



Please note that this paper is a work-in-progress draft and is intended as a background discussion paper for the purpose of the UNITAR/UNFPA/IOM/UNHCR workshop on Irregular Migration, held on 30 August 2006, New York.

## UNDOCUMENTED MIGRANTS – SYMPTOM, NOT THE PROBLEM

- a PICUM Commentary Paper –

by Don Flynn, PICUM Chair

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*“We were occupying one of the gaps in history that go undocumented, that long silent stupefaction before some other means of survival comes along to save civilisation.”*  
Michael Collins, *The Keepers of Truth* (Scribner 2001)

Public debate on immigration policy, particularly in the countries of the global north, is increasingly focused on the issue of irregular migration and the presence of undocumented migrants in their states. Anxieties have arisen about the issue which are increasingly displacing earlier fears about refugees and asylum seekers as the core ‘problem’ with the global management of migration. A number of divergent policy responses have been elaborated as a consequence of these new concerns.

In this Commentary Paper we will review some of the thinking behind these policy responses and consider what they are attempting to achieve. We will ask whether the ‘enforcement agenda’ in particular really is an adequate way to tackle the issues arising from this aspect of global migration trends. In the final section we will set out the views of PICUM – an international network of civil society organisations working with undocumented migrants – and urge deeper thinking on the part of governments and policy-makers, with a view to tackling fundamental problems *within the global systems of ‘managed migration’*, which are the real source of irregular migration across the world.

### ***Irregular migration – what are the governments saying?***

The dominant discourse amongst the authorities of the developed countries is that irregular migration is a criminal activity which can be characterised as ‘illegal’ in all its aspects. Within this outlook the typical ‘illegal’ migrants are people who has, from the onset, sought to gain advantages to which they were not entitled and who should therefore elicit little sympathy if they find themselves dealing with national authorities determined to enforce the normal requirements of immigration regulations by denying all social benefits and protections and seeking their expulsion from the country. Moreover, the credibility of national immigration regulation crucially depends on the ability of the authorities to act decisively against such irregular migrants to effect their removal from the national territory.

In Europe, the United Kingdom government has made the link between credibility and enforcement explicit in its policy statements. Home Secretary John Reid, in an announcement to Parliament in July 2006, promised that “enforcement action against those who overstay their welcome” would be the cornerstone of reforms to the system designed to “restore public confidence.” (Guardian, 26 July 2006). The French government similar

adopted a new immigration law during the summer of 2006, increasing powers to act against undocumented migrants and intended, according to Prime Minister Sarkozy, to show that "France is in control of migration, and not a passive recipient." (BBC, 17 June 2006).

Even more extreme proposals to extend authority to act against migrants are being discussed in some countries, with government ministers in Austria agreeing expulsions measures under the so-called category of "Aliens Police Measures", which includes both voluntary and forced departures. In the first four months of the current year this had led to the removal of 13, 232 people. In campaigning for the elections due in the autumn of this year the leading candidate of the "Alliance for the Future of Austria" (BZÖ), Peter Westenthaler, has advocated the expulsion of 300,000 foreigners in the next three-year period. Those targeted for expulsion would be foreigners "unwilling" to integrate and unemployed for a long period of time. According to Mr Westenthaler, 300,000 is the number of foreigners living in Austria without authorization. (Migration News Sheet", p.5, July 2006)

In the United States, the "Sensenbrenner Bill" passed through the House of Representatives in spring 2006. Included amongst its many controversial measures is the re-classification of the estimated 11 million undocumented migrants currently in the country as criminals, leading to charges against anyone who providing assistance to undocumented migrants in any way. Its passage into law has been delayed by tension between an immigration reform measures originating in the Senate and negotiations in the issues involved are expected to extend at least until the autumn. ([www.migrationinformation.org/Usfocus](http://www.migrationinformation.org/Usfocus)).

Undocumented migration manifests itself in industrial economies outside of Europe and is particularly an issue in the Republic of Korea. Undocumented workers are estimated to make up two-third of the country's migrant workforce (189,000 out of a total 360,000 migrant workers - Ministry of Labour figures quoted in Amnesty International USA 2006). An attempt to legislate for the rights of migrant workers, passed by the National Assembly in 2003, has produced a number of effects which have increased the vulnerability of the undocumented. These have reported on extensively by a number of commentators, including Amnesty International USA.

The consensual view held by the governments of the global north on what they are entitled and required to do to regulate migration and to counter irregular movement and undocumented residence and work has been most succinctly expressed by the European Commission – a body which is not itself governmental but which is closely attuned to the sensitivities of national state authorities in matters of transnational movement. In its *Communication on Policy priorities in the fight against illegal migration of third-country nationals* (CEC, 19 July 2006) it describes as a key element of the EU approach, the view that:

*Illegal entry, transit and stay of third-country nationals who are not in need of international protection undermine the credibility of the common immigration policy. Without reinforced Community action, the crisis as already seen and perceived today would increase both in qualitative and quantitative terms.* (CEC, para. 2.5, 2006)

In summary, across the industrial states of Europe, America and Asia, irregular migration is perceived as a threat primarily because it undermines the claims made to electorates that national governments can be trusted to manage migration effectively and efficiently, maximising which accrue to the receiving countries, and minimising the opportunities migrants might have to enhance their position beyond the confines of what is permitted within immigration regulations.

An increasing difficulty for national governments, however, comes from the fact that there is an increased awareness of a *moral dimension* to immigration management amongst some sections of the public, which is concerned with the fact that official policy should not expose a vulnerable section of the world's population to what are potentially great hazards in order to secure an economic advantage for their own interests. It is becoming important to consider whether the forms of managed migration currently being developed by the governments of industrialised states is not failing in respect to this crucial dimension to policy.

### ***Managed migration – Is it producing equitable and fair results?***

It is now widely recognised that international migration has the potential to make a positive contribution of an extensive range of policy objectives, from economic development and growth, the reduction of poverty through to the protection of human rights and the promotion of equality. The report of the Global Commission on International Migration (GCIM), published in October 2005, set out a series of 'principles for action' which covered the promotion of safe and secure migration procedures within which people could migrate 'out of choice'; reinforcing the beneficial economic and development impacts of migration; strengthening of social cohesion through integration; protecting the rights of migrants; and the enhancement of government capacity.

In an important chapter on 'the challenge of irregular migration' the report discussed the phenomenon as arising from a number of factors, including lack of jobs and livelihood opportunities in countries of origin, "and the demand for cheap and flexible labour in destination countries." (GCIM, p. 33, 2005). It was also linked to the lack of "regular migration opportunities" and the emergence of criminal networks seeking profits from smuggling and trafficking activities. The possibility of widespread evasion of immigration controls arises from a 'lack of capacity' of many states to control the movement of people. In addition many are propelled into irregular migration by insecurity arising from armed conflict, political instability and economic decline. (GCIM, p.33, 2006).

The position outlined in the GCIM expresses the a broad consensus on the issues involved in irregular migration, with the key elements being shared, for example by the International Labour Office (ILO), the International Organisation for Migration (IOM). Given this fact it might be expected that the implications of living in a world where irregular migration is driven by these factors would be reflected in the managed migration policies being developed by national states.

It is to be regretted that the current generation of managed migration policies being developed in the countries of the global north do not contain perspectives that might assist in distributing the benefits of migration more equitably and ensuring that the system contains a capacity for efficient governance and the protection of rights.

A useful set of benchmarks which might allow assessment of national management migration policies is set out in the ILO's *Multilateral Framework on Labour Migration*, agreed in draft form by a tripartite meeting of experts in November 2005 (ILO, 2005) This document sets out a series of non-binding principles and guidelines intended to indicate a 'rights-based approach' to migration. What this entails is the construction of a managed migration regime which makes the obligation to provide 'decent work' a central part of the migration policy agenda – defined as "freely chosen employment", supported by "fundamental rights at work", with an income sufficient to "meet their basic economic, social and family needs and responsibilities", and an "adequate level of social protection for the workers and family members." (ILO, p.5 2005).

Do current policies meet these objectives? The record is extremely uneven across the industrialised countries. The tendency of managed migration policies to privilege skilled and highly-skilled workers means that this group at least is usually provided with an adequate level of protection; though examples can still be found of types of employment restrictions which limit the capacity of even professionals to protect themselves against discriminatory actions in the workplace, (aspects of which are discussed in an examination of labour market discrimination against migrants in Italy by Allasino and others. (Allasino et al, 2004)).

The position is more precarious for migrant workers dependent on jobs in low-skill sectors. The absence of employment security, the prevalence of casual contracts, demands for highly-flexible, often anti-social working arrangements, combined with low capacity on the part of the authorities to police minimum wage and health and safety standards, mean that levels of protection which might be theoretically available do not exist in the practical reality of exploitative workplaces.

The vulnerability of this group of workers was noted in the report on Migration and Development prepared by the Secretary General of the United Nations, Kofi Annan, as the basis for the high-level dialogue that took place in the summer of 2006. (UN 2006). As that report noted, "Migrants in an irregular situation are even more vulnerable, particularly with respect to employment. When migrants are afraid of being detected, they are unlikely to come forward to demand fair treatment by employers." (UN para. 66, 2006).

The report refers to the failure of national authorities to properly assess levels of demand for migrant labour in their economies, and other "administrative inefficiencies" as being responsible for the generation of irregular migration, particularly for undocumented migrants in low-skilled jobs. (UN paras 145-14, 2006). This is a familiar situation in many receiving countries, with the UK Home Secretary John Reid indicating the extent of the problem in Britain with his announcement to Parliament in July that his own department was "not fit for purpose" for managing migration. Policy analysts in the UK have begun to consider the hitherto little-commented on fact of undocumented migrants being present in the country, with numbers being estimated to be within order of 500,000 (Sunday Times, 17 April 2005).

The phenomenon of the large proportion of undocumented workers within migrant workforce of the Republic of Korea illustrates some of the mechanisms in place within managed migration schemes which act as leverage for the emergence of the situation. In its detailed report Amnesty International USA reports on the role played by high recruitment fees typically demanded by the agencies which recruit them for work. The resultant indebtedness means that workers will not return home at the end of their employment contract, having to remain until such time as the money has been repaid. Employers will add to these difficulties by withholding wages or requiring excessively long work hours to earn an adequate wage. Female workers, who make up one-third of the migrant workforce in the country, are particularly vulnerable to abuse and exploitation, and also facing additional problems of intimidation and sexual harassment. (Amnesty International USA, 2006).

From this review of government policies PICUM concludes that managed migration policies as they are currently being developed by the authorities of the industrialised countries, do not meet the criteria for balance and fairness which should be present, and as such contribute directly towards creating situations in which migrant workers find themselves organising their movements, residence and employment outside the provisions of official immigration regulations. From this perspective undocumented migrants exist not as a clearly-defined problem of criminal abuse of the system, but as symptoms of a wider malaise generated by poorly conceived and ineptly administered policies which do not provide sufficient protection for the basic rights of migrant workers.

In the final section of this commentary paper we will look at the implications of this analysis for the position of undocumented migrants in the countries of the global north. We will in particular address the question of why national authorities have not succeeded in establishing the legitimacy of their claim that irregular migration can safely be deemed a criminal activity, and why civil society in many parts of Europe, America and Asia has rallied to the support of the social and economic situation of undocumented migrants.

### ***Supporting undocumented migrants – the response of civil society***

The increasingly strident insistence on the part of national government authorities to deal with undocumented migrants as 'illegal persons' or even criminals is inoperative in the realm of civil society.

For organisations working on issues which concern human and civil rights the terminology of 'illegal immigration' and 'illegal immigrants' is itself contested. The GCIM report itself cautions against the use of these terms. (GCIM 2005, p.7). The association of a category of migrants with criminality as the defining feature of their situation has the effect of reducing even further the level of protection which an exceptionally vulnerable group of people might have from public and civil law and will thereby increase the hazards and dangers they are exposed to in

daily life. This is not a direction in which many organisations working from a civil society perspective will not be prepared to proceed.

The basic dynamic existing between undocumented migrants and civil society is in practice structured around a perception of there being an essential "right to the satisfaction of basic material needs of any person in a position of extreme hardship." (Cholewinski 2005, p.7). At the minimum level these will take the form of the right to shelter (accommodation), the right to health care, and the right to engage in economic activity to avoid a state of destitution. It is in these three areas of social life that civil society organisations have concentrated their activities and have worked in solidarity with undocumented migrant communities.

### *Housing*

In March 2004 PICUM published a report on the housing situation of undocumented migrants in six European countries (PICUM 2004). The report found evidence of activism on the housing needs of undocumented migrants which frequently took the form of extensive coordination of work across countries involving networks of concerned associations. In Spain the work of *Red Acoge* illustrates the sort of work being done. Involving some 25 organisations across the country the federation refuses to make distinctions between undocumented migrants and other vulnerable people in urgent need of accommodation and its social workers assess the position of all of their clients according to the same criteria.

In Germany support for homeless undocumented migrants is provided through networks involving Churches and NGOs. *Projekt Illegalitat* supports Church organisations which are providing assistance to vulnerable migrants, insisting that its professional status requires that the pressing needs of their clients be placed foremost, and precludes concerns about immigration status. In Italy, the work of *Unita Cittadini Senza Territorio*, in the city of Genova, concentrates on the position of unaccompanied minors amongst the undocumented migrant communities. In other countries and regions organisations exist which similarly specialise in alleviating the position of families, women migrants, or individuals vulnerable because for health or disability reasons.

### *Health care*

The provision of health care services to undocumented migrants has been eroded in many countries in recent years because of government policies aimed at aligning medical treatment to nationality or legal immigration status. Undocumented migrants who fall ill or suffer injuries risk being reported to the immigration authorities if they seek treatment.

This has had the immediate consequence of placing increased responsibility for the care of sick or injured individuals on other members of the migrant communities, both with and without legal residence status. The concentration of migrant communities in low pay and amenity poor economic and social sectors means that the increased cost of caring for their own sick and inform reduces the health standards of the whole community.

PICUM is currently engaged in a survey of the health care services available to undocumented migrant communities in European countries, in partnership with NGOs, health care professionals and local authorities. It is finding that health professionals working in community, primary and acute care are reluctant to accept national government pressure to preclude vulnerable migrants from the remit of their services. Working with NGOs such as *Médecins du Monde*, health clinics staffed by volunteer doctors and nurses have been established in a number of regions to provide for the immediate needs of undocumented migrants. In some EU Member States where undocumented migrants can gain access to mainstream services, NGOs play a crucial role in helping undocumented migrants navigate through the often excessive bureaucracy involved in obtaining even emergency health care. Even within mainstream services, professional objections to the exclusion of groups of people for non-medical reasons from access to treatment has provoked controversy and resistance, with some practitioners insisting on the right to health care in direct conflict with official mandates.

## *Employment*

PICUM's review of the work of civil society in protecting the rights of undocumented workers has been reported in the publication, *Ten Ways to Protect Undocumented Migrant Workers*, (PICUM 2006). Drawing on the experiences of migrant community organisations, trades unions, and other civil society organisations in Europe and the United States, the report identifies a basic approach to the task of supporting the rights of undocumented workers which it enumerates as 'Ten Ways'. These are:

- Engaging public support through events and consumer campaigns
- Collecting qualitative and quantitative data on the position of undocumented workers
- Informing undocumented workers about rights available to them under the provisions of human rights and public law
- Building capacity through empowerment
- Supporting unionisation campaigns
- Working with employers to prevent exploitation and the implementation of fair employment standards
- Using mediation and community action to counter exploitation
- Asserting undocumented worker rights through the legal system
- Working with government agencies, such as labour inspectors to promote undocumented worker rights
- Advocating the regularisation of undocumented migrants.

The report discusses the different ways in which these principles have been put into practice in various national contexts and indicates the significant success that has often been obtained through these means to challenge official policies aimed at criminalising the status of the undocumented.

## *Conclusion*

The movement of people across national frontiers as migrants is a fundamental feature of life in our increasingly globalised world. Governments seeking to regulate this situation have a duty to ensure that the legitimate interests of all the parties involved in migration are properly acknowledged within their systems of managed migration, and that migrant workers in particular, and the countries and communities they come from, have every opportunity to ensure that gain are obtained from the experience of living and working abroad. If migrant interests and rights are not attended to, the predicament that results is likely to be marked by increasing levels of irregular movements and undocumented working.

The attempt to deal with this situation through the use of enforcement powers will not be successful and will almost certainly generate unwanted social tension and conflict. It can be predicated that a significant section of civil society - particularly those groups motivated by concerns about equality and social justice, will take the side of undocumented migrants in these struggles, depriving national governments of moral authority in this area of social policy.

A better way for all would be that national governments attend to the issue of migrant worker rights at the onset of their work in managing migration, and ensuring that regulations are geared to the provision of decent work, effective governance, and the distribution of wealth and assets to the developing countries. If these matters are concerned as core issues for the migration policy agenda we would expect that national governments and civil society will be able to renew their relationship on a constructive and progressive basis.

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The Platform for International Cooperation on Undocumented Migrants aims at promoting respect for the human rights of undocumented migrants within Europe. It also seeks dialogue with organisations and networks with similar concerns in other parts of the world.

PICUM considers the following international treaties and conventions as basic values:

International Convention for the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), Universal Declaration of Human Rights (UDHR), European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Convention on the Rights of the Child (CRC), International Covenant on Economic, Social and Cultural Rights (ICESR), International Covenant on Civil and Political Rights (ICCPR), European Social Charter (ESC), Convention relating to the Status of Refugees, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

The social rights of citizens as expressed in the constitutions of the national states involved will be taken into account as well.



PLATFORM FOR INTERNATIONAL COOPERATION ON UNDOCUMENTED MIGRANTS