EXPLORATORY REPORT

ON THE

ACCESS TO SOCIAL PROTECTION FOR ILLEGAL LABOUR MIGRANTS

Exploratory Report on the Access to Social Protection for Illegal Labour Migrants

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1. Introduction and Conceptual Framework of the Research

It is important at the start of present study to pay some attention to the actual definition of the questions to be investigated. We want to examine the social protection given or to be given to 'illegal labour migrants'.

Illegal labour migrants are at the heart of quite a lot of political attention in many European states. Some people blame foreigners coming to work in their country for undermining the social-economic fabric of the state, whereas others see in them the necessary 'oil' to make the economic machinery run smoothly. Debates are going on about the very concept of illegals, the issue being that no human being has an 'illegal existence'. As a consequence some prefer to talk about persons without the required papers 'les sans papiers'. We strongly hold the conviction that we have to stay away from these philosophical and political debates.

Let us therefore define in an operational way, as a working hypothesis, the main components of the group we are interested in, 'the illegal labour migrants'. We understand as such "non-nationals who are working in the country without them being allowed to stay in the country and/or without them being allowed to work in the country".

Let us clarify some elements of our definition.
We refer to non-nationals as all people not having the citizenship of the country they work in. They may have the citizenship of another country, of a formerly existing country or be stateless or a political refugee. In the latter cases, however, their stay in the country is most of time not to be qualified as 'illegal'. We also may assume that citizens of a country are always entitled to stay in the country they are citizens of. We will use the over-all term 'migrant' to indicate all non-nationals, including thus persons who did not necessarily cross borders themselves (e.g. also the child of working age of an illegal

immigrant, who him/herself is an illegal immigrant). We do so because of course, the main category of persons concerned will have come from abroad to live and work (although they were not allowed to do so) in the country, i.e. are (illegal labour) migrants.

These non-nationals do in our hypothesis work in the country. That means that they perform some kind of activity for which they get some form of pecuniary compensation. As such we exclude from the area of our attention people who are not of age to work (because they are babies, very old, …), severely handicapped persons etc.

The work is, however, carried out without the person being allowed to stay in the country and/or to work there. Countries may require non-nationals to have a permit to stay in the country and they may also require a non-national a permit to perform (certain) professional activities. Both authorisations (to stay and to work) are mostly different, but linked to each other. One may assume that a person who is not allowed to enter the country or stay in it, will not get an authorisation to work in the country concerned. Yet, we should not fully exclude that a person illegally staying in the country, may obtain a permit to work there, although this will be very exceptional. What may occur more often, however, is that although the person who is not allowed to enter/stay in the country, will ipso facto not be allowed to work in the country, nevertheless some elements of a legal work relationship will appear and create an impression of a legal of semi-legal work activity. Persons may also be allowed to enter and stay in the country, but not to work in it. This will be very often the case: persons very often enter the country legally as a tourist or as a person coming to visit relatives or friends, but end up working in the country without being allowed to do so. Persons applying for a permit to stay, will often purposely be barred form performing any professional activity, as long as their application is being handled.
A slightly complicated situation is present when a person is allowed to enter and stay the country and is also authorised to exercise a

professional activity in the country, but not the one he is actually exercising in the country. A person may e.g. be allowed to work as a salaried worker in a certain branch of industry, but not to exercise activity in another branch or as a self-employed person; when he is working in that other branch or as a self-employed person he may also be qualified as an illegal worker.

We shall for simplicity's sake qualify all the above "non-nationals who are working in the country without them being allowed to stay in the country and/or without them being allowed to work in the country" as illegal labour migrants.

The other component of the topic to be investigated is 'the access to social protection'. By social protection we understand here in the first place social security and social and medical assistance in the sense of the Articles 12 and 13 of the (revised) European Social Charter. In this first stage we shall concentrate on the legal position of the illegal labour migrant: is he/she entitled to some benefits in the area of social protection? In a next stage, one could make a step further and ask whether the illegal labour migrants do actually get access to the benefits they are legally entitled to. This question, however important, will not be dealt with in present report.

Illegal labour migrants will often be illegally residing in the country; it can, however, not be the purpose of present study to investigate all 'ins' and 'outs' of the international and national law governing the entry and stay (border control, documentary requirements etc.) in a state. As we explained most 'illegal labour migrants' in the sense of the concept defined above, will indeed be 'migrants', i.e. have come from another country. Again, it would lead us too far to address here in general the social protection issues related to migration and migrant workers (both legal and illegal).
Similarly, many states of Europe are confronted with a not unimportant number of persons (nationals and non-nationals) working without their work being registered or otherwise made

known to the authorities of the concerned country. We call it moonlighting or 'black work'. Some prefer to call it the informal sector of economy. Whatever we may call the phenomenon, it is obvious we cannot include the overall topic of the social protection in case of 'black work' in our report. Yet it is also clear that we will have to take into account the way the phenomenon is dealt with in general, in order to avoid that we would come up with solutions which would give the illegal labour migrant a better position than the national performing unregistered professional activities. We shall come back to this issue in our Fourth chapter.

First we will scrutinise the major international social security instruments to see what they tell us about illegal labour migrants. After this we will examine some national approaches; these national illustrations of the issues countries are confronted with and how they deal with them, are not intended to be representative for what is going on in the various countries. They should be seen as mere illustrations, provided by those countries that chose to send in some information. In the 4th chapter we shall then try to develop some general thoughts in relation with the issues discussed and try to come up with some possible approaches. In the 5th and last chapter we shall investigate the next steps the Council of Europe and in the first place its Committee of Experts on Standard-Setting Instruments in the Field of Social Security (CS-CO), could take in relation with the issues of the social protection of illegal labour migrants. In Annex we add the basic questionnaire sent out to the Member States, inviting them to provide us with information that could be used for our 3rd chapter.

2. The illegal labour migrant and international law

In this chapter, we will examine what the main international social security instruments can tell us about the social security status of illegal labour migrants. As such we shall pay attention to instruments developed within the International Labour Organisation and the Council of Europe.

It is important to observe from the outset that only very few of these instruments directly address the issue of the social protection of illegal migrant workers. This makes it all the more important to examine the personal scope of application of the international social security instruments in order to see whether, according to the definition of the scope, illegal labour migrants will be included as well. Not exceptionally we shall be confronted with the problem of less accurate formulations and the fact that principles which might nowadays be questioned (such as e.g. that by definition an illegal has no rights) are taken for granted.

We shall examine a limited number of instruments, recognising that also other instruments might be interesting as well. We believe, however, that the selected instruments are the most relevant and important. We classified the instruments to be examined in the following groups:

a) instruments of principle and human rights instruments

b) instruments relating to the minimum standards of social protection

c) instruments including a non-discrimination clause

d) instruments relating to the social protection of migrant workers

a) instruments of principle and human rights instruments

i) UN and ILO

The Universal Declaration of Human Rights of 10.12.1948 sums up a number of social rights which are granted to 'everyone'. The corresponding Articles 9 to 12 of the International Covenant on Economic, Social and Cultural Rights of 19.12.1966 were drafted in a similar way.

On 13 December 1985 the General Assembly of the United Nations adopted a Resolution 40/144 on the Human Rights of Individuals Who are not Nationals of the Country in which They Live. Although the Declaration defines in its Article 1 'alien' as "any individual who is not a national of the State in which he or she is present" and thus includes illegal labour migrants, when it comes to social protection it takes a much more narrow stance. Its Article 8, which deals with social rights such as the right to safe and healthy working conditions, fair wages, health protection, medical care, social security and social services, restricts its scope to "Aliens lawfully residing in the territory of a State".

ii) Council of Europe

In the European Social Charter we have to have a look at the Appendix to it, dealing with the Scope of the Social Charter in terms of persons protected. It reads as follows:

"1. Without prejudice to Article 12, paragraph 4, and Article 13, paragraph 4, the persons covered by Articles 1 to 17 include foreigners only insofar as they are nationals of other Contracting Parties lawfully resident or working regularly within the territory of the Contracting Party concerned, subject to the understanding that these Articles are to be interpreted in the light of the provisions of Articles 18 and 19." The latter Articles deal with the right to engage

in a gainful occupation in the territory of other contracting parties (Article 18) and the right of migrant workers and their families to protection and assistance (Article 19). Article 12 § 4 contains the obligation "to take steps, by the conclusion of appropriate bilateral and multilateral agreements, or by other means, and subject to the conditions laid down in such agreements, in order to ensure:

a) equal treatment with their own nationals of the nationals of other Contracting Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Contracting Parties;

b) the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Contracting Parties";

Article 13 § 4 contains the obligation to provide the social and medical assistance referred to in that Article "on an equal footing with their nationals to nationals of other Contracting Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11th December 1953."

It is obvious from all the above that it was clearly the intention to exclude persons who are not 'lawfully resident or working regularly within the territory', and thus illegal labour migrants, from the benefit of the European Social Charter.

The Revised European Social Charter includes an appendix fully similar to the one attached to the Charter discussed above. Although it is only a recommendation of the Committee of Ministers (N° 9 of 2000 on temporary protection) and thus is neither a legally binding instrument, nor an instrument of principle, we would like to mention

the specific approach taken in this recommendation. The recommendation deals with temporary protection offered in case of a massive and sudden flight out of areas of trouble in another country. In such case the country where the concerned persons first seek protection should give them such protection. Under Article 3 of the recommendation it is stated that persons benefiting from such temporary protection should have access to at least: adequate means of subsistence, including accommodation, appropriate health care and the labour market (in conformity with national legislation).

Let us add, moreover, that the European Union seems to take a similar approach as the Council of Europe for its Social Charter, given that the EU Charter on Fundamental Rights, Article 34(2), limits social security benefits to those legally moving to and residing in EU territory.

b) instruments relating to the minimum standards of social protection

i) UN and ILO

Most instruments here seem to completely ignore the existence of illegal labour migrants. As they do not include them, nor exclude them, one has to guess what the intention of the authors of these international instruments was. We may easily assume was self-evident that illegal labour migrants were not workers nor residents and thus were not meant to be included in the personal scope of these instruments. As examples we could refer to the silence met in more recent instruments such as ILO Convention N° 156 of 1981 on The Workers with Family Responsibilities. Similarly Article 1 of ILO Convention N° 183 on Maternity Protection of 2000 defines its scope as follows:

"For the purposes of this Convention, the term woman applies to any female person without discrimination whatsoever and the term

child applies to any child without discrimination whatsoever." Does this also imply that a female illegal labour migrant should be categorized as a woman under this Convention? The Convention has entered into force; it has been ratified by 4 states, all Member States of the Council of Europe (Bulgaria, Italy, Romania and Slovakia).

The ILO Convention N° 102 on Social Security Minimum Standards of 1952 is also silent on the subject; it does not, of course, need to address the issue as such as it guarantees rights only to a certain percentage of the (working or general) population. Yet in its definition of what it understands by 'resident' and 'residence' it always refers to 'ordinarily resident' or 'ordinary resident'; the question that arises then is whether this qualification 'ordinarily' also implies a legal connotation of 'legally'. A similar remark can be made in relation with ILO Convention N° 128 on Invalidity, Old-Age and Survivors' Benefits of 1967 (Article 1).

As far as the instruments relating to the minimum standards of social protection also include a non-discrimination clause, we deal with them under next paragraph.

ii) Council of Europe

The European Code of Social Security just like ILO Convention N° 102 does not have to deal with a personal scope of the rights guaranteed by it, as the countries may define themselves the protected categories of persons. Nevertheless, in Part XIII 'Miscellaneous Provisions' it contains an Article 73 stating:

"The Contracting Parties shall endeavour to conclude a special instrument governing questions relating to social security for foreigners and migrants, particularly with regard to equality of treatment with their own nationals and to the maintenance of acquired rights and rights in course of acquisition." As both

'foreigners' and 'migrants' are not specified, one might include illegal labour migrants under these terms.

The Revised European Code of Social Security does not contain an Article similar to Article 73 of the Code.

For the rest, both Code and Revised Code define the term "residence" as ordinary residence in the territory of the Contracting Party concerned and the term "resident" as a person ordinarily resident in the territory of the Contracting Party concerned. We have already commented upon the meaning of 'ordinary' in such a context.

c) non-discrimination provisions

i) UN and ILO

Some international instruments contain provisions as to the non-discrimination on the basis of nationality. These instruments may not purposely exclude illegal labour migrants; in such case the question needs to be answered whether the non-discrimination provisions of these instruments imply that illegal labour migrants should be treated as equal to 'black workers' having the nationality of the country they work in. The older ILO Convention N° 19 on Equality of Treatment (Accident Compensation) of 1925 e.g. reads in its Article 1:

"1. Each Member of the International Labour Organisation which ratifies this Convention undertakes to grant to the nationals of any other Member which shall have ratified the Convention, who suffer personal injury due to industrial accidents happening in its territory, or to their dependants, the same treatment in respect of workmen's compensation as it grants to its own nationals.

2. This equality of treatment shall be guaranteed to foreign workers and their dependants without any condition as to residence. (…)"

A similar provision is to be found in ILO Convention N° 44 on Unemployment Provision of 1934 in its Article 16.

In addition, in the more recent ILO Convention N° 121 on Employment Injury Benefits of 1964 we read without any specific condition of lawful employment, in its Article 27:

"Each Member shall within its territory assure to non-nationals equality of treatment with its own nationals as regards employment injury benefits."

Interesting is the approach taken by the very important ILO Convention N° 102 on Social Security Minimum Standards of 1952, where we read in its Article 68:

"1. Non-national residents shall have the same rights as national residents: Provided that special rules concerning non-nationals and nationals born outside the territory of the Member may be prescribed in respect of benefits or portions of benefits which are payable wholly or mainly out of public funds and in respect of transitional schemes.

2. Under contributory social security schemes which protect employees, the persons protected who are nationals of another Member which has accepted the obligations of the relevant Part of the Convention shall have, under that Part, the same rights as nationals of the Member concerned: Provided that the application of this paragraph may be made subject to the existence of a bilateral or multilateral agreement providing for reciprocity."

Let us also remember that residence is being defined here as 'ordinary residence', which leaves open the question whether 'ordinary' implies 'legal'.

A similar approach is taken and thus the same question comes up in ILO Convention N° 118 on the Equality of Treatment in Social Security of 1962 and in ILO in which residence is defined as 'ordinary residence'.

Let us also refer here to ILO Convention N° 130 on Medical and Sickness Benefits of 1969, ratified by 14 countries, 8 of them being members of the Council of Europe. In its Article 32 we read: "Each Member shall, within its territory, assure to non-nationals who normally reside or work there equality of treatment with its own nationals as regards the right to the benefits provided for in this Convention". Of course much will depend here on the interpretation of the concept 'normally'; but the least one can say is that the Convention makers seem to have opted for a neutral concept, and not for terms like 'lawfully' or similar.

ii) Council of Europe

The European Convention on Social and Medical Assistance of 11.12.1953 defines its scope of application in Article 1:

"Each of the Contracting Parties undertakes to ensure that nationals of the other Contracting Parties who are lawfully present in any part of its territory to which this Convention applies, and who are without sufficient resources, shall be entitled equally with its own nationals and on the same conditions to social and medical assistance (hereinafter referred to as "assistance") provided by the legislation in force from time to time in that part of its territory." Illegal labour migrants seem thus to be excluded from the benefits of this Convention; only a foreigner who has lawfully entered the territory but afterwards started to work in an illegal way, and so became an illegal labour migrant could qualify. According to Article 11 b of the Convention, lawful residence becomes unlawful from the date of any deportation order; before this date, a person may thus qualify for the benefit of the

Convention, when that person can be considered as lawfully present in the country. Seventeen Member States have ratified this instrument.

d) instruments relating to the social protection of migrant workers

i) UN and ILO

ILO Convention N° 97 on Migration for Employment dates back to 1949; it confines its scope of application to 'migrants for employment'. Article 11.2 adds that "the term migrant for employment means a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment". It thus excludes illegal labour migrants from its scope. This changed with the successor Convention, ILO Convention N° 143 on Migrant Workers (Supplementary provisions) of 1975 on the prevention of irregular migration in abusive conditions and equality of opportunity of treatment. This instrument provides in its Article 1 for the general state obligation that the "basic human rights of all migrant workers" must be respected. Furthermore Article 9(1) of ILO Convention N° 143 guarantees equal treatment of regular and irregular migrants with regard to rights arising from past employment as regards remuneration, social security and other benefits. However, for the subsequent Articles 10 to 14, i.e. Part II the term migrant worker is defined in a very similar way as in ILO Convention N° 97. Indeed Article 11.1 reads as follows: "For the purpose of this Part of this Convention, the term migrant worker means a person who migrates or who has migrated from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant worker". The ILO Convention N° 143 has been ratified by 18 states, half of them being Member States of the Council of Europe (Cyprus, Italy, FYROM, Norway, Portugal, San Marino, Serbia and Montenegro, Slovenia and Sweden).

In a previous contribution to the discussions in the CS-CO[1], colleague Ryszard Cholewinski pointed at the importance for the topic we are discussing of the UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted on 18 December 1990, which entered into force on 1 July 2003. Let us remember the main features of this instrument as well as the main comments formulated by Cholewinski in relation with this instrument.

The Convention seeks to protect the rights of all migrant workers and their families, including those who are in an irregular situation.

Cholewinski emphasises that the UN Convention explicitly extends human rights safeguards to all migrants, including irregular migrants (Part III), but that it does so in the context of an overall disapproval of the phenomenon of irregular migration. Part VI of the Convention includes State obligations to co-operate with a view to promoting sound, equitable and humane conditions in connection with international labour migration and to collaborate in the prevention and elimination of irregular migration. The Convention thus has a dual purpose with respect to irregular migrants: to prevent their migration in the first place, but also to protect their fundamental rights.

Article 24 states in general terms:
"Every migrant worker and every member of his or her family shall have the right to recognition everywhere as a person before the law."

The Articles 27 and 28 seem of particular relevance to us. They read as follows:

[1] *Ryszard Cholewinski, UN Convention on Migrant Workers and Protection of Social Security, s.l.n.d.*

Article 27:
"1. With respect to social security, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. The competent authorities of the State of origin and the State of employment can at any time establish the necessary arrangements to determine the modalities of application of this norm.

2. Where the applicable legislation does not allow migrant workers and members of their families a benefit, the States concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances."

Article 28:
"Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment."

Cholewinski considers Article 27 of particular relevance, although it is a 'framework provision' referring to more specific bilateral and multilateral agreements that operate in this area as well as to national legislation. As the Article underlines the principle of equal treatment between nationals and all migrants (including irregular migrants) regarding social security and as it provides that where migrant workers and their families are officially denied access to social security benefits, the reimbursement of their contributions should at least be considered, again on the basis of equality with nationals.

We would like to add, however, that Article 27 does contain a principle, but indicates already itself that it is not self-executing; moreover, the equality to be maintained is not one between the legal national worker and the illegal foreign worker, but according to our vision one between the legal national worker and the legal foreign worker, and one between the illegal (black) worker who is a national and the illegal labour migrant.

In any case, it is important to remember that up till now, only a few (mainly emigration) countries have ratified this UN Convention.

Of the Council of Europe Member States only Azerbaijan and Bosnia and Herzegovina have signed and ratified and Turkey has signed this Convention on migrant workers.

ii) Council of Europe

The European Convention on the legal status of migrant workers takes a very strict attitude towards illegal labour migrants as it states in its Article 1:

"For the purpose of this Convention, the term "migrant worker" shall mean a national of a Contracting Party who has been authorised by another Contracting Party to reside in its territory in order to take up paid employment."

Although it does not pertain to the domain of international social security instruments, we would like to make a remark as to social protection of illegal workers who actually come from abroad, the illegal labour migrants in the strict sense. It would be wrong to conclude from the absence of social protection in the country these illegal labour migrants work in today, that they are necessarily deprived from any social protection. Indeed, in some cases these persons may still benefit from social protection by (and in) the country they emigrated from. This will of course depend on the

rules established by the social security law of the country of emigration. As this protection is the consequence of former professional activities or residence in the country, this obviously does not raise any question. It may, however, be that the illegal migrant (worker) still preserved his/her official place of residence in the emigration country and that some form of social protection is linked to this quality of being a resident. In most cases, however, a state of emigration will not accept the maintenance of the official place of residence in the country of emigration, even when the concerned person did not acquire a status of resident in the country of (illegal) immigration. What calls our particular interest, is beyond any doubt, those national legislations of countries of emigration which allow the maintenance of the social insurance during (periods of) work abroad, even if that work is not legal. In other words, exceptionally, countries will accept, for social security purposes, work performed illegally abroad as if it were legal work performed domestically … provided that the corresponding contribution is paid in. The contribution is then usually established as a (in domestic terms high) fixed sum per month or year.

3. Some national approaches

As was pointed out in our introduction, we did not have the intention of undertaking a comprehensive comparative study of the social protection of the illegal labour migrants in the countries of the Council of Europe. We simply sent around the annexed questionnaire, in order to be able to present some illustrations of how countries deal with this matter.

At the moment of writing the present report, we have received answers from Albania, Bulgaria, the Czech Republic, Greece, Portugal, Sweden, Switzerland, Turkey and the United Kingdom. The findings are similar to conclusions of comparative surveys

undertaken by NGOs who work in the field of illegal migrants and undocumented workers[2].

In all revised countries, the bottom line with regard to access to social benefits for illegal migrant workers seems to be emergency health care. Illegal immigrants have the same right to urgent medical care as regular residents (or workers) in the country. The way in which this access to emergency health care is guaranteed, can differ however across the countries; the same goes for what should be understood as emergency care. In the UK, for instance, with regard to primary medical care, it is at the discretion of the general practitioner whether to treat the patient and whether or not to charge the illegal migrant (worker) in case of treatment. For hospital treatment, emergency care is not questioned but if it is felt that a person has entered the country with the sole purpose of obtaining free treatment he/she could face charges for the received care. In Sweden, Portugal and Turkey the illegal migrant (worker) in need of urgent care can be treated by a medical doctor; however the patient is in such a situation obliged to refund the costs for the delivered health care. Illegal immigrants are thus not entitled to subsidized care. Emergency care is provided to people in need (including the illegal migrants) but if they are not covered by the social protection system, the costs can be charged. It should be mentioned however that Turkey is currently revising its Fundamental Law for Social Services and Welfare, in which it is planned to provide some basic social and medical support for unlawful migrant workers. In

[2] In this respect see e.g. PLATFORM FOR INTERNATIONAL COOPERATION ON UNDOCUMENTED MIGRANTS, *Book of solidarity. Providing assistance to undocumented workers. 3 Volumes covering Belgium, Germany, the Netherlands, UK, France, Spain, Italy, Sweden, Denmark and Austria*, Antwerp, 2003, De Wrikker, resp. 103p., 123p. and 90p. and -, *Health care for undocumented migrants*, Antwerp, 2001, De Wrikker, 97p. In these surveys, however, the emphasis was put on access to social services and health care for undocumented migrants in general. The question to what extent illegal (migrant) workers might have access to work related social insurances has, however, not been developed in detail.

Portugal the health care costs are not charged when the treatment is necessary for safeguarding public health. In Albania, the Hospital Care Law provides that both public and non-public hospitals are obliged to give free treatment to Albanians and foreign citizens (even when the latter are illegally on the territory) if they are in need of emergency care. Non-hospital treatment however is in principle to be charged on the basis of tariffs which have been fixed by the Ministries of Health and Finance. Interesting is the approach of countries such as the Czech Republic and Switzerland. Here as well illegal migrant workers are granted access to emergency care (mainly via social assistance). However, both countries underline the fact that illegal migrant workers are supposed to be socially insured for health care. As will be touched upon later, social insurance is disconnected here from the question whether the person is working/staying legally or illegally in the country. As soon as a person is working/staying on the territory (whatever the legal nature of his professional activities and/or residence), he is supposed to take out a public health insurance through one of the sickness funds operating in the country. The nationality of the concerned person is not of relevance, nor the fact that he is exercising activity without a work permit. In reality, a tiny minority of illegal migrant workers is socially insured for health care as either the worker refrains from disclosing himself and/or the person does not have the financial means to pay for health insurance. In case of an emergency these persons are still guaranteed a health care treatment. The costs are borne by the local authorities, which are competent in the field of social assistance/social welfare.

Another question is what should be understood by urgent or emergency health care. Here some countries reported that in reality there seems to be shift from a strict interpretation of urgent care (essential treatment, which cannot reasonably be delayed until the patient returns to his/her country) to a more flexible one evolving towards "necessary care" on the basis of which doctors consider regular follow-ups and vaccinations also to be part of "urgent

treatments". The treatment preventive care that has been undertaken to protect public health is also regularly being considered as falling under the notion of "urgent care". An example of this evolving interpretation is to be found in the Italian law on immigration in which access to the public health system to foreigners without residence permit is to be guaranteed in the following situations: outpatient and hospital care which is urgent or otherwise essential even if continuous; medical programmes which are preventive or which safeguard individual and collective health; maternity coverage; coverage of the health of minors; vaccinations provided by public health law; diagnosis, treatment, and prevention of infective diseases; activities of international prevention.

With regard to access to social assistance the practices are quite different across the countries. Countries such as Sweden, Albania and Turkey deny any access to social assistance benefits (the latter country however revising its legislation in this respect to create access to some basic social assistance benefits or services). Bulgaria guarantees illegal migrants, who are tolerated for humanitarian reasons, social assistance benefits similar to the ones for legal residents. Most countries follow an in-between approach in which some (but not all) assistance benefits are granted to illegal migrants or illegal migrant workers. Very often non-pecuniary services (foods, clothes, housing, …) and assistance benefits for children and minors are included or sometimes it is left at the discretion of the local municipalities to constitute a basic package of benefits and services to be granted to illegal migrants.

Many countries (e.g. the Czech Republic, Turkey, Switzerland, Sweden, Portugal) do not explicitly link the access to social insurance with regularly (or legally) performed labour activities. The reasoning is that employers who hire workers to perform work are obliged to pay social insurance contributions, even if this work is performed illegally (e.g. by illegal migrants). The performance of labour activities is in other words the essential condition to become

socially insured. Exceptionally, national legislation stipulates that work which has been carried out without any legal permit, cannot be taken into account for the application of the social insurance schemes. In other words, the labour permit might be a condition for performing labour on the territory, but it is mostly not one for becoming socially insured; for the latter performing labour (even in an illegal way) is essential. In some countries this is the case for (practically) all social insurance benefits (unemployment being often the only scheme where a strict relation with legally performed labour is applied); for other it is restricted to some defined schemes (e.g. very often labour accidents and professional diseases). This might lead to a (theoretical) situation where the employer is paying contributions to the social insurance system even if the worker does not have a legal permit to work. Many systems have then to grant benefits to the employee in case he suffers a social risk. More likely, however, is that the employer is not registering the illegal migrant worker but that at the occasion of inspection or an accident the worker becomes known to the authorities. Besides being sanctioned, the employer will have to pay the contributions due for the period he employed the (illegal migrant) worker. As a consequence, the latter becomes socially insured. Whether the worker will be able to receive the benefits in his country of origin (i.e. to export the benefits) in reality will depend upon the bilateral/multilateral treaties (or the national legislation dealing with the territorial scope of the benefits to be paid) in place.

4. Which social protection to grant to illegal labour migrants?

If we try to distillate some general trends in the approach international law takes towards the phenomenon of illegal labour migration, we cannot but conclude that international law is very reluctant to include illegal labour migrants in the personal scope of the concerned instruments. If there is some openness to accept that illegal labour migrants derive some rights from these international

legal instruments, it seems in the first place the case by putting them on the same footing as nationals, but not as national legally employed people. But also the latter seems rather exceptional. International law and some national law and even more national practices, add to this a willingness to cover urgent needs of the illegal labour migrants, in the first place in the area of urgently needed health care. Starting from these general trends, we shall examine first which principles should govern the issue of the social protection of illegal labour migrants, in order to come, in a next step, to some more refined suggestions as to how to proceed in the future. In doing so, it will appear to be important to show some coherence in the approach of the illegal labour migrants, a coherence which sometimes seems to be absent today. It will also be important to keep the legal theory and the practice on the field as close as possible to each other; if we do not succeed to do so in this politically highly sensitive matter, very negative results could come forward. When maintaining strict legislation, but in practice not (always) applying it to illegal labour migrants, one would fuel the suspicions of all kinds of social abuses by migrants. Moreover, it would in fact create an area of unacceptable discretion with the administrations that could without any justification withhold certain benefits to some, simply by applying the law. On the other hand, making liberal international or even national law, but in practice applying it in such way that illegal labour migrants would not in reality get the benefits they are theoretically entitled to, obviously also contradicts the rule of law and creates frustration with the groups of (illegal and presumably also legal) migrant workers. So we plead to keep the law and the practice as close as possible.

We believe that following principles should lead our approach in the quest for the right social protection for illegal labour migrants:

1) the sovereignty of states to regulate access to the country

2) the sovereignty of states to regulate work in the country

3) the equilibrium between rights and duties of the social protected people
4) the respect for human rights
5) the respect for the special needs of migrants

At the same time, we have to take into account the reality that in all our countries a more or less large group of illegal migrant workers do live and work.

With the latter we touch the nerve of the issue: given the fact that there are illegal migrant workers in the country, what social protection do we provide to them as human beings, as (de facto) residents, as workers? And what approach would we consider to be more optimal? What differentiation within social security is to be made (from only some restricted form of social assistance until full social security coverage)?

Before tackling these questions, let us first explore the principles enumerated above.

The first principle cannot be but that every state has the right to regulate the access to its own territory. Of course international law may introduce some corrections to this principle, yet the principle remains of the national sovereignty in this matter. One may like or dislike this, but probably one could hardly imagine this principle to be thrown over board all together. This broad principle is not without consequences in our area. It has as a consequence that the state is free to allow in the persons (who are non-nationals) it wants. This implies that the state has jurisdiction (possibly corrected by international law) to determine which migrants (and thus migrant workers) are allowed in and which not. It is however in our opinion important to stress that this principle relates to the access to the territory and the stay in it. A person who is not allowed to stay in the country, can be removed; this is the logical consequence. However, many states do not draw this conclusion and

have created all kinds of forms of non-legal but at the same time not really illegal stay in the country. In other words, and under various titles, we get an in-between category of persons who are not legally staying in the country, who are not removed from the territory and whose stay is 'tolerated'. The next question is then: should these persons be completely at the mercy of national discretion? The recommendation of the Committee of Ministers (N° 9 of 2000 on temporary protection) deals with such a situation: people who fled suddenly out of areas of trouble into another country. In such a case, the country where the concerned persons first seek protection should give them such protection. Under Article 3 of the recommendation it is stated that persons benefiting form such temporary protection, and thus by hypothesis persons who are strictly speaking not legally staying in the country, should have access, at least to: adequate means of subsistence, including accommodation, appropriate health care and the labour market (in conformity with national legislation).

In other words, the recommendation accepts that (at least some) illegal migrants can be entitled to social protection, as long as they are tolerated on the national territory. In a similar way we read in Article 11 b of the European Convention on Social and Medical Assistance of 11.12.1953 that lawful residence becomes unlawful from the date of any deportation order; suggesting that before this, a person may thus qualify for the benefit of the Convention.

The second principle also relates to the national sovereignty allowing a state to regulate the working of people in the country. Here as well, of course, corrections may come in by virtue of international law, without overruling the basic principle: the state decides how, under what conditions, etc. work is being performed on its territory, whatever the nationality of the workers is. This is not to say that all foreigners need to be granted access to work in the same way as nationals. Here still special conditions prevail in all states. Yet in most countries, and as a matter of fact also as a consequence of international law, once a person is allowed to work in the country,

the work is performed on an equal footing with national workers. Discrimination based on nationality has been banned in most countries as far as the status of the workers is concerned. This also goes for their social protection. Discriminations on the basis of nationality between workers in the country, have disappeared nearly completely from all national social security statute books.

Yet persons may perform their professional activities in accordance with the law regulating work in the country or may not do so. In the latter case, the workers will be labelled as belonging to the grey or black sector of the economy. They may be nationals, non-nationals legally residing in the country or illegal migrants. The group we are dealing with, the illegal labour migrants will normally work in this 'grey' or 'black' economy. When they do so, one could defend that they should not be treated in another way as nationals performing 'black' or 'grey' work. This would be in line with the principle of non-discrimination on the basis of nationality. Stating that those illegal labour migrants should be dealt with in the same way as other migrants, and this probably also in a similar way as 'white' national workers, seems to be rather contradicting the principle of equality, as it would result in treating equally persons who fundamentally are in different situations.

Another principle to be kept in mind when discussing the social protection of the illegal labour migrants, relates to the intrinsic equilibrium of social insurance systems. Although the right to benefits is in most countries not directly linked to the payment of contributions, it goes without saying that one cannot build a decent social protection system when major groups of workers are only taken into account for paying in contributions, but never for receiving any benefit; or when a group of workers would benefit from a system without ever having to show financial solidarity with others. In other words, if a black or grey worker, being a national or an illegal labour migrant, performs his/her work without paying in the (correct) social security contributions, he/she cannot expect to

be dealt with at the benefit side like a worker who has always paid in correctly. We believe this might be a self-evident statement, but it is good to remember it here, as we are sometimes confronted with statements so favorable to the social protection of illegal labour migrants, that they forget completely that social security is about solidarity and that a certain equilibrium between contributions and benefits should not be forgotten.

On the other hand, this principle of equilibrium should also be considered in favour of the illegal labour migrant, who was allowed into the social protection system. As we pointed out earlier, it is not to be excluded that a non-national not legally staying in the country and/or not allowed to work in the country, nevertheless was openly employed with a labour contract. In accordance with the law, or usually outside of the legal framework, that labour is then performed in the formal economy, i.e. it 'is white'. The illegal labour migrant seems then to be socially insured in the same way as the other workers are. He pays in contributions, etc. just like the other workers. The principle of the equilibrium of the social security systems, and probably also the principle of good faith as far as the social security administrators are concerned, then commands that the illegal labour migrant not be refused all benefits, whereas the social security administration was keen in receiving the contributions of that worker and does not intend to refund those contributions. Here we can refer to some rules of international instruments, implicitly applying the principle of the equilibrium. In Article 9(1) of ILO Convention N° 143 on Migrant Workers (Supplementary provisions) of 1975 on the prevention of irregular migration in abusive conditions and equality of opportunity of treatment, we read that regular and irregular migrants are to be treated equally with regard to rights arising out of past employment as regards remuneration, social security and other benefits. In paragraph 2 of Article 27 of the UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, we read:

"2. Where the applicable legislation does not allow migrant workers and members of their families a benefit, the States concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances."

Finally we would like to stress that the social protection of the illegal labour migrants very often raises questions in relation with the respect for the human rights of all. We should not forget in this respect that instruments of principle such as the Universal Declaration of Human Rights or the UN Covenant on Economic, Social and Cultural Rights proclaim social security and assistance to be human rights of all persons, thus not excluding anyone, and hence not excluding illegal labour migrants. Of course we know these instruments cannot be applied directly and that it takes a legislator to organise the social protection in a country. Nevertheless, we should never end up in a situation where a person is deprived of any social protection, in other words, where the right to social security and assistance is emptied completely of any content. It is in this line of thought that ILO Convention N° 143 on Migrant Workers (Supplementary provisions) of 1975 on the prevention of irregular migration in abusive conditions and equality of opportunity of treatment, provides in its Article 1 for the general state obligation that the "basic human rights of all migrant workers" must be respected. Similarly, Article 28 of the UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, states:

"Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment."

In this context, we should not forget either that illegal labour migrants tend to belong to the most deprived sections of the population and therefore deserve special attention as far as their social protection is concerned.

Is it now possible to reconcile the above enumerated principles into an operational format for tackling the issue of the social protection to be granted to illegal labour migrants? We believe we should at least try to construct such an approach. The starting point for doing so will be that the real issue is not: do we include or exclude illegal labour migrants into or from our social security systems? Instead, a more diversified reality is to be taken into account and thus a more complex answer is to be given.

First there are those elements of social protection, the absence of which may directly infringe upon the basic human rights to health and social protection.

In accordance with the direction indicated by the international law and the practice of some states, we hold the opinion that urgently needed and necessary health care should not be withheld from a person because he or she is an illegal labour migrant. The real questions arising here are more concerned with further defining what is urgently needed? What is necessary? Should necessary health care not be provided to the illegal labour migrant, simply because the care is not urgently needed? The bottom line is that one could defend that an urgent treatment, in absence of which a persons' life is threatened, should be guaranteed. The same goes for the (necessary) health treatment of pregnant women and children. Furthermore, urgent health care should relate as well to preventive care. With regard to the latter not only the health of the illegal migrant (worker) is at stake, but also possibly the public health of a whole society. In this situation it is in the interest of everyone to guarantee all persons (including illegal migrants and illegal migrant

workers) access to (preventive) care. With respect to the need of keeping the social health care system in balance it may be acceptable that states check whether foreign persons did not move with the sole reason to receive a treatment and/or that they make the access to the urgent care dependent upon a means test (e.g. via a system of medical assistance).

The income provided by social assistance to the poorest in order to allow them to keep alive in human dignity, should not be refused to illegal labour migrants either. Probably this will be much more contested. Indeed it may be felt that there is a danger that if a country is going to provide illegal labour migrants with social assistance, this will attract more illegal labour migrants. In accordance with the principles enumerated above, we believe that the assistance should be provided as long as the persons are not ordered to leave the country and able to do so. In other words, the right to such social assistance as necessary to live in a human way in the country, should be linked to the factual stay in the country.

More problematic is the question what level of assistance benefit should be provided to the illegal migrant (worker). Providing the person with the traditional monetary income subsistence will sometimes be difficult as simply the conditions to which such benefits are made subject, cannot be applied in the same way to illegal migrants (or migrant workers). Social assistance providing a minimum subsistence income works traditionally with the condition that the person entitled to assistance is first and foremost expected to work for a fair income (in order to become integrated again into society). This duty of suitable work will be very hard to be applied upon a person who is simply not allowed to work at all. Alternatives such as taking part in public welfare tasks might be a solution here. On the other hand it should be mentioned as well that often (sometimes on a temporary basis) one makes abstraction of this work-condition for certain categories of citizens in need of assistance. More troublesome is that in order to become entitled to a

minimum subsistence benefit, one is not allowed to perform undeclared work (and have related undeclared income), something many an illegal migrant worker is doing by definition. For some of these migrant workers however, social assistance will be their last safety net when they become victim of social risk (work incapacity, getting unemployed, etc.). Others however might be in need of social support although they are still working illegally (e.g. on an irregular basis). We think that here a similar approach should be followed as being applied to the nationals who work (or have worked) in the grey economy and apply for social assistance.

The question of what the social assistance benefit consists of and at what level benefits should be provided, also depends on the final perspective for the illegal migrant (worker). Besides guaranteeing means to survive, social assistance and welfare benefits try to stimulate and/or safeguard integration into society. However, when the perspective is that the illegal migrant (worker) is to be expelled (shortly) from the territory benefits which specifically aim at an enhanced integration (e.g. vocational rehabilitation) will make less sense. In a similar way, it is defendable that countries make categories of illegal migrants (illegal migrant workers) to which different benefits or benefit categories correspond. Asylum seekers who are e.g. kept in detention will receive mainly services in kind. In order not to attract too many illegal migrants (migrant workers), a country might decide not to provide any financial assistance as long as no formal application for asylum is introduced, but restrict the assistance to benefits in kind. Persons who launch a second application for asylum (e.g. based on "new elements") will see their perspective for staying in the country reduced. As a consequence a country might decide to shift pecuniary assistance into services in kind. When states work with categories it is however recommendable to have clear distinctions which are based upon objective elements. Moreover, whatever the type of illegal migrant (worker), some emergency assistance should always be guaranteed.

When children stay in the country without being legally entitled to do so, they should also, as long as they are de facto staying in the country, enjoy the social and other protection provided to national children, including opening a right to child benefits. They can, under the necessary protection measures, be removed from the territory, but as long as they stay on it, will enjoy a similar treatment as other children. Indeed, we consider it not possible as far as the children are concerned, to stop the support as soon as the order to leave the country has been given, just like we did in relation with social assistance. Children themselves cannot decide to leave or to stay, and therefore their situation should in our opinion be governed completely by the factual duty of the state to take care of all children staying within its frontiers.

In the above cases, recognising some rights to social protection to illegal labour migrants does not have as a consequence to protect them from expulsion. Nor could one consider a state obliged to export such a benefit; this would obviously have an adverse effect. A more difficult question is whether social administrations providing benefits to the illegal migrant (worker) should report/denounce this to the migration services. If such a policy is applied strictly, the logical effect will be that no illegal migrant (worker) will address himself to the social administration. The right to (basic) social benefits will in other words be annihilated. The question is whether social and public health authorities aim at similar objectives as the department(s) of internal affairs. In case all persons are made subject to preventive care measures, this is in the first place to safeguard public health. When medical doctors, hospitals or social offices refunding preventive care, denounce actively irregular migrants they might put at stake the safety and health of society (as the illegal migrant worker will refrain from presenting himself to the preventive care service). The same goes for social assistance benefits, which try to guarantee the claimant a way of living (survival) and possibly a (re-)integration into society. By doing so, the beneficiary of assistance will be more refrained from using other means (e.g.

criminal) to survive. Denouncing actively illegal migrants (migrant workers) who ask for assistance might then have a reverse effect. On the other hand transmitting information within the social protection system can be defended (as administrative offices aim here at the same objective of providing in a balanced and redistributive way a social safeguard to all persons in need). Social assistance offices e.g. could report social insurance authorities about work performed in the hidden economy).

Other rights related to residence in the country, especially in those countries following a universalist approach of social protection (Scandinavian model; Beveridgean approach), do not seem fit for extension to illegal labour migrants. As the universal schemes are mainly financed from the budget of the state, and illegal labour migrants will normally not pay any income taxes, it seems less in line with the above-mentioned principles to entitle the illegal labour migrants to the universal income replacing benefits.

When income replacement is linked to the professional activity (say in a Bismarckian approach to social security), we need to look a bit more into the situation. Normally the illegal labour migrant will work in the 'black' or 'grey' zone, or in other words in the 'informal economy'. As a consequence he/she will not pay in the required contributions, nor will the corresponding employers' contributions be paid in. Consequently, normally one could decide not to recognise any entitlements to the concerned illegal labour migrant. Looking at it more closely, their situation is not fundamentally different from nationals who work in the 'informal economy'. As far as they would be granted some rights vis-à-vis social security and/or their employers, we do not see why because of their not being nationals the same rights should be denied to illegal labour migrants. Let us take the example of the labour accidents. In many countries the worker who gets a labour accident, will qualify for special compensation by social security and/or the employer, even if the worker was not registered as such, in other words even if the worker

was 'black'. Why would an illegal labour migrant in such hypothesis be dealt with differently? Moreover, if such rights are being granted, we believe that no reason can be given not to export the benefit in the same way as the state would do or have to do for other migrants. Putting it in other words, expelling the illegal labour migrant does not free the state, or rather social security and/or employers, as such from their liabilities towards the (former) illegal labour migrant. Of course if the national 'black worker' is denied any rights under social security, this will also be the case for the illegal labour migrant.

A more complicated situation may arise when the illegal labour migrant, though illegally staying in the country, nevertheless was employed in an apparently legal way. He/she was registered with the social insurance institutions and the employment is otherwise also within the formal economy. One might wonder how this is possible. It may the consequence of forgery by the worker, and then of course, the employer and/or social insurance institutions were misled. In such case the registration will probably be invalid and we return to the previous hypothesis of an illegal employment. However, it is also possible that no special steps were taken by the illegal labour migrant to deceive the authorities. The illegal labour migrant simply took up (in good faith) an employment with an employer who (in good faith) employed him/her and registered the illegal labour migrant with social insurance. If the social insurance institutions do not check (because they are not able to or because they don't want to) the presence of a permit to stay and/or to work of the worker for which registration with social insurance is sought, this may result in the registration of the illegal labour migrant as a legally socially insured worker. How to deal with such a rather less frequent hypothesis? On the one hand, the illegal labour migrant will be supposed, like other persons, to know the law (nemo censetur ignorare legem) and thus to know that although he/she is registered with social insurance, his/her employment remains illegal and consequently the social insurance is registration deficient. On the other hand, the same principle goes, and with even more strength,

for the social insurance institution registering the person; this institution moreover creates and confirms the apparent social insurance of the illegal labour migrant. Moreover, it should be noted that in some countries illegal work and social security entitlement are disconnected. In such a case, it is possible to perform work without a legal permit but to become socially insured in a "legal" way. In these cases, we believe the proposed solution could consist in the recognition of the period for which the illegal labour migrant was registered as being socially insured as a formal period of social insurance. By doing so, the illegal labour migrant would later open up social insurance rights. In case this migrant will not be factually in a situation to effectively receive the benefit (because he/she is expelled/not staying in the country anymore/because the benefit is not being exported…), we can imagine the social insurance institution having to reimburse to the illegal labour migrant the contributions he/she paid in (and possibly also to his/her employer those paid in by this employer). Such reimbursement should then in our opinion occur before the illegal labour migrant is possibly removed from the national territory; at least the reimbursement should not be hindered in practical terms by the fact that the illegal labour migrant is not in the country anymore.

A hypothesis deserving our special attention and possibly also a special treatment consists in the later regularisation of the stay of an illegal labour migrant. We mean the following situation: a non-national is not allowed to stay on the territory and/or to work in it. He/she nevertheless does so and thus can be qualified as an illegal labour migrant. Due to national political decision, the person is however given the opportunity to regularise his/her situation, i.e. to get the papers to stay and/or work in the country. After such a regularisation the illegal labour migrant looses this quality and thus can legally be employed. What to do with the periods this person has been working in the country in the past (i.e. as an illegal labour migrant)? Should we apply the above-described principles also in such a case? We are inclined to do so indeed, except for the cases in

which (without regularisation) one would have to reimburse contributions that were paid in. In these cases we would favour a solution consisting not in reimbursing, but in recognising these periods of insurance as formal periods of legal social insurance. Indeed in such case we do not have to fear the concerned person would not benefit from the rights built up through the contributions.

Finally we would like to draw attention to the grey zone of non-nationals 'tolerated' to stay and/or work in the country. Earlier we defined illegal labour migrants as the non-nationals who are working in the country without them being allowed to stay in the country and/or without them being allowed to work in the country. Until now we have presented the illegal labour migrant as a person not allowed to stay and/or work at all. Yet reality is a bit more complex as there are situations where non-nationals are not allowed to stay and/or work in the country, but still tolerated to do so (e.g. for humanitarian reasons or when due to calamities going on in the country of origin or in case, due to illness, it is not possible to send back the illegal migrant). Some countries grant these persons a specific permit with related rights of staying, sometimes even working on the territory of the country. By doing so, one could state that these persons are legally staying and/or working. Other countries do not grant them a permit but tolerate them de facto on the territory. Consequently they are "illegal" but tolerated in practice. The question is whether this same category of (tolerated) persons with a different (national) legal status should be dealt with differently from a European rights perspective. By the sole discretion of a country, reshaping its immigration policy, these persons can be turned into "illegals" who are tolerated but who do not have a legal status. The danger exists that such persons will be pushed around the countries especially towards the countries providing legal status to such tolerated refugees. As a consequence, the latter countries might be tempted to ban or reduce the legal status of such tolerated persons in order not to attract too many of them. It goes without

saying that also in the field of the categorising of illegal migrants and illegal migrant workers some European agreements have to be made.

5. What next?

In the previous chapter we have enumerated the principles that should guide us in this very difficult, complex and politically sensitive area of the social protection to be given to illegal labour migrants. We have also sketched the solutions which we consider to be most appropriate.

What could be the next steps to be taken by the institutions of the Council of Europe? The worst scenario in our eyes, would be to ignore the problem or, which is more likely to happen, to stick to simplistic extreme approaches such as: social security is a human right and illegal labour migrants are humans, thus they should enjoy full social security coverage; or, illegal labour migrants are illegal and thus cannot qualify for any legal entitlements under social security law. We strongly hold the belief that a more differentiated approach is appropriate. We have tried to develop a platform for discussing such a more differentiated approach. The CS-CO could provide an excellent forum for such a debate, but also in Council of Europe (as human right institution) the legal and social status of illegal migrant workers should be addressed properly. Preferably the various places where the debate is taking place should exchange their views, if the latter should not remain very partial. The whole exercise could then end up in a resolution of the Council of Ministers of the Council of Europe or even in a draft Convention on the social protection of illegal labour migrants. We certainly have not reached the stage of preparing such instruments yet, but we believe that an open and serious debate on the subject should be imminent. The Council of Europe could pave the way to an equilibrated approach, respecting human rights and the specific logics of national social security systems. If the Council does not take the lead in the discussion, the

debate will nevertheless emerge in various Member States and it is not sure that the political pressure in the various countries will allow for a balanced point of view as the one which could proceed from the proceedings of the Council of Europe fora. In this sense we hope that the question of social protection of illegal labour migrants will stay on the priority agenda of the Council of Europe.

Louvain, December 2003

ANNEX : Short Questionnaire

It was decided earlier in the CS-CO to set up a research project in relation with the social protection of the 'illegal labour migrants'. It was agreed also that Member States that would like to do so, could send in information as to their national approach to the contracted consultant. In order to facilitate the work for those countries that choose to provide the Council of Europe with information on the matter, and at the same time, in order to streamline somewhat this information, an elementary questionnaire has been developed. This basic questionnaire consists of the following questions:

If a person (national or foreigner) is living and working in your country without being registered (nor otherwise known by the social security administration as a social insured person), do the various national social security schemes provide that person with any social protection in case one of the following eventualities occur: medical care, sickness, unemployment, old age, employment injury (and professional disease), family, maternity, invalidity, survivorship?

Is it possible for an illegally residing foreigner to be in one way or another working legally in your country? Or at least, his/her work to be taken into account for the payment of social security contributions/ or for the constitution of an entitlement to benefits (immediately or later)?

Do illegal labour migrants qualify for any form of social and/or medical assistance?

Are children of illegal labour migrants, staying (legally or illegally) in your country qualifying for the benefits and services national children qualify for? Which services and benefits do they eventually qualify for?

Do illegal labour migrants and their depending family members (the latter staying legally or illegally in the country) qualify for health care services as do nationals? If not, in which cases and for which services do they qualify? (e.g. only emergency care?).

Once an illegal labour migrant is identified by the competent authorities, do his illegal work activities trigger liabilities of other persons (e.g. his 'employer', the contractor of his services) in respect of social security (e.g. payment of fines, liability for all costs made in respect of the illegal labour migrant by the social security system)?

We would like the collaborating states to consider in their answers both the actual state of their legislation as well as plans to alter this situation.

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