

The Legalisation of Undocumented Migrants: Ideal Solution, Wrong Track or Pragmatic Way?

An European Expert Panel

13th – 15th February 2006
Freiburg im Breisgau
Documentation



Not sehen und handeln.
C a r i t a s



**The Legalisation of Undocumented Migrants:
Ideal Solution, Wrong track or Pragmatic Way?**

**an European Expert Panel
13th – 15th February 2006
Freiburg**

The Legalisation of undocumented Migrants;
Ideal Solution, Wrong track or Pragmatic Way?
An European Expert Panel
13th – 15th February 2006
Lorenz-Werthmann-Haus in Freiburg (Headquarters Caritas Germany)
Documentation
Compilation: Isabell Zwania
Technical compilation: Katharina Bischof
Conceptual design and organisation: Vera Borgards, Karin Vorhoff
Professional Assistance: Dr. Andreas Fisch
Translation and revision: Albrecht Braun, Elaine Griffiths, Reed Wilson, (English); Philipp Rößler
(French)

Editor: Deutscher Caritasverband e.V.
Department for Social Welfare and Health
Unit for Migration and Integration
Freiburg, September 2006

The Expert Panel and this publication were sponsored by funds of the lottery *Glücksspirale*

Index

Foreword	4
Questions that Concern Us	5
<i>Prof. Dr. Georg Cremer, Secretary general of Caritas Germany, Freiburg</i>	
Irregularity Becomes an Issue	9
<i>Roberto Alborino, Head of division Migration and Integration of Caritas Germany, Freiburg</i>	
The Situation of People without Residential Status in Germany.....	13
<i>Dr. Ute Koch, Katholisches Forum "Leben in der Illegalität", Berlin</i>	
Italy	23
<i>Lê Quyên Ngô Đình, Caritas Diocesana Roma, Rome and Marco Accorinti, Consiglio Nazionale delle Ricerche (IRPPS), Salerno</i>	
Portugal	29
<i>Eugénio José da Cruz Fonseca, Cáritas Portuguesa, Lisbon and Rui Manuel da Obra Católica Silva Pedro cs, Portuguesa de Migrações, Lisbon</i>	
Espagne	37
<i>Micaela Sampedro Fromont et Jorge Gonzales Lopez, Asociación Comisión Católica de Espanola Migraciones (ACCEM), Madrid</i>	
France	46
<i>Jean Haffner, Caritas/Secours Catholique, Paris</i>	
Belgium	54
<i>Anne Dussart, Caritas Secours International, Brussels</i>	
Undocumented Migrants	
The precarious Situation of third country nationals residing irregularly in Europe	64
Summary of a Position Paper of Caritas Europa	
<i>Peter Verhaeghe, Caritas Europa, Brussels</i>	
Summary of the Discussions and General Issues in the Country Reports and Presentations	75
<i>Dr. Andreas Fisch, Cologne</i>	
Annex	81

Foreword

At the end of April 2006, Germany's President Horst Köhler stated that we had been "asleep" and allowed decades with favourable conditions for integrating migrants to pass us by. It is true, necessary steps for integration should have been taken long since, and we are suffering the consequences today. And yet the signs of the times were visible 30 years ago. Back in the mid-1970s the Catholic Church in Germany called for a general strategy promoting the active integration of migrant workers, for example, through assistance in learning German.¹

Anyone who wishes to read the signs of the times in the field of integration must today confront the challenge of irregularity of residential status in Germany. The aim of the consultation documented in this booklet was to find out whether, and if so, how "regularisations" may be a solution here, and what their limits and "side effects" are.

To this effect, we invited representatives of Catholic organisations in Europe to share their experience and advice. The presenters of the country reports know the prehistory, implementation and follow-up of the regularisation processes in their countries at first hand, and supply expert information and well-founded assessments. The individual regularisation campaigns were not all alike, nor were they motivated in the same way. In Italy (*Lê Quyên Ngô Dihn/Marco Accorinti*), France (*Jean Haffner*), Portugal (*Prof. Eugénio José da Cruz Fonseca / Pater Rui Manuel da Silva Pedro cs.*), Belgium (*Anne Dussart*) and Spain (*Micaela Sampedro*) the cultural and social, legal and political preconditions were very different. This documentation aims to reflect that variety. In their entirety these reports offer a nuanced and fascinating overview of the existing experience with large-scale regularisations of people without residential status.

The country reports were supplemented by papers that again broadened our national horizons. *Dr. Ute Koch* from the Catholic Forum "Leben in der Illegalität" (Berlin) gave little-known information on the legal and social situation of people without residential status. *Henrik Lesaar* from COMECE (Brussels) situated the national regularisation campaigns in the political and legal framework of the European Union. *Peter Verhaege* of Caritas Europa (Brussels) outlined the position of the Caritas associations in Europe on the regularisation of people without residential status.

The consultation allowed a lot of time for discussion in order to assess regularisations from the angle of different experiences. The results of these lively discussions were summed up by *Andreas Fisch* (Cologne).



Prof. Dr. Georg Cremer
Secretary general of Caritas Germany

¹ See the decision „Der ausländische Arbeitnehmer – eine Frage an die Kirche und die Gesellschaft“, in: Gemeinsame Synode der Bistümer in der Bundesrepublik Deutschland. Offizielle Gesamtausgabe I, Freiburg-Basel-Wien 1976 (2., durchgesehene und verbesserte Auflage), 375–410.

Questions that Concern Us

Prof. Dr. Georg Cremer, Secretary general of Caritas Germany, Freiburg

Imagine: all over the country people form queues outside townhalls, kilometres long. People without documents, wanting to apply for a residence permit. That happened in spring 2005 in Spain. In Madrid, Catalonia or Andalusia thousands spent several days and nights waiting outside the doors of the government departments. The wish to emerge from of the shadows is great, and for them the goal is to lead an ordinary life in society - working, enjoying family life or finding refuge.

“The goal of any church assistance for people without a residence permit or a *Duldung* must be to find ways of regularising the people concerned, unless it is possible for them to return to their home countries or migrate onward to another state that will grant them a residence permit.”² (Commission for Migration Questions of the German Bishops’ Conference, 2001).

Regularising undocumented migrants is a controversial issue in Germany. The picture evoked above of 400 000 people standing in line to be regularised raises questions and concerns. Some object that irregularity is thereby rewarded and, instead, people in this situation should be picked up and deported . Such a rigid interpretation of obeying the law is always also a reflection of the mentality of a country and its population. However, there are other ways of dealing with the issue, as testified by the regularisation programmes of people without residential status in many European countries (and outside Europe).

Leaving aside this question of the ‘German mentality’, Caritas Germany seeks a realistic and differentiated concept of regularisation. We do not want to condemn it on principle nor, again, to advocate it as a matter of ideology, That is why Caritas Germany decided to host a European expert panel in February 2006 entitled “The Regularisation of Undocumented Migrants: Ideal Solution, Wrong track or Pragmatic Solution – a European Expert Panel”.

In the following, I will name three of the problem areas on which the experts were invited to make a contribution, and conclude with a look to the future in Europe.

1. Access to elementary human rights through the legalisation of irregular residence

What are the *normative reference points, and the political goals of regularisations*? A basic objective of a regularisation campaign is the avoidance of humanitarian emergencies. By this I mean, above all, the lack of access to health and education for children and young people. In addition, regularisations can be justified both normatively and politically because they would avoid a “shadow society” in Germany. Anyone who cannot hope for state protection will lose out. Anyone working under irregular conditions and not receiving their wages will possibly turn to the mafia to get hold of the money, Regularisation makes room in society for effective solutions under the law.

² Kommission für Migrationsfragen (2001): *Leben in der Illegalität in Deutschland – eine humanitäre und pastorale Herausforderung* (Erklärungen der Kommissionen 25), hg. vom Sekretariat der Deutschen Bischofskonferenz, Bonn, S. 57.

From the view of society we are entitled to check whether regularisation makes the living conditions of people without residential status *structurally and fundamentally different, and whether normative goals are achieved*. Regularisation campaigns do not generally extend to the following groups:

- those who do not want it, e.g. because they are commuter migrants and only want to stay in Germany for limited periods
- those who are victims of dependence and exploitation
- those who do not meet the prescribed preconditions, or cannot prove this, or for other reasons do not trust the prospect of regularisation

A comparison of the estimated number of people without residential status with the applications for regularisation filed and granted would probably shed some light on the scope of regularisation campaigns.

Another question is about the kind of residence permit actually issued. Does it lead to a consolidation of the residential status? Or are people only granted a few years of *legal* residence, and then confronted again with the decision to leave the country or to “go underground”? It is important to answer these questions in order to be able to realistically estimate how long such a measure stays in effect. The experiences of the experts who took part in our panel was intended to help us to understand whether regularisations are more of an emergency tactic of short duration or, within limits, able to solve the structural problem of a life in residential irregularity.

In Germany it is often claimed that, according to the push-pull model, the prospect of regularisation attracts new migrants. Expectations of further regularisation programmes are aroused and attract new migrants, it is said, even if they have to provide evidence of several years of residence in the regularisation procedure. It is not empirically proven that the prospect of regularisation is the decisive factor for unauthorised migration. In recent migration theories involving factors causing, guiding and enabling migration, the prospect of regularisation is only a downstream factor. According to these theories, other factors are much more relevant, such as an acute emergency, existing networks and the opportunity to earn some money for a limited period. The goal of the consultation was to obtain empirical evidence for one or another theory on how the “regularisation” factor impacts on the movements of migrants. Another area of investigation that interested us was the effects on the labour market.

2. Regulated employment contracts through the regularisation of irregular residence

People without residence status help to create added value in our country. They occupy unpopular jobs, e.g. in cleaning or in catering. Home care is largely supplied by irregular home-care workers from our eastern European neighbouring countries. They enable many older people to remain in their familiar home environment, however problematic this segment of our care market is. People without the proper documents are also misused for unfair competition, e.g. in the building sector. Relations to the labour market therefore present a varied picture.

People are exploited if a society secretly condones and appreciates their work, but deliberately does not give them their place in society. “Regularising” them would mean recognising their *de facto* belonging, and recognising the rights that go with their human dignity. The call to grant them the dignity of really belonging corresponds to the quite pragmatic objectives of some

regularisation campaigns. Some governments use this method to combat the underground economy. They seek to integrate the workers that the countries need and to receive greater revenue in the form of social insurance contributions.

Here too, we are entitled to ask whether these expectations will be met by regularisations. What effect do they have on the employment situation of people without residence status? The answer to this question depends strongly on the grounds for unauthorised employment. Are people employed irregularly because it is not possible for employers to fill certain jobs with Germans or non-Germans living here legally? A regularisation drive could help to overcome these shortages. The area of home care comes to mind here. Carers with a regular residential status could consolidate their position, for example by taking vocational training courses. However – if necessary work is not being done in Germany – the solution cannot just be that of regularising people working here without the necessary permits. After all, if jobs cannot be filled, despite high unemployment, this indicates that our labour market has considerable structural problems. These include inadequate training, the unattractive nature of the work and, in particular, the insufficient integration of unskilled workers into the labour market.

Or are people with irregular status employed because they cannot obtain employment at the statutory wage rate? Then regularisation could mean that they would lose the basis for their employment. They might continue to work unofficially after regularisation, or not go for it at all, in order not to lose their job.

These labour market policy considerations must be kept in mind if we want to create a climate arousing more sympathy with people without residential status.

3. Countering demographic change through regularisation of residential status

Germany, like other industrial countries, confronts the task of coping with demographic change. To this end, the retirement age may be raised or compatibility between work and the family. Or again, better levels of training may pave the way to greater economic productivity. All this is necessary. But if the government were to decide this, and more, tomorrow and put it into practice overnight, Germany would still remain dependent on immigration in the short and medium-term, in order to cushion the demographic change.

How can regularisation fit in with this social policy necessity?

If you take a closer look at Germany's need for immigration, you will see that generally the country needs young people who are well educated and integrate easily. I ask myself, to what extent do men and women without residential status fulfil these requirements? They have been living among us for years, without attracting attention. Generally they are extremely law-abiding. Many have learned German, in order not to draw attention to themselves, and they have adapted to local customs. The migrant workers among them are mostly the able-bodied members of their family; that is why they were selected for the "migration project". Those who live with their families without permission are sustained by family or ethnic networks. Even if these descriptions do not fit all people without residence status, they are generally good preconditions for getting a foothold in a strange country. Are these positive assumptions about those regularised true in practice? Do they keep up their low crime rates, continuity in work, successful integration etc.? Proof of this would be a strong argument for regularising those present in the country. It was the task of the consultation to find out the situation on this question in a number of European countries.

My final point does not follow from the previous remarks, but in view of growing European integration it seems an appropriate and important perspective.

4. The importance of the European Union for regularisation by nation states

The European Union has impacted on Germany since the Schengen Convention (1985) at the level of international law, and since the Maastricht Treaty (1992) in an institutional setting. Since the Amsterdam Treaty (1997) the migration policy areas within the EU have been largely communitarised. Consequently, more and more individual questions are dealt with together. Through the abolition of border controls, the migration policy decisions of one country affect those of others, because regularisation in one country in the long term (but not automatically) enable further migration within the Schengen States. The other EU member states will insist on mutual coordination if individual states proceed with regularisation, and will check their 'suitability' for Europe. Major church organisations at the European level propose that the regularisation of irregular migrants be at least considered. The organisations supporting this idea are:

- Commission of the Bishops' Conferences of the European Community (COMECE)
- Caritas Europa
- Churches' Commission on Migrants in Europe (CCME)
- International Catholic Migration Commission (ICMC)
- Jesuit Refugee Service Europe
- Quaker Council for European Affairs (QCEA)

As far as I know, no one has ever attempted to envisage a Europe-wide regularisation of people without residential status, and to compare it with national regularisation programmes. Perhaps it is time to think along these lines and to present firm, balanced ideas to the European Parliament. This expert panel can play its part here.

The insights gained at this consultation are valuable for us. They will help Caritas Germany to adopt a position. They will assist us in convincing politicians and the public at large. It will be easier to find allies for a humane solution if humanitarian, normative concerns can be linked to national, political interests. Competent responses may promote an acceptance of regularisation measures among the population. This brings me back to the change in mentality. We should manage to allay irrational fears and keep the regularisation discussion down-to-earth. At the same time we should avoid unduly optimistic expectations. That way we will remain closer to the real problems of German society and of the people without residential status.

Irregularity Becomes an Issue

Roberto Alborino, Head of division Migration and Integration of Caritas Germany, Freiburg

August 2005: Young people from all over the world assemble in Cologne, to attend the World Youth Day with the pope. The Federation of German Catholic Youth (BDKJ) seizes this opportunity (supported by the German Justitia et Pax Commission and Misereor, the German Catholic Bishops' Organisation for Development Cooperation) to organise an International Youth Hearing for young visitors to the World Youth Day, as part of the official programme. In a moving four-hour session – broadcast live on TV – the young people articulate “Visions of a just world“. Their vision of a world in which children and young people can go to the doctor and to school, regardless of their residential status, was met with loud applause. So is the appeal that whoever works in a country, contributing to its GDP, should be regularised with all the rights of a citizen. The visions were later included in a published list of issues calling for reforms.³

July 2004: German politicians consider the new “migration law“. The preparatory independent commission on migration also consults the Catholic Church. Its proposal includes the issue of a life without residential status, with practical suggestions on health care and schooling. Despite these thorough preparations, the migration act does not contain a single line on the humane treatment of people without residential status, November 2005: The large mainline parties have reached an agreement. The Grand Coalition is up and running. And – surprise, surprise – it intends to examine the area of irregularity, according to chapter 6 of the coalition agreement.

These highlights do not mark the end of advocacy for people without residential status but they are tangible successes of Church-based commitment. Let us only travel back in time to the beginning of the 1990s in Germany. That was a time when no reporter would have hit upon the idea of researching the topic of people living without documents. At the time, and it is not too long ago, the existence of people without residential status was something Germans knew nothing about. They could not envisage such deprivation. Today we have a noticeable change attitude and awareness, due to a number of actors. These include the Migration Commission of the German Bishops' Conference and the document “Menschen in der Illegalität in Deutschland – eine humanitäre und pastorale Herausforderung” (People in irregular situations in Germany – a humanitarian and pastoral challenge). In presenting this paper, which takes a very clear position, the Migration Commission challenged the unaware public and the hitherto uncooperative politicians, to respond to the proposals presented. The Catholic forum on undocumented migrants (Katholisches Forum Leben in der Illegalität) founded in 2004 brought together a large number of important actors in the Catholic Church in order to continue this work. And the above-mentioned successes encourage us to continue.

³ BDKJ-Bundesvorstand (Hg./2005): International Youth Hearing for Justice and Peace. Visionen der katholischen Jugend für eine friedliche und gerechte Welt, Düsseldorf, in English translation p. 27 (No. 10); p. 29 (No. 8 top / No. 9 below).

How the church was able to convince people...

Why was the church so convincing at this point, I wonder? I think that at least two components were decisive.

First of all, the position of the Catholic Church was in the forefront of the academic debate, which it had helped to shape through its legal opinions and own research – e.g. by the studies of the European Jesuit Refugee service.

Secondly, it had a well-founded position, drawing on Christian sources but, at the same time, linked to the secular convictions of human rights etc. The Church offered Christians and non-Christians alike a social ethical position to think about. Of course, this success is essentially due to the laborious work of advocacy with other actors, and the credible witness of direct support of the groups concerned. However, regarding this consultation, I would like to place the focus on the academic processing of experience, and on reflection in the light of Catholic social teaching, because I believe that these two factors should play an important role if Caritas Germany is to promote a regularisation campaign for Germany.

Inter-country experience

And yet I have to be honest: I cannot hide the fact that Caritas Germany has long had its own doubts about the proposal of regularisation programmes. This reminds me of the situation at the beginning of the 1990s. In the context of Caritas Europa, Spanish Caritas reported on its experience in Ceuta and Melilla and its work in refugee camps in southern Spain. With other Caritas associations, Caritas Spain appealed for this to be recognised as a sign of the times, a serious humanitarian and European problem. And not only that! Despite the scruples of many, Caritas Spain also argued that this should be made public. And it convinced the others! The direct consequences were the first field research by Caritas Europa.

Presenting experiences from other countries as research results provides a sound basis for a convincing position.

Social ethical arguments and those based on faith in Jesus Christ

The fundamental beliefs are still the same. If a pregnant woman without a residence permit tells of her despair, because she wants to keep the child but can expect no assistance from anywhere, then we hear a warning signal of violated humanity. When children without residential status declare that they do not go to school, although they would like to, we hear Christ calling in these encounters. As Christians we take up this call and respond accordingly. The first, immediate response has always been immediate assistance – just as the Good Samaritan wasted no time in looking after the man who had fallen among thieves.

However, accepting the challenge of Christ in people without residential status calls for a careful analysis of the structures and mechanisms underlying the situations of need. The previous history of the Church being at the side of people without residential status clearly shows that it pursues its mission without regard for political taboos. It has also not been led into a harmonious consensus and some kind of middle way, so as not to be the object of adverse criticism, although it has not been spared that, in fact. Far from it! Instead, with its dedication the church has placed itself squarely on the side of the people in trouble, and confronted their justified concerns. As John Paul II put it, the church has become “a *great movement (...) for the*

*safeguarding of human dignity*⁴. That is why, even today, we do not need to shy away from a conscientious and sober examination of socially unpopular measures like regularisations in Germany. Large-scale regularisations are currently taboo and arouse serious doubts in that country. They do not fit into the typically German striving to preserve state order and proper bureaucracy. On the other hand, regularisation programmes promise more than just initial emergency assistance for people without residential status. Regularisation would be a humane measure, because they could look after themselves and not be dependent on assistance. People would again be in charge of their own destiny and the way they choose to live. However, a society, too, has basic rights, e.g. the right to have people abide by its laws. Regular regularisations would undermine its right to determine who can enter the country. And yet there are also arguments according to which it is the exclusion of people without residential status that is illegitimate.

I am thinking of two topics close to the heart of the Church and Caritas Germany, i.e. allowing family reunion and humanitarian arrangements for refugees who do not succeed in being granted asylum despite the inhuman treatment they have suffered. Among the people without residential status there are family members who have been smuggled in, and refugees who have “gone underground” after having endured a series of renewals of their “stay of deportation” (*Kettenduldung*) or because their asylum procedure seemed too long. With their regularisation, the right to be allowed to live with their families and their protection as refugees could be practically strengthened.

The majority of people without residential status in Germany are, however, migrant workers. Their impact on society is frequently described in purely negative terms. Back in 1992 John Paul II stated that the work by which “illegal immigrants” contributed to economic development was, in fact, a form of belonging to society. He called for this to be recognised as such through appropriate regulations.⁵

That was also the view of the young people at the World Youth Day in Cologne.

I remember, too, the victims of human trafficking and forced prostitution, particularly of children and young people and of unaccompanied minor refugees. They are particularly vulnerable as a group and therefore worthy of particular protection, that could be expressed in the form of regularisation.

⁴ Johannes Paul II. (1991): *Centesimus annus*, encyclical letter on the 100th anniversary of *Rerum novarum*, No. 3: ‘Among the things which become “old” as a result of being incorporated into Tradition, and which offer opportunities and material for enriching both Tradition and the life of faith, there is the fruitful activity of many millions of people, who, spurred on by the social Magisterium, have sought to make that teaching the inspiration for their involvement in the world. Acting either as individuals or joined together in various groups, associations and organizations, these people represent a great movement for the defense of the human person and the safeguarding of human dignity. Amid changing historical circumstances, this movement has contributed to the building up of a more just society or at least to the curbing of injustice.’

⁵ John Paul II: “To welcome the stranger with the joy of one who can recognise in him the face of Christ”. Message on World Migration Day (31 July 1992).

All these considerations seem to point towards regularisation in many different areas and so one may well ask whether a general regularisation would be a pragmatic solution. Or is it true that regularisations in other countries have always been in specific areas?

- Was controlling the underground economy the main motive in Spain?
- Do family reunions make up the bulk of regularisations in France?
- Has the number of old asylum cases been largely dealt with in Belgium?

A whole number of questions arise: what advantages do regularisation campaigns offer compared to regularisation for specific groups, in order to help them to lead a life of dignity? What should regularisation be like for it to be humane in its outcome? And can one responsibly do this in a society that is anxious about rising unemployment and in surveys would prefer “fewer rather than more” migrants in Germany? Many fears can certainly be proven to be irrational through an objective analysis. The wish for fewer migrants carries weight in a democracy, regardless of what you might personally think of it. And can the threat to jobs as detrimental for society be really proved, and stand in the way of a general regularisation? This is a sensitive issue, and in order to find our position and to convince society, we will need to analyse it - and a few more such “hot potatoes” – with an open mind.

In our expert panel in February 2006 these questions and queries were discussed together, and I thank participants for their readiness to share their experiences, in order to find well-founded answers. As I have already indicated, it would not be the first time that Caritas in Germany had greatly benefited from cooperation with the Caritas associations in other European countries.

The particular strength of the Church

I am firmly convinced that we are consciously seeking to fulfil the mission of Christ in this consultation, and in our mutual assistance. The Church’s strength is precisely the connection between closeness to people and cross-border experience, between academic analysis and social ethical reflection, and between well-founded convictions and sociopolitical advocacy. When the Church has used its own potential to the full, then its competence cannot be swept aside with the tired old objection: “Well-meaning but technically unfeasible!”. If, in the foreseeable future, Caritas Germany goes public with one or another position on regularisations in Germany, politicians and the general public can rest assured that it will be firmly based and carefully considered, and that it draws on experience from people on the ground and from other countries. They can also be certain that our position meets the standards of social science and social ethical thinking, and may be checked against them. We will be pleased to convince them.

The Situation of People without Residential Status in Germany

Dr. Ute Koch, Katholisches Forum "Leben in der Illegalität", Berlin

1. Irregular immigration: the outlines of a phenomenon

Irregular migration is not a marginal topic, it is a central phenomenon in a global society. The special contours of irregular migration only become visible if this phenomenon is understood in the context of international migratory movements. All forms of international migration are subject to political and legal intervention, and irregular migration is no exception.

The present migration and integration policy in European welfare states concentrates on the integration of migrants with a stable residential situation. In the context of this integration policy the states decide which migrants they intend to have in future and which not. They open the door to migrants considered able to work, while at the same time restrictions are placed on the options for immigration on humanitarian grounds, family reunion and migration for reasons of marriage. These states invest a lot of organisational and financial resources in prevention and control of undesired migration, in detecting irregular migrants and discouraging further immigration attempts. Yet in view of the multifarious social imbalances – the income and development divide, the wars and human rights situations in the world – these attempts to manage, restrict and control migration cannot prevent people from residing irregularly in a country. Ultimately irregular migration is a response to the barriers placed before undesired immigration. The consequences for their way of life have to be accepted by the migrants – they have no alternative, legal access to the country (Bommes 2006: 97-98).

In spite of the European harmonisation of asylum and migration policy, the situations of irregular migrants in the EU member states vary, which is related to the differing opportunities to access social resources.⁶ An important difference compared to many other countries is that irregular entry and irregular residence in Germany is an offence.⁷ The very concept of "irregular" or "irregularity" [German: *legal* and *Illegalität*] established in that country emphasises the unlawfulness of the situation – while other states stress the absence of the proper permits by using terms such as "undocumented persons" or "*sans papiers*".

Irregularity is primarily considered a matter of public order in Germany, and controls are given priority from the angle of "internal security". Typically, considerable effort goes into checking on people within the country, besides the border controls to limit migration. All citizens in Germany are obliged to carry identity cards and register with their municipal authorities. The linking of residential law and labour law heightens the intensity of controls, with many local authorities working together and exchanging data. They include the municipal immigration departments, the police, the federal border police, the main customs offices and the federal employment agency, which deliberately check on residence and work permits as part of their work (for a full account see Cyrus/ Düvell/ Vogel 2004: 54-59). A decisive instrument of oversight in Germany is the obligation of public institutions to report on cases (e.g. schools, or social security and youth welfare departments). If they discover the irregular residential status of a migrant they are obliged to immediately inform the competent local immigration departments.⁸ The fear of this

⁶ Comparative studies show e.g. that irregular migrants in Britain and the USA find employment in very many more areas than in Germany (Cyrus/Düvell/ Vogel 2004; Stobbe 2004).

⁷ Under §95 Residence Act.

⁸ Under §87 Residence Act.

happening prevents irregular migrants in Germany from going to these public places, even in emergencies. They have to live with the fear of discovery, detention and ultimately expulsion. An irregular situation regarding residential status is linked with the danger that diseases or injuries will not be treated in time, that children of parents without residential status will not be able to attend kindergarten or school, and that irregularly employed foreigners will be deprived of the agreed wage by deceitful employers (ibid: 65).

The Independent Commission on Migration indicated the social problems for migrants without residential status and their children⁹ but the legislator has so far rejected any restriction on this instrument of control. In the tradition of the German rule of law all action of state administration takes place on a statutory basis. On this basis it is regarded as splitting the law if government departments give material support to someone in an irregular situation, and under alien law their residence is ended and followed by deportation. Here changes in the law are not entirely out of the question. Recently there have been more and more calls from political circles for the social consequences of compulsory registration to be given more attention.

However, the possibilities of access to social services and benefits depend to some extent on the established structures of the welfare states. According to Esping-Andersen, the German system is a conservative type of welfare state (for a general account see Leibfried/Wagschal 2000). But what does that actually mean in practice? Germany is characterised by a high degree of labour market regulation. It typically has systems of social insurance (e.g. health, pension and long-term care insurance), which are linked to employment. In cases of need the social code provides for a claim to compensatory monetary and material benefits. Most inhabitants are protected by a state-regulated social insurance system at a relatively high level in comparison to other countries. For irregular migrants it is almost impossible, however, to claim social benefits dependent on a job and based on the insurance principle. Moreover, it is only possible to claim inland revenue-financed compensatory social benefits such as health care under the law on asylum seeker benefits if the irregular residence has been exposed to the authorities. In Spain, Britain and Italy, by contrast, people without residential status have access to the public health system, that is not financed by contributions but by tax revenue and is available to all inhabitants (not just to the insured) (Wissenschaftlicher Dienst des Deutschen Bundestages 2001). In all, an international comparison indicates that precisely a developed social policy contributes to irregular migration being seen as a significant problem, while countries like the US, where large numbers of people live on low wages and poor social security, find it easier to allow undocumented migrants to gain access to state benefits (e.g. Stobbe 2004).

Yet in Germany too, people without residential status have social rights – e.g. the right to schooling, legal protection or health care (secretariat of the German Bishops' Conference 2001). The difference is rather that it is practically impossible in Germany to actually assert these rights. German political representatives and society at large have not openly confronted the matter nor have they accepted that irregular immigration and irregular residence cannot be effectively prevented and that the presence of migrants will continue to be part of the reality of Germany. Yet we really do not know much about this reality in Germany. Academic studies of irregular migration, its root-causes, life situations and the number of irregular migrants living in Germany are still rare (Schönwälder/ Vogel/ Sciortino 2004).

⁹ In the run-up to drafting a new migration law, the Independent Commission on Migration was mandated by the federal interior minister to draw up practical recommendations for a future migration policy. The proposals of the Commission are to be found in: Bericht der Unabhängigen Kommission „Zuwanderung: Zuwanderung gestalten – Integration fördern. 4. Juli 2001.

2. Size of the irregular population

How many people are there without residential status actually living in Germany? It is extremely difficult to answer this question as there are no really reliable figures. On the one hand, this lies in the nature of things, but it is also due to the fact that research has so far been largely limited to local studies of the social situation of people living in irregular circumstances.

People living in irregular circumstances strive to be as inconspicuous as possible in Germany. They and their employers are forced to hide the irregular residence and irregular employment from the authorities and thereby steer clear of inclusion in official statistics. Migrants without residential status are thus only recorded statistically when they come into contact with the authorities (e.g. the police or Federal Border Guard). Traces of irregular residence are found e.g. in the statistics on 1) unauthorised entry, 2) deportations, 3) suspects without residential status and 4) the procedure on grounds of irregular employment of foreigners.¹⁰ These official statistics only relate to the “light field” discovered. About the unofficial figures cannot be derived from them. The fundamental problem of these statistics is that picking up “irregular” migrants always depends on the checking behaviour of the investigating authorities (Vogel 1999: 74-77).

Due to these difficult starting situations, figures on the number of people with irregular status in Germany fluctuate between half a million and one million.

3. Why and how people take on irregular residential status

Irregular migrants come to Germany for different reasons. They come as refugees seeking protection from wars, human rights violations and persecution, job-seekers attempting to find opportunities in the richer regions of the world, students or children and older people who want to live with their relatives resident in Germany. Due to the tight restrictions on family reunion they often have no choice but to opt for irregularity. In addition, there are people who are forced into irregularity through people traffickers.

The ways to become irregular are as diverse as the motives for migrating. Irregularity of residence is by no means always the consequence of an irregular border-crossing. In fact, the most important forms are based on the possibilities of legal entry to Germany, e.g. as a tourist, an au pair, a student, a seasonal worker, a travelling businessperson, asylum-seeker or refugee. The irregularity arises only when the person starts to work without a work permit, “over-stays” or “goes underground” when faced with the threat of deportation (Bade/Oltmer 2004: 122).

The interior and justice ministries’ first periodic security report of 2001 (Erste Periodische Sicherheitsbericht’ (Bundesministerium des Innern/ Bundesministerium der Justiz 2001) names four forms of irregular entry: (1) abuse of visa-free entry, (2) entry with false or manipulated documents, (3) entry with a visa acquired with false statements and (4) entry without the necessary documents.

Since it is impossible to have a water-tight check on traffic at the borders, entry without a visa (e.g. for tourists or business people) is the most important access to a life without residential status. Foreign nationals from states for which a visa is required for Germany, above all refugees

¹⁰ In fact, police crime statistics also show that irregular migrants are generally very concerned to obey the law. If they are registered by the police as suspicious, in nine out of ten cases this is due to an offence against the asylum and alien legislation. Another 7.5% are registered on suspicion of forging documents – likewise an offence that is directly connected to a life of residential irregularity.

and asylum seekers, plus migrant workers with an entry ban, can gain seemingly legal entry through presenting forged and borrowed documents or visas acquired with false information. Others opt to enter the country without documents. This kind of irregular border-crossing catches the public eye most (Cyrus 2004: 15-17).

In terms of residential status, these people very often have disrupted biographies, showing phases of regular and irregular residence. After an irregular entry they may apply for asylum as a way of avoiding residential irregularity, at least until the case is decided. With a negative decision the applicants may then drop back into irregularity (see also Alt 2003: 112).

4. Which countries do irregular migrants come from?

There is no reliable data on the national composition of this population. However, there is a clear connection between regular and irregular immigration. Relatives and supporters living regularly in Germany are the crucial contact persons who give assistance in searching for accommodation and work and – if necessary – also in organising irregular entry. Survival in irregularity for any length of time would hardly be possible without the assistance of these networks (Cyrus 2004: 19).

Official statistics also only give an imprecise impression of the national composition of migrants without residential status in Germany. We might assume that they include a particularly large number of Poles¹¹ and other central and eastern Europeans. A further group would be citizens requiring visas from third states with which there are already a history of migration relations, e.g. Turkish citizens and people from former Yugoslavia and Vietnam. The third group are citizens requiring visas from states that are geographically remote, e.g. Afghanistan, Iraq, China and India (Cyrus 2004: 17-23). Their situation differs considerably from that of the migrants from neighbouring states, who may enter without a visa and thereby commute.

5. Employment of irregular migrants in different branches of industry

Available studies show that life in irregularity is often not a lasting state. After all, irregular migrants are primarily migrant workers, who do not intend to stay permanently. Access to the informal labour market is particularly enabled through referral by family or other networks. As a rule it is decisive for survival in irregular circumstances. However, that also means that irregular residence only succeeds if it is tolerated by the receiving society, in demand and supported. When they start to work they become “doubly irregular”, i.e. employees with neither work permits nor residential status (Alt 2003: 24).

In principle, there has been a recruitment freeze on foreign labour since 1973. The employment of migrants with restricted residential permits in Germany is only admissible if there are no unemployed Germans, EU citizens or citizens of privileged third states available for a certain job. Asylum seekers and those with a stay of deportation are at the bottom of the list. With unemployment figures of currently approx. five million people the official policy is that recruiting foreign employees should only be allowed in well-founded cases of exception. This has already happened to a limited extent, after pressure from employer organisations. The exceptional

¹¹ Migrants from Poland can simply claim they are tourists in most everyday situations, so that they are mainly identified as irregular only when they start to work. Since no immediate freedom of movement was agreed after Poland's entry to the EU this situation will continue for a few years (Cyrus 2004: 21).

ordinance to the recruitment freeze and the green-card ordinance provided for the limited employment of seasonal workers, casual workers, highly qualified academics, artists, nurses in private households and IT specialists. In the context of the Migration Act the migration and employment of highly qualified people (e.g. top scientists and business people) has been introduced. Self-employed people from third states are also allowed to move to Germany if their activity is considered to be beneficial for the German economy.

All these modes of access to the labour market are meanwhile linked to strict requirements. People without residential status are, in principle, not allowed regular access to the labour market. This is verified through the regular comparison of data in the work permit file and social insurance registration (Cyrus /Düvell/ Vogel 2004: 56).

The demand for cheap labour in Germany is so great, however, that it is possible for irregular migrants to survive on the informal labour market. The areas constantly mentioned in connection with irregular employment include

- 1) service sectors in demand in private households – i.e. household help, tradesmen, gardeners, babysitters, nurses and carers for the elderly. The risk of being checked on is relatively slight in these cases;
- 2) seasonal activities in agriculture, and hotel and catering;
- 3) the construction industry, that is checked on the most;
- 4) the entertainment industry (bars, nightclubs).

6. Social situation and social problems

People without a residence permit generally cope with everyday problems with the assistance of relatives, friends or supporters. However the potential of these support networks are limited and the risk of being left helpless in an emergency is very great.

Health care

For life in irregularity a serious illness poses an immense problem. The German health system is based on the social insurance model and financed by contributions. Over 99% of the population in Germany is in statutory or private health insurance. The majority of all workers and their family members (without their own income) are insured in the different statutory health insurance schemes. Employers and employees share the contributions equally. People with high incomes, self-employed people, civil servants and students can insure themselves privately. So far there has been no obligation for the whole population to be insured, unlike in Switzerland or the Netherlands.

Irregular migrants are de facto excluded from this insurance system while they have a claim to health assistance under the Asylum Seeker Benefits Act, they are generally then threatened with deportation as the social security offices responsible for these cases are, as public authorities, obliged to report them to the local immigration departments (see Groß 2005).

It therefore becomes problematic with respect to serious illness or accidents, requiring complex treatment or even hospitalisation. Concerned about a disclosure of their lack of residential status, people use different strategies. In the case of slight illnesses, they try to manage by themselves or to get treatment from a doctor or nurse in their personal network. For irregular

migrants from neighbouring countries (commuting migrants), returning to their own country may be one strategy for solving the problem. A further possibility is to be treated with the health insurance card of another person. Others go to nonprofit centres who help to find an appropriate doctor or even conduct medical treatment themselves in the field of care for homeless and non-insured people (Cyrus 2004: 52). In some cities private initiatives have come into being e.g. the “Offices for medical assistance for refugees” or “Medinets”, advice centres of the welfare organisations or the Malteser Migrant Medicine (currently in Berlin, Cologne, Munich).

According to Malteser Migrant Medicine (MMM) in Berlin, ill people without a residence permit wait much longer before they seek medical assistance, and are thus more seriously ill than the normal patients consulting a doctor. If these patients have work and earn money they participate as best they can in the cost, but generally this contribution cannot cover the real costs. In general, 86 percent of patients of the MMM are under 50, and 50 percent are under 30. Many women patients are pregnant and frequently in the difficult situation that they want to keep their child but cannot see how to pay for the delivery and the related necessary care for the baby; that concerns about 60 percent of expectant mothers. Depending on the illness, the patients are also referred to other doctors who have declared their willingness to give cost-free treatment. Laboratories, pharmacies and midwives etc are also active in this network. Some hospitals are also willing to conduct an operation at a reduced rate (Franz 2006).

Ultimately, however, all these initiatives are only emergency solutions which cannot make up for the lack of access to health care services. The limited financing of the Malteser Migrant Medicine and similar bodies through donations only allows for emergency care. Their capacities quickly reach their limits when it comes to expensive in-patient treatment or precautionary check-ups (Arbeitsgruppe „Armut und Gesundheit 2001: 8).

All concerned are nervous about hospitalisation. Hospitals fear that their costs will not be reimbursed; migrants without residential status fear that they will have to be registered with the immigration department and ultimately deported. In order to escape this police detention, they even discontinue treatment prematurely (Cyrus 2004: 56). This is not just very dangerous for the migrants, it means that untreated infectious diseases may be a direct danger to the whole population.

Attending preschool and school

In the field of preschool and school attendance, parents frequently do not dare to register their children in schools and school heads do not dare to accept such children. The key reason for this is currently believed to be the obligation to report them to public authorities. The main problem is that there is a considerable lack of legal certainty about the school attendance of children whose parents have no regular residential status in Germany – and this is primarily to the detriment of the children, who thereby run the risk of not receiving any education at all.

The legal uncertainty arises mainly because the regional and local authorities do not take the same line. Germany is a federal state and a child’s right to go to school is dealt with differently in the different state legislations. In the state of Hessen, children and young people without regular residential status or a *Duldung* (stay of deportation) are not allowed to attend school. School heads have to be shown a registration certificate and are then obliged to inform the immigration departments. But even in those states that grant the right to attend school to

undocumented children there is considerable uncertainty about the obligation of the school to check the residential status on registering and possibly to report it. In Hamburg discussions are currently going on about a central school register to list all school students of the city who are registered with the local authorities, in order to close gaps in the verification procedure.

There is no right to attend preschool (kindergarten) for children without residential status in Germany. According to the child and youth welfare act (Kinder- und Jugendhilfegesetz), foreign nationals can only claim services if they have a regular residential status or a *Duldung* (Fodor/Peters 2005: 37-42).¹² The staff of one city youth welfare department is now in a predicament. The public prosecutor is investigating them for misuse of public money because they enabled the children of parents without regular residential status to attend preschool. They thereby granted services that were not meant for these children and, and, moreover, violated the obligation to report them.

It may be assumed that many irregular migrants do not register their children at a preschool or school for fear of discovery and then of deportation. If advice centres are asked for help they can only arrange to send children to private schools in a limited number of cases, as these schools fill up rapidly.

Economic exploitation

Since migrants without a work and residence permit in Germany cannot take on a regular job they are forced to earn their living in the informal economy (if they are not supported by relatives). A large number of international documents of the International Labour Office and the United Nations state that fundamental rights cannot be refused even to irregularly employed foreign workers. In Germany too, people have a legal right to the agreed wage even if they do not have a work and residence permit. Yet it repeatedly happens that if they demand an improvement in the employment conditions or the payment of the withheld wage, they are simply sacked. Often they and their families are threatened with violence and this is also carried out in some cases. The employers know very well that the persons concerned generally will not dare to appeal to a labour tribunal – for fear of being deported. This makes irregular workers open to blackmail and exploitation with respect to their working conditions (Cyrus 2004: 34-35).

7. Civil society involvement

In Germany the societal handling of these social and humanitarian problems is left to civil society actors, but not resources are made available nor are the appropriate statutory conditions created. Social workers, doctors, teachers and other supporters are very uncertain whether the assistance for people in irregular situations is assessed to be aiding and abetting the irregular residence and consequently liable to penalty. Under the German Residence Act, assistance on humanitarian grounds, if repeated or in favour of several foreigners, may be interpreted as “aiding and abetting non-permitted residence” and punished by a prison sentence or fine.¹³

¹² Foreigners only have a claim to benefits from the social code SGB VIII, if they are lawfully resident in Germany or are in possession of a *Duldung* (§2 para. 2 SGB VIII).

¹³ Under §96 Residence Act (smuggling foreigners into the country). A prison sentence of up to five years or a fine shall await anyone who incites or abets another to be in, or enter, German territory without the necessary residence permit and receives or is promised monetary advantage for doing so, or acts repeatedly or to the benefit of several foreigners.

Surveys of advice centres show, however, that assisting people in irregular situations has become a firm part of daily work – although unofficially (Schäfers 1995; Sextro 2002). In some centres of migration social work up to 30% of those seeking help have no residential status (Krieger et al 2006).

Politicians often argue that clarifying legal questions in the area of humanitarian assistance is not necessary, as there have so far not yet been any relevant sentences. Yet the occasional case of criminal procedures instituted against humanitarian workers shows how precarious their situation is.

Churches, welfare organisations and initiatives have been criticising these general conditions for years and pressing for a change of regulations to guarantee the elementary security of migrants and impunity for humanitarian workers. So far there has not been a really broad constituency for these demands in Germany. There is also no organisation of *sans papiers*, unlike in France.

8. Publicly raising the phenomenon of “irregularity”

In Germany irregular migration has hitherto been largely taboo and only occasionally hit the headlines. Only recently has the issue of “irregularity” been attracting a bit more attention. The phenomenon of residential irregularity and those concerned have to date been inseparably connected to the issues of “internal security” and crime. Now, for the first time, it has been possible to place the humanitarian aspects of irregular migration on the political agenda. For a long time these political signals only came from individual municipalities where humanitarian and human rights problems were particularly acute at the local level. The cities of Freiburg and Munich are worthy of mention here. Yet now the irregularity debate has taken on some momentum at the federal level as well. The coalition agreement of the new German government contains an agreement on evaluating the application of the new migration act. It expressly provides a mandate for examining the issue of “irregularity”.

In order to strengthen the legal certainty and ability to cope with conflict of people living with irregular status, churches, associations and initiatives are calling upon the legislator to limit the obligation to report them to public authorities.¹⁴, as this deters the group concerned from claiming their social rights. However, if it is correct that democratic states like Germany are not in a position to prevent residential irregularity then there must be guarantees, in their own interest, that such people are not deprived of fundamental human rights and that they are enabled to find a way out of irregularity under certain conditions (e.g. in the form of individual solutions for cases of hardship, group-related ‘old-case’ arrangements and generous granting of work permits and ways of arranging family reunion).

Large-scale regularisation campaigns, as conducted in Italy, Spain and Greece, are rejected on principle by the authorities in Germany. Regularisations are supposed to end an illicit state of affairs where it is not possible to adhere to the law. The difficulty from the German angle is that this shows up the failure to implement the law, and thereby the limited sovereignty of the state. In addition, there is a fear of arousing the expectations of future migrants. “Breaking the law by entering the country and staying there irregularly should not be rewarded,” say politicians.

¹⁴ Since education in Germany is the responsibility of the federal states (Länder) changes in their school regulations will also be required in some cases.

However, in Germany a *Duldung* may also be granted to such persons as cannot be deported for humanitarian or de facto grounds. In parallel to the falling numbers of recognition of asylum seekers and refugees, since the mid-1990s there has been a steady rise in the number of people whose deportation order has been suspended to around 200 000. If a *Duldung* is granted this means that an irregular residence cannot be terminated and has to be accepted for the foreseeable future, thereby constituting a form of regularisation. The “tolerated” residence may lead to solutions for “old cases”, which can likewise be regarded as a form of regularisation. So far arrangements made to settle “old cases” and the “right to stay” in Germany have remained confined to certain nationalities and been linked with certain requirements. The applicants were e.g. not allowed to commit an offence and had to cover their living costs from their own resources (Bommes 2006: 108-111).

Since the new Migration Act came into effect there have been hard-case commissions set up in almost all federal states, deciding whether a residence permit can be granted in cases of particular hardship. The output of these commissions has been rated as rather disappointing. In most states a mere handful of cases have been decided positively.

Fundamentally, regularisation programmes are possible in Germany too. With all these arrangements, irregular residence rules out eligibility for consideration as an “old case” or “case of hardship”.

9. Conclusion

There will always be irregular migration - that is the historical experience of all countries of immigration.. It is the joint result of different social structures, which are rooted in the countries of origin, in which the migrants see no prospects for themselves. Further causes lie in the processes of globalisation and in the receiving countries themselves.

In spite of efforts by the European Union to adopt a common asylum and migration policy, a comparison with other member states shows that they are pursuing differing courses. In Germany there is a comparatively densely knit web of controls and authorities involved, although it is by no means without loopholes. The opportunities for irregular migrants to take up lawful employment and take advantage of the state’s social infrastructure are thereby largely eliminated. The resultant problematic situations are alleviated only thanks to civil society organisations.

We can learn from other countries that it may make sense for states to reduce their ambition to exercise controls and implement the law, so that people in irregular situations, too, may be granted legal protection, healthcare and schooling for their children.

It will not help to be sticklers for rules and regulations in this matter. Even in the international context it would be better to show greater political serenity, admitting the existence of the problem, increasing the available data, and seeking pragmatic solutions.

Literature:

- Alt, Jörg (2003): *Leben in der Schattenwelt. Problemkomplex irreguläre Migration*. Karlsruhe
- Anderson, Phillip (2003): “Dass Sie uns nicht vergessen ...”. *Menschen in der Illegalität in München. Eine empirische Studie im Auftrag der Landeshauptstadt München. München – Sozialreferat* (<http://www.gruene-muenchen-stadtrat.de/seiten/themen/migration.html>)

- Arbeitsgruppe Armut und Gesundheit des Bundesministeriums für Gesundheit (2001): Empfehlung der Arbeitsgruppe "Armut und Gesundheit" zu "Migration und gesundheitliche Versorgung, Unveröff. Ms., Bonn.
- Bade, Klaus J./Oltmer, Jochen (2004): Normalfall Migration. Bundeszentrale für politische Bildung. Bonn
- Bommers, Michael. (2006): Illegale Migration in der modernen Gesellschaft, in: Alt, J./ Bommers, M. (Hrsg): Illegalität: Grenzen und Möglichkeiten der Migrationspolitik. Wiesbaden, S. 95-116
- Cyrus, Norbert (2004): 'Aufenthaltsrechtliche Illegalität in Deutschland: Sozialstrukturbildung – Wechselwirkungen – Politische Optionen'. Bericht für den Sachverständigenrat für Zuwanderung und Integration. Berlin
(http://www.forum-irregularitaet.de/Materialien/04Expertise_Sachverständigenrat_Cyrus.pdf)
- Cyrus, Norbert/Düvell, Franck/Vogel, Dita (2004): Illegale Zuwanderung in Deutschland und Großbritannien: Ein Vergleich. IMIS-Beiträge Nr. 24, S. 45–74
- Ralf Fodor/ Erich Peters (2005): Aufenthaltsrechtliche Illegalität und soziale Mindeststandards: Das Recht des statuslosen Kindes auf Bildung. Rechtsgutachten im Auftrag der Max-Traeger-Stiftung der Gewerkschaft Erziehung und Wissenschaft. Berlin/Bremen
(http://www.gew.de/GEW_und_terre_des_hommes_Jedes_Kind_hat_das_Recht_auf_Bildung.html)
- Groß, Jessica (2005): Möglichkeiten und Grenzen der medizinischen Versorgung von Patienten und Patientinnen ohne legalen Aufenthaltsstatus. Büro für medizinische Flüchtlingshilfe Berlin
(http://www.fluechtlingsinfo-berlin.de/fr/arbeitshilfen/Medizin_fuer_Statuslose.pdf)
- Krieger u.a. (2006): Lebenslage „illegal“: Menschen ohne Aufenthaltsstatus in Frankfurt am Main. Karlsruhe
- Stephan Leibfried/Uwe Wagschal (Hrsg.) (2000): Der deutsche Sozialstaat: Bilanzen – Reformen – Perspektiven. Frankfurt a.M./ New York
- Schäfers, Hans-Dieter (1995): Caritasumfrage zu statuslosen Ausländern, in: Caritas – Caritas Europa zur Migration. Beiheft der Zeitschrift für Caritasarbeit und Caritaswissenschaft, H. 1, November 1995
- Schönwalder, Karen/Sciortino, Guisepppe/Vogel, Dita (2005): Migration und Illegalität in Deutschland. AKI-Forschungsbilanz 1. Wissenschaftszentrum Berlin (http://www.wz-berlin.de/zkd/aki/files/AKI-Forschungsbilanz_1_Migration_Irregularitaet.pdf)
- Sekretariat der deutschen Bischofskonferenz (2001): Leben in der Illegalität und Deutschland – eine humanitäre und pastorale Herausforderung. Bonn (http://www.forum-irregularitaet.de/DBK_2001.pdf)
- Sextro, Ulrich (2002): „Illegalität“. Menschen ohne Aufenthaltsstatus. Bericht
(<http://www.ekir.de/ekir/dokumente/ekir2003illegalitaet-auswertung.pdf>)
- Stobbe, Holk (2004): Undokumentierte Migration in Deutschland und den Vereinigten Staaten. Interne Migrationskontrollen und die Handlungsspielräume von ‚Sans Papiers‘. Göttingen
- Dita Vogel (1999): Illegale Zuwanderung nach Deutschland und soziales Sicherungssystem, in: Eichenhofer, E. (Hrsg.): Migration und Illegalität. IMIS-Schriften 7. Osnabrück
- Wissenschaftlicher Dienst des Deutschen Bundestages (2001): Ansprüche illegaler Zuwanderer auf Krankenbehandlung in den Ländern der EU. Reg.-Nr. 2. WF VI - 49/01

Italy

Lê Quyên Ngô Đình, Caritas Diocesana Roma, Rome and Marco Accorinti, Consiglio Nazionale delle Ricerche (IRPPS), Salerno

1. Economic and political conditions in Italy

In the month of March 2006, when the new governor of the Bank of Italy Mario Draghi read his report to the Forex, he stated: “It is necessary to find lasting solutions and explain them clearly to the general public” because, as he explained before the representatives of credit and the world of financial operators, “once the deceptive remedy of competitive devaluations has failed, increase in productivity remains the only way to create prosperity, to provide a solid, sustainable basis for income growth, and to guarantee development”.

The invitation seems aimed specifically at companies, and concerned the lack of progress in productivity. As the governor pointed out, since the nineties, the Italian economy “is as if it had run aground. The trend indicators and the short and medium-term evaluations of the main forecasters now see the Italian GDP recovering,” but it still isn’t enough because the expected growth of the GDP is maintained on “rates lower than the potential ones, already lower – he warns – than in the main countries”.

During the nineties, the Italian labour market underwent three important phases. At the beginning of the decade there was a serious economic recession, in the mid 1990s the situation was stagnating and during the final years of the decade it began to show signs of recovery. The employment situation was widely influenced by the changes in the productive sector (growth in the service sector, reorganisation of large companies, etc.) and by changes in labour availability (demographic effects, etc.). The activity rate and the employment rate remain 10 points lower than the EU average, with an ample unbalance between the Centre-North of Italy and the rest of the country. In terms of unemployment and underemployment, the national record is in the south of the Country, and what worries analysts most is that the repercussions of this negative record become solid constraints for any chance of economic recovery in that area.

The element that predominates in the Italian economy is the high rate of “off-the-books” work. Italy is a country with a high rate of irregular work, with “off-the-books” work having an importance of between approximately 26.2% and 30%, depending on the source (bear in mind the difficulty to provide estimates on this phenomenon). The underground economy represents a significant percentage of the Italian economy, and the employment of undocumented migrants constitutes a large share of its labour supply. According to Schneider (2004), the level of underground economy is very relevant in Italy, as the following table shows:

Table 1. Size of the Shadow Economy in some OECD Countries (in % of GDP)

Country	1999/00	2001/02	2002/03
Austria	9.8	10.6	10.9
Belgium	22.2	22.0	21.0
Denmark	18.0	17.9	17.3
Finland	18.1	18.0	17.4
France	15.2	15.0	14.5
Germany	16.0	16.3	16.8

Greece	28.7	28.5	28.2
Ireland	15.9	15.7	15.3
Italy	27.1	27.0	25.7
Netherlands	13.1	13.0	12.6
Norway	19.1	19.0	18.4
Portugal	22.7	22.5	21.9
Spain	22.7	22.5	22.0
Sweden	19.2	19.1	18.3
United Kingdom	12.7	12.5	12.2
OECD Average	16.8	16.7	16.3

Source: Schneider, 2004. Underground economy estimated through DYMIMIC¹⁵ method.

The economic sectors mostly struck by this phenomenon are: agriculture and construction, followed at a distance by repair activities, the clothing and footwear industry, and services to companies and people. To be taken into further consideration is the fact that the great strength of the submerged economy lies in the widespread ‘conspiracy of silence’, a typical Italian attitude that allows getting around fiscal and social security controls and that is deeply rooted in society. Quantitatively the phenomenon of “off-the-book” work – according to an investigation by CGIL presented at the CNEL in the month of December 2003 – involves more than six million workers, about 20% of total workers employed; out of these, 36.7% in the South, 24.3% in the Centre and 18.9% in the Northeast. Within the Italian territory the phenomenon is anything but uniform, both for its dimensions and for the sectors concerned by it.

In connection with immigrants, the underground economy has had an important magnet effect, attracting the arrival of immigrants in Italy over the last two decades and especially during the last seven years. Within their general strategy to fight the underground economy, Italian authorities have periodically used regularisations of undocumented immigrants as a mechanism to bring the submerged economy and irregular employment onto the surface (five legalisations over a period of fifteen years, 1986-2001). In this vein, a series of schemes have been implemented over the last two decades.

The importance of these processes must be considered within a context of transformation of Italy from a country of emigration into a country of immigration, yet, it should also be underlined the relatively limited efficiency of such mechanisms when applied alone to fight against a complex and multifaceted phenomenon like that of the underground economy. There is a high level of insertion of foreign workers in the service sector, which registers a significant level of informality.

“Up to now, the issue of the systematic occurrence of illegal conditions has been managed in Italy, as well as in other countries of Mediterranean Europe, with the systematic use of amnesty measures. [...] if one considers that almost all immigrants of a working age are employed, one can understand that in the end they have found a place in Italian society, since they satisfy the demand from businesses and families. We should stress that the role of families in activating the

¹⁵ The DYMIMIC (dynamic multiple indicators multiple causes) model considers the multiple causes leading to the existence and growth, as well as the multiple effects, of the shadow economy over time. This method is based on the statistical theory of unobserved variables. For the estimation a factor-analytic approach is used to measure the shadow economy as an unobserved variable, linking them to observed indicators (Schneider, 2004: 51).

labour demand, is one of the main aspects of the Italian immigration pattern.” (Pugliese, 2005, p.1)

There is a sort of vicious circle between submerged economy and irregular immigration: the submerged economy allows irregular immigrants to remain in the country without a regular permit of stay; irregular immigrants in turn make up a basin of available labour that supplies the submerged economy (Moreno, 2005). The ‘submerged’ phenomenon develops in the less structured and regulated contexts and is therefore less subject to control: agriculture, construction, care services, domestic services, catering, commerce.

2. Situation of undocumented migrants in Italy

The situation of migrants in Italy who have no permit of stay or are holders of an expired permit of stay, and are thus to be considered from an administrative point of view irregular, is generally good as they may still have access to fundamental rights such as health care, education and basic social services. Moreover, the Italian legal system is well structured; even though existing laws, when required, are largely unapplied by competent authorities. With regards to health care facilities, undocumented migrants may be issued an STP¹⁶ code, a medical card issued by local health care authorities (ASL) and can be renewed every six months. The STP code is issued anonymously, no identity proof is thus required, and it gives access to the following services:

- first aid and essential medical care
- pregnancy and maternity care
- health care services to minors
- national and international vaccines

If the STP holder has insufficient economic means, medical care is issued free of charge. Moreover, local health authorities have no obligation to inform police authorities regarding the presence of the undocumented migrant, except in cases in which a crime may have been committed.

The education system does also guarantee fundamental rights to undocumented migrants. Minors irregularly staying in Italy have access to compulsory education and their enrolment may occur at any time of the year. If the minor holds no valid identity proof, his/her enrolment will be welcomed by school authorities with reservation which, however, does not impede the issue of an educational qualification to the student. Some Municipalities have also private kindergarten facilities, financed with public funds which are open also to the children of undocumented migrants.

With regard to basic social services, undocumented migrants can generally exercise their right to have access to emergency services such as food and housing facilities.

For this reason, we may say that migrants, including undocumented migrants, are generally tolerated by official authorities in almost every part of the country. It is important to underline also that existing restrictive norms are generally not applied by official authorities. This occurs for two linked reasons: it is usually favoured the maintenance of some “superior” moral order to the application of restrictive norms which, however, are applied only as a last resort, that is, to cope with social crises. Such trend simply reflects a sort of “Italian way” to deal with social and

¹⁶ STP stands for “foreign nationals residing temporarily”

economic problems, the *motto* that prevails is: “action, but in the face of emergencies only”. With regard to the immigration phenomenon for example, the Italian Government has generally avoided tackling the problem by applying existing laws or by reinforcing the existing legal and/or welfare system. This has resulted in the declaration of legalisations from time to time in order to cope with social emergencies by regularising the undocumented migrants already living in the country, without, however, the provision of an efficient and sustainable legal and welfare system, which can guarantee a more systematic approach to the phenomenon of migration.

3. Consequences of legalisation acts

The first consequence to this social and Governmental attitude, which spans from a leftist to a rightist approach, is the exponential increase of regular migrants living in Italy: from approximately 943.530 in 1996 to 2.402.157 in 2005¹⁷ coming from more than 150 countries. This in turn determines the presence in Italy of a wide variety of cultures and national identities in a context which has been, at least over the past two centuries, quite homogenous from a religious, linguistic and ethnic point of view. The second consequence is a general, mass attraction towards legalisations which are viewed as the only feasible solution to deal with the migration phenomenon. Since 2002, however, no legalisations have been declared. The present Government seems to have opted for a different political approach which consists in opening the boundaries just to let in limited quotas of migrant workers. Such quotas are established yearly through National Decrees following a more or less accurate analysis of the demand for migrant workers in the Italian labour market. Once quotas are established, employers must submit their request to authorise the entry of a migrant worker. The migrant worker seeking to enter Italy must enlist in the Italian Consulate and obtain the authorisation to enter, provided it falls within the quota established by the Italian Government and *nulla osta* against the request. Such procedure is called *Chiamata Nominativa* (Nominal Call or Individual Request). Even though the regulation of influxes of migrant workers in Italy is in no way a regularisation, it is however perceived and applied as such as the workers called by the employers are *de facto* already living and working irregularly in Italy. Such a trend clearly indicates that even though the legal system may provide norms to regulate the phenomenon, Italy has in fact always opted for mass regularisations based on economic factors rather than based on people’s specific needs and the present political approach is only apparently changing by the usual route. This element is important if we consider the expectations raised by such mass regularisations in hundreds of thousands of people living in and out of Italy. This leads to the third consequence of legalisation acts. Such influxes of migrants represent an undeniable weight on the Italian welfare system, which is in no way organised to cope with such high demand.

4. Legalisation measures

Italy has been for decades a country of emigration: between 1860 and 1960, approximately 27 million Italian nationals have left the country. Italians used to emigrate either to other continents such as North and South America, or to other European countries such as France, Switzerland and Belgium. Following World War II, Italy was left poverty stricken and in a state of near economic collapse. By the early 1950s however, especially with the aid of foreign assistance (*i.e.* the Marshall Plan), Italy managed to restore its economy. During the 1960s and 1970s, an estimated 2.5 million residents living in the southern region of Italy migrated to the north and

¹⁷ Font Ministry of Interior and ISTAT (National Institute of Statistics)

gradually the country managed to restore its economy to pre-war levels, finally experiencing an unprecedented development through the 1960s and during the first half of the 1970s. After 1973, following the Opec oil crisis and the closure of other European countries to the entry of migrants, Italy began to register the first influxes of migrants wishing to work, particularly in the domestic and agricultural field. It is also worth remembering that during the 1980s, Italy witnessed short-term, yet significant, influxes of refugees in transit coming from Eastern Europe and Africa and travelling towards North America and Australia.

Regularisations arise from a politically unstable context, incapable of devising a sustainable reception system for migrants. The only programmes devised were for the benefit of a small number of refugees in view of their moving to other continents. Listed below are the regularisation orders declared by Italian Governments from 1986 to 2002. The first legalisation of irregular migrants was declared in 1986 by the promulgation of law 943/1986: As a result, 118.348 migrants were regularised. In order to be regularised, migrants had to prove that they had been living in Italy starting from the 31st of December 1986. On that occasion, the first norm regulating family reunion was also issued. In 1990 the second legalisation was promulgated following Law 39/1990; at that time, 234.841 migrants were regularised provided they produced evidence of their presence in Italy starting from 31/12/1989. Law 617/1996 brought to the regularisation of 258.761 migrants who had to produce evidence of a work activity in Italy starting from 19/11/1995. Such rule was also extended to the relatives of the migrant residing on the Italian territory. In 1998, following the Prime Minister's Decree of the 16th of October 1998, approximately 217.00 migrants were regularised. They had to produce evidence of their presence, work activity, including self-employment, and housing in Italy before 27/03/1998. The last legalisation was declared in 2002, following Law 189/02 and law 222/02. As a result, 646.000 migrants regularised following proof of presence in Italy and work activity before 10/06/2002 to be undersigned by stipulation of a Contract of Stay.

5. Short summary and Recommendations

The economic situation, characterized by the prevalence of the submerged work, and the national custom of declaring cyclical regularisations, have constituted two elements of strong attraction for the arrival of undocumented migrants in Italy. Besides, some of the specific aspects of the Italian immigration model are linked to the demographic and social trends of the population.

Immigrants are a fragile category within the Italian welfare system (especially in the sphere of the Italian pension system). Their fragility is caused by the fact that, despite the innovations introduced by the Bossi/Fini law, they often perform multiple jobs in order to reach a "dignified" standard of living. Their main activity – a regulated but de-skilled job – is generally economically insufficient and is therefore supplemented by other non-regulated jobs that remain outside the reach of pension regulations.

The level of social risk coverage guaranteed to immigrants by the Italian state depends on various factors: although not universal, and not even categorical, the social protection system for immigrants in Italy is conditioned by (at least) three factors: the legal position, the work condition and the residential position. With respect to the group with regular permits of stay, a distinction should be made among resident immigrants and immigrants residing for more than six years: some of the citizenship rights foreseen for immigrants by the current law are guaranteed only to persons holding a 'card of stay', which is issued only after six years of

regular and permanent presence in Italian territory. In addition, the work condition (as for Italians too) guarantees whether or not they have access to forms of protection. Regarding undocumented migrants, medical care is in all cases permitted, but only for emergency health services; pregnancy and maternity services are assured until the newborn is 3 months old; kindergarten and schooling are possible for children without risk up to the age of 16, undocumented migrants can attend school but are not entitled to receive diplomas (nor to sit the final exams).

In light of this analysis it is thus recommended that annual entry quotas of migrants are established in favour of all categories of skilled and unskilled labourers. Moreover, the Government is investing more in dealing with emergencies and detention policies of migrants at the borders than in integration policies (shelter, school, medical care, integration programmes). It is recommended that the Government invest more of its economic resources in devising integration policies in favour of migrants. This will bring more economic and social stability for the country and, in the long run, less economic burden on the Italian welfare and legal system.

Portugal

Eugénio José da Cruz Fonseca, Cáritas Portuguesa, Lisbon and Rui Manuel da Silva Pedro cs, Obra Católica Portuguesa de Migrações, Lisbon

I Economic and political condition in the country

1. General Information

Portugal is a traditional country of emigrants (33% of the population) and in the 1970's becomes also a destination for immigrants (4,5%). It is a country that keeps both fluxes alive: arrival and departure, making it a unique case in Europe. Figures from INE (National Statistical Institute) show that annually 30 000 persons depart to take residence abroad for a period greater than one year.

Total Population -	10.529.255
Active Population-	5.130.000
Unemployment rate -	7,7 %
Economic growth -	0,5 %
Inflation rate -	2,5 %
Minimal wage -	385,90 Euros
GDP per Capita –	19,300 US\$

Emigrants 4.800.000 - we have Portuguese emigrants in irregular administrative situation in terms of work and residence in countries such as Canada, Brazil, the United States of America, Angola and the United Kingdom...

Immigrants 490.000 - The three largest communities are:

- Brazil – 85.000
- Ukraine – 70.000
- Cape Verde – 65.000

Currently we have close to 80 000 irregulars registered in ACIME (High Commissioner for Immigration and Ethnical Minorities) waiting for the conclusion of their legalization process. There are no reliable numbers that quantify the other irregulars.

2. The perception of undocumented migrants by the public

The irregularity with all its negative aspects has been the propagated image in the media when the subject is immigration. Irregular immigration in detriment of the integration subject has predominated the political arena. The generalized vision has been made more from the effects than from the causes.

The situation of irregulars has been a subject that has mobilized the Civil Society in its claims for the past 10 years, where we observed five legislative changes having been made. The Civil Society organizations in defense of irregulars are mainly: immigrants associations, trade unions, the Catholic Church and other religious communities, political parties, NGO's...

Platforms in defense of immigrants in general but irregulars also:

- In 1996 – The Coordinating Secretariat of Associations for Legalization, also known as SCAL, had in the OCPM its executive secretariat and it gathered together the major immigrants associations, trade unions and churches. (currently it is suspended due to the evolution of the associative world and the large difference of the migration fluxes).
- In 2001 – the Anti-Racism Network (RAR) was established and gathered the anti-racist organizations and immigrants associations.
- Also in 2001 – appearance of the Coordinating Secretariat of Immigrants Associations (SCAI) with the purpose of being an autonomous associative space without the presence of the Church, NGO and union trades.
- Again in 2001 – the Catholic Church congregates the most involved organizations in defense of immigrant's rights and creates the Forum of Catholic Organizations for immigration (FORCIM).
- In 2003 – a new associative platform emerges and, by their own will, reintegrates trade unions and religious confessions.

It was this platform that summoned two public demonstrations in Lisbon:

- In January 2004 (in Largo do Chiado – Praça do Comércio/in front of MAI – Ministry of Internal Affairs) – after the 2003 sector regularization process for Brazilian citizens);
- In March 2005 (in Martim Moniz – Anjos/ACIME) – After governmental crisis related to Durão Barroso departure to the European Commission.

There was another public demonstration organized by Casa do Brasil Association regarding Brazilian irregulars:

- In November 2004 (in Largo do Chiado) – to alert about the bureaucratic delays and difficulties with the legalization process of Brazilians of 2003

The lobby in favor of immigrants in irregular situations is carried out by Immigrant associations and the referred platforms.

3. Opportunities for legal economic migration of unskilled workers

Portugal is a country in a fast modernization process and consolidation of its liberal economic model. The last 10 years have been characterized by large public construction works like Expo' 98, the Vasco da Gama Bridge in 1998, the new highway from the north to the south of the country; the 10 football stadiums for Euro 2004... The upcoming years will be the same because of construction projects like the new Lisbon international airport and the TGV are programmed.

The Portuguese economy has within it a black market for cheap labor, mainly constituted by foreigners. The hardest sectors to control and in need of unqualified workers are: building construction, tourism and domestic work. All these sectors are very difficult to regulate at the present moment.

Informal work is the main cause for the presence of irregular workers in Portugal, which has led to the appearance of organized networks of illegal raisers and transporters that traffic persons for labor exploitation.

4. Possibilities for the legalization of undocumented migrants

During these last 10 years three were made:

- In 2003 – for irregular Brazilian workers under the Agreement for Reciprocal Contracting of Nationals, signed during the visit to Portugal of the Brazilian President Lula da Silva between Portugal and Brazil. In the Agreement the two countries had committed to legalize the irregulars within their borders. This was a facultative process for those who entered Portugal until June of 2003. The registration was done in ACIME or in CNAI (National Immigrant Support Center) but ACIME was the Institution responsible for analyzing the processes.
- In 2004 – for irregulars who, despite not having residence permit, deducted for social security and tax payments. This process was compulsory for all irregulars who could prove that they effectively had a working relationship before March of 2003. The registration was made in the CTT (postal office) and ACIME received the processes.
- Also in 2004 – opened a registration process for children of irregular parents under ACIME whose main goal was to guarantee the rights but not the legalization process.

In these last 10 years a number of structures were created to support some categories of irregulars at risk such as:

- 2003/2005 “S. John of God” Temporary Shelter Center for immigrants in Sintra. This organization received mainly immigrants in irregular situations and in the regularization process. It welcomed nearly 300 citizens, men, women and children. It was composed mostly of homeless immigrants. It was a partnership between civil society – S. John of God Institute, OCPM /Portuguese Catholic Work for Migration), Cáritas Portugal and JRS (Jesuit Refugee Service) – the Sintra Autarchy and the State. The doors closed in June 2005 for lack of financial support.
- In 2006 the opening of the first Temporary Installation Center (CIT – Centro de Instalação Temporária) for the “detention” of irregular immigrants in Oporto was announced. Others will follow under the Decree-Law 34/2003 and they are partnerships between the State, JRS and OIM (IMO – International Migration Organization).
- In 2007 the CAIM will be created– Permanent Observatory in defense of women victims of traffic and prostitution.

II The situation of undocumented migrants in the country

1. Health Care

The National Health Service (SNS) is free. The user needs to be properly registered in a health center and must pay the moderating fees. For specific surgical intervention patients usually face long waiting lists.

In emergency situations all patients at serious risk are allowed, either nationals or foreigners. The problem for irregulars starts when they need to extend hospital stays and continuous treatments – consultations, exams and medication. These are paid.

The Order (Despacho) No. 25 360/2001 issued by the Health Ministry in 2001 restated that irregular immigrants have access to the emergency services as well as basic health care. This order was issued because some health employees were creating difficulties for the undocumented, refusing them entrance to emergency services and not giving them hospital support.

In 2002 and 2003 irregular workers in the country, including those without a working contract, were allowed to register in the Social Security and in the Tax Payment service. Many had access to the National Health System.

In neighborhoods where immigrant presence is strong several control campaigns and medical information actions took place, especially informing about HIV and tuberculosis.

The number of immigrants that are victims of accidents in the workplace has increased. They become destitute, receiving no compensation because they are in illegal working conditions and insurance companies create difficulties to the processes. The insurance is always nominal.

In some categories of immigrants the number of depression situations has also increased, mainly from Africa, Ukraine or Brazil. Several become homeless due to the absence of family networks or associative networks that could protect them and provide support.

Another situation is the abandoned and unclaimed dead bodies in morgues, especially among eastern immigrant victims of severe illness or in homeless conditions. This category represents the last migration flux that arrived in Portugal between 2001 and 2005. In 2004 108 cases were reported and in 2005 the number increased to 128.

There is another issue of public health related to the feminine genital cutting performed on African girls carried out by some cultures.

2. Risk-free access to education

In the 2003/2004 school year 81,470 foreign students, or descendants of parents from a different cultural group, were enrolled in Portuguese schools (from kindergarten to secondary school). In 4 years there has been an increase of 11,000 pupils.

Irregular children or children of irregulars can attend kindergarten. Many are Private Social Solidarity Institutions (IPSS) bonded to Parishes or associations and usually they have quotas for vulnerable cases. In extreme cases, where parents cannot afford school fees or are not present, there exist, in some neighborhoods, babysitter services formed by friendly families.

There are also irregular children and adolescents in both private and public schools. The school boards and executive school councils decide with complete autonomy the attitude to be taken but, in general, there is no studying exclusion within the obligatory scholarship (1st and 2nd cycles until the 9th grade). Even without documentation the children can continue their studies, if properly authorized. However they can not transit to the 3rd cycle without regulating their condition and the school contributes determinately to this regularization. The “ad hoc” exams taken during the child school course will be revalidated once the compulsory residence or regularization process is authorized.

If a student is irregular when he finishes the obligatory scholarship he cannot proceed to a higher education.

There are some children and adolescents in an irregular situation that have access to the school social support.

The government created a program to teach Portuguese to immigrants called “Portugal Acolhe” (Portugal welcomes) but the irregulars were excluded. They could not attend the courses and did not have access to food support and transportation support provided within the program.

3. Registration opportunities for undocumented migrants

In Portugal during the last 10 years two registration processes occurred for immigrants in irregular situations:

- In 2003 for immigrants from Brazil as a result of the visit of the President of Brazil to Portugal. It was called Agreement between the Portuguese Republic and the Federal Republic of Brazil regarding reciprocal contracting of nationals: Decree-law n.º. 40/2003 of 19th September. This was a facultative registration process done in Brazilian Associations or ACIME.
- In 2004 for immigrants who had paid into the social security and the fiscal system and that could prove a working relationship. This was a compulsory registration process made in ACIME and the CTT (Postal offices).

Once ACIME collected the data and analyzed it, they forwarded the information to SEF (Serviço de Estrangeiros e Fronteiras/Service for Border Control and Aliens). This data could only be used for an eventual legalization process and no other ends. Confidentiality of the involved institutions was safeguarded.

Municipal Autarchies remain uninvolved in immigration issues.

Public and private organizations that collect data about irregulars cannot identify irregular immigrants for expulsion effects under the law for personal data protection.

4. Which authorities are obliged to inform the aliens information office in case of illegal residence?

Only police forces, in searches and other identity control actions, are forced to identify illegal immigrants.

III Legalization measures

1. Legalization measures during the last decade

Legalization measures in the last decade: 1996-2006:

In 1992 occurred the first extraordinary regularization under Decree Law n.º 212/1992 12th October – 39,166 migrants regulated their situation.

In 1996 occurred the second extraordinary regularization under Decree Law n.º 17/1996 24th May and Ministerial Order (Portaria) 207/1996 11th June – 30,082 migrants regulated their situation.

Legislative changes that allowed, under various forms, the regularization of irregular immigrants under the “legal rules regarding the entry, stay, departure and expulsion of foreigners from national territory”:

1. Decree-Law nº 244/1998, 8th August (Original Version);
2. Law nº97/99 26th July;
3. Decree-Law nº 4/2001, 10th January (Report – Quotas – residence visa);
4. Regulatory-Decree nº 9/2001 30 May;
 - In the first year 126,901 immigrants legalized their situation;
 - In the second year 183,833 immigrants legalized their situation.
 - Only after five years of uninterrupted residence in the country was a residence visa obtained.
5. Decree-Law nº 34/2003, 25th February (new text – suspends the concession of permanence visa);
6. Brazilian Immigrants Registration Agreement between Portuguese Republic and the Federal Republic of Brazil regarding reciprocal contract of nationals, Decree-Law nº 40/2003 19 September;
 - 30,000 registered, of which, until now only 13,000 obtained residence visas.
7. Regular-Decree nº 6/2004 26 April;
 - Registration in the postal offices (CTT) under article 71 it applied to 50,196 persons of which until now only 8,006 have obtained residence visas.
8. A new change to the Immigration Law is being prepared

2. Prerequisites for legalization

The need of continuous permanency in the national territory under a period determined by law (between one to five years). In some legal diplomas positive discrimination is present regarding lusophone citizens. Regarding others, the entrance date in the country and the permanency time differ.

Existence of a working relationship (e.g. must be express in working contract or promise of working contract; denounce of fraudulent employer with witnesses or with the support of the union).

Any revisionment of the permanency permit (annually) or the residence visa (between two to five years) is only possible through the obligatory presentation of a working contract.

The payment of minimal contribution (at least ninety days) to social security and to the tax payment (this were the prerequisites for the “CTT registration process “in 2004);

Payment of a fee for the months the immigrant was irregular (in the “Brazilian registration process” the maximum fee was 500 Euros)

The Brazilian citizens legalized in the 2003 registration process, after satisfying all pre-requisites, had to leave the country (usually to Spain) in order to obtain the permanent visa.

There is an annual payment for the permanency permit. Each costs 75 euros.

3. Types of residence permits and possibilities for family reunification

In 2001 the permanency visa was created and it was no more than an exceptional working visa in the national territory.

The permanency visa is renewable with a valid working contract and the payment of 75 euros.

After five years of uninterrupted renewals the applicant is entitled to a residence visa. In the first two years it is temporary only becoming "permanent" after the fifth year.

In 2006 we will assist with the passage of a permanency visa for the residence visa of 200, 000 persons. The expectation is that this minor residence title (permanency permit), created to regulate the 2001-2002 migration beam and that did not concede the same rights as a residence permit, will be ended during 2006.

Positive discrimination privileging lusophone countries is still very present. This attitude is very visible in the payments, while the persons proceeding from the Portuguese speaking communities pay 20 Euros for the visa and all the others pay 100 Euros.

IV. Consequences of legalization acts

1. Long term influences and trends in the number of irregular migrants

In the Portuguese case all seems to indicate that in the last decade the number of irregulars has been increasing. This assumption is based on statistical data of the regularized immigrants to which residential and permanence visas were issued. The dossier we delivered to the secretariat of this conference has attached this statistical data.

Even with restrictive immigration laws, registration processes for irregulars is very complex and the tendency is not for decreases but increases. Especially when having in account the immigration flux from Brazil. This is the second wave of Brazilian immigrants in the last 20 years mainly from Minas Gerais state.

Nobody knows how many irregulars live in Portugal. What can be said at this time is that approximately 80,000 foreign citizens in irregular situations are registered (since 2003) in ACIME and many of them are waiting for legalization.

Both registration processes (2003 and 2004) excluded the immigrants that were already living in the territory on the date of the publication of these two decrees.

2. The situation of migrants with a legalized status

There is a group of immigrants that, after the first legalization, on a working and residential/permanency level, returned to an illegal situation. The reasons are:

- In order to legalize themselves they have to take an inferior wage offered by the employer therefore preferring informal and insecure but more monetarily rewarding work;
- They aren't able to collect all the necessary documentation demanded by SEF and money to pay the fee in order to renew their documentation. This problem is driven by precarious situations related to family or personal issues.

- Nowadays a small amount of investigative information exists concerning the “world of irregulars” on work, habitation conditions and health levels. However in the economic area the sectors that are responsible for employing many irregulars are construction, hotels and tourism in general, entertainment and domestic work.

Conclusion

This “world of irregulars” has been for the catholic organizations in Portugal a “preferential option” of organized charity because we live daily the dilemma between legality and solidarity taking us many times to a certain silent civil disobedience of our action.

When the organized crime of facilitating illegal immigration arrived, the Catholic Organizations took a position close to SEF so they wouldn't be penalized in the humanitarian non profit work they do.

To end, we understand that the campaign for the ratification of the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, in which irregular immigrants are understood as subjects with rights, is an instrument in defense of irregulars.

Espagne

Micaela Sampedro Fromont et Jorge Gonzales Lopez, Asociación Comisión Católica Espanola de Migraciones (ACCEM), Madrid

I. Situation politique et économique en Espagne

Pendant les dernières décennies, l'Espagne a connu une remarquable évolution dans le domaine de la migration.

Bien qu'on ait commencé à observer une augmentation continue de l'immigration depuis le milieu des années 1980, ce n'est qu'à partir des années 1990 et plus particulièrement pendant les dix dernières années que les taux d'immigration commencent à être significatifs. C'est dans ce XXI^{ème} siècle que se produit un renversement des flux migratoires : pour la première fois dans l'histoire de l'Espagne contemporaine, la population étrangère immigrée est plus grande que la population espagnole vivant hors les frontières espagn

Selon recensement du 1er janvier 2005, la population en Espagne a atteint 44 108 530 habitants, dont 3 730 610 ne possèdent pas la nationalité espagnole. Encore en 1995, il y avait seulement 500.000 étrangers recensés en Espagne, presque 900 000 en 2000, et deux millions en 2002. Selon le recensement de l'Institut National de Statistique, la population en Espagne a augmenté la dernière année de 910.846 personnes, dont 76.4 % sont d'origine étrangère (696 284).

Parmi ces étrangers, les nationalités les plus nombreuses sont les suivantes : Marocains (511 294) , Équatoriens (497 799) et Colombiens (271 239).

* Chiffres provenant de l'Institut National de Statistique d'après les enregistrements. (La méthode employée n'est pas sans défaut, et les chiffres doivent être reçus avec une certaine méfiance du fait qu'ils contiennent une certaine marge d'erreur : on y trouve seulement les personnes qui se sont enregistrées volontairement, il y a des duplicités d'inscriptions, il y a des personnes enregistrées qui n'habitent plus en Espagne etc. ; en plus il faut compter que l'augmentation des personnes enregistrées ne garde pas de proportion avec les personnes arrivées récemment en Espagne, mais dépend aussi d'autres facteurs, comme la nécessité du recensement dû au processus extraordinaire de normalisation).

Pour analyser la situation du travail des étrangers par rapport aux Espagnols, on tiendra en compte seulement les étrangers possédant une autorisation de travail, étant donné (voir plus haut) que le caractère clandestin des travailleurs irréguliers ne nous permet pas de faire une estimation sérieuse ni de leur nombre ni de leurs conditions de travail. D'après l'EPA (Étude de la Population Active), le taux de chômage général en Espagne est de 8,5 % pour le dernier trimestre en 2005, parmi les étrangers avec autorisation de travail, il est pour la même période de 10,23 %. Les raisons de ce déséquilibre pourraient se trouver dans les délimitations des permis de travail concernant le secteur géographique et le secteur d'activité, dans un manque général de qualification de la plupart des travailleurs étrangers, dans des réseaux d'appui moins performants, dans une économie souterraine etc.

II. Possibilités d'immigration légale

On peut dire que les possibilités d'immigration légale en Espagne sont dictées par la situation nationale d'emploi : les administrations publiques, en collaboration avec les syndicats et le patronat, élaborent trimestriellement un Catalogue des Professions à Couverture Difficile. Dans ces métiers pour lesquels il n'y a sur le marché de travail espagnol pas assez de demandeurs d'emplois disponibles et qualifiés, les employeurs peuvent avoir recours à une main-d'oeuvre étrangère.

Exigences générales:

- Les offres d'emploi doivent correspondre à un métier inclus dans ce catalogue.
- Les travailleurs étrangers ne doivent se trouver sur territoire espagnole.

Les voies les plus importantes d'immigration légale sont les suivantes:

- Le système du Contingent des travailleurs étrangers est une procédure de recrutement programmé d'ouvriers qui ne se trouvent pas sur le territoire espagnol, qui sont appelés à occuper un poste de travail stable et qui seront sélectionnés dans leur pays d'origine à partir d'offres génériques présentées par les employeurs. Les compagnies peuvent participer au procès de sélection et dresser le contrat de travail déjà au pays d'origine. (Les offres d'emploi véhiculées à travers le contingent seront envoyées de préférence aux pays avec lesquels l'Espagne a signé des accords de régulation de courants migratoires, comme la Colombie, la République Dominicaine, l'Équateur, la Roumanie, la Pologne ou le Maroc.)

Le gouvernement fixe chaque année ce contingent par accord du Conseil des Ministres, tenant compte de la situation nationale de l'emploi, des propositions des régions, et des avis des organisations syndicales et patronales les plus représentatives. Cet accord peut également établir un nombre de visas pour la recherche d'emploi dans certaines activités, ainsi que pour les fils et petits-fils de ressortissants espagnols. Dans ces cas, le visa a une durée de trois mois, pendant lesquels l'étranger doit trouver un emploi et s'inscrire à la Sécurité sociale pour obtenir l'autorisation de travail et de résidence. Au cas où l'étranger n'accomplirait pas cette exigence, une fois ce terme écoulé l'étranger devrait retourner dans son pays d'origine.

(Pour l'année 2006, le chiffre provisoire du contingent est de 16 878 emplois stables, dont 1 296 sont des visas pour la recherche d'emploi : 661 visas pour le personnel de service, 15 pour le BTP (bâtiment, travaux publics), 40 pour des serveurs, 10 pour des cuisiniers et 570 visa pour des fils et petits-fils de ressortissants espagnols (ces dernières ne contiennent pas de limitation sectorielle).

- Autorisation de travail saisonnier ou dans la campagne : Ces permis sont accordés pour réaliser un travail concret pendant une certaine période de temps. Une fois cette période conclue, l'étranger est tenu à retourner dans son pays d'origine. Ils sont dirigés surtout vers le secteur agricole, les périodes d'autorisation coïncidant généralement avec les récoltes saisonnières. Leur durée doit coïncider avec la durée du contrat ou des contrats, avec la limite de neuf mois dans une période de douze mois consécutifs.

Une série d'obligations est imposée tant envers l'employeur comme envers l'employé. L'employeur doit garantir l'activité continue de l'employé pendant toute la durée de l'autorisation, procurer un logement approprié, et organiser et assumer le coût de

l'arrivée en Espagne et du retour au pays d'origine. De son côté, le travailleur s'engage à retourner dans son pays d'origine une fois que le contrat de travail est terminé.

(L'exécution par l'ouvrier étranger de ses obligations lui donnera la priorité pour se porter candidat à d'autres offres d'embauche dans la même activité. S'il est embauché pendant 4 années, consécutives ou non, cela sera pris en considération pour l'obtention d'une autorisation de travail temporaire, celle-ci étant prorogable d'une année.)

Pendant l'année 2004, 20 070 permis de travail saisonnier ont été accordés, l'agriculture étant, avec 17 428 permis, le secteur dominant, suivi par l'hôtellerie avec 1 327 permis.

- Les Autorisations initiales pour le travail autonome exigent une série de conditions comme la présentation d'un projet viable, et elles dépendent de l'obtention des licences d'ouverture.
- Autorisations initiales de travail : Si un employeur veut proposer un poste de travail à un travailleur étranger il doit d'abord personnellement demander une autorisation initiale de travail nominative pour la personne qu'il veut embaucher.

Avant l'approbation du *Règlement d'Exécution de la Loi Organique des Droits et Libertés des Étrangers en Espagne et de leur Intégration Sociale* du 30 décembre 2004, la législation obligeait l'employeur à présenter a priori l'offre d'emploi à l'INEM (Agence Nationale pour l'Emploi), et seulement au cas où celle-ci certifierait l'impossibilité de trouver des candidats espagnols, il pouvait demander l'autorisation de résidence et de travail pour un étranger.

Selon le nouveau Règlement il suffit pour l'employeur de consulter le Catalogue des Postes à Difficile Couverture, où l'on trouve pour chaque secteur d'activité et dans chaque département les postes pour lesquels il s'avère difficile de trouver des candidats adéquats et disponibles. Si le poste offert se trouve inclus dans ce catalogue, l'employeur peut demander l'autorisation de travail, en satisfaisant évidemment les autres exigences.

III. Possibilités de régularisation pour les personnes qui sont en situation irrégulière sur le territoire espagnol

Malgré l'intention des gouvernements consécutifs de contrôler les courants migratoires à travers l'établissement d'exigences d'entrée et en dépit de plusieurs processus de régularisation en Espagne, il continue à y avoir un nombre important de personnes qui restent en Espagne dans une situation d'irrégularité. Pour ces cas, la loi prévoit des mécanismes de régularisation individuelle (article 31.3 de la Loi sur les étrangers et article 45 de son Règlement d'exécution).

De cette façon, les étrangers en situation irrégulière peuvent demander une autorisation de résidence temporaire si une des circonstances exceptionnelles suivantes est reconnue:

- **Insertion professionnelle:** les étrangers qui peuvent justifier une permanence ininterrompue en Espagne pendant une période minimale de deux ans, sous condition qu'ils n'aient pas de casier judiciaire ouvert ni en Espagne ni dans leur pays d'origine, et qui peuvent prouver l'existence de relations de travail pendant une période minimale d'un an (attestée par jugement prud'homal ou par un rapport de l'Inspection du Travail), peuvent demander cette autorisation de résidence.

- **Insertion personnelle:** les étrangers peuvent obtenir cette autorisation s'ils justifient une permanence ininterrompue en Espagne pour une période minimale de trois ans, sous condition qu'ils aient une offre certaine de travail d'une durée d'une année, qu'ils n'aient pas de casier judiciaire ouvert ni en Espagne ni dans leur pays d'origine à la date de la demande, et qu'ils aient un parent muni de permis de résidence (époux, ascendants ou descendants) ou, par défaut, présentent un rapport émis par le Conseil municipal de la Commune certifiant leur intégration sociale.
- **Liens familiaux:** peuvent avoir accès à cette autorisation de résidence temporaire les enfants d'un père ou d'une mère d'origine espagnole.
- **Raisons de protection internationale:** le Ministre de l'Intérieur peut autoriser la permanence en Espagne pour des raisons de protection internationale d'après les règlements du droit d'asile.
- **Raisons humanitaires:** cette autorisation de résidence est accordée aux étrangers qui ont été victimes d'immigration clandestine, qui ont été discriminés en raison de leur idéologie, religion, croyances, appartenance à une ethnie ou une nation, en raison de leur sexe, option sexuelle, situation familiale, d'une maladie ou handicap etc. , qui ont été victimes de délits racistes ou discriminatoires ou de violence exercée au sein de la famille , sous condition de pouvoir produire un jugement définitif.

Ceci est également applicable à ceux à qui le renvoi dans le pays d'origine entraînerait un danger pour leur sécurité ainsi que celle de leur famille.

Pourront également avoir accès à cette autorisation les étrangers qui souffrent d'une maladie qui ne peut être prise en charge dans leur pays d'origine.

- **La collaboration avec les autorités** ou des raisons d'intérêt public ou de sécurité nationale peuvent également constituer une nécessité d'autoriser la résidence d'un étranger ou d'une étrangère en Espagne.

Les autorisations de résidence temporaire accordées pour des motifs exceptionnels n'exigent pas l'obtention d'un visa, doivent être demandées directement par l'étranger, et ont une validité d'une année, mais elles sont renouvelables si les circonstances qui en ont motivé la concession subsistent.

IV. Situation d'irrégularité

Quelles sont les causes qui font qu'un étranger finisse dans une situation d'irrégularité? Les situations sont variées, parmi lesquelles les plus communes sont les suivantes:

- l'impossibilité de renouvellement du permis de résidence : certains étrangers ont eu une autorisation de résidence dans le passé, mais, pour des raisons multiples, ils n'ont pas été capables de la renouveler. Souvent le fait de ne pas avoir cotisé pendant 6 mois à la Sécurité sociale pendant toute une année, ou le fait de ne pas avoir un contrat de travail au moment de la demande du renouvellement entraînent à présent le refus du renouvellement de l'autorisation de travail ;
- des étrangers qui sont arrivés sur le territoire espagnol de façon irrégulière ou qui, étant arrivés en règle, ont décidé de rester après l'expiration de leur visa de séjour ;
- des demandeurs d'asile dont la requête a été rejetée.

Dans ces situations, bien qu'ils n'existent pas de statistiques à cet égard, l'expérience comme organisation dédiée au conseil d'immigrés nous montre que beaucoup de ces étrangers restent en Espagne de façon irrégulière. Il faut aussi souligner qu'il est parfois difficile d'exécuter les ordres d'expulsion, faute de documentation pour identifier la nationalité des immigrants irréguliers ou parce qu'il n'y a pas d'accord de dévolution avec leur pays d'origine.

V. Situations des immigrants irréguliers en Espagne

En Espagne, les étrangers sont protégés par les droits et libertés reconnues dans la Constitution. Ces droits sont exercés dans les termes prévus par les traités internationaux, la Loi sur les Étrangers et son Règlement d'exécution :

- **Droit à la documentation:** Il s'agit d'un droit-obligation de conserver la documentation qui prouve l'identité d'un(e) immigré(e) et son statut en Espagne, donc la documentation du pays d'origine ainsi que celle émise par les autorités espagnoles.
- **Droit et devoir à l'éducation:** Les étrangers de moins de dix-huit ans ont le droit et le devoir d'éducation sous les mêmes conditions que les Espagnols. Ce droit comprend:
 1. l'accès à enseignement de base, gratuit et obligatoire ;
 2. l'obtention des diplômes académiques correspondants ;
 3. l'accès au système public de bourses d'études et d'aides.
- **Droit à l'assistance médicale:** Les étrangers qui sont en Espagne, enregistrés dans la commune où ils résident habituellement, ont le droit à une assistance médicale sous les mêmes conditions que les Espagnols.
- **Droit aux services et prestations sociales de base**
- **Droit à la tutelle judiciaire effective:** Les étrangers ont le droit à la tutelle judiciaire effective.
- **Droits d'assemblée, de manifestation et d'association, droit de syndicalisation, droit à l'assistance juridique universelle et gratuite.** C'est paradoxal que la loi organique 4/2000 étende les droits d'assemblée, manifestation et association, le droit à la syndicalisation, le droit à l'assistance juridique universelle et gratuite à tous les étrangers, en situation régulière ou irrégulière, pour ne pas être traités dans la suivante réforme législative (moins d'une année après), qui en plus ne reconnaît ces droits qu'aux résidents en situation régulière.

Actuellement ces droits sont conçus de la façon suivante:

1. Droit à l'assistance juridique gratuite : Les étrangers qui se trouvent en Espagne et qui n'ont pas suffisamment de ressources économiques ont le droit à l'assistance juridique gratuite dans les procédures administratives ou judiciaires qui pourraient aboutir au refus de leur entrée, à leur dévolution ou expulsion du territoire Schengen, et dans toutes les procédures en matière d'asile.

Les étrangers résidant légalement sur le territoire espagnol qui n'ont pas suffisamment de ressources économiques ont le droit à une assistance juridique gratuite dans les

mêmes termes que les Espagnols, dans les procès dans lesquels ils font partie, devant n'importe quelle juridiction.

En revanche, la sentence du Tribunal Constitutionnel du 22 mai 2003 a déclaré nulle la prévision qui limite le droit à la justice gratuite aux étrangers qui résident légalement en Espagne, donc qu'à présent, même si cet article n'a pas été supprimé, tous les étrangers, en situation régulière aussi bien qu'en situation irrégulière, ont droit à l'assistance juridique gratuite.

2. Liberté d'association, syndicalisation et grève : Les étrangers pourront se syndiquer librement ou s'affilier à une organisation professionnelle sous les mêmes conditions que les autres travailleurs, mais seulement s'ils possèdent une autorisation de résidence ou de séjour. Ils pourront exercer le droit de grève seulement s'ils possèdent une autorisation de travail.

Même si les associations d'immigrés irréguliers n'existent pas, les travailleurs étrangers en situation irrégulière s'affilient aux syndicats existants en Espagne et en tout cas ils sont protégés par la législation du travail.

3. Libertés d'assemblée et manifestation : Les étrangers auront le droit d'assemblée sous les mêmes conditions que les Espagnols, mais pour pouvoir exercer ce droit il doivent avoir une autorisation de séjour ou de résidence en Espagne.

VI. Processus de régularisation

Les processus de régularisation sont une mesure exceptionnelle destinée à résoudre la situation de centaines de milliers d'immigrés qui se trouvent en Espagne en situation irrégulière. En général, les processus de régularisation sont accompagnés par des changements législatifs dans le domaine de l'immigration, des changements qui s'orientent habituellement vers une plus grande restriction et qui ont comme intention de stabiliser une situation réelle, avec le souci que la nouvelle réglementation n'ait pas d'effets négatifs sur les étrangers qui se trouvent déjà en Espagne.

La première loi espagnole sur les étrangers a été promulguée en 1985, date à laquelle a eu lieu le premier processus de régularisation. Après, en 1991, la recommandation adoptée par le Congrès des Députés fixait les lignes de base de la politique migratoire espagnole, en signalant l'importance d'endiguer l'arrivée d'immigrés, pour mieux l'adapter aux besoins de main-d'œuvre de l'économie espagnole et à la capacité d'absorption de la société en général et du marché du travail en particulier. Cette recommandation a été accompagnée d'un autre processus de régularisation en juin 1991 ; ultérieurement en 1996, en 2000 et en 2001, il y a eu différents processus de documentation d'étrangers.

Le nouveau Règlement de la Loi Organique 4/2000 des Droits et Libertés des Étrangers en Espagne et leur Intégration Sociale a été approuvé en décembre 2004. Ce nouveau Règlement, qui est le fruit d'un accord du Groupe de Dialogue Social entre les syndicats et le patronat, avec l'avis conforme des régions, des conseils municipaux, des organisations sociales et professionnelles, définit les aspects fondamentaux de la nouvelle politique que le gouvernement espagnol a mis en marche dans le domaine de l'immigration.

Le nouveau Règlement s'efforce d'orienter les courants migratoires en fonction des besoins du marché du travail espagnol.

Le Règlement prévoit, dans sa disposition transitoire troisième, un processus de régularisation. Étant donné que ce processus s'est déroulé récemment en Espagne, nous allons nous concentrer sur celui-ci.

Les exigences pour avoir accès à ce processus étaient les suivantes:

- avoir été recensé en Espagne avant le 8 août 2005;
- avoir une offre de travail d'une durée minimale de 6 mois;
- ne pas avoir de casier judiciaire ouvert ni en Espagne ni dans le pays d'origine;
- déposer la demande entre le 7 février et le 7 mai 2005.

C'étaient les employeurs qui devaient présenter la documentation, sauf quand il s'agissait de personnes qui – travaillant dans le service domestique – servaient dans plusieurs foyers.

La nouveauté de ce processus de régularisation a été que la concession de l'autorisation de travail est conditionnée à l'affiliation de l'étranger au système de la Sécurité sociale par l'employeur, sauf comme il a été dit dans le cas du service domestique autonome, cas où les employé(e)s en question devaient s'inscrire personnellement.

Les autorisations de résidence et de travail accordées lors du processus de régularisation ont une validité d'une année, elles ont une limitation géographique et sectorielle, et elles sont renouvelables sous certaines conditions.

Du fait que ces autorisations de résidence étaient accordées sous la condition d'avoir un contrat de travail, les mineurs et les membres de famille dépendants étaient exclus.

Pour les étrangers qui ont obtenu une autorisation de travail et qui ont des enfants mineurs différentes possibilités se présentent :

si leurs enfants sont nés en Espagne et se trouvent en Espagne, les parents peuvent demander directement une autorisation de résidence pour leurs enfants, sous condition de la validité du titre de séjour des parents;

si leurs enfants ne sont pas nés en Espagne, mais se trouvent sur le territoire espagnol, le Règlement exige une permanence ininterrompue en Espagne pendant une période minimale de deux ans, un certificat d'une scolarité en continue, et l'existence d'un logement approprié;

si leurs enfants se trouvent dans leur pays d'origine, les parents doivent attendre le renouvellement de son autorisation de résidence et de travail pour demander le regroupement, donc un an après l'obtention de la carte de séjour. Les conditions pour avoir accès au regroupement sont des moyens financiers pour subvenir aux besoins des enfants ainsi qu'un logement approprié.

Pour les familiers dépendants (époux ou parents), deux possibilités se présentent:

- s'ils sont dans le pays d'origine, l'étranger doit attendre le renouvellement de son autorisation de résidence et travail pour demander le regroupement. Les conditions pour avoir accès au regroupement sont que le regroupant justifie de moyens économiques suffisants pour subvenir aux besoins des membres de la famille et d'un logement approprié. Pour le cas des ascendants, il faut qu'ils justifient aussi une dépendance économique.
- s'ils sont en Espagne en situation irrégulière, il n'y a pas de préférences spéciales, sauf celles accordées par le régime général.

VII. Conséquences des régularisations

Chez ACCEM nous pensons que le control des flux migratoires reste nécessaire, essentiellement les flux économiques - les déplacements découlant des persécutions dans les pays d'origine, des situations protégées par le droit d'asile mériterait un autre débat à part – à partir de l'idée que la population étrangère se déplace vers les sociétés où elle trouve du travail. Dans ce sens, les immigrés choisissent comme pays de destination l'Espagne parce qu'ils y trouvent du travail.

L'expérience nous dit que les immigrés trouvent du travail avec ou sans autorisation Administrative, et tant que ceci continue d'être une constante il est difficile de penser que l'arrivée d'immigrés se canaliserait exclusivement à travers les alternatives légales existantes, trop limitées et compliquées.

Pour cette raison, nous comprenons qu'un des éléments incontournables est la lutte contre l'économie souterraine, à travers une surveillance efficace du marché du travail. Cette surveillance doit comprendre le respect de la législation du travail, elle doit empêcher l'embauche d'une main-d'œuvre irrégulière (qui est normalement exposée à des situations d'exploitation) et elle doit réellement poursuivre les employeurs qui enfreignent les lois.

C'était dans cet esprit de la lutte contre l'économie souterraine que le dernier processus de la normalisation a eu lieu. Étant donné le nombre de personnes régularisées, on peut dire que ce processus extraordinaire de normalisation a été une mesure convenable pour essayer d'adapter la réalité sociale des immigrés en Espagne aux nécessités du marché du travail.

VIII. Analyse quantitative du processus de normalisation

(30 décembre 2005)

Applications	Positives	Négatives	Résolutions	En suspens	Affiliation a la Séc. soc.
691 655	573 270 (83,2 %)	115 149 (16,8 %)	688 419 (99,5 %)	3 236	550 136 (80 %)

Affiliations à la Sécurité sociale:

Équateur	122 636	Argentine	20 307
Roumanie	95 993	Ukraine	18 652
Maroc	64 697	Uruguay	9 165
Colombie	48 355	Pakistan	7 844
Bolivie	37 286	Bulgarie	21 316
autres	103 885		

Par secteur d'activité:

Service domestique	33,42 %
Construction	21,19 %
Secteur agricole	14,16 %
Hôtellerie	10,77 %
Mer	0,11 %
Autres	20,34 %
Affiliation à la Sécurité sociale (chiffre absolu)	550,136

France

Jean Haffner, Caritas/Secours Catholique, Paris

En France, la problématique des « sans-papiers » est tout à fait d'actualité : en effet, une nouvelle loi est en préparation qui vise à favoriser l'immigration « choisie » et à lutter contre l'immigration « subie » (autrement dit l'immigration qui est la conséquence des conventions internationales concernant l'asile, le statut de réfugiés ou bien les regroupements familiaux etc.).

Pour bien comprendre la situation française dans le cadre de ce panel qui met en avant les aspects économiques, il importe d'avoir à l'esprit que seulement 7 % à 12 % des étrangers ont un titre de séjour pour un motif direct de « travail » et que donc 90 % obtiennent le séjour sur d'autres bases (famille et vie privée comme liens importants en France, asile etc.) qui leur accorde néanmoins un accès direct au marché de l'emploi. Concrètement en France aujourd'hui, *la situation personnelle des individus prime sur la situation économique*. Un projet de loi actuel vise à inverser cette réalité.

I. La situation de l'immigration en France et des « sans-papiers »

La France compte un peu plus de 60 millions d'habitants et environ 3,2 millions d'étrangers selon le recensement de 1999 (3,6 M. en 2003), avec une concentration dans certaines régions.

Les étrangers en séjour régulier ont pour la plupart une carte de longue durée (10 ans), mais la tendance actuelle est de privilégier les autorisations de séjour plus courtes : en 1993, seulement 5 % des étrangers avaient un document de séjour d'un maximum d'un an, en 2003, ce chiffre s'élevait déjà à presque 10 %.

Les « sans-papiers » sont de l'ordre de 300 à 400.000 personnes. Mais il ne s'agit pas d'un groupe uniforme : la majorité d'entre eux sont connus de l'administration et multiplient les démarches pour être régularisés (déboutés d'asile, étrangers de longue date en France ou avec des liens importants avec des Français ou étrangers en situation administrative régulière...) ; d'autres se cachent délibérément : parmi eux, il y a des victimes du règlement « Dublin », des étrangers qui n'ont aucune chance d'obtenir un titre de séjour (et qui travaillent clandestinement) ou qui le croient (conjointes venues en dehors du regroupement familial, victimes d'esclavage moderne etc.).

En effet, après la régularisation assez massive de 1997-98, la France privilégie une régularisation au cas par cas : un étranger peut être régularisé s'il peut démontrer une présence en France depuis 10 ans ou si ses liens en France sont importants (c'est ce qu'on appelle la « vie privée et familiale ») ou en cas de maladie grave si un traitement n'est pas accessible au pays d'origine. Grosso modo, ces mesures concernent environ 20 à 40.000 personnes par an.

Situation économique et politique

Un risque de chômage plus élevé pour les immigrés

En France, le chômage ne touche pas de façon identique les immigrés (c'est-à-dire des personnes nées étrangères dans un pays étranger et qui ont migré vers la France et dont certaines sont devenues françaises) et les non-immigrés.

9 % des travailleurs autochtones sont au chômage, mais on compte plus de 17 % parmi les travailleurs immigrés. Les femmes immigrés sont les premières victimes de cette différence notable, leur taux de chômage est de 20 % et donc deux fois plus élevé que celui des non-immigrées.

Finalement, pour les immigrés comme pour le reste de la population, le taux de chômage diminue avec le niveau de qualification. Cependant, à un niveau de diplôme donné, le taux de chômage des immigrés est toujours substantiellement plus élevé (deux fois plus, sauf au niveau de qualification le plus bas) que celui des non-immigrés.

Les besoins de main d'œuvre (selon le ministère de l'économie – janvier 2006): Les secteurs pour lesquels la main d'œuvre immigrée pourrait venir compléter l'apport de la main d'œuvre autochtone

À court terme, l'existence de difficultés de recrutement pour certains métiers constitue un élément susceptible de justifier une politique en faveur de l'immigration. Une liste de dix métiers qui pourraient être éligibles à une telle politique est présentée ci-dessous. Il s'agit pour la plupart de métiers qualifiés mais qui requièrent rarement des études supérieures.

Métiers pour lesquels l'immigration pourrait atténuer les difficultés de recrutement dans les deux ou trois prochaines années :

- Ouvriers qualifiés des travaux publics
- Représentants
- Employés et agents de maîtrise de l'hôtellerie
- Infirmiers, sage-femmes
- Techniciens et agents de maîtrise de la mécanique
- Cuisiniers
- Bouchers, boulangers, charcutiers
- Ouvriers qualifiés du gros œuvre
- Techniciens du bâtiment
- Ouvriers qualifiés de la mécanique
- Maîtrises et intermédiaires de commerce

Toutefois, rien ne garantit que les difficultés de recrutement de ces métiers persistent à un horizon de quelques années ni que l'immigration constitue la meilleure réponse possible à ces difficultés. En effet, un rapport du Ministère de l'économie et des finances du 16 janvier 2006 émet des doutes que l'immigration soit la solution la plus adaptée pour répondre aux difficultés de recrutement de court terme.

Situation démographique

Au vu de la situation démographique de ces quelques dernières années (et surtout du nombre de naissances en hausse), il n'y aurait pas un besoin très supérieur vis à vis du niveau d'immigration actuelle (140 à 200.000 étrangers par an selon les années). Pourtant, ceci tient au discours politique actuel qu'il serait important de regarder de plus près.

L'immigration illégale dans le discours politique

L'opinion publique se révèle très versatile. Elle est très sensible aux thèmes de l'insécurité (violences dans les banlieues en novembre 2005, attribuées parfois aux enfants d'immigrés), du chômage (les plus opposés à l'immigration sont les gens qui vivent dans les situations les plus précaires, qui sont peu qualifiés et particulièrement touchés par le chômage). Souvent, l'immigration sert de bouc émissaire, mis en avant surtout par la droite et l'extrême droite : la mauvaise gestion de ce « problème » est rendue responsable de tous les maux de la société. Ce sera sans doute un des thèmes pour les futures élections présidentielles de 2007.

Les « sans-papiers » essaient de constituer un groupe de pression, mais de multiples dissensions les empêchent de présenter un front commun ; ceux qui sont régularisés abandonnent souvent la lutte, de peur de perdre leurs « papiers » finalement acquis, et il y a donc souvent des changements de leaders. Les multiples communiqués de presse sont vite banalisés. Les moyens d'action qui interpellent les médias, et donc l'opinion, s'orientent de plus en plus vers les grèves de la faim ; les préfets interrompent le plus vite possible toute velléité et aucune organisation non-gouvernementale sérieuse n'encourage cette atteinte à la vie.

Du côté des organisations non-gouvernementales (ONG), il existe des clivages concernant la nécessité de frontières (protectrices, forteresses...), la libre installation (en plus de la libre-circulation) : « des papiers pour tous » ou encore la question concernant la légitimité de la maîtrise de l'immigration par les pouvoirs publics. Ces ONG ont du mal à mobiliser l'opinion publique, d'autant que ce thème est très complexe et politiquement « sensible ». Elles se rejoignent pourtant contre les vellétés gouvernementales de « choisir » les migrants sur des bases utilitaristes, les éloignements forcés qui touchent de plus en plus des familles avec des enfants scolarisés et les restrictions ou contrôles qui deviennent liberticides. Elles sont très vigilantes à ce qui pourrait restreindre leur liberté d'action avec les « sans-papiers » et donc contrecarrer leurs buts humanitaires.

Dans l'opinion publique, il n'y a pas de réel débat, les éléments évoqués ici ou là sont surtout des caricatures ou des approximations et ne permettent pas un vrai débat rigoureux.

Possibilités d'immigration pour des raisons économiques

L'analyse des flux d'entrée montre que la très grande majorité des immigrés est autorisée à entrer en France pour d'autres motifs que les études ou le travail. Ainsi en 2003, sur les 173 000 nouveaux immigrants autorisés sur le territoire français pour des séjours permanents, seuls 20 700 (12%) étaient venus pour exercer une profession. La plupart des autorisations permanentes sont délivrées à d'autres titres et notamment au titre de conjoints de français (37 100) ou du regroupement familial (26 700).

Les travailleurs « saisonniers » n'y sont pas comptés (14 500 en 2003), car leurs documents de séjour ne constituent qu'une autorisation provisoire (souvent 6 mois, voire 8 mois).

Le projet de loi actuel appelle à privilégier une « immigration choisie », basée sur l'emploi :

- les étrangers très qualifiés auraient des conditions plus favorables pour les cartes de séjour (3 ans, voire 4 dans certains cas) ;
- les étrangers qui viendraient occuper certains métiers délaissés recevraient une carte d'un an (ou d'une durée limitée, égale à celle du contrat de travail).

Mais ces cartes ne s'ouvrent pas aux « sans-papiers » du fait de la nécessité généralisée d'une « entrée régulière » : le visa de long séjour.

La situation des « saisonniers » devrait être plus favorable qu'actuellement : le projet de loi prévoit une carte de séjour pour trois ans, avec un accès au travail 6 mois par an.

Régularisation au cas par cas

Des régularisations « au fil de l'eau » existent dans l'actuelle réglementation : le gouvernement veut réduire cette possibilité à ceux qu'il choisirait sur des bases d'intégration ou humanitaires. Aujourd'hui, un étranger qui peut prouver 10 ans de séjour en France est régularisé « de plein droit » : 10 ans d'une vie, c'est important ! Mais l'argument gouvernemental est que cette perspective encouragerait à rester dans l'illégalité.

Les victimes de trafic peuvent accéder au séjour si elles témoignent contre l'auteur du trafic, mais ceci a concerné quelques dizaines de personnes.

Des raisons pour une résidence « sans papiers »

Bien qu'une existence en France requiert normalement, pour un étranger, un titre de séjour, les « ni... ni » (« ni régularisés ni expulsables ») existent : des étrangers sont « tolérés » sans-papiers, car on ne peut les renvoyer vers leur pays si celui-ci ne leur accorde pas de laissez-passer (refus par exemple de le reconnaître comme son ressortissant) ou si ce pays est notoirement un pays dont la situation intérieure est troublée ou si leur vie familiale est en France (famille présente de longue date).

Le nombre de « ni...ni » risque d'augmenter avec la future loi : les conjoints de Français par exemple devront être entrés avec un visa de long séjour, mais on voit difficilement comment ceux qui craignent pour leur vie dans leur pays d'origine repartiraient afin d'y attendre un visa ou comment les y renvoyer de force si leur vie familiale peut effectivement être démontrée; il en va de même pour toute mesure qui restreint les conditions du regroupement familial... Si la loi retire la régularisation des étrangers présents sans document de séjour depuis 10 ans en France, les étrangers concernés risquent de rester « sans papiers » à perpétuité en France et, au fil des ans, il devient alors de plus en plus difficile de les éloigner.

Notons aussi les délais (longs) pendant lesquels les demandes de régularisation sont examinées : pendant ce temps, le demandeur reste « sans-papiers ».

II. Situation des « sans-papiers » en France

Accès aux soins médicaux

Le système de santé peut être résumé pour la France en trois niveaux :

- la Sécurité Sociale Générale qui prend en compte les soins jusqu'à un certain niveau ; elle est accessible sur base de cotisations (travail). Pour un remboursement plus large, chacun peut prendre une assurance complémentaire. Pour ceux qui ont un niveau de ressources moindre, une Couverture médicale Universelle a été mise en place (à la charge de l'État) pour une durée de 5 ans. Une couverture complémentaire est possible en fonction des ressources (à renouveler chaque année). Cette sécurité sociale n'est accessible qu'aux Français et aux étrangers avec une carte de séjour, ainsi qu'aux demandeurs d'asile.

- l'Aide Médicale d'État (AME) prend en charge les soins des étrangers en situation irrégulière, sous conditions de ressources (très faibles et démontrées), de présence sur le territoire français (3 derniers mois prouvés avant la demande) et de prouver son identité. Cette aide médicale (document écrit) est valable pendant une année après l'avoir demandée et l'étranger peut bénéficier des soins chez un médecin « de ville » ; les difficultés concernent les lunettes ou prothèses peu prises en charge.
- Dans des cas exceptionnels, les hôpitaux peuvent prendre en charge les malades « hors Aide Médicale » (qui n'ont pas les 3 mois de présence ou n'ont fait aucune démarche), c'est-à-dire dans le cas de certaines maladies ou s'il s'agit de maternités ou de mineurs. Une dotation exceptionnelle est payée par l'État aux hôpitaux.

Dans les cas d'urgence, les hôpitaux doivent soigner avant de demander des papiers.

À noter : le personnel médical est tenu au secret professionnel et n'a aucun lien ou obligation envers la police. En revanche, le fait d'avoir l'aide médicale ou de s'être fait soigner est une preuve de présence en France.

Les exigences pour l'AME font que beaucoup d'étrangers qui ne peuvent prouver leur identité ou leur présence depuis 3 mois vont dans les permanences médicales associatives. Il n'y a que 150 000 sans-papiers qui ont l'AME sur 300 000 à 400 000 sans-papiers vivant en France.

En France, un enfant ne peut pas être « sans-papiers » puisque l'exigence d'une carte de séjour ne concerne que les adultes. La scolarité est obligatoire en France pour tous les mineurs de 6 à 16 ans. Ne pas scolariser leur(s) enfant(s) constitue un délit pour les parents. Des problèmes peuvent venir de l'inscriptions à l'école (p. e. si les parents n'ont pas de domicile, car chaque école dépend d'une « carte scolaire ») ou de problèmes annexes : cantine ou fournitures scolaires.

Mais normalement, l'école se révèle plutôt une « protection » pour les enfants et leur famille : le milieu enseignant va souvent faire front contre des éloignements forcés et mobiliser les parents des autres enfants de l'école. La scolarité est aussi une preuve d'intégration dans la société et peut être source de régularisation.

Possibilités d'enregistrement

Les mairies, les écoles ou les associations ne sont pas connectées avec la police des étrangers quand elles agissent dans le domaine social. Il arrive même que des « sans-papiers » qui travaillent clandestinement fassent des déclarations de ressources et payent des impôts...

Il y a une obligation pour les fonctionnaires de signaler à la police quand ils ont connaissance d'un délit : ceci entraîne des dénonciations qui attirent la désapprobation quand le public en a connaissance. Un cas de figure est néanmoins admis pour éviter les délits graves ou les mariages de complaisance : le maire a obligation de signaler au Procureur de la République ces cas s'il estime qu'il y a un détournement de l'objet du mariage (certains maires signalent systématiquement les « sans-papiers » qui veulent se marier !). Mais les cas de dénonciations proviennent plutôt de jalousies ou de divorces.

III. La politique d'immigration

Campagnes de régularisation

La France a connu une régularisation importante en 1997 : environ 80 000 étrangers sur 135 000 demandeurs. Les bases de cette régularisation étaient soit les liens familiaux (avec des Français) ou une vie familiale assez longue en France (5 ans environ), soit des problèmes de santé graves, soit des craintes en cas de retour au pays, soit une insertion importante en France (7 ans) avec un travail (les demandeurs d'asile qui avaient fait leur demande avant octobre 1991 avaient le droit de travailler jusqu'à la réponse à leur demande).

Depuis cette régularisation massive, la loi permet une régularisation au cas par cas sur les bases de la « Vie privée et familiale » qui recouvre 11 cas de figure ; le plus contesté par le projet de loi actuel est la régularisation après 10 ans de présence prouvée (2 à 3000 cas par an) : le projet va arrêter cette forme de régularisation. Un second cas est la « vie privée » qui concerne les cas humanitaires ou les étrangers qui ont une insertion et une vie en famille depuis longtemps (au moins 5 ans) : le projet de loi veut limiter cette possibilité en l'encadrant avec des critères plus rigoureux et précis. Un autre cas concerne les jeunes (en France avant l'âge de 13 ans) qui parviennent à l'âge adulte – et qui ont donc besoin d'une carte de séjour. Une possibilité de plus en plus utilisée est la carte pour « soins médicaux ». Ces formes de régularisation concernent environ 40 000 étrangers par an, soit environ une carte de séjour sur 4.

Au cas par cas, pour les jeunes, il s'agit d'une scolarisation (au moins 5 ans), pour les adultes des preuves d'insertion longue dans la société. Très souvent, une promesse d'embauche sera un élément important dans la demande. Pour les malades, il faut un dossier médical très solide mais tout dépend de la situation médicale dans le pays d'origine.

Conditions à l'obtention d'une régularisation

Le gouvernement français repousse l'idée d'une régularisation d'un grand nombre de « sans-papiers », car celle-ci attirerait beaucoup de futurs migrants « non choisis ». Plusieurs candidats de l'opposition en revanche estiment qu'une régularisation importante est indispensable.

La France est actuellement en pré-campagne électorale pour les élections présidentielles en avril 2007. On peut observer qu'une régularisation ne se produit normalement pas à la veille d'élections importantes...

Les étrangers régularisés obtiennent normalement une carte de séjour d'un an sur les bases de la « Vie Privée et Familiale » (article 8 de la Convention Européenne des Droits de l'Homme) ; le renouvellement se fait ensuite sur les mêmes motifs que la délivrance de la première carte : dans ce cas leur vie privée et familiale qui aura peu changé.

Mais il arrive que les malades n'obtiennent que des autorisations de séjour de 3 mois, parfois renouvelées : normalement cela dépend de l'évolution du traitement et de la maladie.

Environ 25 000 personnes bénéficient chaque année du regroupement familial.

Mais le problème concerne les étrangers qui se marient en France alors qu'ils sont en période d'attente de réponse (pour l'asile par exemple) : le regroupement exige un visa, ce qui les oblige à repartir. Ceux qui ne sont pas mariés, mais vivent en concubinage se voient confrontés au problème de ne pas être redevables du regroupement familial.

Les conditions matérielles de ce regroupement familial ont évolué au fil des ans : elles exigent la preuve de ressources et de logement aux normes. Ceci fait que certains conjoints sont venus illégalement car à l'époque leur parent ne pouvaient justifier des conditions. La régularisation « sur place » devient délicate car la loi actuelle peut faire retirer la carte de séjour du conjoint en règle. Les conjoints de Français ou de réfugiés échappent à la procédure de regroupement familial.

Un problème devient de plus en plus courant et augmente les délais : c'est la légalisation des documents d'état civil du fait des États Civils défailants dans divers pays.

La réaction de la politique semble être de combiner une nouvelle législation avec des mesures plus restrictives pour lutter contre l'immigration clandestine ; ceci est en tout cas l'objet d'un projet de loi qui va être discuté au mois de mai 2007.

IV. Conséquences des mesures de régularisation

Il n'existe aucune donnée précise sur le nombre de « sans-papiers » et il est difficile de comptabiliser des « régularisations » du fait que certains « sans-papiers » obtiennent des documents de séjour car ils remplissent les conditions de la loi (par exemple 10 ans de présence ; voir les indications chiffrées plus haut).

D'autre part, les données chiffrées sont très compliquées en France selon l'administration qui les donne. Parfois les ressortissants de l'Union européenne (UE) sont comptés, parfois non (s'ils n'ont plus d'obligation à avoir une carte de séjour). Certains chiffres donnent le nombre de cartes délivrées dans l'année, parfois seulement les premières cartes. Les étrangers qui ont un document de séjour d'une durée inférieure à un an sont parfois exclus des chiffres, parfois inclus (saisonniers...)

Il arrive aussi que les chiffres ne concernent que la France métropolitaine (la France a des départements et collectivités d'outre-mer dans lesquels la problématique des « sans-papiers » est importante, mais différente).

Le nombre de sans-papiers a augmenté du fait du nombre très important de demandeurs d'asile dont la demande a été rejetée en 2004 et 2005. Il en ira de même en 2006. Beaucoup de ces étrangers restent en France. Il faut aussi ajouter les victimes du règlement Dublin (ceux qui se cachent car ils ont été rejetés par d'autres pays de Dublin ou simplement car ils y ont laissé leurs empreintes digitales ou ceux qui transitent par la France en espérant parvenir en Angleterre).

Un nombre de 300 à 400.000 « sans-papiers » est souvent avancé (pour la France métropolitaine). Les éloignements forcés ont concerné 20.000 étrangers en 2005, un nombre un peu moindre est reparti sans le signaler auprès des autorités et 20 à 40.000 ont été régularisés. Les départs aidés concernent un nombre infime d'étrangers (moins d'un millier en 2005). Mais les chiffres sont sujets à caution, car ils incluent parfois les enfants, parfois seulement les adultes. On peut en tout cas affirmer que le nombre de « sans-papiers » augmente.

La nouvelle loi en préparation va augmenter mécaniquement le nombre de « sans-papiers » du fait d'exigences supérieures pour l'obtention d'un titre de séjour, même si elle va dissuader certains candidats de venir.

La grande majorité des étrangers régularisés voient leur séjour renouvelé (voir III.3). Il y a des cas de non-renouvellement, principalement pour des cas de « santé » (où un traitement au pays d'origine est jugé être possible) ou de fraude.

Les cas de non-renouvellement concernent surtout d'autres catégories : des étudiants voudraient rester en France au-delà de leurs études ce qui est très difficile s'ils ne peuvent présenter un contrat de travail avec un niveau de rémunération important. Ou des salariés qui n'ont plus de contrat de travail.

Il arrive que des étrangers qui travaillaient clandestinement perdent leur travail s'ils exigent un travail « régulier » et certains restent parfois dans une économie parallèle. Mais au moment du renouvellement de leur carte de séjour, il leur faut démontrer leur insertion. Il n'y a aucune étude sur le sujet, d'autant que les « régularisations » n'ont souvent pas été basées sur un motif de travail.

Belgium

Anne Dussart, Caritas Secours International, Brussels

I. Legal Description

1. Migration stop 1974

Through different migration flows and globalization, Western-European society has changed into a multicultural society. Many EU-residents have foreign nationalities or have (grand)parents originating from abroad. Originally, most people in this category came as immigrant workers.

During the 40's and 50's most immigrants came from Southern Europe (Greece, Italy, and Spain) to Northern Europe (Belgium, the Netherlands, Germany, France, a.m.). In the 60's and 70's immigrants were predominantly Turkish and Moroccan. But because of the oil-crisis in 1973-74 the guest-countries proclaimed a migration stop, which brought the influx of foreign labour to a standstill. The original intent was for the migration to be temporary, but in practice it turned out differently. About 70% of foreign labourers, from before 1974, stayed in Europe. Which is why people no longer talk about foreign labourers, but rather about immigrants.

However the expression 'migration stop' is misleading as migration has never really stopped. International treaties make it possible for migrants to bring their families over. That's how a 2nd and a 3rd generation arose, many of whom made their companions come over from their countries of origin. Migration by family reunion has remained an important immigration channel. Even admittance based on the procedure for asylum (Convention of Geneva, 1951) stayed on. (1)

2. Section 9§3

2.1 General

Foreign law anticipates different procedures on the merits which enables foreigners to obtain residence in Belgium. Section 9, part 3 Vw is one of them. He who makes an appeal to section 9, part 3 asks for authorization for a stay of more than 3 months. If someone only needs a short extension of his stay then it is more appropriate to apply for a short delay of his departure date instead of a regularization based on this article.

Article 9 Foreign Law

To stay longer in the country than is stated in article 6, the foreigner whom isn't in one of the cases stated in section 10, will need an authorization from the Minister or his substitute.

Except in an international treaty, in a law or a royal decree certain variations this application for authorization has to be submitted to the Belgian diplomatic office or consulate at his place of residence or there where he is hold up.

In case of exceptional circumstances the foreigner can apply for this authorization to his municipality; they will forward it to the minister or his substitute. In this case it will be delivered in Belgium.

2.2 Double motivation

The Aliens' Office evaluates an application section 9§3 in two stages: admissibility and examination on the merits. During the first stage it will be checked if there are exceptional circumstances which justify an application in Belgium. During the 2nd stage there is an investigation on the merits on the arguments brought forward by the applicant.

2.2.1. Investigation on admissibility

The 3rd part of section 9 says that a foreigner will have to present exceptional circumstances to justify why the application for authorization was done in Belgium and not in the country where he has permanent residence. The application will then be accepted by the Aliens' Office if no exceptional circumstances can be given. A possible acceptance is only evaluated at the same moment the application is submitted.

An exceptional circumstance can not be equal to a 'force majeure' circumstance beyond one's control. Exceptional means it is impossible or very hard for the person concerned to return to his country of origin and make an application there. It is also not a requirement that the exceptional circumstance be unpredictable. It can even be a result of the concerned person's behaviour. The individual has to behave as a normal careful person and cannot create a situation which makes it difficult to be repatriated.

Below a few examples of exceptional circumstances which can be located in the administration of justice of The Council of State:

- When someone is too ill to make the journey to his country of origin;
- When there is no permanent Belgian diplomatic delegation or when this delegation has no authority to deliver a residence permit valid more than 3 months;
- When the applicant is a student in secondary or higher education. The Aliens' Office cannot require a student in higher education to go back to his land of origin and apply for a permit residence.

It is important to mention that when someone has made connections or developed relationships with people in Belgium, this is not an exceptional circumstance.

When there is only one exceptional circumstance there will be only a small chance the application will be accepted. Therefore it is advisable to quote as many arguments as possible which can be seen as exceptional circumstances. An important remark here is that the administration of justice of the Dutch speaking and the French speaking chambers of the Council of State aren't really unequivocal. The result is that some cases are accepted as exceptional circumstances by the French chamber and not by the Dutch chamber.

The Aliens' Office suspects in some cases a presence of exceptional circumstances. It concerns the so-called status amendment described in the circular dated February 19th, 2003 about the use of section 9§3. (2) A foreigner who is staying legally in the country also has to prove exceptional circumstances to justify his application for a residence permit valid more than 3 months.

These exceptional circumstances are ‘suspected’ to be present if the following conditions are carried out:

- As a student
- (or) by obtaining a work permit or a business permit
- (or) grounded on cohabitation
- (or) as an independent employer whom is subject of a country in Central or Eastern Europe.

(and) when the application for a residence permit is submitted during the legal stay of the person concerned (3)

Only those people who are already legal residents in Belgium at the moment of application, but with another status, can enjoy the advantage of this suspected exceptional circumstance. Asylum seekers cannot make any use of this supposition. Just like foreigners with a legal residence, they have to prove exceptional circumstances.

2.2.2. Examination on the merits

If the first stage is finished and the Aliens’ Office has accepted the application then the next procedure can be started. Apart from the exceptional circumstances, the applicant has to present reasons in the request why he or she should be authorized for a residence of more than 3 months. During the examination of the merits of the application the elements which are present at the moment of consideration are taken into account. Contrary to the examination of admissibility, the evaluation isn’t done at the moment the application was filled in.

There are some cases where the Aliens’ Office will reject the application: if the applicant uses manifest and intentional fraud or if the applicant is considered a danger to public order or national security. Article 9§3 doesn’t hold any condition regarding granting an authority of residence. Because of this, the minister of Internal Affairs has discretionary authority to decide who is granted residence.

The outcome is often that the arguments, used by the applicant to support the exceptional circumstances, also can be used to motivate the examination on the merits. An example can be that if a seriously ill person can justify that he/she cannot apply in his/her country of origin, he/she can also use the arguments for the examination on the merits. But it is still advisable to have as many elements of integration as possible to motivate the merits (ex. Employment, studies, etc). (4)

2.3. Circular 1998

As we’ve seen above section 9§3 doesn’t contain any condition criteria by which an authorization for residence can be obtained. The article contains only the procedural possibilities and the regulations of jurisdiction for residence applications. The (inhoudelijk) criteria are partly arranged by the administrative discretion of the Minister of Internal Affairs (Aliens’ Office) and partly by unwritten rules, internal directions or circulars. (5)

The circular dated December 1998 about the application of article 9, 3rd part, of the law dated December 15th 1980 regarding access to the territory, residence, place of residence and expulsion of foreigners and regularization of special situations, says precisely that section 9§3

could also be applied as a procedural rule to the regularization of residence conditions in a few special cases. In the circular a summary is given of some special situations where people under certain conditions, can make an application for regularization. (6) The first part concerning the use of section 9§3 of this circular was replaced by the circular dated February 19th 2003, about the use of section 9§3, of the law dated December 15th 1980. The second part concerning the special situations was cancelled by the regularization law dated 1999 where the structural possibility for regularization was amended by a temporary measure. Although this circular was cancelled by other circulars as well by the regularization law dated 1999, it still remains a guideline.

When then can it be significant to fill in an application? Four different situations are quoted in the circular dated 1998 on which one can apply for regularization: long term procedure for asylum, for medical reasons, impossibility of expulsion, and humanitarian reasons.

2.3.1. Long term procedure for asylum

When an asylum seeker has to wait an unreasonably long time for a decision about his application for asylum, that can be the consequence of his/her attitude during the procedure, or it can be because of the government. If the government's attitude is to blame, the situation of residence of the concerned asylum seeker can be regularized in certain circumstances. So it is essential to note here that we speak of negligence from the government. (7)

In December 2004 the federal government renewed its regularization policy for long term procedures. This policy wasn't announced by circular or by a regulated text. The only basis written text is an old press-announcement from the ministry of Internal Affairs' Patrick Dewael, and a recent budget adjustment done by the government saying the Aliens' Office could employ extra civil servants.

The 'Vlaamse Minderhedencentrum' received explanations regarding the exact content and range of the new policy, coming from the cabinet and from the Aliens' Office.

Long term procedure for asylum from before 2001

In the first place we have a look at the new policy for long term procedure for asylum from before 2001. From now on the department of Aliens' Office will attribute a definitive status to people with a long term procedure for asylum dated before 01/01/2001, unless there are some specific opposing indications in the file. The procedures for asylum still running and the procedures for asylum which were rejected after more than 4 years (or more than 3 years when families with school-aged children), are qualified to obtain this status. One condition is that the people concerned submit an application or have submitted one already based on section 9§3.

As mentioned before there may not be any negative opposing indications in the file. Two forms of negative opposing indications are mentioned: when the applicant is considered to be a danger to the public order or national security and/or when the applicant is clearly causing trouble or problems for the society. If a decision or regularization, for one of the two reasons, is negative, the reasons for rejection will be mentioned. Against this rejection one can make an appeal to the Council of State.

If none of these cases are applicable then a too long procedure of asylum is a sufficient argument for regularization. The “integration”, knowledge of the language and a willingness to work have to be proved, although they are always positive.

Asylum seekers who were regularized because of a long term procedure of asylum from before 2001, receive a Certification of inscription on the National Registry for Foreigners (white card) for an indefinite time. If one had only a temporary regularization, he can make a request to the department of Aliens’ Office asking them for a new decision.

Long term procedure for asylum as from 2001

In the second place we’ll have a look at the new policy of long term procedure for asylum as from 2001. Applications for asylum dated after 21/12/2001 and which are taking longer than 4 years or longer than 3 years for families having school-aged children, are qualified for regularization, but with other conditions. Furthermore the concerned individuals have to make a request, or have already made a request, based on section 9§3.

The difference with the regularization application from before 2001, is that the Aliens’ Office will only regularize asylum seekers if distinct proof of integration can be shown. Proof of integration can be, for instance: knowledge of language, training, being employed or showing a willingness to work, being active in local associations, having long-lasting connections with Belgium or Belgian citizens. The long duration of this procedure for asylum is an important, but not sufficient argument.

A regularization in this framework is only accepted for a temporary time. “Temporary” Certification of Inscription on the National Registry for Foreigners (white card) is valid for only 1 year where the person concerned has to show evidence of employment by the end of the year in order to obtain definitive regularization.

When a decision for regularization is negative, because of a problem with the public order, or a lack of integration for example, the reasons for rejection will be mentioned. Against this rejection an appeal can be made to the Council of State. (8)

2.3.2. Medical Reasons

In exceptional human circumstances, a foreigner can use article 3 of the European Treaty for Human Rights, because of his/her medical condition, to obtain residence in Belgium and benefit from medical assistance. The Council of State evaluates, according to certain criteria, whether “exceptional, humanitarian” circumstances are present or not. These criteria are: the impossibility of the person concerned to travel; serious medical condition, the availability of medical care in the country of origin, financial means for medical care and eventually the presence of relatives or a third party. (9)

2.3.3. No possibility for repatriability

A third special situation can appear when asylum seekers, independently and of their own free will, are unable to return to their country of origin. A difference is made between the actual and the administrative impossibility. In an actual impossibility returning is made impossible because of an 'actual situation' (ex. Airport closed, no flights). In the second situation returning is impossible when the embassy or consulate of the country of origin refuses to provide the travel documents.

There are 3 cases where there is a matter of non-repatriability: clause of non-repatriability, stateless persons and section 3EVRM.

- Clause of non-repatriation: A clause of non-repatriation or NTC is a section in which the Commissaris-Generaal advises the Minister of Internal Affairs not to repatriate the asylum seeker to his country of origin because of the local situation.
- Stateless persons: Non-repatriation can also be a consequence of the asylum seeker having no nationality. The recognition as a stateless person has no consequence for the current residence situation of the asylum seeker. A recognized stateless person needs to follow procedure section 9§3 to obtain residence in Belgium
- Section 3 EVRM: At last asylum seekers can be non-repatriate, because if they return to their country of origin they would be tortured or be treated inhumanly. (10)

2.3.4. Humanitarian reasons

The last special situation concerns people who can prove they have special connections with Belgium. One can, if one has close (family) connections with a Belgian citizen or a foreigner staying legally in Belgium, appeal to section 8 EVRM, to obtain residence. (11)

Article 8EVRM Right to respect of privacy, family life.

1. Each one has the right to respect to his privacy, his family-life, his home (house) and his correspondence

2. No interference of the public authorities is allowed in exercise of this right, as far as it is expected by the law and is essential in a democratic society in the interest of national security, public security or economical well fare of the country, prevent disorder and offences, protection of health or good morals or for the protection of the rights and freedom of others.

3. Regularization law 1999

In January 2000 people without legal papers or with a vulnerable residence status under certain conditions, got the possibility to regularize their stay by using the "law from December 22nd 1999, regarding regularization of the residence for foreigners of certain categories, staying in the territory". This regularization campaign happened only once.

The regularization law was used in four different categories. The general condition was that foreigners must be in the territory by October 1st 1999. (12)

Those four categories were defined as follows:

- Foreigners who applied for the recognition of refugee, without having received an applicable decision within 4 years; this period can be altered into 3 years for families with children, who are minor, who were staying in Belgium on October 1st 1999 and who are the school-going age.
- Foreigners who, for serious reasons beyond their will, cannot return to their country or the country in which they resided before their arrival in Belgium, or to their country of origin, or to the country of their nationality.
- Foreigners who are seriously ill.
- Foreigners who have humanitarian reasons and have developed long-lasting connections in the country. (13)

As we've seen already, before the regularization campaign in 2000, there was a possibility to obtain an authorization for residence longer than 3 months, using section 9§3 of the foreign law dated from 1980. Usually such authorization should be requested at the Belgian consulate in the country of origin. In exceptional circumstances this can be done in Belgium (see 2.1. general).

These special circumstance are described in the circular from December 14th 1998 and are specified in the regularization law (see 2.3. circular 1998). In fact the new regularization law has cancelled the circular from 1998 by which the structural possibility for regularization was replaced by a temporary measure.

II. Situation of undocumented migrants in Belgium

1. Right to urgent medical assistance

Section 1 of Royal Decree concerning urgent medical assistance provided by the "OCMW" (public centre for social health) to foreigners staying illegally in the country, dated December 12th 1996, says people have right to urgent medical assistance. Urgent medical assistance can be of a preventive nature as well as a curative nature, ambulant or residential. (1) This assistance refers to a wide scale of medical supplies like surgery, birth, examination, medicines, etc. (2)

The expression 'urgent' suggests it is only about assistance in urgent cases, e.g. when someone has had an accident. This is not the case here. When someone is just ill, he or she has the right to medical assistance. The government did not stipulate what sort of assistance one is entitled to and only the doctor or the dentist can determine this. If he/she says assistance is needed then the government will pay the costs only if the applicant doesn't have the financial means.

'OCMW' will refund the costs if the circumstances comply with the following 3 conditions:

- the applicant is staying illegally in Belgium;
- the applicant having no legal documents is in need;
- a medical certificate is provided, stipulating urgent medical assistance is needed, signed by a recognized medical person;

some 'OCMW' want applicants to sign their application.

'Doctors without Borders' and the medical support for undocumented migrants are 2 organizations who support undocumented migrants on a medical level. One of their aims is to inform those people who are not familiarized with the Belgian system (3). They see it as their job to inform hospitals and doctors about the meaning 'urgent medical assistance'.

2. Right to employment

The chance a foreigner, staying illegally in Belgium, will obtain a work permit is very small and mostly not possible as a work permit has to be applied for by an employer, for a candidate refugee who is still in his country of origin. Only for specific categories, namely those which have been exempt from research on the labour market (e.g. students, high qualified personnel/staff), the application can be done in Belgium. In practice, a foreigner who applied for regularization and isn't still in a procedure, is not allowed to work.

The government made an important exception to the principle that an undocumented migrant is not allowed to work, namely for foreigners who applied for regularization in the frame of the regularization campaign in 2000, and who are still waiting for an answer. The person needs to prove the application is still running. As long as the minister hasn't pronounced a definitive negative sentence, they are allowed to work if they can find an employer who is prepared to make an application for a temporary work permit.

Employment while studying

In the Royal Decree concerning employment of foreign labourers, there are two exceptions on the principle that people without legal residence status are not allowed to work:

- When a foreigner has to do a work placement practice, he or she is excused from having a work permit or business permit.
- A second exemption can be obtained in the frame of alternative study. (4)

3. Right to shelter

Section 23 of the coordinated constitution dated February 17th, 1994 says that everybody has the right to a dignified life. And section 191 says that every foreigner staying in Belgium, benefits from the protection granted to persons and goods, except for the exceptions stated by the law. This means that all foreigners staying in Belgium, even those having no legal residence, in principle have the same rights as Belgian citizens (unless the law stipulates an exception). This point of view was confirmed by the court. (5)

It is possible to rent a house/home to someone without legal residence. Some people are abusing the vulnerability of residents' situations if a resident is illegal. (6) So undocumented migrants are compelled to make use of the private market. This market puts them in a very vulnerable position and they are often victims of abuse. Both "Koepel Sociaal Verhuurkantoren Antwerpen" (Kosova vzw) and the "Antwerp Work for Refugees" (de Acht vzw, team haven) have worked since 1999 on this project to offer accommodation to undocumented migrants. (7)

In certain cases under-aged foreigners, staying with their parents illegally in the country, have more protection from the government than the usual urgent medical assistance (program law 22/12/2003). If some conditions (among other things child younger than 18, child in need etc.)

are fulfilled the minor is entitled for material help indispensable for the development/education of the child.

The law says this help can only be provided in a federal shelter centre. The parents of the minor don't have any right to material help, but they can stay in the same shelter their child is staying in.

To be able to benefit from this material assistance an application has to be made to the "OCMW" located at the child's residence. The "OCMW" will investigate if the conditions have been fulfilled. If the conditions were fulfilled the "OCMW" has to make a request to Fedasil to make a proposition for placement in a federal shelter-home. The proposition has to be approved by the parents or the minor. If they refuse the proposition this will be seen as a rejection for social help. (8)

Few people make appeals for this assistance because they don't want to leave their homes and/or because they are afraid to be forced to repatriate. (9)

(1) LOOBUYCK P., Multicultureel Burgerschap, Voorbij integratie, assimilatie, segregatie en marginalisatie, Centrum voor Islam in Europa, s.d.,

<http://www.flwi.ugent.be/cie/CIE/loobuyck2.htm,09/09/2006>

(2) VZW VLAAMSE MINDERHEDENCENTRUM, Hoe dien ik een aanvraag artikel 9§3 Verblijfswet in?, Regularisatie van verblijf, vzw Vlaamse Minderhedencentrum, Brussel, December 2004, pp. 14-16.

(3) Omzendbrief van 19 februari 2003 over de toepassing van artikel 9, derde lid, van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, Belgisch Staatsblad 17 maart 2003.

(4)) VZW VLAAMSE MINDERHEDENCENTRUM, Hoe dien ik een aanvraag artikel 9§3 Verblijfswet in?, Regularisatie van verblijf, vzw Vlaamse Minderhedencentrum, Brussel, December 2004, pp. 5-12.

(5) Wet 80

(6) VAN DER AUBERAERT J. Regularisatiecampagne in België, een impressie, s.d., p. 3.

(7) Circular 1998

(8) VZW VLAAMS MINDERHEDENCENTRUM, Regularisatie in geval van langdurige asielprocedure: vernieuwd beleid in 2005, 27/03/2006, www.vreemdelingenrecht.be

(9) VZW VLAAMS MINDERHEDENCENTRUM, Hoe dien ik een aanvraag artikel 9§3 Verblijfswet in?, Regularisatie van verblijf, vzw Vlaams Minderhedencentrum, Brussel, December 2004, pp. 13-14

Non-repatriation

(10) VZW VLAAMS MINDERHEDENCENTRUM, Hoe dien ik een aanvraag artikel 9§3 Verblijfswet in?, Regularisatie van verblijf, vzw Vlaams Minderhedencentrum, Brussel, December 2004, pp. 14-16.

(11)) VZW VLAAMS MINDERHEDENCENTRUM, Hoe dien ik een aanvraag artikel 9§3 Verblijfswet in?, Regularisatie van verblijf, vzw Vlaams Minderhedencentrum, Brussel, December 2004, pp. 18.

(12) VAN DER AUWERAERT J., Regularisatiecampagne in België, een impressie, s.d., p. 2.

(13) Section 2 of de code book dated December 22nd 1999 concerning the regularisation of residence for certain categories of foreigners staying on the territory.

(1)Artikel 1, Koninklijk Besluit betreffende de dringende medische hulp die door de openbare centra voor maatschappelijk welzijn wordt vertrekt aan de vreemdelingen die onwettig in het Rijk verblijven, (B.S. 31/12/1996)

- (2)PICUM, *Basic Social Rights, Belgium*, PICUM, 11/04/2006,
- (3)DRUYTS E., *Toegang tot de gezondheidszorg voor mensen zonder wettig verblijf*, Medimmigrant, februari 2004, <http://www.medimmigrant.be/dmh.tekstvoorwebsite.pdf>, p. 1.
- (4)VLAAMS MINDERHEDENCENTRUM, *Illegaal verblijf*, VMC, 11/04/2004, <http://www.vmc.be/vreemdelingenrecht.wegwijs.aspx?id=653>, pp. 1-3
- (5)VLAAMSE MINDERHEDENCENTRUM, *Kerntaken voor het opvangbeleid voor mensen zonder wettig verblijf in Vlaanderen, aanbevelingen over wie wat moet doen, tekst goedgekeurd door de ICEM werkgroep, opvangbeleid op 20 juni 2003*, VMC, 2003,
- (6)RAES J., *Mensen zonder papieren, sombere toekomst* in Caritas International Magazine (nr 192), maart 2006, p. 12.
- (7)X, Prohject huisvesting, *Mensen zonder papieren*, Kosova vzw & Antwerpse vluchtelingenwerk, s.d.
- (8)X, *OCMW en opvang, Mensen zonder wettig verblijf*, Vreemdelingenrecht, 13/04/2006,
- (9)RAES J, *Mensen zonder papieren, sombere toekomst* in Caritas International Magazine (nr 192), maart 2006, p. 12.

Undocumented Migrants

The precarious Situation of third country nationals residing irregularly in Europe.

Summary of a Position Paper of Caritas Europa

Peter Verhaeghe, Caritas Europa, Brussels

1. Introduction

Caritas Europa is a network of 48 national Caritas organisations, which are active in 44 European countries. Caritas Europa and its members are active in issues relating to poverty and social exclusion, international cooperation, emergency humanitarian relief, development and issues of migration and asylum.

Caritas organizes social services and social and legal counseling for asylum seekers, refugees and migrants. The phenomenon of the “Sans-Papiers” or undocumented migrants is an indisputable reality in our societies. In several Caritas organisations, people with an irregular residence situation constitute over 50 percent of the assisted migrants. This bears some witness of the extent to which undocumented migrants are living in precarious situations in terms of health, housing, labour conditions etc.

The experience of the Caritas Services shows that there are several types of situations of irregular stay. In reality, a variety of circumstances can eventually lead someone to a situation of undocumented migrant; circumstances clearly illustrating the marginalization processes that people in a weak situation face. This reality suggests that a range of responses needs to be found and implemented.

Moreover, this situation is fluid: one can observe progressive changes in the composition and the extent of the population of undocumented migrants as well as in governmental measures; whilst governments generally develop restrictive policies, one also finds certain diametrically opposed examples, some of which demonstrate a better understanding of individual situations and others which are inspired by different motivations: regularisations based on labour, family situation, long term residence etc. These measures show that the complexity of the problems has, to some extent, been taken into consideration.

The complexity of the situation is evidenced by a new terminology which is developing: “suspension of the order to leave the country”, visa of “tolerated person”, “temporary leave to stay for exceptional reasons”, status “of humanitarian protection”, “special protection status”, leave to stay “private life and family life”, etc.

In many ways, the presence of third country nationals in an irregular status in European countries raises complex questions where passions and opportunism are often in competition with objectivity and reason. Public opinion is formed, based on perceptions rather than on hard facts. In addition, political parties, governmental organizations, associations, foreigners’ collectives etc. discuss the issue, without reaching a consensus, thus making it very difficult to find any solutions.

The quantification of the phenomenon is an example of that debate: it is effectively impossible to reliably estimate the number of third country nationals residing irregularly in European countries. Estimations can differ widely. In any event, Europe has within its territory several hundreds of thousands, if not several millions of third country nationals in an irregular situation.

The discourse concerning migrants in an irregular stay is so confused and general that it prevents these migrants from being seen as individual human beings; many among them live under frightening and precarious conditions, which threaten their human dignity.

Before tackling the difficult administrative situations that are not more than a consequence of forced migration, it is important to keep in mind some of the causes:

- Wars, conflicts, persecutions, human rights' violations, economic crises and collapsed state structures and environmental and natural disasters are causes of forced movements. The inequalities between North and South are accentuated in a world where globalization plays an important role. In a number of countries people don't perceive any improvement in their living conditions so they emigrate to places where the conditions and the economic, political and social rights are preferable to those in their country of origin. These perspectives are strongly encouraged by a real demand for a "cheap" labour force in Europe.
- The self-interest that is the motivation of rich countries hinders the development of a number of the other countries, victims furthermore of the emigration of their nationals. The economic and social conditions in different countries of emigration sometimes make it difficult to envisage a future based on a genuine human dignity, or even one that satisfies basic needs.
- Modern means of communication encourage people not to resign themselves to living conditions of mere survival. This hope for a solution through emigration is endorsed by the rumours or the examples of compatriots who have "succeeded" abroad, and are strongly encouraged by intermediaries or exploiters: to earn a living for themselves and their families, many use all their savings and contract debts, sometimes lifelong...

Fighting irregular migration in Europe should in the first place mean fighting the causes of forced migration, because no one leaves his/her country without a reason.

Caritas Europa wants to encourage all stakeholders (the governments of countries of origin and of destination, the migrants, the local communities and civil society) to find solutions to these degrading situations and to base their actions on the full respect of human dignity. The Caritas Europa definition of the undocumented migrants is followed by an overview of the international, European and national legislative instruments relating to the protection of the rights and the dignity of every human being. The next part recalls the motivation for the engagement of Caritas Europa in upholding respect for the dignity of human beings in an irregular situation of residence. The final part contains the recommendations of Caritas Europa, translated into concrete demands addressed to Churches, politicians and different social actors.

2. Clarification of concepts, used in this paper

For the purpose of this paper, Caritas Europa defines the undocumented migrant as *"a third country national or a stateless person who does not possess or no longer possesses a valid document authorising his/her stay in a country"*.

This definition includes a variety of situations. As a matter of fact, certain persons either do not obtain or lose leave to stay for a variety of reasons: gaps in the legal provisions of the country of residence, slow or malfunctioning administrations, inadequate knowledge of legislation, job loss, a legal or facts-related situation in the country of origin, the material impossibility to present a document of civil status, etc.

The concept of “undocumented migrant” covers here by extension the minor children, even if - in certain countries - they don’t need to possess personal “papers” covering their stay.

3. The proclamation of Human Rights and their Realisation

Article 1 of the Universal Declaration of Human Rights affirms, “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” The subsequent articles set forth a series of civil, political, economic, social and cultural rights.

The Universal Declaration of Human Rights is not a legally binding instrument but it has an important influence on international conventions and treaties¹⁸, constitutions and national legislations¹⁹ putting these rights into practice. It must be recognised however that the declaration of rights and liberties is one thing whilst their practical effectiveness and the safeguarding of these rights is another.

The priority given to the integrity and dignity of the human being is the main driving force behind the Caritas action on behalf of migrants, independent of their administrative situation of residence. This respect for the dignity of the human being is reflected in the Gospel message and in the social teaching of the Catholic Church.²⁰

The universality of human dignity, understood as the fundamental prerequisite according to which every person has rights solely by the fact that he is a human being, is not fully recognised by States’ practice.

¹⁸ Among the international conventions we mention in particular: the international Pact on economic, social and cultural rights (1966); the international Pact on civil and political rights (1966); the Convention on Children’s Rights (1989). At European level: The European convention for the Protection of Human Rights and fundamental Freedoms (Council of Europe, 1950); the Charter of fundamental Rights of the European Union (integrated in the draft constitutional Treaty of the EU).

¹⁹ For example:

in Germany : Article 1 of the Constitution : “The dignity of the human being is inalienable (...). Consequently, the German nation recognises the inviolable rights of the human being.”

In Belgium: Article 23 of the Constitution provides that everybody has the right to lead his life in conformity to human dignity” and enumerates the guaranteed rights: the right to social security, to protection of health and to social medical and legal assistance and the right to housing

In France: according to the preamble of the Constitution of 27 October 1946 “the French people proclaims again that every human being, without distinction of race, religion or belief, possesses inalienable and inviolable rights. They solemnly confirm the rights and liberties of man and citizen established by the declaration of rights of 1789 (...) The Nation assures the individual and to the family the necessary conditions for their development.

In Italy: the Constitution of 27 December 1947, article 2 “The Republic recognises and guarantees the inviolable human rights to individuals as well as to social groups where he develops his personality, and requires the accomplishment of the undeniable obligations of political, economic and social solidarity”, and article 3 “All citizens have equal social dignity and are equal for the law, without distinction of sex, race, language, religion, political opinions, personal and social conditions”

²⁰ See annex 1

Even if they recognise the universality of human dignity, the constitutions, national legislations and international Conventions contain provisions authorising States to limit the scope of application (derogations and reservations)²¹. These provisions allow States to distinguish between the rights of non-nationals according to their legal or irregular stay, all the more so since the right to control entry and stay of non-nationals on their territory is an essential element of their sovereignty. States should however not with such exceptions deprive migrants from the exercise of fundamental human rights.

Not having residence permits, migrants in an irregular situation generally do not enjoy social rights. While they are victims of exploitation or discrimination, they face difficulties in asserting their rights, even fundamental rights, in the same way as nationals or foreigners in a regular situation are able to do. In the majority of European States, undocumented migrants do not have legal access to social assistance or to a guaranteed minimum satisfaction of basic needs. In some countries they even don't have access to minimum health care provisions.

With respect to "basic needs", necessary to ensure survival and the full respect of human rights, it seems that social rights and the dignity of persons in an irregular situation are allowed in principle but not in practice. Moreover, legislation of some States requires civil servants to denounce persons in an irregular situation of stay or allows the penalising of persons for giving humanitarian assistance to undocumented migrants.

Rights, even for undocumented migrants

Living conditions respecting human dignity, including the exercise of certain rights must be guaranteed to every person, regardless of his/her administrative situation of residence.

Even if international law provides for derogations and restrictions to the exercise of human rights, some of these rights are inalienable and impose unconditional obligations for the States that cannot refuse access to persons in an irregular situation. Four of these are found jointly in the International Pact on civil and political rights and in the European Convention for the protection of human rights. These four inalienable rights are the individual rights related to the physical and moral integrity of the human being and to his/her liberty: *the right to life, the right not to be subject to torture or inhuman or degrading treatment, the right not to be kept in slavery or servitude, the right to non-retroactivity of penal law.*

The provisions, labelled as "necessary", which allow the derogation from the rights of persons in an irregular situation frame their own limits: *the States shall respect a certain number of criteria, the objective has to be legitimate and the means put into place have to be proportionate to the legitimate objective.*

The courts of justice are entrusted with the interpretation of these criteria and their application in national legislations. A minority of undocumented migrants obtain some rights by "going to justice", a certain jurisprudence is created which sometimes leads to rare positive modifications in legislation.

²¹ Example: Article 191 of the Belgian Constitution: "All foreigners on the territory of Belgium enjoy the protection given to persons and goods, but for the exceptions established by the law ». The legislator leans on this article to refuse assistance to undocumented migrants, which they should receive.

In this sense, The European Convention for the protection of human rights and the European Court for human rights, assuring the legal control effectively give birth to certain fundamental rights for undocumented migrants. As a matter of fact, article 1 of the Convention aims at protecting every person towards whom the contracting states have a certain authority, independently of his/her nationality, his/her residence or his/her administrative residence status.

An important aspect of the judgements delivered by the Court in relation to non-nationals, concerns people with an irregular residence status. The judgements are often based on the assessment of the proportionality between the interest of the states to control immigration and the right of the petitioner.

If the right of each individual to lead a life in conformity with human dignity is at the basis of the other rights, this first “fundamental” right without which the individual could not claim his/her other rights has not yet been the subject of a jurisprudence of the European Court for human rights.

4. The recommendations of Caritas Europa

Migratory movements have always taken place, with undeniable positive benefits for societies. With regard to forced migration however, as long as unreasonable inequalities between countries in economic, social and political rights exist and grow, people will be forced to emigrate, seeking for a better life.

Caritas Europa and its member organisations want to denounce the precarious situation of irregular migrants, promote their fundamental rights and contribute to solutions which would provide for full respect for human rights and for a decent living in one’s own country, thus preventing forced migration.

They have, however, assessed that in reality hundreds of thousands of third country nationals live clandestinely in extremely precarious conditions in Europe. Above all else, Caritas sees men, women, and children living throughout Europe in inhuman situations.

In the light of their experience with migrants in an irregular situation in Europe, our Caritas organisations put forward the following recommendations:

Respect for the dignity and the integrity of the human being

Above all, it is of immediate and fundamental importance to give practical effect to the right of every human being in Europe for respect and for recognition of his or her dignity. This includes access to food, health care, housing, education, and a family life...

For minors in particular, the Convention on the Rights of the Child must be fully and effectively enshrined in national legislation, including the protection of unaccompanied minors.

Respect for the dignity and integrity of every human being should be guaranteed in all circumstances.²²

²² Article 1 universal Declaration of Human Rights

Combating the root causes of forced migration

If the right to leave one's own country is a recognised right²³, every person also has the right to live in his/her own country.

Numerous persons leave their country because it cannot provide them with mere survival or the promise of a decent future in terms of employment, education or civil rights. While more and more financial means are found, particularly to control immigration to Europe, aid for real development of the poorest countries is notoriously insufficient to create the conditions for a better future; the international commitments to development aid, promised by our countries are not fully implemented. Consequently a number of persons with the most initiative experience various degrees in compulsion related to the decision to emigrate. Committed development policies include an outspoken human rights policy, the political will to create fair trade relations worldwide and more severe control on arms trade.

Committed and comprehensive policies and measures allowing people to see prospects for a decent future in their own country and efforts for development are fundamental prerequisites to combat the root causes of forced migration. We ask national governments to fully commit to the fulfilment of the Millennium Development Goals.

Fair and efficient legislation...

The complexity of legislations on immigration and the facility it affords to certain qualified migrants generates a lack of clarity prejudicial to all. Moreover, in their attempt to tackle irregular immigration, legislation tends to criminalise all third country nationals in administratively irregular situations and hardly takes into consideration individual circumstances.

- Caritas organisations often meet persons who suffer from indirect and perverse effects of legislations on immigration and asylum. Before adopting new legislation, studies should assess the negative consequences that migrants will face, and propose amendments; whatever the reason in full knowledge of the facts, persons who suddenly lose their permit to stay should be given the benefit of an authority empowered to grant exceptions.
- The migrants that our organisations meet often find themselves in unusual situations requiring special treatment. A decision of refusal of stay should not be taken without the advice of a commission comprising a representative of a social service.
- Some do not take any steps anymore because they believe – correctly or incorrectly – that they risk being repatriated; e.g. women who have come to join their husband, who was at that time incapable of fulfilling the conditions for family reunification: from their arrival they are condemned to a clandestine stay, often through ignorance of the legislation in force.

Fair and efficient legislation is necessary to avoid that persons in a regular position fall into an irregular situation because of administrative requirements.

Undocumented migrants should have access to competent free legal and social counselling. Undocumented migrants should have access to the fulfilment of the basic needs (education, shelter, food, health care) Caritas Europa asks the European Governments to ratify the UN

²³ Universal Declaration of Human Rights, article 13 – 1 & 2

Convention on the Protection of the Rights of all Migrant Workers and the Members of their Families.

Churches, NGO's and other civil society actors should not be penalised in their efforts to assist and support undocumented migrants. Caritas asks the relevant authorities to recognise the counselling activities for migrants provided by civil society.

Caritas Europa and its member organisations have an important role to play in monitoring the relevant legislation as well as its consequences for the people concerned.

... with a human face

A residence permit for third country nationals is often granted solely from the point of view from their usefulness to our countries.

- Some migrants, when losing their job, lose their permit to stay at the same time.
- Sometimes migrants have no true link anymore with their country of origin while they have established roots in Europe
- Among the migrants in an irregular stay many are or become victims of exploiters or networks of exploitation and sanctions often hit them harder than those who benefit from them. Measures have been implemented to protect certain victims if they denounce their exploiters, but the effectiveness of these measures is weak compared to the risks trafficked persons have to take.

Caritas Europa asks humane, family-related and humanitarian criteria to be considered when examining the possibilities of granting a permit to stay to the applicants.

Persons, known for having applied for a permit to stay should not be kept in a limbo administrative situation: permits to stay should be issued, at least temporarily, opening access to the labour market and to health care. Procedures exceeding a reasonable length should result in a permit to stay.

The right to international protection

Many persons become or have become undocumented migrants because their application for protection is treated under inequitable circumstances. Many migrants are constrained to an irregular stay because of inefficient administrations or requirements that are often very difficult to meet.

- Some persons have not been able to present their application in a favourable light, wrongly informed, not understanding the language or the subtleties of the procedure in the country where they apply for protection, without the support of qualified and accessible translators and interpreters.
- Others are victims of provisions and regulations (e.g. accelerated procedure, Dublin regulation) forcing them to apply for asylum in unfavourable conditions or to hide in order to be able to apply in a country where they have some links.
- When a refugee asks for family reunification, after a long period of time before being granted refugee status, he will often have to wait several years, especially in the case when the civil services in the country of origin are in default, while s/he knows that her/his family is in danger...

- The slowness or requirements of administrations do not conform adequately to the reality of life. The will to live with one's family in Europe cannot endure the complex and lengthy legal requirements for family reunification: to enjoy their right to live with their family, some will anticipate the administrative authorisations and let their family members come and join them, consequently taking important risks for their own stay.
- Sometimes certain undocumented migrants meet the conditions to obtain a residence permit, but the loss or the absence of a document hinders them from proving it. The evidence of many people as well as that of conclusive certificates of many

The assessment of each application for international protection should be done through a fair and efficient procedure with respect to the socio-cultural and psychological situation of the applicant.

Procedures exceeding a reasonable length should result in a permit to stay.

Regularisations

We note and welcome the fact that different countries organise regularisation initiatives, sometimes collectively, sometimes on a case-by-case basis. They are however often represented as acts of pure generosity without seriously informing public opinion in order to understand the logic and the ground of the operations.

These operations often overlook the need to put in place a consistent policy of social integration: housing, counselling of the persons concerned, infrastructure etc....²⁴

Migrants are tolerated in irregular stay by the authorities:

- Because of diverse international Conventions (the right to live a family life, Children's Rights, country of return profoundly troubled or seriously violating human rights ...) or for diverse other reasons independent of their will, certain undocumented migrants can not be expelled or cannot leave. For their survival, they are often pushed in a parallel economy, completely dependant on exploiters.
- Others, seriously sick, do not in practice have access to medical treatment in their country.

Caritas calls for regularisation measures for undocumented migrants under certain conditions, to avoid exploitation and degradation of human beings.

Caritas Europa recommends that criteria for regularisation include provisions for families with children, for medical reasons, for long-term residents who have no links with the country of origin and for persons tolerated in the country of residence.

Provisional residence documents should cover the necessary period to examine the application for a residence permit and any subsequent appeal.

Caritas Europa asks that public opinion be informed correctly about the issue of immigration and that public debate be launched on objective bases

²⁴ cfr Caritas Europa position paper "Integration, a process involving all" (March 2004)

Removal and repatriation

Caritas Europa challenges the policies of forced removal and repatriation as THE solution to the problem of irregular residence. Moreover, the execution of a measure of forced return to the country of origin increases the risk of violation of human rights.

Forced removal often takes place under deplorable conditions, in a context of humiliations, and repatriation under such conditions affects severely the prospects for reintegration.

When a forced removal is decided, measures are effectively taken in order to ensure its execution, without concern for the preservation of full respect of dignity before, during and after the removal and repatriation.

It also happens that certain third country nationals, because of their extremely precarious situation, wish to return home but can't for practical reasons (means of transportation, reinstallation) ; if they are affected by a decision of forced removal, the administration can't offer them this type of return. In the case of voluntary repatriation and "humanitarian" repatriation, assistance must be provided, without being jeopardised by pedantic conditions.

Caritas Europa calls for humane and dignified return policies. Voluntary return, including reintegration programmes should be the favoured option in a return policy.

When authorities decide on removal, conditions respecting human dignity and human rights must be guaranteed during the time necessary to organise the return as well as during the return procedure and reintegration in the home country. Detention as a measure to enforce removal should only be used as last option.

Conclusion

In conclusion, Caritas Europa calls on the competent authorities and services to develop their policies based on a full respect of human rights and taking into account the realities that force people to migrate.

It is of major importance that European countries formally recognise that they are countries of immigration, that they need migrants and that a thoughtful and well planned immigration policy can result in an economic, social and cultural wealth for those who succeed in welcoming immigrants, respecting their dignity. This policy must not adversely affect the development of the countries of origin. It must balance different interests and so produce a universal common good.

Approved by ExBo, Brussels, February 2006

Annex 1

The Christian Message : the foundation of Caritas action

The option for the poor

Caritas organisations have adopted a preferential option for the poor, the frail persons or those at risk of frailty. The Bible presents three main faces of the poor: the widow, the orphan and ... the stranger (Ex 22/20, Dt 24/17-21, Dt 27/19, etc.). In the Gospel Christ names diverse

categories of poor of his epoch: those who are hungry or thirsty, those who have no clothes, the sick, the prisoners and... the foreigners, to whom He compares himself to the point that they become a criterion for the final judgement: "I was a stranger and you welcomed me" (Mt 25/31-46). Welcoming the foreigner becomes, so to speak, impossible to circumvent.

The human family

Through and in Jesus Christ, God is the Father of all people, and the foundation of the sisterhood and brotherhood of all humankind. The apostle Paul keeps coming back to this paternity and communion of human beings amongst themselves: "You are all the children of God through your faith in Jesus Christ ... There are no longer Jews nor Greeks, there are no longer slaves nor free men, ..." (Gn 3, 26 & 28).

The right to live in a country, to migrate and the obligation to welcome

The Church, in its services to humankind, has always had concern for the stranger. Its lasting insistence on this, however varied in time or place, can be found in numerous documents.

The first right of the migrant is the right to live in his/her own country: *"To me it seems opportune, in this context (of complexion and aggravation of migrations) to reaffirm that living in one's own country is a fundamental human right. This right however becomes effective only if the factors pushing people to migrate are constantly kept under control."* (John-Paul II to the World Congress of 1998)

In 1963, the encyclical *"Pacem in terris"* of Pope JOHN XXIII raised emigration to the status of a right, even if conditional:

" Every human being has the right to free movement and of stay in the political community of which he is a citizen; he also has the right, under valid reasons, to go abroad and to take residence there" (n° 25).

In 1992, the Catechism of the Catholic Church draws the link between the fundamental rights and the local and universal common good, and the duty to welcome.

"Political powers are required to respect the fundamental rights of the human being (2237). "It behoves the STATE to defend and promote the common good of civil society, citizens and all intermediary bodies" (1910).

"The realisation of a universal common good is a basic condition for the unity of all human beings, which will include people of equal natural dignity. This requires an organisation of the community of nations, capable of fulfilling the various needs of men, as well in the sphere of social life (nutrition, health, education...) as to cope with myriads of particular circumstances emerging here or there (e.g. to answer to the needs of refugees, the assistance to migrants and to their families)" (1911)

"The common good consists of three main elements: the respect and promotion of the fundamental human rights, the prosperity or development of society's spiritual and worldly goods, and the peace and security of the group and its members" (1925).

It is precisely due to the fact that in numerous countries the common good suffers from serious deficiencies, and development processes towards the common good are partially or completely hampered, that the Church's teaching raises to the level of a Right, the right to immigrate and to the level of an obligation, the duty to welcome strangers who leave these countries:

" More advantaged countries are required to welcome, wherever possible, the stranger in search of security and vital resources which he cannot find in his own country. Public powers will ensure the respect of the natural right which places the guest under the protection of his host" (2241).

Even if it is true that *"political authorities may, in the name of the common good, submit the exercise of the right to immigrate to various legal conditions, particularly with regard to the duties of migrants towards their adoptive country" (2241)*, such conditions should not constitute a limitation or hindrance to this right.

The Church recognises the legitimacy of laws: a state has the right to define the conditions of entry and stay of foreigners on its territory. John-Paul II recalls:

« Public authorities have the responsibility to exercise a control on migratory flows in function of the requirements of the common good. A good reception must always be done in respect of legislation and therefore must go together with a determined repression of the abuses" (Apostolic exhortation, The Church in Europe, June 2003, n° 101)

Where state regulations violate the Fundamental Human Rights, disobedience can become necessary:

"Every citizen has the moral duty not to comply with the regulations of state authorities if these regulations violate ethical laws, the Fundamental Human Rights, or Evangelical Laws. This disobedience to state laws that violate the laws of morality can be justified by the distinction between service to God and service to mankind. "Give unto Caesar what is Caesar's and to God what is God's!" (Mt 22, 21). "Thou shalt obey God more than man!" (Apg. 5, 29) (2242).

These messages of the Holy Scriptures and the teachings of the Church form the basis of Caritas' work for migrants, be their stay regular or irregular.

For our Caritas organisations, respect for human dignity includes a number of aspects: from the basic needs to assure material as well as spiritual survival to the right to lead a normal family life, access to health care and preparing children for their life as adults. But requiring the respect for the dignity of all human beings does not mean helping people to hide their identity or to neglect steps to legalise their stay.

Summary of the Discussions and General Issues in the Country Reports and Presentations

Dr. Andreas Fisch, Cologne

If we look at the discussions in the European institutions we see that – in spite of the unmistakable tendency to communitarise ‘migration and integration’ policy – the European Union only has limited influence on the management of migration; this is still largely left to the member states. When it comes to regularising the situation of people without residential status this means two things. One is that general, e.g. EU-wide campaigns to give such people documents have hitherto been inconceivable, politically speaking. Secondly, the policy considerations regarding such moves remain the business of the nation states.

However, the discussion within the European institutions indicates the existence of two substantive priorities and reservations, which were referred to repeatedly during the conference. On the one hand, regularisation is said to attract more non-permitted migration. On the other hand, under the President of the European Commission, José Manuel Barroso, labour-market related arguments (such as the demand for workers) are increasingly important in decisions on regularisation. The way in which arguments are found and presented came up several times in the discussions.

Different ways of dealing with the problems of people without residential status

In other countries (than Germany) social benefits are granted directly, and often to all the people in the country, although at a low level. These differences may be explained by the differing social insurance systems, as described in the country reports. It is noteworthy that there are two significant differences in the arrangements in Germany compared to all other countries presented here. First, it is not usual to have compulsory registration in all the countries presented. Second, in all the other countries steps are taken to ensure that children and adolescents, even those in an irregular situation, can have access to health care and schooling; in France these arrangements have been reinforced by social movements against the expulsion from the country of children of school age. The phenomenon of poverty in old age among people without residential status has not been particularly noticed to date and was only mentioned in passing in the presentations. This should be especially underlined in order to raise awareness for new developments. Another point only mentioned in passing, being off the actual point of the conference, was the discussion about deportation detention of people without residential status. If they have been called upon to leave the country, such people may be detained in European states governed by the rule of law; the period varies from a maximum of 35 days (France) and 40 days (Spain) to 2 months (Belgium) and up to 18 months (Germany). The Catholic Church gives pastoral care in these cases. Comparing the situation in the various countries, participants were particularly critical of special “deportation prisons”, which were felt to be illegitimate and unjust.

Differences in the understanding of regularisation

The record for the number of people regularised in Europe is held by Italy, with over one third of the total. Spain is next, overtaking Greece with its last wave of regularisation. The conference showed clearly that previous regularisations have been area-specific, providing a – generally temporary - residential status - for groups of people defined narrowly or more broadly if they fulfilled certain other criteria. It was by no means a matter of unconditional, general regularisation as frequently assumed; individual exceptions from this rule (the Martelli Act in Italy) have never been repeated. The motivations for such regularisation programmes were as varied as the different target groups. They were not so much humanitarian as based on advantage to the particular society; they were pragmatic solutions for the previous lack of legislation and generally a matter of political expediency. It was possible for pragmatic considerations to weigh so heavily that even conservative governments with deep-seated reservations about regularisations were forced to resort to them in order to meet social expectations, as happened in Italy in the case of nursing and domestic staff. One criterion regarded as relevant for regularisation, besides employment, is the inconspicuous presence of the person in the country of arrival for a long period (e.g. in France for 10 years). Regularisations pursued the goal of reducing the number of people without residential status according to definite criteria (target group, conditions, upper limit). Never was there any illusion, however, that these interventions could lead to a full or lasting reduction of irregularity in this respect.

These differences led to an interesting insight regarding the situation in Germany. First of all, it was interesting to note that the difficult 'status' of people with a *Duldung* (a "toleration visa", technically a stay/suspension of deportation) needed explanation, being a political construct peculiar to that country. Clarification is needed as to whether the humanitarian solutions found in Germany for cases of particular hardship (*Härtefallregelungen*) among those in this category could count as a covert regularisation or not; in my view this is not the case. Nevertheless, the discussions showed that Germany has a number of standard instruments for the regularisation of certain groups of people without residential status. This will be explained below.

Regarding people with a *Duldung* and the humanitarian solution granted them

The plenary could not agree on whether the numerous but extremely limited humanitarian solutions found for people with a *Duldung* could be officially identified as an equivalent of regularisation under another name. In Germany, holding a *Duldung* is official confirmation of presence in that a person is not prosecuted for being in the country. Laws even stipulate the suspension of deportation, e.g. owing to a danger of torture in the country of origin; however, the term 'Duldung' (expressing the fact that the person is tolerated) reflects a certain political ideology and does not denote a 'residential status', however minimal in terms of rights. In Spain this act of toleration is carried out without legislation because it is more acceptable for existing deportation orders not to be implemented. In Germany this leads to the strange paradox whereby people with a *Duldung* lead 'an officially endorsed life of irregularity under residence law'. The uncertainties regarding the classification of humanitarian solutions (*Härtefallregelungen*) as a covert form of regularisation practised fairly often in Germany arises from the official political understanding according to which people with a *Duldung* are immediately seen as a subgroup of people without residential status. If a few of them receive an official residence permit as a humanitarian act this may be defined as a regularisation measure, for which a *Duldung* is a prerequisite. By contrast, opponents of this view state that, despite the

official political language, people holding a *Duldung* have access to basic necessities, are officially known and do not have to expect immediate deportation in the event of a police check. All these attributes distinguish them considerably from the typical situation of other people without residential status. In my view we can conclude that the previous *Härtefallregelungen* in Germany – quite apart from the political use of language – are more like an improved status and bear *no* resemblance to the regularisation programmes in other countries, which allow people provision for basic needs which they did not enjoy at all before.

Standard regularisation programmes in Germany

By contrast, a surprising outcome of the discussion was that even Germany possesses standard instruments for regularisation – and this in a country almost all politicians reject regularisation campaigns as inappropriate, especially as they too have generally only allowed for temporary regularisation. In Germany people in humanitarian emergencies may obtain a *Duldung* for a limited period, e.g. if they are seriously ill, in the final stages of pregnancy or if a child of theirs and a German partner is recognised and both of them look after the child. This analysis broke with the stereotypes existing both among Germans and among the visitors from the other European countries, because these standard options can in some cases be regarded as more humane than many a sporadic regularisation.

Analysis of the effects

One thing that is striking is that the usual arguments about Germans ‘losing their jobs’ were not examined and the consequences in countries that have conducted regularisation drives were not made on a systematic, scientific basis.

In view of the consequences for the labour markets it is striking that in most countries people without residential status work in the same sectors and thus evidently relieve a Europe-wide shortage of legal employment options. The country reports did not suggest the extent to which this leads to job loss or wage dumping. Anyone claiming that there is a *de facto* loss of jobs is still called upon to provide empirical evidence for their statements. The motivation of the countries that have conducted regularisations on labour-market grounds is, however, their undeniable benefit to society.

The integration of people with regularised residential status has not been examined in terms of the consequences for demographic change, partly because the residence permits granted were only temporary and thus excluded long-term studies. The ‘criminality’ of people without residential status is confined e.g. in Germany (other countries did not cite any figures) in 97.5 % of cases to residence law, while they otherwise prove to be most law-abiding. While an objection came from the plenary that this painstaking law-abiding attitude stems from the precarious circumstances of a life without residential status, the vast majority thought that this groups showed no criminal energy.

Regarding the postulated attraction as a consequence of regularisations, estimates are not based on comprehensive empirical studies, but on personal assessments. A comparison of the people without residential status in a country before/after regularisation with figures from later years is not statistically valid because migratory movements are influenced by quite a number of other factors. Precisely determining the influence of one individual factor is a complex business.

Participants anticipated that in countries with frequent regularisations that are ultimately constant, despite assertions to the contrary, a certain expectation stance is created. There is still no well-founded proof - or refutation - of the magnet effect.

Labour-market policy and other interest-related arguments

Most of the arguments put forward by church agencies appeal to human dignity, human rights and particular humanitarian emergencies. In order to convince politicians, however, additional arguments are required, as shown by glimpses of the discussions in the European Union, including additional arguments that emphasise their own usefulness. However, the social concerns, like fear of wage dumping, job loss etc. have to be taken up and analysed objectively, without any irrational fears. Quite a few countries (Greece, Spain, Portugal, Italy; exceptions: Belgium, France) saw regularisations as expressly and primarily combating informal work, to recruit labour required by society from unskilled to skilled workers, and to collect additional taxes. Precisely church agencies will lose opportunities for persuasion if they cite exclusively humanitarian arguments and do not point to the host of arguments linked with the interests of a society. consequences for integration, for demographic change, labour markets, fighting crime, tax income etc. While some participants recognised the need for such arguments in order to be able to convince politicians, others urgently stressed the necessity to go beyond interest-driven arguments since these only covered a certain group of people without residential status. There is also a further need for social-ethical and human rights arguments so that - even if people without residential status cannot be associated immediately with benefit to society - their urgent humanitarian plight can be brought to the attention of the general public.

The legal arguments in Germany

For the internal German debates about proposed improvements for the situation of people without residential status, it is particularly important to use carefully chosen legal arguments in order to be taken seriously in a debate. This may be due to the fact that legal interpretation is being hotly debated, and obeying the law plays a major role in Germany. The participants found it important that the status of these arguments be clarified in a dialogue. By no means should a legally acceptable argument be limited to the given framework of the statutory status quo – this could lead to misunderstandings. Rather it was important first to bring out the given possibilities of helpers and their restrictions and help them to engage in discussions in this specialised field through a careful legal approach. Only after clarifying this given framework can a more far-reaching, social-ethical reflection follow, serving as the basis for necessary legislative change and laying its implementation back in the hands of lawyers if this change of direction were to be politically adopted. A warning was uttered against citing human rights or the constitution prematurely and as pseudo-legal arguments in order to break down existing legislative restrictions. The moral argument with human rights must not be sold as legal too soon, and a clear distinction has to be made between these two levels. A rights-based argument may prompt politicians and society to undertake humanitarian changes but not necessarily correspond to legal logic. At this point too, participants argued for a rights-based and social-ethical reflection that can link up with existing specialist debates.

In-depth ethical reflection

So there seems to be a need for in-depth ethical arguments and reflection. For example, the magnetic attraction that so far has only been postulated requires not just empirical examination to see whether regularisations in certain forms actually contribute to the motivation to enter a country without permission. Likewise, ethical reflection is called for as to whether even an empirically proven magnet effect could justify accepting cases of humanitarian hardship or deliberately heightening them in order to lessen the attraction, if this lessening can indeed be proven. Regularisations are not to be dropped as such if they produce this magnet effect since, on the other side of the scales, valuable benefits may weigh more heavily. Speakers in our discussions rejected any automatic reflex whereby the attraction effect was assumed to mean that regularisation was illegitimate – that would be ethically blind. The necessary ethical consideration was not, however, carried out in detail. In the practical regularisation illustrated in the country examples and in the discussion, no weight was attached to democratic theory as leading to a moral right to naturalisation. Nevertheless, it seems to me that we would be justified in calling for this type of ethical reflection as well.

Further-reaching reflection for Germany

With respect to the mobilisation of public opinion it was confirmed that in Germany there was no '*sans papiers*' (undocumented migrants) movement comparable with that of other countries; the reasons for this were not discussed. The precarious situation of people without residential status and their moral rights to inclusion must thus be brought into public awareness. The churches lend themselves to carrying out this task of advocacy. Here the church could draw more deeply on Catholic social teaching and make more of its convictions regarding human dignity and the common good for people without residential status.

We must apply the many and varied instruments enabling the goal of a life in dignity in an irregular situation. This became clear through the country examples indicating the boundaries of regularisation programmes because they are only limited in duration and restricted to certain groups of people. Other international ways of gaining access to social rights or regularisation are the UN Convention on the Rights of the Child, the Migrant Workers Convention or national laws based on international law. There is also assistance for voluntary returnees who can regularise their status in their home country if they leave in an orderly manner, or opening up legal options for immigration if there is a social demand or for family reasons. A further course would be to examine the causes of migration, often rooted in an unfairly organised world trade system. At the national level these are all arrangements that lead to provision for basic necessities.

The detailed examination of regularisation waves in other countries showed that Germany should not go for an unconditional, general regularisation. Rather it should identify areas which lend themselves to a sectoral regularisation for reasons of labour-market policy, or on humanitarian, family, demographic and/or other grounds. Groups of people without residential status typically found in other countries, who were offered regular residence on a temporary or permanent basis, may give us ideas: direct relatives, victims of human trafficking and forced prostitution, children and young people, members of friendly states, refugees, people in humanitarian predicaments, people who have lived there for a long time and are integrated into the community. One strategy that was not fully discussed comes to mind – first of all to compile

all the existing ways of regularisation and then to check whether other groups of people could be included in them, in order to grant them a limited residential status. That could mobilise public opinion on behalf of certain groups of people without residential status. If a society speaks out in favour of certain types of regularisation, the country examples show that frequently more people register than expected. These experiences provide information requiring closer analysis as to how the procedures need to be organised in order to reach the target group and shape the consequences in such a way that the receiving society ultimately benefits. Other countries pursue obvious advantages and their national interests by regularising families and integrated individuals in view of demographic change, regularising urgently needed workers for the labour market or regularising forced-prostitutes when combating people traffickers. Urgent attention should be given to checking whether these advantages and interests are applicable to the German situation.

Annex

Program:

MONDAY, 13.02.2006

- from 13:30 Arrival and welcome coffee
- 14:30 Welcome and opening statement
Prof. Dr. Cremer, Secretary General German Caritas Association, Freiburg
- 14:50 Introduction to the conference
Roberto Alborino, German Caritas Association, Freiburg
- 15:15 The situation of undocumented migrants
in Germany
Dr. Ute Koch, Katholisches Forum „Leben in der Illegalität“, Berlin
- 16:30 Coffee break
- 17:00 Country report Italy
Lê Quyên Ngô Dinh, Caritas Diocesana, Rom
Marco Accorinti, IRPPS-Consiglio Nazionale delle
Ricerche, Salerno
- 17:45 Country report France
Jean Haffner, Caritas/Secours Catholique, Paris
- 18:15-18:30 Day's review
Dipl.-Theol. Andreas Fisch, Köln
- 20:00 Reception and dinner
Fortbildungs-Akademie des Deutschen
Caritasverbandes

TUESDAY, 14.02.2006

- 09:00 Legalisation campaigns in European countries: Effects and reactions in the
European Union
Henrik Lesaar, COMECE, Brussels
- 10:15 Coffee break
- 10:30 Country report Portugal
Prof. Eugénio José da Cruz Fonseca, Cáritas Portuguesa, Lissabon
Pater Rui Manuel da Silva Pedro cs., Obra católica portuguesa de Migrações,
Lissabon
- 11:15 Plenary discussion
- 12:15 Church service in the chapel of the DCV
Rainer Klug, suffragan bishop in the archdiocese Freiburg
- 13:00 Lunch
- 14:30 Country report Belgium
Anne Dussart, Caritas International Belgium,
Brussels
- 15:15 Country report Spain
Micaela Sampedro Fromont, ACCEM, Madrid
- 16:00 Coffee break
- 16:30 Plenary discussion
- 17:20 Day's review
Dipl.-Theol. Andreas Fisch, Köln
- 18:00 Reception by the Municipality of Freiburg
- 20:00 Dinner
Stadthotel Kolping

WEDNESDAY, 15.02.2006

09:00	Legalisation of undocumented migrants from the point of view of Caritas Europe <i>Peter Verhaeghe, Caritas Europa, Brussels</i>
09:30	Concluding plenary discussion
10:45	Coffee break
11:15	Day's and conference review <i>Dipl.-Theol. Andreas Fisch, Köln</i>
11:30	Conclusions <i>Roberto Alborino, German Caritas Association, Freiburg</i>
11:45	The work of the German Caritas Association for migrants in Germany
12:30	Lunch und departure

Participants:

- Marco Accorinti IRPPS – Consiglio Nazionale delle Ricerche, Salerno
- Roberto Alborino Deutscher Caritasverband e.V., Freiburg
- José Antonio Arzoz Delegatur der Spanischsprachigen Katholischen Seelsorge, Bonn
- Prof. Dr. Georg Cremer Deutscher Caritasverband e.V., Freiburg
- Eugénio José Da Cruz Fonseca Cáritas Portuguesa, Lissabon
- Rui Manuel Da Silva Pedro cs. Obra Católica Portuguesa de Migrações, Lissabon
- Anne Dussart Caritas International, Brüssel
- Dr. Andreas Fisch Dipl.-Theologe, Köln
- Josef Follmann Caritasverband für die Erzdiözese Freiburg e.V., Freiburg
- Katrin Gerdsmeyer Katholisches Büro Berlin
- Jorge Gonzalez Lopez ACCEM, Madrid
- Jean Haffner Caritas/Secours Catholique, Paris

- George Joseph Caritas Schweden, Stockholm
- Dr. Ute Koch Katholisches Forum Leben in der Illegalität, Berlin
- Henrik Lesaar COMECE, Brüssel
- Michele LeVoy PICUM, Brüssel
- Christian Müller Deutsche Bischofskonferenz, Bonn
- Lê Quyên Ngô ònh Caritas Italiana / Caritas Diocesana Roma
- Micaela Sampedro Fromont ACCEM, Madrid
- Dr. Elke Tießler-Marenda Deutscher Caritasverband e.V., Freiburg
- Peter Verhaeghe Caritas Europa, Brüssel
- Karin Vorhoff Deutscher Caritasverband e.V., Freiburg
- Theresia Wunderlich Deutscher Caritasverband e.V., Freiburg
- Isabell Zwania Deutscher Caritasverband e.V., Freiburg

Interpreters:

- Karen Becker
- Annette Fess
- Elaine Griffiths
- Mechtild Schreck



Edited by
Deutscher Caritasverband e.V.
Migration and Integration
Postfach 4 20, 79004 Freiburg
Karlstraße 40, 79104 Freiburg
Fon: 0761 200-331
Fax: 0761 200-211
E-Mail: Isabell.Zwania@caritas.de
Internet: www.caritas.de
ISBN 3-9809087-9-8
(10/2006)

The Expert Panel was sponsored
by funds of the lottery GlücksSpirale