

# Critical Report n° 9

Issue: Rights of Migrants

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## FOR THE RESPECT OF THE RIGHTS OF ALL MIGRANT WORKERS

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### INTRODUCTION

Migration is a phenomenon as old as humanity itself. Individuals and peoples have always gone in search of an environment that is best for their survival and their comfort. Of course, those in power have also been responsible for the forced movement of whole populations, and at various times in history, these groups have been reduced to conditions of slavery, such as was the case with the slave trade, when black people were taken forcibly to the Americas to serve the needs of the colonisers of that continent, etc.

For thousands of years, human beings have migrated freely across the world and settled in uninhabited or supposedly uninhabited lands. This is no longer the case today. With the creation of modern states, with their clearly delineated borders, migratory movements are strictly controlled.

There are many causes for migration today, but the overwhelming number of people who migrate do so for economic or political reasons (see Chapter II).

We need to make a distinction here between migration within a country and international migration. Four times as many people migrate internally as internationally.<sup>1</sup> We need also to make a distinction between asylum seekers and migrant workers. The first group are seeking to escape repression in their own State<sup>2</sup> whereas the second group are supposedly responding to the need for a work force in

1 According to UNDP estimates, the number of internal migrants has risen to 740 million, see *UNDP Human Development Report 2009. Overcoming barriers: Human mobility and development*, page 21: [http://hdr.undp.org/en/media/HDR\\_2009\\_EN\\_Complete.pdf](http://hdr.undp.org/en/media/HDR_2009_EN_Complete.pdf)

2 According to current international law, victims of acts of persecution committed by third parties (armed opposition

another state. The *United Nations Convention Relating to the Status of Refugees* (called the Geneva Convention, of 1951) only protects people whose civil and political rights have been abused.<sup>3</sup> It makes no provision for people who have suffered abuses of their economic, social, cultural and environmental rights which are not covered by international protection.<sup>4</sup> But there is a narrow dividing line between political refugees and so called economic migrants, and in practise the distinction is quite arbitrary.

Naturally, the fundamental right of each and every human being should be to remain in their country of origin and to have basic needs met. But the unequal development that characterises the world today is forcing vastly more and more people to look for a better future in another country. In the last few decades international migration has grown enormously. The neo-liberal policies that dominate the process of globalisation today have accelerated international migration, providing capital with an ever cheaper work force. Between 2000 and 2010 the number of migrants doubled and now exceeds 200 million people across the world.<sup>5</sup> All regions of the world are affected by the phenomenon although one thing that is new is that today women constitute nearly half of all migrants.

Inevitably this enormous movement of people has significant economic, political, social and cultural consequences, as much in the host country as in the countries they are leaving. The country of origin loses many well educated people (brain drain), who are of course indispensable to economic, social and cultural development but the host country benefits accordingly.<sup>6</sup> The migrants contribute to the prosperity of the host countries to the extent that they have become vital to the functioning of their economies. Migrants also contribute to the host country culturally and artistically.

We must not lose sight of the fact that migrants also play an equalising role, offering a kind of safety-net in an unequal world, by financially maintaining their families who have stayed behind in the country of origin. In 2010, the amount of money sent back by migrant workers to their country of origin (in the South) was nearly three times the amount<sup>7</sup> received by those countries in development aid.<sup>8</sup>

Contrary to common perception in the West, by far the largest international migration occurs between countries of the South. According to 2010 figures, out of 128 million migrants living in countries of

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groups or transnational companies who have recourse to mercenary/paramilitary forces in order to exploit natural resources for example) have no right to asylum, because it is understood that it is the State that, in the last resort, is responsible for protecting its nationals from violations committed or the risk of violations from third parties.

3 The *Geneva Convention* applies to anyone with a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion” (art.1.A.2). Note that to begin with the scope of this Convention was limited to Europe and to refugees from the Second World War, but following the adoption of the Protocol Relative to the Status of Refugees (1966) it became universal, see: <http://www.unhcr.org/3b66c2aa10.html>

4 Money that is given to the Somali famine victims in refugee camps in Kenya or to the victims of natural disasters (the tsunami in Asia, the earthquake in Haiti, etc) comes in the form of humanitarian aid, thanks to the goodwill of donors, or as part of the strategic planning of the powerful nations.

5 See *ILO Press release of 2<sup>nd</sup> March 2000*:

[http://www.ilo.org/global/about-the-ilo/press-and-media-centre/news/WCMS\\_007891/lang--en/index.htm](http://www.ilo.org/global/about-the-ilo/press-and-media-centre/news/WCMS_007891/lang--en/index.htm)

and the ILO report entitled *International Labour Migration: a rights-based approach*:

[http://www.ilo.org/public/english/protection/migrant/download/rights\\_based\\_approach.pdf](http://www.ilo.org/public/english/protection/migrant/download/rights_based_approach.pdf)

6 Of course, it must be acknowledged that at certain times and in certain countries or regions, large scale migration can pose problems with infrastructure (housing, schools, transport, etc) and/or with food provision.

7 According to the World Bank, the transfer of funds by migrant workers to the South has risen to 325 billion US dollars out of a total of 440 billion US\$ world wide:

<http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:22757744~pagePK:64257043~piPK:437376~theSitePK:4607,00.html>

8 According to the OECD, in 2010, this rose to 129 billion US\$:

[http://www.oecd.org/document/40/0,3746,en\\_2649\\_34447\\_46195625\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/40/0,3746,en_2649_34447_46195625_1_1_1_1,00.html)

the North only 74 million originated from countries in the South, whereas the latter receive 86 million on their own soil.<sup>9</sup>

We must also remember that the reason that so called “irregular”, “clandestine” or “undocumented” migration has increased in Europe and in the USA (who receive nearly half of the irregular migrants in the world)<sup>10</sup> is precisely because these countries have taken administrative, legislative and even military measures to prevent all “unwanted” migration to their territory. These measures have removed all the weight from the Geneva Convention, which was already quite restricted in its application, and have rendered it almost inoperable, as is certainly the case in Europe (see Chapter III A).

While host states have the right, within current international law, to regulate levels of migration they also have a duty both to respect and to ensure respect for the rights of migrants who do arrive (regular or irregular). This is the message at the heart of the UN and ILO international conventions. While this report concentrates mainly on the situation of irregular migrants, it will also look at the scope and workings of these conventions.

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9 Cf. *Report of the Secretary General*, presented at the 65<sup>th</sup> session of the UN General Assembly, A/65/203, dated 2<sup>nd</sup> August 2010.

10 By definition, it is difficult to establish the precise number. The Office of the United Nations High Commissioner for Human Rights (OHCHR) estimates that, out of a total of 214 million migrants in the world, 10 to 15% are irregular: [http://www.unog.ch/unog/website/news\\_media.nsf/%28httpNewsByYear\\_en%29/07B94AEEC10C7E86C1257910005EB1B2?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/%28httpNewsByYear_en%29/07B94AEEC10C7E86C1257910005EB1B2?OpenDocument)

## I. THE CAUSES OF INTERNATIONAL MIGRATION

There are many reasons for migration but in general people migrate for economic and political reasons. Some migrants are hoping for a better standard of living but the overwhelming majority migrate for reasons of survival. In fact, migration is often, quite specifically, the result of serious and widespread violations of human rights,<sup>11</sup> the consequence of structural adjustment programmes, inequalities, social exclusion, unemployment, poverty, armed conflict, the forced displacement of populations,<sup>12</sup> the exodus from rural areas, land grabbing on a vast scale, technological progress in production, demographic growth,<sup>13</sup> natural catastrophes, climate change, corruption, and the need for manpower (unqualified, qualified and sometimes highly qualified) in host countries.

These factors are often interlinked. Take the example of technological progress. Obviously, it has made a number of arduous tasks much easier and has increased productivity in many areas (industry, agriculture, services, construction, transport etc), but at the same time it has considerably reduced the amount of work that is available and has created a vast army of unemployed people.<sup>14</sup> On top of this, there is the question of inequitable trade and the dominance of transnational corporations in a number of sectors. Neither the wealth created nor the profits made in such a way are distributed fairly, either within or between countries. This then leads to increasing inequality and social exclusion.<sup>15</sup>

Among the causes of migration, we need to focus particularly on the exodus from rural areas and on those migrants who have been forcibly displaced. At present, 50 million people (mainly peasant farmers) are forced to leave rural areas every year and find themselves in the shanty towns outside the major metropolises: a certain number of them cross international borders (like the Mexican peasants who have migrated in enormous numbers towards the USA over the last fifteen years<sup>16</sup>), thus becoming migrants in search of subsistence wages.

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11 At the beginning of 2011, according to the Geneva Convention, the number of refugees was estimated at 15 million: <http://www.unhcr.org/pages/49c3646c4d6.html>

Only violations of civil and political rights are taken into consideration, as stated above.

12 Estimated at 27 million people in 2009: <http://www.unhcr.org/pages/49c3646c146.html>

See also on this subject the CETIM publication of April 2007, on *Internally displaced persons*: [http://www.cetim.ch/en/publications\\_depl-bro5.php](http://www.cetim.ch/en/publications_depl-bro5.php)

13 It is a fact that the world's population is growing but that growth is unequal across the world. In some countries (European countries in general) the population is stagnant or even falling (as in Russia). Others continue to grow at a rapid rate (in particular in Asia and Africa). Population growth presents a number of challenges and has an impact in various areas (economic, social, political, cultural, environmental, etc). But this phenomenon does not "explain" international migration, given that the vast majority of migrants move, or in most cases are forced to move, within their own state borders.

14 In this connection, the advent of computers has posed new problems in the world of work. Over the last fifteen years, a new category of workers who do not cross any borders has come into being (for example, Indian computer operatives who work for transnational companies based in the USA). This new phenomenon merits its own specialist study, but is beyond the scope of the report presented here.

15 According to its new indicators, the UNDP estimates that a third of the population of 104 countries, nearly 1.75 billion people, suffer multidimensional poverty, or in other words severe deprivation in terms of health, education and standard of living. 2.6 billion people try to live on under 2 US dollars a day, cf *UNDP Human Development Report 2010*, p. 96: [http://hdr.undp.org/en/media/HDR\\_2010\\_EN\\_Complete\\_reprint.pdf](http://hdr.undp.org/en/media/HDR_2010_EN_Complete_reprint.pdf)

At the other end of the spectrum 1,210 billionaires have a combined fortune of 4,500 billion US\$: <http://www.forbes.com/wealth/billionaires>

16 Since the North American Free Trade agreement between Canada, the United States and Mexico came into force in 1994, Mexico's agriculture has been literally devastated and the countryside has lost a quarter of its population. See CETIM's brochure *The right to Work*, 2008, p. 22: <http://www.cetim.ch/en/documents/bro10-travail-coverA4-an.pdf>

Andres Manuel Lopez Obrador also attributes the collapse of local industry and the disappearance of hundreds of thousands of jobs in Mexico to competition from North American companies. 6,000 Mexicans would lose their jobs in this way every day (quoted by James D. Cockcroft in his article "*Faudra-t-il lutter pour abolir l'esclavage une seconde fois?*") published in *Solidarités* No. 190, June 23, 2011.

At the root of this mass exodus are the economic, commercial and agricultural policies that have been introduced over the last few decades in all continents, and of course the armed conflicts that are themselves often the result of inequality, social exclusion, discrimination - in short, the widespread violation of human rights.

Structural adjustment programmes imposed by international financial institutions (IMF and World Bank) on the countries of the South who have been in debt since the 1970s, have little by little destroyed the peasant way of life in communities, many of whom were actually self-sufficient in food. Promotion of the free-market economy as the model of development and neo-liberal policies imposed by these institutions have produced a kind of 'counter land reform', that reinforces the "latifundia" (large agricultural estates), suppresses any state aid to peasant farmers or any rural development policies in the countries concerned (for example growing cash crops for export in order to repay external debt, rather than growing food for the local population). Privatisation, the deregulation of agricultural markets, the dumping of agricultural products, the commercial development of bio-fuels, the reduction of land available for agriculture, land grab on a huge scale... have all been part and parcel of this model of development, forcing millions of people off the land every year. It was also these policies in particular that led to the food riots that took place between 2007 and 2008 in many countries of the South.<sup>17</sup>

The situation for these rural populations (and for those living in the shanty towns) is terrifying. According to UN figures, there are a billion people worldwide suffering famine and malnutrition, the same number without access to clean water and 2.6 billion without access to basic sanitation. It is often the same people who are homeless, have no access to education or to health care, etc. The sad irony is that the overwhelming majority of the people who are starving in the world live in rural areas and are or were food producers.

Leaving aside for the moment the unspeakable suffering of the people involved in this exodus and the social problems caused by it, we should be aware that the urban centres and the so-called industrialised or developing countries simply cannot absorb this enormous exodus of people. According to Samir Amin, the famous alter globalization economist "***it would take an annual growth of 7% in our urban areas and four Americas to absorb the surplus agricultural workforce in the case of a total collapse***".<sup>18</sup> Obviously this is impossible, but in any case, the following figures confirm, if any confirmation were needed, that S. Amin's assessment is correct.

If this rural exodus continues at its present rate, within 60 years the countryside, in which half of humanity (more than 3 billion people) currently lives, will be empty. UN agencies expected the urban population to overtake the rural population by around the year 2050. However, that milestone was passed this year and today there is a total of 490 cities in the world with populations ranging between a million (Nice, France) and 37 million (Tokyo, Japan).<sup>19</sup> This results in often insoluble problem: shortages of housing, supplies (of water, energy, and food in particular), infrastructure, transport, employment, and problems of crime...

People might argue that Western European countries managed to integrate their rural population into industry. It is true that during industrialisation, peasant families in Western Europe had their homes expropriated and were chased from the land, to work in factories, in a process involving much sacrifice and suffering. But this process went on for about two hundred years, and the countries involved were colonisers. They occupied extensive territories over four continents (America, Asia, Africa and

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17 See amongst others Critical Report No 3 from CETIM entitled "The global food crisis and the right to food", December 2008, [http://www.cetim.ch/en/publications\\_cahiers.php#crisis](http://www.cetim.ch/en/publications_cahiers.php#crisis)

18 See *Genèse et enjeux des migrations internationales*, Centre Tricontinental and Syllepse, 2004, 208 pages, p. 15.

19 Cf. <http://www.populationdata.net/index2.php?lang=EN&option=palmares&rid=4&nom=grandes-villes>

Oceania), and this allowed them to “export” (without any need for visas) their surplus manpower.<sup>20</sup> Moreover, the area involved at the time was comparatively small and sparsely populated, when measured on a world scale.

In short, this problem, on its own, has enormous implications in many areas (economic, social, political and cultural, etc), and therefore should be given the highest priority, and be treated as a matter of urgency by all governments.

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<sup>20</sup> Between 1800 and 1930, 40 million Europeans left Europe to settle in the Americas and Africa, in Australia and the Pacific Islands (cf. Presentation by Professor C.-M. Eya Nchama, presented to the Assises européennes sur le droit d'asile, Lausanne, 15-17 February 1985).

## II THE PROBLEMS AND HUMAN RIGHTS VIOLATIONS ENCOUNTERED BY MIGRANTS DURING THE PROCESS OF MIGRATION

These days, apart from some exceptions (highly qualified people and investors) regular immigration into Europe and the United States has become almost impossible for people from many Asian, African and Latin American countries.<sup>21</sup> This explains why migrants risk everything, including their lives, to enter these “paradises”, even though they know they will never obtain the necessary legal authorisation to travel or to stay in those countries. As a consequence thousands of would-be migrants lose their lives every year in their attempt to cross the European and the United States borders (see below).

The problems for would-be migrants begin in their country of origin. First of all they need a passport and the requisite visas for both the destination country and the countries they will pass through, which is a virtual impossibility for the majority of would-be migrants or asylum seekers. At this point they may seek help from the network of traffickers and criminal gangs to obtain false papers and/or to be escorted towards the destination country, where they might arrive if they are “lucky”... Many of them lose their lives in their attempts to overcome the obstacles put in their way and the constraints they encounter in the transit countries.<sup>22</sup> The more vulnerable (women and children)<sup>23</sup> may become victims of human trafficking at the hands of these of criminal gangs.<sup>24</sup> As for those who are intercepted by the authorities (from the country of origin, transit or destination) they are all too often treated as criminals for having broken immigration laws and regulations. As a result, their basic human rights (the right to life, the right not to be tortured, or badly treated, or detained arbitrarily, the right to be heard and the right to a fair trial, the right to protection from persecution, etc.) are flouted and these people can be expelled, sometimes in inhumane conditions. It is worth noting that a computer database (EURODAC) has been in operation since January 2004, “to determine the European Union (EU) country (and three non-member countries, Iceland Norway and Switzerland) to be responsible for processing an asylum application”.<sup>25</sup> This has led some migrants, in desperation, to mutilate themselves (usually by burning the fingers) in order to escape EURODAC’s surveillance records.<sup>26</sup>

For the destination countries, sealing their borders as hermetically as possible, using radar surveillance, constructing walls and even mobilising their armies to prevent migrants entering either by land, sea or air, has not been enough. They have now concluded bilateral agreements with states of origin and transit states, which go against and are in violation of international conventions on human rights and the rights of refugees, in order to control immigration as efficiently as possible. The European Union, for example, (see later chapters) has made aid and economic co-operation with origin and transit states dependent on active collaboration in the interception of so called illegal or unwanted

21 By contrast, EU and US nationals, and, more recently, an increasing number of Chinese are free to live and work in the South. Moreover, transnational corporations bring with them their own officers, and even skilled workers, instead of training nationals in the host country.

22 For example, according to the Mexican national Institute for Migration (in charge of apprehending and repatriating irregular migrants), about 400,000 Latin Americans cross Mexico every year to immigrate into the United States. A substantial number of them do not reach their destination and settle in Mexico. Others are either kidnapped by Mexican gangs and held to ransom and become the victims of crimes such as rape, disappearances and murder, or are blocked at the US border and expelled to their country of origin. Between January and September 2011 the Mexican Institute cited above expelled 53,000 migrants (see newspaper *Le Courrier* of 8<sup>th</sup> February 2011).

23 Concerning the specific problems encountered by children, the UN Special Rapporteur on the rights of migrants presented a report to the 11<sup>th</sup> session of the Human Rights Council (June 2009) identifying three groups of children affected by the process of migration: children left behind by migrants in the country of origin, children of migrants who cross borders (accompanied by an adult or not) and children of migrants in the host countries, see A/HRC/11/7, dated 14<sup>th</sup> May 2009: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.7.pdf>

24 See also the work of the UN Special Rapporteur on human trafficking, particularly of women and children: <http://www.ohchr.org/EN/Issues/Trafficking/Pages/TraffickingIndex.aspx>

25 Created under *Regulation No 2725/2000* of the Council of Europe of 11<sup>th</sup> December 2000:

[http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_immigration/l33081\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l33081_en.htm)

26 Cf. <http://www.migreurop.org/article1795.html>

migrants. Even private airlines are called on to intercept undesirables. The European Union has gone even further and employs a special force (FRONTEX, see page 16) to control its external borders, in the “fight” against “illegal” immigration.

We have reached this point because the authorities in the destination countries view immigration as a question of national security or public order (vague notions that allow a great deal of latitude to the arbitrary practices of the administrative powers) and so migrants are very easily criminalised. The same applies to anyone who tries to help migrants in distress (see later chapters).

The measures adopted by a number of states in the “fight against terrorism” after the attacks in New York on 11<sup>th</sup> September 2001 have increased this tendency, without any real opposition in the so-called democratic countries (in the European Union and in the United States in particular), who have gone so far as to tolerate forms of torture that had been illegal in these places since the end of the Second World War.



### III THE SITUATION FOR MIGRANTS IN THE HOST COUNTRIES AND AT THEIR BORDERS

#### A) The European Union

In 2010 the countries of the European Union were officially home to 32 million migrants, of whom 80% were resident in five countries (Germany, Spain, France, Italy and the United Kingdom),<sup>27</sup> out of a total population of more than 500 million.

Among the 30 million so-called irregular immigrants in the world,<sup>28</sup> four and a half million may be resident in the European Union.<sup>29</sup>

The Treaty of Amsterdam<sup>30</sup> gave the European Union responsibility for "...external border controls, asylum, immigration and the prevention and combating of crime". (Title 1, art 2 [ex-article ]) This Treaty was followed by the adoption of the Tampere Programme (1999) and The Hague Programme (2004) aimed at setting up a common immigration and asylum policy. The European Union adopted a whole series of "Directives" and "Regulations" with the aim of making its borders even more water-tight and to make it easier to send back illegal immigrants.<sup>31</sup>

It is important to understand that the European Union is tending increasingly to "subcontract" the task of border control to the countries of origin and transit countries. The European Union "reached association agreements with seven countries from the Mediterranean area between 1998 and 2005, which set the conditions for cooperation with each of them in the economic, social and cultural fields."<sup>32</sup> Among these conditions is cooperation to "fight against illegal immigration". As an example, between 2003 and 2008, Morocco, Tunisia, Libya and Algeria adopted new legislation on foreigners, which increased the sanctions with regard to illegal immigrants, and many of these countries signed agreements between themselves concerning readmission. As part of the Aeneas Project, "two million euros have been allocated to fight irregular migrations just between Niger and Libya, and several millions to control migration movements within these countries."<sup>33</sup>

Furthermore, the European Union also 'offers' its technology in order to "make secure" the borders of a number of African countries.<sup>34</sup>

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27 See [http://epp.eurostat.ec.europa.eu/cache/ITY\\_OFFPUB/KS-CD-10-220/EN/KS-CD-10-220-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-CD-10-220/EN/KS-CD-10-220-EN.PDF)

Note that the European Union figures concerning the number of migrants in the different member States diverge from the UN figures. Although we cannot be precise, it is possible that the UN figures include so called irregular migrants also, see: [http://www.un.org/esa/population/publications/2009Migration\\_Chart/IttMig\\_maps.pdf](http://www.un.org/esa/population/publications/2009Migration_Chart/IttMig_maps.pdf)

Note also that these figures include migration between European countries (nine million according to 2007 figures, see Note 29) It should also be emphasised that migrant children born in most European countries are still considered to be foreigners even after a period of several decades and even if they no longer have any attachment to the country of origin of their parents, unless they themselves take steps to acquire nationality. Following the census in 1999 which established the number of foreigners in France at 3,260,000, the French demographer Hervé Le Bras explained this anomaly with the following example: "Under US law, the 510,000 foreigners born in France would be French. Similarly, if the law as it exists in Latin American countries were applied, those who had been resident for more than 10 years would have acquired the nationality of the host country. So, this would leave only 638,000 foreigners in France."

Quoted in *Pour une politique ouverte de l'immigration*, Migration and Globalization Working Group of the Scientific Council of Attac, Syllepse, October 2009.

28 See Note 10.

29 See the report entitled *An opportunity and a challenge: Migration in the European Union*, European Union, May 2009. Available free as downloadable pdf from <http://bookshop.europa.eu/en/an-opportunity-and-a-challenge-pbNA7808857/>

30 Adopted on 2<sup>nd</sup> October 1997, it came into force on 1<sup>st</sup> May 1999 (see: [http://europa.eu/abc/treaties/index\\_en.htm](http://europa.eu/abc/treaties/index_en.htm))

31 For more detail, see: "A Critical Chronology Of European Migration Policies", by Alain Morice (CNRS-University Paris-Diderot) for Migreurop, 6<sup>th</sup> September 2011: <http://www.migreurop.org/article1961.html>

32 Cf. *Migreurop Report 2009-2010*: [http://www.migreurop.org/IMG/pdf/rapport-migreurop-2010-en\\_-\\_2-121110.pdf](http://www.migreurop.org/IMG/pdf/rapport-migreurop-2010-en_-_2-121110.pdf)

33 Idem.

34 For example, in October 2009, a 300 million euro deal was won by an Italian firm for the 'electronic reinforcement' of the

These policies lead to violations of human rights, albeit of varying degrees, directed against both regular and irregular migrants.

### **1. The situation for regular migrants**

After the Second World War, the industrialised countries of Western Europe imported cheap labour on a huge scale from Africa, Turkey and the Commonwealth countries in particular, to replace the workforce they had lost,<sup>35</sup> and to get their economies going again.<sup>36</sup> Following the oil crisis in the 1970s, the same countries began to gradually close their borders to migrants, while at the same time, tightening up conditions of stay for those migrants already resident (creating obstacles to family reunification,<sup>37</sup> and to free movement, etc). These policies are still being pursued today and have an impact particularly on the enjoyment of economic, social and cultural rights by legal migrants.<sup>38</sup>

For instance, depending on the country, regular migrants are not permitted to change employer or the economic sector to which they have been assigned. If they lose their job for whatever reason they instantly lose the right to stay in the host country. They are often discriminated against in matters of housing, education, health, salary, etc. They are the first to suffer during economic crises, losing their job and, if they do not find another within a certain specified time (the time varies according to the country) they are forced to leave the country in which they have made their home, sometimes after years of residence.

It is important also to note that regular migrants increasingly face competition, not only from nationals but with new European migrants (from the Schengen Area) and irregular migrants, to the detriment of their working and living conditions. Moreover in the last few years we have seen a rise in racism and xenophobia towards both regular and irregular migrants. Certain political parties in a number of European countries mount clearly racist and xenophobic campaigns.<sup>39</sup> These campaigns have become the “trademark” of these parties who have even found themselves propelled into government in some countries over the last decade (Austria, Italy, Netherlands, etc). The European Commission against racism and intolerance fears the worst and believes that “... Legal means alone do not seem sufficient to counter this trend. More needs to be done to fight it, such as encouraging adherence to parliamentary codes of ethics regarding the impermissibility of racist political discourse and voluntary ‘good practice’ commitments among politicians and political parties...”<sup>40</sup>

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immense Southern border between Libya, the Sudan, Chad and Niger (Cf. *Migreurop Report 2009-2010*, op cit, p. 127)

35 At the same time, more than 10 million people left Western Europe to settle permanently on the continent of America (see § 38 of the study by expert Baroness Elles *The Problem of the Applicability of Existing International Provisions for the Protection of Human Rights to Individuals Who Are Not Citizens of the Country in Which They Live*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/369 dated 9<sup>th</sup> August 1976).

36 In 1950 Western Europe was home to 3.8 million migrants whereas at the beginning of the 1970s this figure had reached 11 million (see the report by M. Abye Makonnen, representative of the International Organisation for Migration: <http://www.senat.fr/rap/r03-273/r03-2732.html>) (in French)

37 In any case, it should be noted that “Family reunification and marriage migration represent a significant share of inflows into virtually all OECD countries. Indeed, some countries are dominated by flows linked to family ties, as in France and the United States, where these account for 60 and 70 percent of annual flows respectively.”, see *UNDP Human Development Report 2009*, op cit: [http://hdr.undp.org/en/media/HDR\\_2009\\_EN\\_Complete.pdf](http://hdr.undp.org/en/media/HDR_2009_EN_Complete.pdf)

38 For the economic, social and cultural rights of migrants in host countries and on States obligations in this area, see, among others, the *Report of the UN High Commissioner on Human Rights*, presented at ECOSOC, E/2010/89, dated 1<sup>st</sup> June 2010. Also the *Annual Report of the UN Special Rapporteur on the rights of migrants about the right to health and the right to housing of migrants*, presented at the 14<sup>th</sup> session of the Human Rights Council, A/HRC/14/30, dated 16<sup>th</sup> April 2010.

39 See, among others, the report of the UN Special Rapporteur on racism: *Political platforms which promote or incite racial discrimination* A/HRC/5/10, of 25<sup>th</sup> May 2007, presented at the 5<sup>th</sup> session of the Human Rights Council. Also the CETIM report entitled *The right to non-discrimination*: <http://www.cetim.ch/en/documents/bro13-discrim-A4cover-an.pdf>

40 See the *2010 Annual report of the European Commission against racism and intolerance (ECRI)*, pp. 7-8, published on

In this situation, it might appear incongruous to talk about the civil and political rights of regular migrants (notably residents), but we tend to forget that they do contribute considerably to economic and social development in the countries where they live. They also contribute to public finance and Social Insurance funds, but are not allowed to give their opinion on such things as housing or health policy for example.

The Member States of the European Union also have a long way to go in ensuring the political rights of European citizens residing in a State that is not their own.<sup>41</sup> While ‘The Treaty establishing a Constitution for Europe’<sup>42</sup> allows freedom of movement to citizens of Member States in the European Union,<sup>43</sup> it also limits their political rights (the right to vote and to stand as a candidate) to municipal elections and to elections to the European Parliament (art.I-10.2).<sup>44</sup>

Having said that, it is clear that the European Union, faced with a decline in population that has been taking place for a number of years coupled with an ageing population, cannot maintain its level of economic and social development without international migration. In 2006 the European Commission estimated that 40 million migrants between then and 2050 “... could offset the effects of low fertility and extended life expectancy.” The Commission also warned Member States that “...The *ageing population* will also have an impact on *social protection* and *public finances*. On the basis of current policies, ageing will lead to considerable upward pressures on public spending. Budgetary deficits of this type could compromise the future equilibrium of pension and social protection systems in general and perhaps even the potential for economic growth or the functioning of the single currency.”<sup>45</sup>

## **2. The situation for irregular migrants**

The drastic restrictions in European immigration policy have disastrous consequences for irregular migrants, but also for asylum seekers. First of all potential migrants or asylum seekers are choosing more and more dangerous routes. Often they have to hide their identity and/or use false identity papers in the hope of not being sent back to their country of origin. For example, African migrants attempt to cross the desert or go by sea on makeshift vessels. The journey across the Sahara is long and dangerous: there are problems of transportation, of extortion and corruption from officials in the transit countries, the risk of getting lost or being abandoned by an escort... Every year, hundreds of migrants lose their lives in the attempt. The Trans-Saharan routes must be littered with the skeletons of these clandestine travellers. It is the same situation in the Mediterranean and the Atlantic Ocean where bodies disappear sometimes for ever, not to mention the rivers that constitute national borders (the Evros river, for example, between Greece and Turkey).<sup>46</sup>

The number of migrants who have died attempting to reach European borders since 1988 has risen to 17,738 of whom 8,145 disappeared at sea.<sup>47</sup> The figure for those lost at sea has continued to rise with the war in Libya, and there have been 2000 deaths recorded since the beginning of 2011 along the

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16<sup>th</sup> June 2011: [http://www.coe.int/t/dghl/monitoring/ecri/activities/Annual\\_Reports/Annual%20Report%202010.pdf](http://www.coe.int/t/dghl/monitoring/ecri/activities/Annual_Reports/Annual%20Report%202010.pdf)

41 Nine million people according to official European Union figures in 2007, see the study referred to in Note 27.

42 Adopted 29<sup>th</sup> October 2004 in Brussels.

43 It would seem that this right does not extend to the Roma, although they are European citizens, given their expulsion from Italy and France (see the condemnation of these two countries by the European Committee for Social Rights, cited in the recent publication by CETIM *The right to non-discrimination*, already cited, page 29.

44 <http://www.consilium.europa.eu/igcpdf/en/04/cg00/cg00087-re02.en04.pdf>

45 See *Communication from the Commission of 12<sup>th</sup> October 2006* entitled “The demographic future of Europe - from challenge to opportunity”:

[http://europa.eu/legislation\\_summaries/employment\\_and\\_social\\_policy/situation\\_in\\_europe/c10160\\_en.htm](http://europa.eu/legislation_summaries/employment_and_social_policy/situation_in_europe/c10160_en.htm)

46 Cf. *Migreurop Report 2009-2010*, already cited.

47 Of course, these figures only refer to those cases that are known about and registered, see:

[http://fortresseurope.blogspot.com/2006/02/immigrants-dead-at-frontiers-of-europe\\_16.html](http://fortresseurope.blogspot.com/2006/02/immigrants-dead-at-frontiers-of-europe_16.html)

Libyan coasts.<sup>48</sup> Even worse, a number of these deaths could have been the result of the non-assistance of NATO naval forces.<sup>49</sup>

Irregular migrants that succeed in entering the European Union or who become irregular migrants after having entered legally can be found working in nearly all sectors of the economy (agriculture, construction, service and domestic). Their conditions of life can be terrible: extremely long hours of work, inadequate and overcrowded lodgings, no employment contracts, no social or trade union protection, maltreatment, sexual abuse, etc. Some are subjected to conditions of semi-slavery as testified by Adv. Iside Gjergji describing migrant Africans in the Salento region of Italy. Employed by the Spanish company Tecnova Ltd<sup>50</sup> in the construction of hundreds of photovoltaic units, these workers were forced to work for 24 to 26 hours at a time for less than a euro an hour. Those who fell ill were sacked on the spot. Those who had an accident at work were dropped off in front of the emergency department of the local hospital after the tag on the uniform identifying the company had been torn off. The workers had no contact whatsoever with the company's personnel. This situation led them to rebel and to organise demonstrations in the streets of San Pancrazio (Brindisi) between the 22<sup>nd</sup> and the 30<sup>th</sup> of March 2011. The hundreds of workers who eventually complained confirmed in their statements, that they had never encountered such work practices before other than in the stories told to them by their grandparents about slavery in the cotton fields of the United States.<sup>51</sup>

In general, irregular migrants do not complain about abuses, even when they are victims of rape or violence, through fear of losing their jobs, or of being arrested and expelled. This is often what happens in fact when victims try to involve the authorities in the countries concerned. The only reason that “the slaves of Salento” broke the silence was that they hoped to lose their clandestine status and obtain a residence permit by using a section of Italian law that allows permits to be given to victims of international trafficking and exploitation at work.<sup>52</sup>

### **3. The situation for asylum seekers**

The right to asylum and the right of immigration are two distinct things. The right to asylum is a means of providing a form of international protection. It is really about protecting anyone who makes an appeal against the risk of persecution or of continued persecution. This right is recognised in the Geneva Convention on refugee status (1951). On the other hand, immigration signifies the movement of people, who are not nationals, who have entered a country with the intention of settling or staying temporarily to work. Over a number of years there has been a merging of the two ideas. One particular example of this is the way in which various Western laws have chosen to interpret that part of the Geneva Convention mentioned above in a very narrow way, with the result that they have reduced the scope of the international protection that it was originally intended to provide, and has rendered it inoperable in practice.

Following the Dublin Convention (1990) and the Dublin Regulation (2003),<sup>53</sup> asylum seekers are automatically sent back to the first country whose border they crossed so that their case can be examined. Returning people in this way poses a number of problems in ensuring that the human rights of asylum seekers are respected.

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48 Cf. <http://www.rfi.fr/afrique/20110802-libye-porte-sortie-europe-mort> (in French)  
<http://www.english.rfi.fr/africa/20110801-italian-coast-guards-find-25-dead-libya-refugee-boat>

49 Cf. *Migreurop Press release 5th August 2011*: <http://www.migreurop.org/article2027.html>

50 Sub-contractors of a “temporary company association” called U.T.E. financed by an investment fund, GSF Capital based in Luxembourg, Madrid, Shanghai, Athens and Singapore, see “The slaves of Salento” in *Archipel* N°196, September 2011 (in French or German): <http://www.forumcivique.org/fr/articles/dossier-italie-les-esclaves-de-salento>

51 Idem.

52 Idem.

53 All the member States of the European Union and three non-member States (Iceland, Norway and Switzerland) took part.

Unfortunately, most European countries, having signed readmission agreements with a number of supposedly 'safe' transit countries (Benin, Bosnia, Mali, Mongolia, Senegal, Ukraine, etc),<sup>54</sup> automatically send these asylum seekers back to the transit countries, whatever their situation or the threat that hangs over them. A certain number will end up where they started, in other words in their country of origin, while others try their luck using other routes to try to get back to Europe if they have the financial means to do so.

Sometimes a request for asylum will not even be considered or will be turned down (on the basis of a superficial investigation) in the country of entry into the European Union. As an example, the chance of obtaining the right to asylum in Greece is almost zero<sup>55</sup> and in Poland less than 1% of applications are successful.<sup>56</sup> A lack of knowledge about the legislation or the language of the country (or of one of the commonly used European languages), the absence of travel documents (or of identity cards), lack of legal aid, the very short time period in which to lodge an appeal (five days), etc: these are all factors that put obstacles in the way of an asylum seeker attempting to win the right to asylum. Moreover, an asylum seeker who meets with refusal immediately loses the right of making another application in another European Union country and in three other non-Member countries (Iceland, Norway and Switzerland).

Even worse, the European authorities sometimes prevent asylum seekers or would-be migrants from entering their territory because it is not always possible to be sure of the intentions of someone who is trying to cross a border illegally. This is what happened to a group of twelve Afghans who were attempting to cross the river Tisa (between Romania and Ukraine) on an inflatable boat in March 2009. Warned by Romanian border guards, their Ukrainian colleagues intercepted the twelve Afghans.<sup>57</sup>

Since May 2009, when the Italian navy arrested 240 migrants at sea and turned them back to Libya it has become standard practice to intercept and send back migrants, without any examination of their situation as regards the right to asylum.<sup>58</sup> In 2009, the number of people refused entry to the European Union rose to 114,000.<sup>59</sup> We have no idea how many among them had the right to international protection.

The situation is no better on the Turkish-Greek border, which in 2010 became the main point of entry for irregular immigration according to Frontex (see page 16). In 2009, the Greek Coast Guards

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54 See among other sources the list on the French government site:  
[http://www.ofpra.gouv.fr/index.html?xml\\_id=276&dtd\\_id=11](http://www.ofpra.gouv.fr/index.html?xml_id=276&dtd_id=11) (in French)

55 The European Court of Human Rights has condemned the Greek government several times for the degrading and inhuman conditions in its detention centres. At the beginning of this year, in the case of an Afghan asylum seeker, they condemned the Greek government again for violation of Article 13 (the right to an effective remedy) combined with Article 3 (prohibition of torture and maltreatment) of the Convention "on the grounds of the failure of the asylum process in the case of an asylum seeker and the risk of expulsion to Afghanistan without a serious examination of his entitlement to asylum and without offering any effective remedy". In the same case, the Belgian government was also condemned for violation of the same articles (13 and 3) "on the grounds that in sending the asylum seeker back to Greece, the Belgian authorities exposed the asylum seeker to risk resulting from the failures of the asylum procedure in that State" but also for exposing him to "conditions and existence in detention in this State that are contrary to this article", see *Case of M.S.S. v. Belgium and Greece (application No. 30696/09)* of the 21<sup>st</sup> January 2011:  
<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=30696/09&sessionid=82599017&skin=hudoc-en>

56 Cf. *Migreurop Report 2009-2010*, pp. 66-68:  
[http://www.migreurop.org/IMG/pdf/rapport-migreurop-2010-en\\_-\\_2-121110.pdf](http://www.migreurop.org/IMG/pdf/rapport-migreurop-2010-en_-_2-121110.pdf)

57 *Idem*, p. 57.

58 Cf. Migreurop, "A Critical Chronology Of European Migration Policies", *op. cit.*, p. 16.

59 Cf. *Migreurop Report 2009-2010*, p. 49.

stopped 10,165 migrants in the Aegean Sea.<sup>60</sup> Just like Greece, Turkey has been condemned several times by the European Court of Human Rights for not respecting the right of asylum.<sup>61</sup>

#### **4. Arbitrary detention**

Irregular migrants who have crossed international borders without the necessary authorisation (without a visa for example) and asylum seekers whose cases have been rejected (and are awaiting expulsion) are often incarcerated in detention, or sometimes called “retention” centres. The length of time spent inside varies from one country to another but irregular migrants can be detained for years (six months in Italy, a year in Poland, 18 months in Switzerland,<sup>62</sup> two or three years in Turkey<sup>63</sup>), treated like criminals for a simple infraction of the laws/ regulations on residence for foreigners.

As an example, there were 20 registered detention centres in Libya (at the end of 2009). In 2007 these camps had been holding 60,000 migrants, without legal basis or judicial oversight, nor legal assistance, nor the possibility of seeking asylum. The Libyan government repatriated some 145,000 foreigners between 2003 and 2005. During the same period 360 bodies of migrants were recovered.<sup>64</sup>

The UN Working Group on Arbitrary Detention believes that criminalising irregular entry into a country exceeds the legitimate interest of States to control and regulate irregular immigration and can lead to unnecessary detention.<sup>65</sup>

On this subject, the analysis of the Special Rapporteur to the UN on the human rights of migrants offers a clear overview of the problems posed by these arbitrary detentions from a human rights perspective:

“Some national laws do not provide for judicial review of administrative detention of migrants. In other instances, the judicial review of administrative detention is initiated only upon request of the migrant. In these cases, lack of awareness of the right to appeal, lack of awareness of the grounds for detention, difficult access to relevant files, lack of access to free legal counsel, lack of interpreters and translation services, and a general absence of information in a language detainees can understand on the right to instruct and retain counsel and the situation of the facilities where they are being held can prevent migrants from exercising their rights in practice. In the absence of lawyers and/or interpreters, migrants can often feel intimidated and obliged to sign papers without understanding their content.

“Migrants and asylum-seekers are sometimes detained at airport transit zones and other points of entry, under no clear authority, either with the knowledge of government officials at the airport or simply on the instructions of airline companies before being returned to their countries. The difficulty or impossibility of reaching any outside assistance impedes the exercise of the right of the persons concerned to challenge the lawfulness of the State’s decision to be detained and returned and to apply for asylum, even in the presence of legitimate claims. In practice, some States

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60 Ibid, p. 101.

61 For example, in the case of Mohsen Abdolkhani and Hamid Karimnia, two Iranians detained and denied access to the asylum process with the risk of being deported to Iran, the Court judged that there had been a violation of sections 5.1, 5.2, 5.4 (right to liberty and security) and Article 13 (right to an effective remedy) as well as Article 3 (prohibition of torture and abuse) of the Convention for the Protection of Human Rights and Fundamental Freedoms (see *the case of Abdolkhani and Karimnia v. Turkey*, Application No. 30471/08, Judgement of September 22, 2009).

62 Switzerland is not a member of the European Union but is included in the Schengen and Dublin agreements.

63 Turkey is a candidate for membership of the European Union. According to witnesses, the Turkish authorities do not send many African migrants back, given that the latter are responsible for paying their own fare back. This is why detention in Turkey can extend indefinitely. See « Turquie: avec les migrants », *Archipel*, N°186, October 2010 (in French).

64 Cf. *Migreurop Report 2009-2010*, pp 40-42.

65 Quoted by the UN Special Rapporteur on the Rights of Migrants, A/HRC/7/12, § 43, of 25th February 2008, presented at the 7th session of the Human Rights Council. All the reports of the Special Rapporteur (annual reports and mission reports) are available online at the United Nations High Commission for Human Rights:

<http://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/SRMigrantsIndex.aspx>

misleadingly label migrant detention centres as “transit centres” or “guest houses” and change “detention” to “retention” in the absence of legislation authorizing deprivation of liberty.

“Often the legislative criteria of a given State allow for a high degree of discretion in ordering administrative detention: foreign nationals can be detained when immigration officers have “reasonable” grounds to believe that the person is inadmissible, is a danger to the public, that the individual is unlikely to appear for an examination or a hearing, or where the officer is not satisfied about the identity of the person. Some anti-terrorism legislation allows for the detention of migrants on the basis of vague, unspecified allegations of threats to national security. The high degree of discretion and the broad power to detain accorded to immigration and other law enforcement officials, often coupled with a lack of adequate training, can give rise to abuses and to human rights violations. The failure to provide legal criteria can result in de facto discriminatory patterns of arrest and return of irregular migrants.”<sup>66</sup>

Furthermore, migrants detained in this way, are sometimes subjected to inhuman and degrading conditions. Given this situation, it is not surprising that they sometimes revolt. Since the beginning of this year, the Migreurop network has listed more than ten revolts and riots in European detention centres.<sup>67</sup>

### **5. The crime of solidarity**

The anti-immigrant obsession of the Member States of the European Union is such that even helping people in danger can be criminalised. Such was the case of seven Tunisian fishermen who were taken to court in Agrigente (Italy) for having gone to the aid of 44 migrants shipwrecked near the island of Lampedusa on 8<sup>th</sup> August 2007.<sup>68</sup> In fact a number of European countries have adopted legislation to criminalise those who try to give support to these excluded people in distress and to asylum seekers, in flagrant violation of the Geneva Convention on refugees. For example, French laws introduce down heavy penalties for this type of action: “Any person, who directly or indirectly facilitates or attempts to facilitate the entry, movement or illegal residence, of a foreigner in France will be punished with imprisonment for five years and a fine of 30,000 euros. (...) The same penalties apply to anyone who facilitates or attempts to facilitate the entry, movement or illegal residence of a foreigner on the territory of another State that is party to the convention signed at Schengen on 19<sup>th</sup> June 1990.”<sup>69</sup>

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66 Idem, §§ 46 to 48.

67 This includes a number of detention centres in Italy. Pazzallo (8<sup>th</sup> July and 23<sup>rd</sup> August), Lampedusa (8<sup>th</sup> July), Trapani (20<sup>th</sup> July) Rome (30<sup>th</sup> July), Bari (1<sup>st</sup> August), Pantelleria (17<sup>th</sup> August), Bologna (24<sup>th</sup> August), Malta (16<sup>th</sup> August), in France, Lyon (28<sup>th</sup> July), in Greece Fylakio (3<sup>rd</sup> September), Cf. Migreurop, “A Critical Chronology Of European Migration Policies”, op cit, p24.

68 Cf. <http://www.migreurop.org/article1193.html> (in French).

See also: <http://fortresseurope.blogspot.com/2006/01/lampedusa-fishermen-arrested-having.html>

69 See article L622-1 of the *Code for entry and residence of foreigners and the right to asylum*, consolidated version of 1<sup>st</sup> October 2011, (in French):

[http://www.legifrance.gouv.fr/affichCode.do;jsessionid=72CA6D439731881775ED69646C8D6202.tpdjo12v\\_1?idSectionTA=LEGISCTA000006147789&cidTexte=LEGITEXT000006070158&dateTexte=20111009](http://www.legifrance.gouv.fr/affichCode.do;jsessionid=72CA6D439731881775ED69646C8D6202.tpdjo12v_1?idSectionTA=LEGISCTA000006147789&cidTexte=LEGITEXT000006070158&dateTexte=20111009)

## FRONTEX

Set up in 2004 and operational from 1<sup>st</sup> May 2005,<sup>70</sup> the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) presents itself in the following way: “FRONTEX coordinates operational cooperation between Member States in the field of management of external borders; assists Member States in the training of national border guards, including the establishment of common training standards; carries out risk analyses; follows up the development of research relevant for the control and surveillance of external borders; assists Member States in circumstances requiring increased technical and operational assistance at external borders; and provides Member States with the necessary support in organising joint return operations.”<sup>71</sup>

With an annual budget of 88 million euros (in 2011) FRONTEX has at its disposal “26 helicopters, 22 light aircraft and 113 vessels. According to the Agency, the CRATE database (*Centralised Record of Available Technical Equipment*) lists 476 items of technical equipment used to combat “illegal” immigration: including, mobile radars, thermal cameras, CO2 detectors, heartbeat detectors, and a Passive Millimetric Wave Imager (PMMW) etc. This equipment, which is based in various EU countries, is made available to Member States upon request.”<sup>72</sup>

Moreover, “in a situation of ‘urgent and exceptional [migratory] pressure’ at the borders of a Member State or a country with which FRONTEX has signed an agreement, the Agency can also, as of 2006, deploy Rapid Border Intervention Teams (RABITs). These groups – which comprised around 700 border guards at the start of 2010 – are intended to provide ‘increased technical and operational assistance’ in coordination with national units. RABITs intervened for the first time in November 2010 at the request of Greece.”<sup>73</sup>

With such a mandate, as well as the equipment and capacity to intervene, FRONTEX resembles an army, given instructions to contain “the new barbarians” (including irregular migrants) far from the borders of the European Union. Emmanuel Blanchard, an historian and an European activist that militates for the respect of the rights of migrants was not mistaken when he pointed out several years ago that “we (in Europe) are already in a war against migrants.”<sup>74</sup>

As we have already mentioned, the two main tasks with which FRONTEX has been entrusted are the surveillance of the European Union external borders and the organisation of “joint return operations” (where migrants who have been found on European Union territory are sent back in groups by the agency).<sup>75</sup>

FRONTEX has attracted increasing criticism for violations committed in the carrying out of these tasks. Between 2007 and 2008, 270,000 people were turned back or were refused entry into countries in the European Union, or associated countries.<sup>76</sup> We have no way of knowing how many of them were asylum seekers or “vulnerable persons”.<sup>77</sup> These expulsions take on an even more sinister dimension when you take into account the fact that, since 2009, FRONTEX have been turning migrants back at sea, when they arrive on makeshift boats, often in distress (for instance denying access to drinking water). The clearest example of this was the operation known as Nautilus IV, in June

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70 See *Regulation (CE) No 2007/2004* of the Council of the European Union of 26<sup>th</sup> October 2004, modified by *Regulation (CE) NO 863/2007* of the European Parliament and the Council of 11<sup>th</sup> July 2007: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2004R2007:20070820:EN:PDF>

71 Cf. [http://europa.eu/agencies/regulatory\\_agencies\\_bodies/policy\\_agencies/frontex/index\\_en.htm](http://europa.eu/agencies/regulatory_agencies_bodies/policy_agencies/frontex/index_en.htm)

72 See the study *FRONTEX: Which guarantees for human rights?*, conducted by Migreurop with the support of the Green group in the European Parliament, p.7: <http://www.migreurop.org/IMG/pdf/Frontex-PE-Mig-ENG.pdf>

73 Idem.

74 Interview carried out by the review *Les invisibles* 5<sup>th</sup> November 2006, quoted frequently on internet sites. See among others (in French): <http://regularisation.canalblog.com/archives/2006/12/24/3509329.html>

75 Art. 2 of *Regulation (CE) NO 2007/2004* op cit.

76 See *FRONTEX: Which guarantees for human rights?*, op. cit., p. 9.

See also the annual reports of FRONTEX 2007 and 2008, [http://www.frontex.europa.eu/annual\\_report](http://www.frontex.europa.eu/annual_report)

77 See *FRONTEX: Which guarantees for human rights?*, op. cit.



2009, when 75 boat people were intercepted by Italian coast guards, aided by a German helicopter, and turned over to a Libyan maritime patrol boat, near the Italian island of Lampedusa.<sup>78</sup>

While the number of group expulsions of irregular migrants from European Union countries and associated countries by air is less spectacular (1622 people in 2010)<sup>79</sup> and these expulsions are in general quite costly,<sup>80</sup> the human rights violations to these people are clear, and in some cases have resulted in deaths: "... expelled persons regularly report violence in the form of humiliation, insults, aggression, blows and even beatings during attempts to remove them. This brutality causes acute distress to the individuals concerned: their legs may be bound and their wrists handcuffed, their mouths are sometimes covered to prevent them from speaking or crying out, and in some instances disabling sprays are used to prevent them from shouting. The actions of the – often uniformed – officials tasked with carrying out these coercive measures leave a mark on both their victims and the other foreign nationals housed in the detention centres."<sup>81</sup>

In its 2010 report, FRONTEX boasted of having reduced the number of irregular migrants "taking routes through West Africa, the western Mediterranean and the central Mediterranean". On the other hand, it worried about the number of "irregular land border crossings between Turkey and Greece". For FRONTEX, "in 2010 Greece became the main entry point for irregular migration into the EU, and Turkey the main transit country for irregular migrants."<sup>82</sup> To put a stop to this, the European Union concluded a readmission agreement with Turkey on 25<sup>th</sup> February 2011,<sup>83</sup> with the aim as always of offloading its responsibilities elsewhere.

Faced with criticisms regarding FRONTEX, the European Parliament adopted a resolution in September 2011 asking FRONTEX to "appoint an inspector to ensure respect for human rights".<sup>84</sup> There is good reason to doubt how effective this measure is likely to be, given the tens of thousands of expulsions that take place each year.

While it is understandable that criticisms have focused on FRONTEX, which is supposedly 'independent', this masks the responsibility of Member States for the human rights abuses committed by the agency. We need to remember that the agency, based in Warsaw, was created by the European Union and its statutes are very clear. The 25 Member states of the European Union and of three non-member States (Norway, Iceland and Switzerland) are represented on the Administrative Council of FRONTEX.<sup>85</sup> Ireland and the United Kingdom are 'invited participants'.<sup>86</sup> FRONTEX is subsidised by the European Union and the three countries mentioned. Its budget and its accounts are overseen by the European Parliament.<sup>87</sup> The executive director of this agency is appointed by the Administrative Council on the advice of the European Commission.<sup>88</sup>

It is therefore clear that the Member States of the European Union and the three other States associated with FRONTEX are accountable for the human rights violations committed by the agency in the course of its activities.

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78 Idem.

79 Idem.

80 In 2008, Migreurop estimated the annual cost of expulsions from France alone at 700 million euros, see *Migreurop Report 2009-2010*, op. cit., p. 125.

81 See Migreurop, *FRONTEX : Which guarantees for human rights?*, op cit., p. 15

82 See *FRONTEX General Report 2010*, p. 8: [http://www.frontex.europa.eu/annual\\_report](http://www.frontex.europa.eu/annual_report)

83 See [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/jha/119501.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/119501.pdf)

84 See <http://www.europarl.europa.eu/news/en/headlines/content/20110908FCS26135/4/html/Parliament-agrees-to-strengthen-Frontex-border-control-agency>

85 Two representatives from each country, one the titular post holder and one deputy

86 See *FRONTEX General Report 2010*, op. cit.

87 Art. 29 and 30 of *Regulation (CE) No 2007/2004*, op. cit.

88 Idem, Art. 20.

## **B) The situation of domestic workers throughout the world**

Domestic work is one of the oldest and most important occupations, exercised mainly by women (but also by men and by children) all over the world. As a recent report by the ILO rightly points out, domestic work is "...rooted in the global history of slavery, colonialism and other forms of servitude. In contemporary society, care work at home is vital for the economy outside the household to function. In the past two decades demand for care work has been on the rise everywhere. The massive incorporation of women in the labour force, the ageing of societies, the intensification of work and the frequent lack or inadequacy of policy measures to facilitate the reconciliation of family life and work underpin this trend. Today, domestic workers make up a large portion of the workforce, especially in developing countries, and their number has been increasing – even in the industrialized world...Domestic work, nonetheless, is undervalued and poorly regulated, and many domestic workers remain overworked, underpaid and unprotected."<sup>89</sup>

UN human rights organisations are unanimous in their opinion that these domestic workers are among the most vulnerable of all migrants because of the particular conditions under which they are employed. They are very often victim to numerous demands made by either their employer or the employer's entourage. The UN Special Rapporteur on human rights makes the following observations about the violations to which this category of worker, in particular the women, are subject:<sup>90</sup>

- Physical or psychological violence on the part of employers, other family members or the staff of the recruiting agency. There have also been cases of migrant domestic workers who have died or disappeared;
- Sexual abuse by the employer, his children or family members, or by other domestic workers living in the same house. Many are obliged to remain in the rapist's house and are repeatedly sexually violated;
- Female migrant domestic workers work up to 19 hours per day and must be available round-the-clock, which in practice is tantamount to slavery. Many have to accompany their employer at all times and sometimes end up working for the employer's friends or family for no extra wage;
- Employers frequently take away the identity and travel documents of migrant domestic workers on arrival. This places migrant domestic workers in a situation of complete dependence and hampers their movements, including their return to their country of origin without the employer's consent. Moreover, in some countries it is illegal to leave the house without carrying identity documents. In some countries it is also impossible to obtain medical attention without documents. Such circumstances sometimes turn domestic work into a form of slavery.
- Not all the female migrant domestic workers living in their employer's house have suitable accommodation. Some have their own rooms, but others are forced to share a room with the children, the elderly persons they care for, or with other domestic workers, and sometimes they are forced to sleep in the kitchen or bathroom. Sometimes, to punish them, they are denied food. In other cases, they are forced to eat the leftovers from the meal of their employer and his family;
- Migrant domestic workers' right to privacy is often violated; their correspondence is opened, their telephone calls are monitored, their rooms are searched. The invasion of their privacy is a form of harassment that violates their dignity;

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89 Cf. *Decent work for domestic workers* Report IV (1) of ILO presented at the 99<sup>th</sup> session of the International Conference on Work, June 2010:

[http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@relconf/documents/meetingdocument/wcms\\_143337.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_143337.pdf)

90 Cf. §§ 25 to 35 of the Annual Report by the special Rapporteur on migrant workers, E/CN.4/2004/76, of 12<sup>th</sup> January 2004, presented at the 60<sup>th</sup> session of the Human Rights Commission:

[http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/0032d58d2667f0b9c1256e700050f77f/\\$FILE/G0410237.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/0032d58d2667f0b9c1256e700050f77f/$FILE/G0410237.pdf)

- Sometimes they are not allowed to telephone their families and are not allowed to go out to use a public telephone. Sometimes they are given a visa that is only valid for a single entry and, although they have holidays, they cannot return to their countries;
- Some migrant domestic workers are forbidden to practise their religion.

In these conditions, it is understandable that certain countries in Asia have forbidden their nationals to migrate, “depending on their sex, age, social condition or that of the host country”, with the aim of protecting them from abuse and the risk of trafficking,<sup>91</sup> even if these measures restrict freedom of movement for these people. For example, India has forbidden all female domestic workers aged less than 30 to accept work in Saudi Arabia.<sup>92</sup> On the other hand, other countries (the Philippines in particular, but also Indonesia and Sri Lanka) depend economically on the export of their domestic workers. In fact, this sector has become vital to the economy of the Philippines in particular, (eight and a half million people, roughly 22% of the population of working age, are employed in foreign countries, and, in 2010, sent back 21.3 billion US dollars to the Philippines) since this country is unable to impose the host country to all its nationals either a reasonable salary (estimated by the Philippine government as 400 US dollars) or dignified conditions of work.<sup>93</sup>

In view of this, the initiative taken by the UN Committee on the rights of migrant workers, which in 2010 adopted a General Observation on domestic workers, was very relevant. The ILO followed suit in 2011 and adopted a convention on domestic workers (see below).

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91 Cf. *Report of the Special Rapporteur on human trafficking*, presented at the 65<sup>th</sup> session of the UN General Assembly, A/65/288 of 9<sup>th</sup> August 2010, § 40.

92 Idem. For more information on this subject, please refer to the report of Global Alliance Against Traffic in Women entitled *Beyond Borders: Exploring Links between Trafficking and Migration*, Working Papers Series 2010, [http://www.gaatw.org/publications/WP\\_on\\_Migration.pdf](http://www.gaatw.org/publications/WP_on_Migration.pdf)

93 See the article by Julien Brygo entitled “Profession, domestique” that appeared in *Le Monde Diplomatique*, September 2011 (in French only)

#### IV. RECOMMENDATIONS AT THE INTERNATIONAL LEVEL TO PROTECT THE RIGHTS OF MIGRANTS

In general, the UN human rights treaties and the conventions of the International Labour Organisation (ILO) governing labour relations are equally applicable to migrant workers. However considering the extreme vulnerability of these people, the ILO (for nearly a century), and the UN (for several decades) have tried to find ways to protect their rights. Following a lengthy negotiation process, a number of specific conventions have been adopted by these two institutions.

***Convention No 97 of the ILO on migrant workers (revised)***<sup>94</sup> calls for equality of treatment between regular migrants and nationals (“without discrimination on the grounds of nationality, race, religion or sex”) in matters of remuneration, housing, social security, trade union rights and access to justice (art 6).

Contrary to the UN Convention on the rights of migrants (see below), Convention 97 of the ILO does not apply in the case of: “a) frontier workers; b) short-term entry by members of the liberal professions and artists; c) seamen” (art 11.2).

***Convention No 143 on migrant workers (supplementary provisions)***<sup>95</sup> demands that all State parties “respect the basic human rights of all migrant workers” (art 1). It also stipulates that State parties should take all adequate measures “(a) to suppress clandestine movements of migrants for employment and illegal employment of migrants, and (b) against the organisers of illicit or clandestine movements of migrants for employment departing from, passing through or arriving in its territory, and against those who employ workers who have immigrated in illegal conditions” (art 3).

Convention No 143 states that rights of residence should be maintained when a migrant loses their job: “1. On condition that he has resided legally in the territory for the purpose of employment, the migrant worker shall not be regarded as in an illegal or irregular situation by the mere fact of the loss of his employment, which shall not in itself imply the withdrawal of his authorisation of residence or, as the case may be, work permit. 2. Accordingly, he shall enjoy equality of treatment with nationals in respect in particular of guarantees of security of employment, the provision of alternative employment, relief work and retraining” (art 8).

This Convention calls on States to regularise the situation of irregular migrants: “4. Nothing in this Convention shall prevent Members from giving persons who are illegally residing or working within the country the right to stay and to take up legal employment” (art 9.4).

***The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families***, adopted by the UN General Assembly on 18<sup>th</sup> December 1990,<sup>96</sup> came about as the result of a number of expert studies undertaken by the UN over several decades.<sup>97</sup>

This Convention has a number of innovative aspects and is intended as an ***all-embracing instrument*** covering a wide spectrum of migrants’ rights and responding to their specific needs not only in the host

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94 Adopted on 1<sup>st</sup> July 1949 and came into force on 22<sup>nd</sup> January 1952, it has so far been ratified by 49 States (verification on 3<sup>rd</sup> October 2011).

95 Adopted on 23<sup>rd</sup> June 1949 and came into force on 9<sup>th</sup> December 1978, it has so far been ratified by 23 States (verification on 3<sup>rd</sup> October 2011).

96 Cf. Resolution 45/158 of UN General Assembly.

97 See among others, the study *Exploitation of Labour Through Illicit and Clandestine Trafficking* by Mme Halima E. Warzazi, Special Rapporteur to the Sub-Commission on combating discriminatory measures and the protection of minorities, E/CN.4/Sub.2/L.640, of 20<sup>th</sup> November 1975, and the study from the same body led by Baroness Elles *The Problem of the Applicability of Existing International Provisions for the Protection of Human Rights To Individual Who Are Not Citizens Of The Country In Which They Live*, E/CN.4/Sub.2/369, dated 9<sup>th</sup> August 1976.

country but throughout the process of migration. It is worth noting that the Convention applies to all migrant workers, *whatever their status* and to *the members of their family*: “1. The present Convention is applicable, except as otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status. 2. The present Convention shall apply during the entire migration process of migrant workers and members of their families, which comprises preparation for migration, departure, transit and the entire period of stay and remunerated activity in the State of employment as well as return to the State of origin or the State of habitual residence.” (art 1)

The first part of the Convention (art. 1 to 6) defines its area of applicability. The migrant worker refers to “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.” Defined in this way, different categories of workers (frontier workers, seasonal workers, seamen, workers on installations at sea, itinerant workers, independent workers,<sup>98</sup> etc.) are protected by the Convention (art 2.2). The same applies to migrant workers and members of their families who “are considered as non-documented or in an irregular situation...” (art 5.b.)

The second part of the Convention deals with the principle of non-discrimination in matters of human rights (art 7).<sup>99</sup>

Part 3 (art. 8 to 35) and Part 4 (art. 36 to 56)<sup>100</sup> are concerned with a series of rights, from which migrants should benefit and with the prohibition of certain practices that still go on today. For example, the Convention outlaws slavery, servitude (art. 11.1) and forced labour (art. 11.2); all arbitrary practices such as interference in the private lives of migrants (art 14); confiscation of property (art. 15) or of their work or residence permits (art. 20.2); arbitrary arrest or detention (art 16.4) It also outlaws “collective expulsion” (art. 22.1).

The present Convention guarantees among other things, equality of treatment between migrants and nationals of the State in employment and conditions of employment (art. 25), Trade Union rights (art. 26 and 40), social security (art. 27), medical care (art. 28), education (43.1.a and 45.1.a), including for the children of migrants (art 30), of training (art. 43.1.c and 45.1.b), housing (art. 43.1.d) etc. It also guarantees equality before the law and the right to a fair trial (art. 18), the right to liberty of movement and to choose a place of residence in the territory of the State of employment (art. 39), protection against dismissal and unemployment benefits (art. 54.1a.and b).

The Convention also states that migrants have the right to the protection and assistance of the consular or diplomatic authorities of their State of origin. The State of employment should “facilitate the exercise” of this right in the case of expulsion for example (art. 23).

Enjoyment of political rights in the State of employment is left to the discretion of the latter (art. 42.3). It is important to note on this point that the UN<sup>101</sup> believes that civil, economic, political, social, and cultural rights should be guaranteed without discrimination between nationals and foreigners.<sup>102</sup>

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98 The Convention excludes foreign investors of course (art.3.c)

99 See also the recent report by CETIM, *The right to non-discrimination*, op. cit.

100The 4<sup>th</sup> part of the Convention concerns regular migrants specifically.

101The Human Rights Committee and the Committee on Economic, Social and Cultural Rights in particular.

102See the report by CETIM, *The right to non-discrimination*, op. cit.

Part 5 of the Convention (art. 55 to 63) contains the rights of particular categories of migrant workers and members of their families (frontier workers, seasonal workers, seamen, workers on off-shore installations, itinerant workers, self employed workers, etc.).

Part 6 of the Convention is concerned with the “promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families” (art. 64 to 71). According to the provisions set out here, States should cooperate as appropriate in ensuring better regulation of international migration. In the context of this cooperation, States should prevent and eliminate “illegal or clandestine movements and employment of migrant workers in an irregular situation.” (art. 68.1). It is also expected that States of employment “shall take all adequate and effective measures to eliminate employment in their territory of migrant workers in an irregular situation, including, whenever appropriate, sanctions on employers of such workers. The rights of migrant workers vis-à-vis their employer arising from employment shall not be impaired by these measures.” (art. 68.2)

Part 7 of the Convention proposes the setting up of a committee to review its application by Member States (art.72 to 78). Made up of 14 experts, elected by the State Parties for a renewable period of four years, the first Committee held its first session in March 2004. State parties to the Convention are required to present a report every five years or whenever they are asked to do so by the Committee (art. 73.1.b). The Committee will also receive complaints from individuals if the State Party in question has recognised its competence (art.77). Complaints can be made by one State against another if that State Party is not fulfilling its obligations and if it recognises the competence of the said Committee (art.76).<sup>103</sup>

As has already been acknowledged, the International Convention on the protection of the rights of all migrant workers and of members of their families constitutes undeniable progress in offering protection for this group, which is constantly increasing in size, but which has become more and more vulnerable in the face of the restrictive and repressive policies of all states, but particularly of host countries. Having said that, there are some of the articles, as well as the fact that so few countries have ratified the Convention, that call for some comment.

For example, art.35 rules out any interpretation of the Convention as implying that the situation of migrant workers who are non-documented or in an irregular situation should be regularised, while Convention 143 of the ILO actually encourages States in this direction (see above).

Art.79 leaves States free “to establish the criteria governing admission of migrant workers and members of their families”. Of course, it is to be expected that States have a degree of flexibility in regulating migration flows, but we are entitled to expect that they respect international commitments regarding human rights and that migrant workers can enjoy those rights without discrimination.

As so few States have ratified the Convention,<sup>104</sup> its area of application is restricted. Even worse, very few host States, particularly in the West, have ratified it. A study undertaken in 2007 by December 18, a Belgian NGO, identified six principal arguments put forward by the Member states of the European Union to justify non-ratification. Some States say that their own national legislation, or Community law (sic) or other international human rights legislation they have ratified already protects the rights of migrant workers. Others justify their non-ratification of the Convention by arguing that some clauses within the instrument contradict national laws. This is true, but, as we have already pointed out above,

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<sup>103</sup>For more information, please refer to the website of the UN Office of the High Commissioner for Human Rights:

<http://www.ohchr.org/EN/Pages/WelcomesPage.aspx>

<sup>104</sup>So far, only 45 States have ratified this Convention (as of 3<sup>rd</sup> October 2011).

These States are all from the South, and, with the exception of Mexico and Turkey, none of them belong to the OECD.

the laws referred contradict international conventions on the rights of refugees and of human rights, that have been ratified by these same States. The new Member States of the European Union (the Eastern European countries), invoke instead the administrative and financial burden involved and argue that coming into line with EU law takes precedence over any ratifying any new international instrument. Another argument used is that no other Member State in the European Union has ratified the Convention. The Spanish and the French governments argue that since immigration falls within the competence of the Community, national government could not take the path of unilateral ratification.<sup>105</sup>

Adopted at its 13<sup>th</sup> session, in December 2010, by the Committee on the protection of the Rights of All Migrant Workers and Members of their Families (CMW) **General Observation N°1 on domestic migrant workers**<sup>106</sup> constitutes something of a roadmap for States. The CMW justifies the adoption of this general observation as follows: "...Generally, migrant domestic workers are at heightened risk of certain forms of exploitation and abuse. At the heart of their vulnerability is isolation and dependence, which can include the following elements: the isolation of life in a foreign land and often in a foreign language, far away from family; lack of basic support systems and unfamiliarity with the culture and national labour and migration laws; and dependence on the job and employer because of migration-related debt, legal status, practices of employers restricting their freedom to leave the workplace, the simple fact that the migrants' workplace may also be their only shelter and the reliance of family members back home on remittances sent back from the domestic work. Women migrant domestic workers face additional risks related to their gender, including gender-based violence. These risks and vulnerabilities are further aggravated for migrant domestic workers who are non-documented or in an irregular situation, not least because they often risk deportation if they contact State authorities to seek protection from an abusive employer." (§7)

In its general Observation, the CMW gives the following definition of domestic worker: "...the term "domestic worker" generally refers to a person who performs work within an employment relationship in or for other people's private homes, whether or not residing in the household." (§.5).<sup>107</sup>

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105December 18, *The UN Treaty Monitoring Bodies and Migrant Workers: a Samizdat*, October 2009.

The Belgian NGO *December 18* released an update of this study in December 2010, describing the position of all Member States of the European Union. It is particularly worth mentioning here the stance of Hungary that best expresses the position of the Member States of the European Union. For them, the fact that the provisions of the Convention cover the various phases of migration, namely preparation, departure, transit and return, means that it would be difficult to apply in the context of the European Union (see *Ratification of the UN Migrant Workers Convention in the European Union - Survey on the Positions of Governments and Civil Society Actors, December 2010*)

106See *General Observation N°1*, CMW/C/GC/1, dated 23 February 2011:

[http://www2.ohchr.org/english/bodies/cmw/cmw\\_migrant\\_domestic\\_workers.htm](http://www2.ohchr.org/english/bodies/cmw/cmw_migrant_domestic_workers.htm)

107The International Labour Organisation (ILO) has produced a detailed list of all the tasks that can be assigned to domestic workers. The duties of **Housekeepers and related workers** (5121) include: (a) engaging, training, discharging organising and supervising workers employed as domestic staff; (b) purchasing or controlling the purchase of supplies; (c) controlling storage and issue of supplies; (d) supervising general welfare and conduct of individuals in institutions; (e) assisting in cases of minor injury or illness by performing tasks such as taking temperature, giving medicine, putting on bandages; (f) performing related tasks; (g) supervising other workers. The duties of **cooks** (5122) include: (a) planning meals, preparing and cooking foodstuffs; (b) planning, supervising and coordinating work in the kitchen; (c) performing related tasks; (d) supervising other workers. The tasks of **child-care workers** (5131) include: (a) assisting children to bath, dress and feed themselves; (b) taking children to and from school or outdoors for recreation; (c) playing games with children, or entertaining children by reading or storytelling; (d) maintaining order in children's bedrooms and playrooms; (e) taking care of schoolchildren at lunch or other school breaks; (f) taking care of schoolchildren on excursions, museum visits and similar outings; (g) performing related tasks; (h) supervising other workers. The duties of **Home-based personal care workers** (5133) include: (a) assisting persons in getting into and out of bed and making the appropriate change in dress; (b) changing bed-linen and helping persons with their bath and toilet; (c) serving food - prepared by them or others - and feeding persons needing help; (d) giving or ensuring that persons take the necessary medicaments; (e) watching for any sign of deterioration in the person's health and informing the relevant medical doctor or social services; (f) performing related tasks; (g) supervising other workers. The duties of **protective services workers (protection and security) not classified elsewhere** (5169) would include, among others:

The CMW also states that “...Some national labour laws include protections for domestic work and workers, but exclude migrant domestic workers from some or all of these protections.” (§ 20).

For the Committee of the CMW “... migrant domestic workers are included in the term "migrant worker" as defined in article 2, paragraph 2, of the Convention (International Convention on the protection of the rights of all migrant workers and members of their families) and that any distinction made to exclude migrant domestic workers from protection would constitute a prima facie violation of the Convention.” (§ 6).

Among the measures to protect the rights of migrant domestic workers, the CMW advocates the following: equality of treatment with other workers (§ 37); conditions of work clearly defined in a written contract (§ 40); state provisions for monitoring the conditions of work for migrant domestic workers. (§ 41); equal treatment with nationals in regard to access to social security benefits (§ 42); full labour and trade union rights (§ 45); access to justice without fear of expulsion (§ 50); legal redress even when their employer enjoys diplomatic immunity<sup>108</sup> (§ 49); guaranteed access to regular channels for migration “...with a view to preventing irregular migration as well as smuggling and human trafficking” (§ 51) and the regularisation of “migrant domestic workers (who) are undocumented” (§ 52); the avoidance of making the immigration status of migrant domestic workers conditional on the sponsorship or guardianship of a specific employer, since any such arrangement may unduly restrict the liberty of movement of migrant domestic workers and increases their vulnerability to exploitation and abuse, including in conditions of forced labour or servitude (§ 53); migrant children “should not perform any type of domestic work which is likely to be hazardous or harmful to their health or physical, mental, spiritual, moral or social development” (§ 56); “embassies and consulates of States of origin should play an active role in protecting the rights of their nationals employed as migrant domestic workers.” (§ 62)

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(a) patrolling buildings and areas to prevent theft, violence, infractions of rules or other irregularities; (...) (f) performing related tasks; (g) supervising other workers. The duties of **Gardeners, horticultural and nursery growers** (6113) include: (a) determining kinds and amounts of vegetables, horticultural and nursery products to be grown; (b) purchasing seeds, bulbs, fertiliser and other supplies; (c) renting or investing in land and land improvements, buildings, working animals, equipment and machinery; (d) performing farm operations such as land preparation, sowing, growing vegetables by intensive cultivation, cultivating flowers, trees or bushes and harvesting crops; (e) producing saplings, bulbs and seeds; (f) cultivating flowers, trees, shrubs and other plants in parks or public or private gardens; (...) (h) delivering or marketing products; (i) storing and carrying out some basic processing of their produce; (j) tending working animals and maintaining buildings, machinery and equipment; (k) performing related tasks; (l) supervising other workers. The duties of **Doorkeepers, watchpersons and related workers** (9152) include, among others: (a) doorkeeping in hotels and helping guests, especially on their arrival and departure, with luggage, keys, or information about directions, etc.; (b) doorkeeping in apartment houses and other buildings, checking the right-of-entry of callers and giving them requested information; (c) watching houses and other properties to prevent illegal entry or theft, fire or other hazards. See ILO, *International Standard Classification of Occupations (ISCO)*: <http://www.ilo.org/public/english/bureau/stat/isco/isco88/major.htm>

108 It is deplorable that those very people who are supposed to defend human rights are themselves guilty of violating the rights of their servants. Many cases of diplomats or even ambassadors (as in Geneva and New York), have been brought before the Labour Relations Courts in Geneva and the UN Special Rapporteur on the Human Rights of Migrants. For example, the Swiss Federal Court (the highest court in the land) has recently condemned the Consul General of Saudi Arabia in Geneva and the State of Saudi Arabia for working conditions akin to slavery imposed on two Indonesian sisters working as servants (paid respectively, 285 francs and 221 francs a month, the sisters had to work 14 or 15 hours a day, seven days a week. Moreover, their passports were confiscated), see the article by Info-Sud entitled “Slavery: the Saudi Consul does it again”, published in French as “Esclavagisme: le Consul d’Arabie saoudite récidive”, <http://www.infosud.org/spip.php?article9821>

In a similar case, one of aggravated sexual abuse, the UN Special Rapporteur on the human rights of migrants has been called in by an Indian servant employed by a representative of the State of Kuwait at the UN in New York, see: E/CN.4/2006/73/Add.1, §§ 146-154 and §§ 356-363, dated 27 March 2006.



Finally the CMW emphasises “the importance of genuine consultations with migrant domestic workers and civil society organisations in the development and implementation of legislative and other measures related to migrant domestic workers and the protection of their rights.” (§ 65).

Adopted on 16th June 2011, during the 100<sup>th</sup> session of the ILO, *the Convention on domestic workers N°189* “applies to all domestic workers” (art 2.1) except for “(a) categories of workers who are otherwise provided with at least equivalent protection; (b) limited categories of workers in respect of which special problems of a substantial nature arise.” (art 2.2)

The definition given to domestic work and to domestic workers in the Convention is the following: (a) the term “*domestic work*” means work performed in or for a household or households; (b) the term “*domestic worker*” means any person engaged in domestic work within an employment relationship; (c) a person who performs domestic work only occasionally or sporadically and not on an occupational basis is not a domestic worker” (art. 1).

In line with the present Convention, States (those which have ratified it)<sup>109</sup> should, in relation to domestic workers, take the measures set out in this Convention to “respect, promote and realise the fundamental principles and rights at work, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation” (art.3.2).

States should also “...take measures to ensure that domestic workers enjoy effective protection against all forms of abuse, harassment and violence.” (art. 5).

States should also ensure that domestic workers enjoy “...fair terms of employment as well as decent working conditions and, if they reside in the household, decent living conditions that respect their privacy” (art. 6).

States should also ensure that “...domestic workers are informed of their terms and conditions of employment in an appropriate, verifiable and easily understandable manner and preferably, where possible, through written contracts...” (art. 7).

States should ensure in addition that “domestic workers: (a) are free to reach agreement with their employer or potential employer on whether to reside in the household; (b) who reside in the household are not obliged to remain in the household or with household members during periods of daily and weekly rest or annual leave; and (c) are entitled to keep in their possession their travel and identity documents.” (art. 9).

The Convention outlines the minimum age to respect in the employment of domestic workers (less than 18 in certain situations),<sup>110</sup> but stipulates that this employment should not deprive them of compulsory education, or interfere with opportunities to participate in further education or vocational training (art. 4).

The Convention advocates “equal treatment between domestic workers and workers generally” in a number of areas (normal hours of work, compensation for overtime, periods of daily and weekly rest and paid annual leave). It provides also that “...Weekly rest shall be at least 24 consecutive hours.” (art. 10.1 and 10.2)

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<sup>109</sup>Two ratifications are sufficient for this Convention to come into force (art. 21.2).

<sup>110</sup>Here, the ILO is referring to Conventions N°138 on the minimum age in 1973 and N°182 on the worst forms of child labor in 1999.

The Convention provides also that “domestic workers enjoy minimum wage coverage”, social security protection, including maternity benefits, and that they be paid “at least once a month” (art. 11, 14.1 and 12.1).

The Convention recognises that domestic workers have “the right to a safe and healthy environment” (art.13) and requires States to take a series of measures to protect domestic workers “against abusive practices”. (art.15).

Finally, the agreement provides access for domestic workers or their representatives to “complaint mechanisms and means of ensuring compliance with national laws and regulations for the protection of domestic workers” (art 16 and 17).

In this respect, it is worth mentioning the commitment made by States during the *Durban Review Conference* (Geneva, April 2009). Paragraphs 74 to 79 of the Final Declaration of this conference represent a progressive view of the rights of migrants.<sup>111</sup> In the Declaration, States<sup>112</sup> committed themselves: “to protect the human rights of all migrants regardless of their immigration status” (§74); “to formulate and implement training programmes for law enforcement, immigration and border officials, prosecutors and service providers, with a view to sensitising them to racism, racial discrimination, xenophobia and related intolerance” (§75); “to take measures to combat the persistence of xenophobic attitudes towards and negative stereotyping of non-citizens, including by politicians, law enforcement and immigration officials and in the media, that have led to xenophobic violence, killings and the targeting of migrants, refugees and asylum seekers” (§76); “to review and, if necessary, to revise immigration policies inconsistent with international human rights obligations, with a view to eliminating all discriminatory policies and practices” (§78); “to adopt and enforce legislation to protect migrant domestic workers, regardless of their immigration status, in particular women, and to grant migrant workers in domestic service access to transparent mechanisms for bringing complaints against employers, while stressing that such instruments should not punish migrant workers, and calls on States to promptly investigate and punish all abuses, including ill-treatment” (§79).

Finally, it is worth mentioning the critically important advice given by the Inter-American Court of Human Rights concerning the legal status and rights of undocumented migrant workers in the United States. In its article of advice N°18, of 17<sup>th</sup> September 2003, the Inter-American Court had no hesitation in elevating the principles of equality and non-discrimination to the status of *jus cogens* (peremptory norms for States.) While confirming that “**human rights.... (derive).... from the attributes of the human person not depending in any way on a person’s belonging to a given country**”, the Court specifies that the rights of the worker “benefit every person engaged in a remunerated activity. The exercise of a remunerated activity is the only criterion that identifies a person as a “worker”. Once this identification is established, the court affirms that the worker benefits automatically from workers’ rights. These rights must be recognized and guaranteed, independent of the irregularity of the migrant’s situation. The Court emphasizes also that nothing obliges employers to hire ‘clandestines’. If they do so, however, they must assume the consequences and accept that the clandestine has thus become a worker benefiting from the rights that accompany this status.”<sup>113</sup> The Court warns States that “The government’s international responsibility is implicated from the moment it tolerates discriminatory actions or practices against migrant workers”.<sup>114</sup>

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111Cf. [http://www.un.org/durbanreview2009/pdf/Durban\\_Review\\_outcome\\_document\\_En.pdf](http://www.un.org/durbanreview2009/pdf/Durban_Review_outcome_document_En.pdf)

112Note that about ten Western States boycotted this conference, see *CETIM’s Newsletter n°35*, September 2009: [http://www.cetim.ch/en/publications\\_bull.php](http://www.cetim.ch/en/publications_bull.php)

113See the summary of the opinion of the Inter-American Court by Ludovic Hennebel, researcher at the Centre de philosophie du droit of the Free University of Brussels, published in CETIM’s brochure *The Right to non-discrimination*, op. cit. The synthesis can be found in the annex to this critical report.

114Idem.

## CONCLUSION

International migration (regular or irregular) presents States with responsibilities, but also challenges individual citizens on three issues in particular: 1) Are we really all equal in dignity and rights as the Universal Declaration of Human Rights proclaims? 2) Given the trend in modern society of increasingly mixed populations, is the model of the Nation State that advocates “homogeneity” in a given country and in so doing excludes not only minorities but also migrants or “foreigners”, any longer tenable? 3) Is the model of development that is being implemented on a global scale (i.e. a consumer society based on ‘endless’ economic growth and the unbridled exploitation of natural resources to meet, not the basic needs of everyone, but the appetite of a small minority) viable?

As regards the third issue, it does not take a prophet to guess that unless there is a change in the dominant development model, current trends in migration will continue. Meanwhile, the question is whether a form of migration that respects human and labour rights is possible. One thing is certain: the drastic restrictions on legal migration leave the oppressed and excluded peoples (politically, economically, socially and culturally) of the world, no alternative but illegal migration.

However, as this report has shown, criminalising irregular migration results in many serious violations of human rights. It offers neither a solution nor an effective response to the problem, given how many people in dire circumstances continue to try their “luck”, and given how many people are working illegally in Western countries. Rather, criminalisation simply forces irregular immigrants into the arms of criminal networks with appalling consequences, including murder, rape, trafficking in women and children, torture, ill-treatment, extortion etc. It also allows unscrupulous employers to exploit a docile workforce deprived of any rights.

The criminalisation of irregular migration has very worrying consequences for the situation of legal migrants and for the population of the host societies. Differential treatment, or even the total deprivation of rights, creates a two-tier society. Discrimination becomes an acceptable part of society. The European Commission against Racism and Intolerance has recently sounded the alarm on this subject: “Today, racism and intolerance are no longer limited to the fringes of society. This is evidenced by the success of extreme right-wing parties in a number of member States in 2010; the holding, on a worryingly regular basis, of referenda targeting non-citizens and religious minorities and, unfortunately, their outcome; and the increasing use of xenophobic and anti-Muslim arguments by mainstream political leaders. Legal means alone do not seem sufficient to counter this trend. More needs to be done to fight it, such as encouraging adherence to parliamentary codes of ethics regarding the impermissibility of racist discourse and voluntary “good practice” commitments among politicians and political parties.”<sup>115</sup>

This is the reason why an urgent measure the states could adopt would consist in regularising illegal migrants living on its soil, in accordance with Convention N°143 of the ILO.

At a time when social movements are protesting against the arbitrariness of the nation state, and against the global system of domination that was inherited from colonisation and deportations, and are demanding the right to freedom of movement throughout the world,<sup>116</sup> it is time to address the root causes of migration and to abandon repressive policies that cause serious human rights violations. It is also time for States to meet their commitments under international law and ensure respect for the fundamental principle of human rights, namely: ***equal rights and equality before the law for everyone.***

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<sup>115</sup>See the *2010 Annual report of the European Commission against racism and intolerance (ECRI)*, p. 7, op. cit.

<sup>116</sup>*World Charter of Migrants*, proclaimed in Gorée (Senegal) 4<sup>th</sup> February 2011 at the World Social Forum:  
<http://www.cmmigrants.org/goree/spip.php?article26>

## ANNEX

### Advisory Opinion on the Legal Condition of the Rights of Clandestine Immigrants Workers by the Inter-American Court of Human Rights 17 September 2003

On 10 May 2002, Mexico requested of the Inter-American Court of Human Rights an advisory opinion on the respect of the rights of clandestine migrant workers in the United States. In a very tense political context, the Mexican government intended thus to clarify the situation of the rights of Mexican workers illegally in the United States. Beyond the legal questions that this involved, the discussion had a considerable practical importance for Mexico, which estimates the number of Mexican emigrants at some six million, of whom almost two and a half million are clandestine (figures 2002). The Mexican government emphasized in its request its concern regarding the legal interpretations and practices in certain countries of the Organization of the American States (OAS), which it considers incompatible with the Inter-American system of human rights protection. The interpretations and practices that Mexico had in mind would be discriminatory with regard to clandestine workers and would result in encouraging employers to deny them their social rights. This situation constitutes, according to the Mexican government, a threat for the protection of human rights in the region of the OAS.<sup>117</sup>

In its request, Mexico asked four questions of the Court. First, it asked if, within the framework of the principle of legality before the law as set forth in the human rights treaties, a member state of the OAS can treat differently immigrant workers relative to the rights granted to the rest of the population. The second and the third questions dealt with the legal or illegal status of workers: would the fact that a worker might be in possession of regulation documentation change the obligation of the government regarding the principle of equality and the prohibition of discrimination, a principle in contradiction with *erga omnes*? Finally, the last question requested that the Court rule on the importance of the principle of equality and thus the prohibition of discrimination, as well as on its possible inclusion among the *jus cogens* norms.<sup>118</sup>

Ludovic Hennevel succinctly presents the ruling of the Inter-American Court on this consultative opinion that set a milestone. We reproduce here extracts from his above cited article.

“3. In its advisory opinion number 18, the reasoning of the Inter-American Court is built on three points. It begins by recalling the general principle to respect and guarantee human rights incumbent upon the member states of the Organization of American States. Second, it analyses the content of the principle of equality and non-discrimination, which it characterizes as *jus cogens*. Finally, it applies the resulting principles to migrants and clandestine workers.

“4. First, the Court affirms that all governments have the obligation to respect and to guarantee human rights. The Court recalls that this obligation is general and is enshrined in several international human rights instruments. It results, in particular, from human rights as deriving from the attributes of the human person not depending in any way on a person’s belonging to a given country. The Court characterizes the obligation to respect and to guarantee the exercise of human rights and *erga omnes* obligation. This obligation is imposed upon governments to the benefit of any person under their jurisdiction, independent of migrant status of any person under consideration. The Court also judged that human rights

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117V. Ludovic Hennebel, researcher at the Centre de philosophie du droit of the Free University of Brussels, “L’Humanisation’ du droit international des droits de l’homme, commentaire sur l’avis consultatif no.18 de la Cour interaméricaine relatif aux droits des travailleurs migrants”, *Revue trimestrielle des droits de l’homme*. (59/2004) (French only). Cf. Published in CETIM’s brochure *The Right to non-discrimination*, op. cit.

118V. *Advisory Opinion OC-18/03 of September 17, 2003, Requested by the United Mexican States, Juridical Condition and Rights of the Undocumented Migrants*, §§ 1 to 4 (Spanish only): <http://www.corteidh.or.cr/opiniones.cfm> and the explication of the opinion by Amaya Ubéda de Torres (French only): [http://leuropedeslibertes.u-strasbg.fr/article.php?id\\_article=98&id\\_rubrique=6](http://leuropedeslibertes.u-strasbg.fr/article.php?id_article=98&id_rubrique=6)

likely to be required to be guaranteed and respected by all governments are those of the Inter-American Convention and of the International Covenant on Civil and Political Rights, including the right to benefit from legal guarantees.

“5. Second, the Court analyses the “principle of equality and non-discrimination” (el principio de igualdad y no discriminación) – the use of the singular would seem to imply that the Court considers that equality and non-discrimination form a single principle comprising two elements. The Court then clarifies that “distinction” and “discrimination” must be distinguished. “Distinction” is admissible is so far as it is reasonable, proportional and objective, whereas “discrimination” is characterized precisely by its unreasonable, non-proportional and subjective character. Discrimination, according to the Court, includes all sorts of exclusion, restriction and privilege that are neither objective nor reasonable and that are carried out to the detriment of human rights. Citing its own advisory jurisprudence and the jurisprudence of the European Court of Human Rights, the Inter-American Court insists on the nuance that exists between the notion of “distinction” and that of “discrimination” and recalls that “distinctions” can be made in particular when it is a matter of offering a vulnerable person particular protection. The Court concludes that the “principle of equality and non-discrimination” implies that governments have the obligation not only to not introduce into their judicial systems discriminatory regulations but also to repeal already existing discriminatory regulations and to combat discriminatory practices. Next, the Court characterizes the “principle of equality and non-discrimination” by affirming that it falls under *jus cogens*. The Court recalls that, while *jus cogens* has its origin in treaty law, citing in this regard Articles 53 and 64 of the *Vienna Convention on the Law of Treaties*, it has undergone its own evolution particularly in the area of human rights. It concerns not only treaties but also all legal acts that are null and void once they contravene a rule of *jus cogens*. The Court judges that the “principle of equality and non-discrimination”, given that it falls under *jus cogens*, has an imperative character. Consequently, it is incumbent upon all states and affects third parties, including individuals. This implies that the government, at both the international and the domestic level, cannot act in contradiction with the “principle of equality and non-discrimination” to the prejudice of any given group of persons. The Court considers then that the general obligation to respect and guarantee human rights must also be executed in conformity with the “principle of equality and non-discrimination” and that the state can, in practice, allow distinctions only if they are reasonable and objective. The government is responsible for the non-respect of this obligation.

“6. Third, the Court recalls the vulnerability of migrants, which justifies a particular protection. The Court affirms that the irregularity of migrants’ situation can in no way serve as an excuse for discrimination in regard to their enjoyment of the exercise of their rights. This does not prevent the state from taking measures against illegal migrants, but it must, at least in the implementation of its measures, respect the human rights of clandestine workers and guarantee the exercise of the enjoyment of their rights. If the state can neither discriminate against migrants nor tolerate discriminatory situations and practices, it can, on the other hand, set distinctions between legal and illegal migrants and between migrants and its nationals (for example concerning the exercise of political rights), on condition that these distinctions are reasonable, objective and proportional and do not infringe upon human rights. The Court affirms that the right to a fair trial is part of the minimal rights that must be guaranteed for the benefit of migrants. The minimal legal guarantees must be strictly observed, in particular in administrative procedures and in all other procedure likely to affect human rights. As for the rights of the worker, the Court stipulates that they benefit every person engaged in a remunerated activity. The exercise of a remunerated activity is the only criterion that identifies a person as a “worker”. Once this identification is established, the court affirms that the worker benefits automatically from workers’ rights. These rights must be recognized and guaranteed, independent of the irregularity of the migrant’s situation. The Court emphasizes also that nothing obliges employers to hire clandestines. If they do so, however, they must assume the consequences and accept that the clandestine has thus become a worker benefiting from the rights that accompany this status. The principles thus arrived at by the Inter-American Court apply to both the public sector and to the private sector. If the government is the employer, it is obvious that it must guarantee and respect the workers’ rights of all public employees, be they nationals, migrants, legal or illegal, in

default of which it would engage its international responsibility. But the Court goes further, judging that the government also has the obligation to monitor respect of human rights, particularly workers' rights, between individuals. The Court draws inspiration explicitly in this respect from the German theory of the *Drittwirkung* ("third-party effect") according to which human rights must be respected by both the public powers and individuals, considering that the obligation to respect and guarantee human rights applies also to relations between individuals. The government thus must prevent violations of workers' rights by private employers and assure that contractual relations do not infringe upon human rights. Employers, for their part, have the obligation to respect workers' rights. The government's international responsibility is implicated from the moment it tolerates discriminatory actions or practices against migrant workers. As for the notion of "workers' rights", the Court considers that it includes the entirety of workers' rights in conformity with the judicial system in question, national or international."

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