tax might be quite impressive, the reality of it is largely debatable (especially in current times of globalization and the so-called "race to the bottom", where it is quite unrealistic for nation states to impose additional burdens on domestic employers). Another interesting idea from academia is that general regularisation campaigns do not seem to be the best means to reduce illegal migration. That is why there is a need for some innovative, much more individualized and pragmatic mechanisms to permit the granting of legal status on general humanitarian grounds, on a case by case basis[126] (for instance, in Belgium, trafficked persons can apply for a residence permit on humanitarian grounds;[127] in Germany, granting residency rights is possible for humanitarian reasons or in cases of hardship).[128]

---

122 Commission of the European Communities (2004): Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Study on the links between legal and illegal migration. Brussels, 4. 6. 2004. COM(2004) 412 final. p. 4.

123 It is an interesting example, how Italy regulates the employers' responsibility when hiring an employee, who is a national of a non-EU state or is stateless. The employer and the foreign employee should make a "residence contract for subordinate work". In order to be valid, this "residence contract for subordinate work" between an Italian employer and the foreign worker must contain among others the followings:
• the employer's guarantee of the availability of housing for the worker, which must fall within the minimum parameters set by law for public residential housing;
• the employer's obligation to pay for the worker's return trip home.
These specific responsibilities on Italian employers make illegal labour migrants even more desirable. European Migration Network – Italien National Contact Point (2005) p. 7.

124 For example in Italy (1986, 1990, 1997, 1998/99, 2002, 2006 etc.); in Greece (1998, 2001); in Belgium (1974, 1999/2000) or in Spain (for e. g.: in 2000/01). On the other hand, no legalisation campaigns are carried out in Germany, for example.

125 Jonathan Power (1979) p. 247.

126 Matthew J. Gibney p. 25.

127 Reported by: European Migration Network (2007) p. 20.

128 § 25. para. 4. AufenthG; § 23a AufenthG.

State agencies can impose various administrative fines on employers for hiring illegal migrants. Although the burden of implementation of such fines typically rests on labour inspectorates[129] (or social security administration), it is also possible to entrust other authorities (e.g.: tax authorities) by their implementation.[130] For example in Germany, anyone who recruits, employs or rents to illegal workers can be fined (or can be jailed in exceptional cases) already since the 70s.[131] In the last couple of years, many MSs (e.g.: France, UK, Germany, the Netherlands)[132] introduced new penalties for employers, ranging from exclusion from public procurement contracts, to limitations on future recruitment (black lists), to criminal sanctions, and to the obligation to bear return costs.[133] Based on a questionnaire sent out to OECD member countries, a report prepared by the OECD secretariat, analysing measures undertaken to prevent and combat illegal employment of foreigners, says that most of the OECD countries consider the employer to be the leading party in illegal employment. Most states have set up enforcement mechanisms against illegal employment of foreigners, concentrating on traffickers, middlemen and employers. In the Netherlands, for example, in case of subsequent offences the judge is recommended to order a month's imprisonment and closure of the firm. In France, any person who hires someone without due authorization to work faces a penalty of up to three years imprisonment and/or considerable fine for each illegal worker. The OECD also highlights that potential sanctions are quite high, but the probability of detection is still very low.[134] Later on we will see how the EU would like to harmonise these sanctions.

It is also possible to use preventive measures in the fight against illegal employment: for example information drives aimed at employers, financial incentives to employ documented workers etc.

### *IV. 2. 5. The public social responsibility of employers ("civil/non-governmental regulation")*

According to some experts,[135] the key to the success of employer sanctions is the widespread public support – the general public perception that illegal immigration and employment are obviously wrong and detrimental (owing to the previously already described factors, see: Chapter II.). A self-conscious civil society and a "sensitized" public opinion might create such a general moral framework-attitude which could be able to deter employers from hiring illegal migrants abusively. For the realisation of minimum rights of irregular migrants, the general

129 This is the case in Hungary or in the Netherlands for example.

130 For example in Austria, before July 2002, regional branches of the Central Labour Inspectorate, which was part of the Federal Ministry of Labour, investigated the illegal employment of foreigners. Since then, this task has been shifted to the Central Taskforce for the Prevention of Illegal Employment (KIAB) at the Federal Ministry of Finance. Further, the branches of the Austrian Public Employment Service and the customs authorities have to report any well-founded suspicions on the trespassing of employment and other law encountered within their business operating area. National Contact Point Austria Within the European Migration Network (2005) p. 99.

131 Jonathan Power (1979) p. 245.

132 In the Netherlands, since 1 January 2005, the Employment of Aliens Act has included the possibility of an administrative penalty. The Labour Inspectorate is now able to impose a fine upon anyone providing employment to aliens who are not in possession of the required work permit. The relevant fine may be as high as € Euro 8,000 per illegal employee. European Migration Network (2005) p. 39.

133 Commission Of The European Communities (2006): Communication from the Commission on Policy priorities in the fight against illegal immigration of third-country nationals, Brussels, 19.7.2006. COM(2006) 402 final. 38.

134 Horst Entorf (2002) p. 32.

135 See for example: Philip Martin – Mark Miller (2000) p. 3.

knowledge (a so-called "social legitimacy") of such rights is also crucial. Therefore, instead of stereotyping, public awareness-raising is needed about illegal migrants' rights and the employers' social responsibilities when hiring them. In general, it is important to increase the visibility of illegal migrants in society. It is also important to inform undocumented workers about their rights. Indeed, there have been many initiatives by various civil society organizations to empower undocumented workers by informing them of their rights and by building capacity for them. States should be required to generally facilitate a socially responsible business climate through persuasion measures, incentives etc. A socially sensitized preventive culture towards illegal labour migration would certainly contribute to the handling of this overall phenomenon.

### *IV. 3. Employers' liability in the EU's immigration policy*

Some sources point to the fact that the EC issued a draft directive already in 1976 that encouraged the adoption of employer sanction in context of illegal employment of migrants.[136] Although that early proposal was abandoned,[137] many recent Commission documents argued that sanctions against illegal employment should be harmonised in order to eliminate "competitive advantages", which is an essential principle of Community Law.[138] More precisely, in its Communication from 2006 the Commission has pledged that it "will start discussions with Member States and relevant stakeholders, in particular employers´ organisations and trade unions, on employers' liability in respect of employment by enterprises of illegally staying third country nationals. At the end of this process, the Commission will evaluate whether additional measures at EU level designed to harmonise sanctions targeting enterprises employing illegally staying third-country nationals are needed."[139]

Finally, The EU has recently announced (in May 2007) that it plans to impose serious fines and possibly jail sentences for those caught employing illegal migrants (however, the criminal sanctions[140] are not in the "heart" of the proposal for a new Directive, which rather intends to be a preventive measure). The proposal is part of a comprehensive European Migration policy which supports legal migration, fights against illegal migration, builds cooperation with third countries and works with the development agenda.[141] According to the proposal for a new Directive,[142] employers will face financial penalties, such as refunding the social welfare system for lost revenue or be obliged to pay the illegal migrants the outstanding salary he would normally earn. In case of expulsion, the employer could be called on to pay the costs of sending the person home. If appropriate, other administrative measures can also be imposed

136 For example, reported by: Philip Martin – Mark Miller (2000) p. 4.

137 Mainly because of British objections.

138 Michael Samers (2004) p. 36.

139 Commission of the European Communities (2006): Communication from the Commission on Policy priorities in the fight against illegal immigration of third-country nationals, Brussels, 19.7.2006. COM(2006) 402 final. 39.

140 The Commission would propose criminal penalties only as an "ultima ratio", only in extremely serious cases such as repeated infringements, illegal employment of at least four third-country nationals, particularly exploitative working conditions, and where the employer knows that the worker is a victim of human trafficking.

141 Towards a comprehensive European Migration Policy: Cracking down on employment of illegal immigrants and fostering circular migration and mobility partnerships, IP/07/678 Brussels, 16, May 2007.

142 See for more details: Sanctions against employers of illegally staying third-country nationals, MEMO/07/196 Brussels, 16 May 2007.

on fraudulent employers (e. g.: loss of subsidies or EU funding; disqualification from public contracts for a defined period). The proposal would also deal with the increasingly important issue of subcontracting: in certain affected sectors such as construction, all the undertakings in a chain of subcontracting would be held jointly and severally liable to pay financial sanctions against a subcontractor at the end of the chain who employs illegally staying third-country nationals.

As I have already mentioned, the proposal tries to act in a preventive way, thus it would oblige employers to regularly verify residence and work permits of those who come from third countries, and update the respective authorities on all details (employers who can demonstrate that they had fulfilled these "pre-recruitment" checks would be exempted from sanctions). The proposed sanctions explicitly target employers, not workers.

As regards enforcement, the proposal would require the establishment of effective complaint mechanisms and it would require Member States to conduct a minimum number of inspections of companies established in each Member State.[143] The proposal contains a specific approach with regard to "posting":[144] companies that post employees who are third-country nationals to another Member State in the context of the provision of services will be subject to control by the Member State in which the company is established and not the Member State in which the services are provided.

The Commission explained this proposal by concluding that employment in the shadow-economy is one of the main reasons for illegal immigration and it is for this reason that the EU must act together. The proposal also builds heavily on existing measures in the Member States, but it intends to introduce similar penalties in all Member States and to enforce them effectively on employers. (By the way, at least 26 of the 27 EU Member States already have some kind of employer sanctions and preventive measures in place, and the legislation of 19 Member States provides for criminal sanctions as well.) Ensuring that all Member States introduce analogous sanctions, and enforce them effectively, will avoid distortions on the single internal market caused by unfair competition from employers of illegal migrants.

ETUC, SOLIDAR and PICUM recently issued a joint opinion on the above described EU-proposal.[145] Their comments are rather supportive, but they are also criticising some elements of the proposal and they are also presenting some innovative reforms. Let's see some interesting examples:

- they would prefer to use the term "irregular" instead of "illegal";
- they are calling for more effective regulations of subcontracting networks by means of client liability or joint and multiple liability mechanisms;
- they are advocating for innovative regulations that would allow public authorities to take away presumed profit of abusive employers;
- they are promoting new methods of self-regulation that may contribute to the reduction of

143 Currently checks on staff records in Europe's firms are rare (just over 2% were checked in 2006). The proposal requires MSs to inspect at least 10% of their companies every year. In: Towards a comprehensive European Migration Policy: Cracking down on employment of illegal immigrants and fostering circular migration and mobility partnerships, IP/07/678 Brussels, 16, May 2007.

144 Posting of workers is a system in which employers can send out employees to another country to temporarily carry out work on behalf of a local firm. What is the most important, the posted workers remain subject to the social security and tax systems of their home country. This system allows employers to misuse "cheaper" workers from less developed countries. Upon inspections, the hub company frequently tries to shift responsibility onto the contracted company if certain matters are not in order.

145 ETUC – PICUM – SOLIDAR (2007).

recourse to irregular employment practices (e.g.: such CSR[146]-initiatives as certification schemes, social labelling, trade marks etc.);
- they are arguing for an EU "Sociopol" etc.

We can refer to another important EU-initiative in the respective field.[147] The recent Policy Plan on legal migration[148] announced a proposal for a general framework Directive for 2007 to guarantee a common framework of rights for all third-country nationals in legal employment. This piece of legislation will also include measures to combat illegal employment. These should comprise the establishment of a single work/residence permit that would contain biometric identifiers. According to the proposal, the financial responsibility of employers could be engaged, in line with the principle already established in the Directive on third- country national researchers (2005/71/EC).[149]

## V. Conclusion

The major conclusion of the paper can be summarized as follows: although the work of illegal migrants can be an illegal activity in itself, this does not allow employers to violate these working people's basic labour and social rights. In other words: the illegal status in itself should not offer a "green light" for exploitation and total denial of social protection. On the other hand, one of the main goals of social policy is to fight against social exclusion. Illegal labour migrants are frequently representing a so-called separate and marginalized (sometimes also "discriminated") underclass micro-society in European countries. This phenomenon is detrimental for the whole European Social Model. (On top of that, it is also a widely shared concept that the lack of protection of illegal migrants can lead to the lack of protection of all workers, undermining the general level of social protection by creating an arena of unfair competition). Thus, some kind of basic social protection is clearly well-founded for illegal labour migrants, and employers unquestionably should play a major role in this protection. That is to say, employers are the ones who benefit the most from illegal labour migration and they are also the ones who directly and primarily have "contacts" with these otherwise frequently "invisible" people.

146 Corporate Social Responsibility.

147 See: Commission Of The European Communities (2006): Communication from the Commission on Policy priorities in the fight against illegal immigration of third-country nationals, Brussels, 19.7.2006. COM(2006) 402 final. 41.

148 COM(2005) 669, 21.12. 2005

149 Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research. Article 5. (3) reads as follows: "Member States may require, in accordance with national legislation, a written undertaking of the research organisation that in cases where a researcher remains illegally in the territory of the Member State concerned, the said organisation is responsible for reimbursing the costs related to his/her stay and return incurred by public funds. The financial responsibility of the research organisation shall end at the latest six months after the termination of the hosting agreement." In this case, the research organisation is the employer.

## REFERENCES


Margo ALOFS (2003): Migration policy, irregular migration and social security, Preliminary Version www.enepri.org/PapersENEPRIfinalconference/paper4.pdf (last visited: 03. 06. 2007.).

Jörg ALT (2005): Life in the world of shadows: the problematic of illegal migration. Global Migration Perspectives No. 41., Global Commission on International Migration (GCIM), Switzerland.

Nilim BARUAH – Ryszard CHOLEWINSKI eds. (2006): HANDBOOK on Establishing Effective Labour Migration Policies in Countries of Origin and Destination, OCSE (Organization for Security and Co-operation in Europe) – IOM (International Organization for Migration) – ILO (International Labour Office) ISBN-978-92-9068-296-7.

Luca BICOCCHI (2007): Decent Work for Undocumented Migrants, A PICUM Policy Brief.

Christina BOSWELL – Thomas STRAUBHAAR: The Back Door: Temporary Migration and Illegal Employment of workers, HWWA (Hamburg Institute of International Economics).

Marc CHESNEY – Bharat R. HAZARI (2003): Illegal Migrants, Tourism and Welfare: A Trade Theoretic Approach, Pacific Economic Review, 8: 3 2003 pp. 259–268.

Ryszard CHOLEWINSKI (2003): Report of the Ad Hoc Working Group on Irregular Migrants, 17–18 December 2003, MG-AD 2003 (3) 12/03/2004, Council of Europe.

Ryszard CHOLEWINSKI (2005): Protecting Migrant Workers in a Globalized World, IOM.

Ryszard CHOLEWINSKI (2006): Identifying and Clarifying Concepts on "Irregular Migration"; 10th Regional Conference on Migration – Current Perspectives and Strategies in Addressing "Irregular" Migration, Singapore, 6–10 November 2006.

Commission of the European Communities (2004): Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Study on the links between legal and illegal migration. Bruddels, 4.6.2004. COM(2004) 412 final.

Commission of the European Communities (2005): Green Paper on an EU Approach to Managing Economic Migration, Brussels, 11. 1. 2005. COM (2004) 811 final.

Commission of the European Communities (2006): Communication from the Commission on Policy priorities in the fight against illegal immigration of third-country nationals, Brussels, 19.7.2006. COM(2006) 402 final.

Commission of the European Communities: Sanctions against employers of illegally staying third-country nationals, MEMO/07/196 Brussels, 16 May 2007.

Council of Europe Parliamentary Assembly (2006): Human rights of irregular migrants, Report, Committee on Migration, Refugees and Population, Rapporteur: Mr. Ed van Thijn, Netherlands, Socialist Group, Doc. 10924, 4 May 2006.

Catherine DAUVERGNE (2004): Sovereignity, Migration and the Rule of Law in Global Times, The Modern Law Review 2004 67(4) MLR 588-615.

Ulrike DAVY Hg. (2001): Die Integration von Einwanderern – Rechtliche Regelungen im europäischen Vergleich, Campus Verlag, Frankfurt/New York, Europäisches Zentrum Wien.

László DUX (2003): The UN Convention on Migrant Workers. Acta Universitatis Szegediensis, Acta Juridica et Politica Publicationes Doctorandum Tomus III. Fasciculus 4. Szeged, 2003 pp 61-78.

László DUX (2006): The Protection of Migrant Workers' Human Rights. Acta Universitatis Szegediensis, Acta Juridica et Politica. Tomus LXVIII. Fasc. 5. Szeged, 2006.

Horst ENTORF (2002): Rational Migration Policy Should Tolerate Non-zero Illegal Migration Flows: Lessons from Modelling the Market for Illegal Migration, International Migration Vol. 40 (1) 2002.

ETUC – PICUM – SOLIDAR (2007): Joint Comments of ETUC, PICUM and SOLIDAR on expected Commission Proposals to fight "illegal" employment and exploitative working conditions. Brussels, 26 April 2007.
European Commission (1998): Communication of the Commission on Undeclared Work, Brussels, COM (98) – 219.
European Economic and Social Committee (2004): Opinion of the EESC on the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Study on the links between legal and illegal migration. Brussels, 4.6.2004. COM(2004) 412 final.; SOC/182 Brussels, 15 December 2004.
European Migration Network (2005): Illegally Resident Third Country Nationals in EU Member States: state approaches towards them, their profile and social situation; Contribution by the Netherlands.
European Migration Network (2006): Annual Policy Report 2005; November 2006.
European Migration Network (2007): Illegally Resident Third Country Nationals in EU Member States: state approaches towards them, their profile and social situation; EMN Synthesis Report: Illegal Migration January 2007.
European Migration Network – BELGIAN CONTACT POINT (2005): Illegally Resident Third Country Nationals in Belgium: States: state approaches towards them, their profile and social situation.
EUROPEAN MIGRATION NETWORK – Italien National Contact Point (2005): Illegally Resident Third Country Nationals in Italy: States: state approaches towards them, their profile and social situation. Edited by IDOS – EMN National Contact Point in collaboration with the Caritas/Migrantes Dossier Statistico Immigrazione and with the support of the Ministry of Interior.
Peter FUTO – Michael JANDL – Liia KARSAKOVA (2005): A Survey of Illegal Migration and Human Smuggling in Central and Eastern Europe, in: Migracijske I Etničke Teme – Migration and Ethnic Studies, Vol. 21., No. 1-2., June 2005, pp. 35–54.
Matthew J. GIBNEY: Outside the Protection of the Law – The Situation of Irregular Migrants in Europe, A synthesis report commissioned by the Jesuit Refugee Service-Europe.
Tamás GYULAVÁRI – Éva GELLÉRNÉ LUKÁCS (2005): A legális és illegális bevándorlók jogai az Európai Unióban (Rights of legal and illegal immigrants in the European Union), Európai Tükör – Hungary X./4. pp. 47–76.
ILO (2006): ILO Multilateral Framework on Labour Migration, Non-binding principles and guidelines for a rights-based approach to labour migration, adopted by the Tripartite Meeting of Experts on the ILO Multilateral Framework on Labour Migration (Geneva, 31 October-2 November 2005) (http://www.ilo.org/public/english/protection/migrant/download/multilat_fwk_en.pdf), accessed on 05 June 2007.
IPPR (2006): Irregular migration in the UK – an ippr FactFile, Institute of Public Policy Research (IPPR), April 2006.
Michael JANDL (2004): The Estimation of Illegal Migration in Europe, Studi Emigrazione/Migration Studies Vol. XLI., No. 153, March 2004, pp. 141–155.
Judit JUHÁSZ (1999): Illegal labour migration and employment in Hungary; International Migration Papers, ILO 1999.
Judit JUHÁSZ (2006): Migráció és feketmunka Európában (Migration and "black-labour" in Europe), Munkaügyi Szemle 2006/12.
Philip MARTIN – Mark MILLER (2000): Employer sanctions: French, German and US experiences; International Migration Papers 36, ILO – Geneva, International Migration Branch.

National Contact Point Austria Within the European Migration Network (2005): Illegal Immigration in Austria – A survey of recent Austrian migration research; Austrian Contribution to the European Research Study Project II: "Illegally Resident Third Country Nationals in the EU Member States: State Approaches Towards Them and Their Profile and Social Situation" (Budget year 2004) Vienna, 2005.
OR. C. A.: Undocumented Workers. A Guide to Rights, Belgium (http://www.orcasite.be /ENG/Rechtengids_ENG.pdf accessed on 05 June 2007).
PICUM (2005): Ten Ways to Protect Undocumented Migrant Workers, By Michele LeVoy and Nele Verbuggen, Platform for International Cooperation on Undocumented Migrants.
PICUM (2006): Protecting Undocumented Workers in Europe: Successes and Strategies, Conference Report, March 23, 2006, Platform for International Cooperation on Undocumented Migrants.
PICUM (2007): Undocumented Migrants Have Rights – An Overview of the International Human Rights Framework, By Luca Bicocchi and Michele LeVoy. March 2007.
Jonathan POWER (1979): The Great Debate on Illegal Immigration – Europe and the USA Compared, Journal of International Affairs 3(2): 239–248.
Michael SAMERS (2004): An Emerging Geopolitics of "Illegal" Immigration in the European Union, European Journal of Migration and Law 6: 27-45., 2004.
Paul SCHOUKENS (2004): Exploratory report on the access to social protection for illegal labour migrants, International Social Security Association – European Regional Meeting: Migrants and Social Protection, Oslo, 21–23 April 2004, ISSA/EUR/OSLO/04.
Penelope SCOTT (2004): Undocumented Migrants In Germany And Britain: The Human "Rights" And "Wrongs" Regarding Access to Health Care, Electronic Journal of Sociology 2004 ISSN: 1198 3655. ICAAP.
Annette SINN – Axel KREIENBRINK – Hans von Loeffelholz DIETRICH (with the contribution of Michael WOLF): Illegally resident third-country nationals in Germany – Policy approaches, profile and social situation, Research Study 2005 within the framework of the European Migration Network. EMN GNCP.
Georges TAPINOS (2000): Illegal immigrants and the labour market. OECD Observer February 2000.
Patrick A. TARAN – Eduardo GERONIMI (2003): Globalization, Labour and Migration: Protection is Paramount. Perspectives on Labour Migration 3E, ILO – International Migration Programme, International Labour Office Geneva.

### *Some important webpages:*

www.picum.org Platform for International Cooperation on Undocumented Migrants
www.gcim.org Global Commission on International Migration
www.december18.net Portal for the Promotion and Protection of the Rights of Migrants
www.gfmd-civil-society.org Global Forum on Migration and Development
www.ilo.org/public/english/protection/migrant/ ILO – MIGRANT – International Labour Migration
www.migrantwatch.org Migrants Rights International
www.iom.int International Organization for Migration (IOM)
www.european-migration-network.org European Migration Network

## Zusammenfassung

### *Die grundsätzlichen sozialen Rechte der illegalen migranten Arbeitnehmer in der EU – Mit besonderer Hinsicht auf die Verantwortung der Arbeitgeber.*

Die Studie versucht vorzustellen, welche grundsätzlichen sozialen Rechte den illegalen migranten Arbeitnehmern, – die in Europa „schwarz" arbeiten – zugehören. Dadrinnen ist das Hauptziel dessen Analyse, bis wohin die rechtliche Verantwortung der Arbeitgeber, – die sie beschäftigen – in dieser Hinsicht reicht. Die Studie führt grundsätzlich menschenrechtlichen (dadrinnen sozialrechtlichen) Denkansatz, sie hat theoretisch entdeckende Wesensart.

Die Studie kann auf drei größeren Einheiten geteilt werden: die Erste analysiert die Erscheinung der illegalen migranten Arbeit im Allgemeinen, die Zweite überblickt das internationale und europäische Normsystem in Betracht der Arbeitgeber-Verantwortung, die Dritte deckt die Gründe und die möglichen Kanalen der rechtlichen Verantwortung der Arbeitgeber auf.

Nach der theoretischen Hauptkonklusion der Studie kann der sogenannten „illegale" Menschenwesen nicht existieren, das heißt, bloss das „illegale" migrante Status, oder die Illegalität der gemachten Arbeit kann keine totale menschenrechtliche und soziale Rechtslosigkeit ergeben. Bestimmte grundsätzliche Arbeitrechtliche- und soziale Rechte gehören den illegalen migranten Arbeitnehmern auch zu. Weil die Hauptnutznießer der illegalen Beschäftigung die Arbeitgeber sind, wäre es moral begründet, dass ihre rechtliche Verantwortung in dieser Hinsicht auch eindeutig sein sollte, sogar verschärfen sollte. Gleichzeitig ist es außerordentlich problematisch, praktische Gültigkeit für das abstrakte menschenrechtliche Anforderungsystem zu erwerben.