



PLATFORM FOR INTERNATIONAL COOPERATION ON UNDOCUMENTED MIGRANTS

**PICUM's Comments on the Communication from the Commission on
"Policy priorities in the fight against illegal immigration of third-country nationals"
COM (2006) 402 final**

PICUM, the Platform for International Cooperation on Undocumented Migrants, is a non-governmental organization that aims to promote respect for the human rights of undocumented migrants within Europe.

PICUM promotes respect for the basic social rights of undocumented migrants, such as the right to health care, the right to shelter, the right to education and training, the right to a minimum subsistence, the right to family life, the right to moral and physical integrity, the right to legal aid, and the right to fair labour conditions.

PICUM is based in Brussels and works as a network of approximately 2,400 civil society organizations and individuals operating in 13 countries. Its monthly newsletter on issues affecting undocumented migrants is produced in seven languages and circulates to its network supporters and further.

1. Why should undocumented migrants not be referred to as "illegal" migrants?

In referring to migrants without a valid residence permit, PICUM prefers the use of the term "undocumented migrants" (or alternatively "irregular migrants"), as opposed to "illegal migrants."

The use of the term "illegal" can be criticized for three reasons: 1) due to its connotation with criminality, and most undocumented migrants are not criminals; 2) defining people as "illegal" can be regarded as denying them their humanity; and 3) labelling "illegal" asylum seekers who find themselves in an irregular situation may further jeopardize their asylum claims.¹ It has also been argued that "a human being can never be 'illegal,' as otherwise the right of everyone 'to recognition everywhere as a person before the law' would be violated."² PICUM underlines the position that is increasingly being taken by a multitude of non-governmental organizations, local authorities, professionals from diverse fields, and undocumented migrants themselves, and reaffirms what the NGO Solidar has stated in its comments on the same communication, that "both from a juridical and an ethical point of view, no human being can be considered illegal."³

¹ See Khalid Koser, "Irregular Migration, State Security, and Human Security," Paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration, September 2005 (<http://www.gcim.org/attachements/TP5.pdf>) at p. 5.

² See Ryszard Cholewinski, "Identifying and Clarifying Concepts on 'Irregular' Migration," Paper presented at the 10th Regional Conference on Migration, Migrant Forum in Asia and Singapore National Trade Union Congress, 6-7 November 2006 (<http://www.mfasia.org/mfaResources/RCholewinski-Concepts.pdf>) at p. 4.

³ See Solidar, "Irregular migrants have rights: Solidar Position on the European Commission Communication on illegal immigration: a rights-based approach to the question of irregular migration" (www.solidar.org).

International organizations such as the International Labor Organization (ILO) and the International Organization for Migration (IOM) specifically refrain from using the term “illegal” when referring to undocumented migrants. In recently adopted policy measures, some regional organizations have expressly referred to the rights of “irregular migrants” or “undocumented migrants”: the Council of Europe adopted a resolution in June 2006 on the human rights of *irregular migrants*, in which it states that it “prefers to use the term ‘irregular’ migrants,”⁴ and the Association of Southeast Asian Nations (ASEAN) signed a declaration in January 2007 on the protection and the promotion of the rights of migrant workers, in which it refers to the “migrant workers who, through no fault of their own, have subsequently become *undocumented*.”⁵

Recommendation:

PICUM recommends the various European Union bodies to adopt language that is consistent with the standards set by international and regional organizations and many civil society actors in referring to undocumented migrants, and refrain from terminology such as “illegal migrants” and “illegal migration.”

2. “Fundamental rights must be protected and promoted.”

While it has been estimated that there may be from 5 to 8 million undocumented migrants in Europe,⁶ the latter largely remain invisible in the eyes of policy makers. This situation puts enormous strain on local actors such as NGOs, health care and educational professionals, and local authorities, who often work with limited resources to defend undocumented migrants’ fundamental rights, including the right to health care, education and training, fair working conditions, and housing. These local actors are confronted on a daily basis with situations in which they witness that irregular legal status is an obstacle for a sizeable part of the population in accessing basic social services. Professional groups experience clashes between what their professional ethics tell them to do and the incriminatory discourse regarding undocumented migrants.

PICUM welcomes the fact that the communication highlights the need to promote and protect undocumented migrants’ fundamental rights. Nonetheless, PICUM regrets that while “irregular migrants must be offered a humane and dignified treatment particularly as they are often victims of traffickers’ networks and exploited by employers,” there is no other mention in the communication of *what* these fundamental rights are, and *how* they can be protected and promoted.

2.1 Preventing social exclusion through access to basic social services: the example of health care

PICUM’s research and the experience of the organizations in its network have shown that there is a wide disparity amongst EU Member States concerning legal entitlements of undocumented migrants to basic social services. An example of this inequality is in the area of health care, where the following general observations can be made:

⁴ See Council of Europe, Parliamentary Assembly, Resolution 1509 (2006), *Human rights of irregular migrants* at point 7.

⁵ See Association of Southeast Asian Nations, ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, 13 January 2007 (<http://www.aseansec.org/19264.htm>), at point 2.

⁶ The report by the Global Commission on International Migration, *Migration in an interconnected world: New directions for action. Report of the Global Commission on International Migration (GCIM)*, October 2005 (<http://www.gcim.org/en/finalreport.html>), states that the Organization for Economic Cooperation and Development (OECD) has estimated that “between 10 and 15 percent of Europe’s 56 million migrants have irregular status, and that each year around half a million undocumented migrants arrive in the EU,” at p. 32.

- Some member states provide no subsidized health care to undocumented migrants, allowing access only on a payment basis (e.g. Sweden and Austria);
- Some member states (e.g. Germany) provide subsidized access in very limited cases but this access is overridden by civil servants' duty to denounce the irregular migration status to the immigration authorities;
- Some member states run parallel health care services for undocumented migrants, which can lead to an increased risk of stigmatization (e.g. France, Belgium and the Netherlands);
- Some member states offer free health care to undocumented migrants almost under the same conditions as nationals (e.g. Italy, Spain).

In addition to these wide discrepancies in legal entitlements, there is a general lack of clear-cut definitions and poor awareness amongst all actors concerned (local authorities, health care providers, NGOs, and especially undocumented migrants themselves) about entitlements to health care services.

The EU Social Protection and Social Inclusion Process constitutes the policy framework of a two-year project that PICUM is currently running on access to health care for undocumented migrants, with the financial support of DG Employment and Social Affairs. Since the first set of national action plans on social inclusion in 2001, EU member states have been constantly requested by the European Commission to adopt specific and effective measures to reach the objective of making "a decisive impact on the eradication of poverty and social exclusion" as it was agreed in the Lisbon Summit in 2000. Even if undocumented migrants are one of the groups facing the greatest risks of poverty and social exclusion in Europe today, almost no mention of their presence and marginalization has been made in the different National Action Plans (NAPs) on social inclusion so far.

Recommendation:

PICUM recommends that undocumented migrants be included as a specific target group in the Social Protection and Social Inclusion Process.

3. Addressing regularizations

To be able to develop coherent policies in the fields of migration, integration and employment, it is essential for policy makers to have an understanding of the socio-economic realities faced by undocumented migrants. Nonetheless, there is a general lack of both quantitative and qualitative data on undocumented migrants in Europe, including in the area of the various regularization measures undertaken by member states. PICUM thus welcomes the fact that the Commission has called for a study on current practices, effects and impacts of regularization measures in member states.

Many of the organizations in PICUM's network have provided advice and assistance to undocumented migrants during the course of regularization campaigns, and can testify to the numerous problems that arise when such measures are poorly designed and implemented. Building on this expertise, PICUM has formulated a set of recommendations for policy makers concerning regularization measures.

Recommendations:

PICUM recommends that regularization measures are designed and implemented taking into account the following:

- Regularization schemes should be devised in collaboration with all interested parties, such as NGOs and trade unions.
 - Clear, well-defined criteria should be established as to who qualifies for the schemes. The period in which applicants may apply should be long enough.
 - Undocumented migrants who have lodged a claim should not be at the risk of deportation during the procedure. Personal information in the application should remain confidential from enforcement authorities.
 - Employment and provision of social benefits should be available to claimants.
 - The application should be considered by an independent body rather than the competent ministry.
 - The law should provide a remedy to migrants whose applications have been rejected under the procedures.
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4. Protecting undocumented workers from exploitation and abuse

PICUM welcomes the fact that the communication recognizes that irregular employment can lead to serious exploitation and that this “cannot be tolerated in the European Union.”

There is a serious risk inherent in tolerating a situation in which a certain group of workers is denied their rights. Foreign workers and undocumented migrant workers have often been the experimental ground for the profound restructuring of the economic fabric and work models in Europe. The new orientation of capital-work relations can be described in two words: flexibility and externalization.⁷ All of the present trends of temporary work, precarious contracts, subcontracting, mobile schedules, dependency of employees and undeclared employees have all been tried out first on foreign workers.

Nonetheless, PICUM regrets that the communication predominantly focuses on employer sanctions as a way of addressing the issue of irregular employment, without further justifying and elaborating on ways to promote and protect the fundamental rights of undocumented workers. A rights-based approach should be a central tenet of how the EU addresses not only irregular migration but also irregular employment, since “recourse to the employment of migrant workers who are in an irregular situation will be discouraged if the fundamental rights of all migrant workers are more widely recognized.”⁸

4.1 Employer sanctions and the role of labor inspection

Paragraph 38 of the communication refers to some EU member states that have introduced penalties for employers who hire undocumented workers, and highlights measures that employers must take to make sure that a potential employee has work authorization:

⁷ See Alain Morice, “Migratory Policies and the Evolution of Work in the European Union: Where Undocumented Migrants Fit Into This System,” in Michele LeVoy, Nele Verbruggen and Johan Wets, eds., *Undocumented Migrant Workers in Europe* (Leuven: PICUM and HIVA, 2004), at pp. 25-26.

⁸ See “Preamble” in the International Convention for the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) (GA res. 45/158), 18 December 1990, entry into force: 1 July 2003.

Some Member States have taken measures further to a 1995 Council Recommendation on harmonizing means of combating illegal immigration and illegal employment and improving relevant means of control, including obliging employers to verify the immigration status of third country nationals before offering employment through checks with the authorities responsible for issuing residence and work permits.

PICUM is concerned that the above-mentioned measures of employer sanctions may cause discrimination of all workers. Federal employer sanctions have existed for more than twenty-one years in the United States, since the 1986 Immigration Reform and Control Act (IRCA) made it illegal for an employer to hire an undocumented worker. Experience there has shown that an unintended effect can be the increase in discrimination by employers of all “foreign” workers, including those with legal status: both the General Accounting Office and the U.S. Commission on Civil Rights have found that “employer sanctions contribute to discrimination against citizens and legal residents who look or sound ‘foreign,’” with the Commission on Civil Rights stating that “IRCA has caused at least ‘a pattern of discrimination,’ if not widespread discrimination.”⁹

While PICUM recognizes that targeting unscrupulous employers is one of the elements in the fight against irregular employment, it is likely that employer sanctions will create increased vulnerability of undocumented workers towards their employers if such measures are not coupled with ways that these workers can properly defend their rights. Heightened enforcement of employer sanctions will entail more inspections by enforcement officials and higher risks for employers who employ undocumented workers. It is very probable that undocumented workers themselves will pay the consequences of the enforcement measures, as they will increasingly be afraid of speaking out against their employers if the latter exploit or abuse them.

The role played by labor inspection in the fight against irregular employment is one that is crucial in upholding undocumented workers’ rights. Yet PICUM’s research with NGOs and trade unions that work closely with undocumented workers in Europe and in the United States underlines a number of challenges that impede labor inspection in effectively promoting fair working conditions for undocumented workers, including:

- Poor awareness amongst labor inspectors, undocumented workers, and those offering them assistance (e.g. NGOs, trade unions, local authorities) about the possibilities for filing an official complaint if the worker is exploited or abused by his/her employer.
- Lack of resources within the department of labor inspection:
 - to properly investigate all of the accidents and abuses encountered by undocumented workers;
 - to enforce case judgments requiring employers to pay the wages or other expenses owed the worker (one interviewee stated that “you can have a moral victory by winning the claim but then... no money. The money never sees the light of day.”);
- Incompetent and inefficient inspectors in some countries, even corruption.
- Inspectors who denounce a worker’s irregular migration status to the immigration authorities.¹⁰

⁹ See *The Immigration Reform and Control Act: Assessing the Evaluation Process* (1989), <http://www.law.umaryland.edu/marshall/usccr/documents/cr12r25z.pdf>, cited in National Employment Law Project, *More Harm Than Good: Responding to States’ Misguided Efforts to Regulate Immigration*, March 2006 (<http://www.nelp.org/docUploads/state%20anti%20immigration%20legislation%20guide.pdf>) at p. 6.

¹⁰ See PICUM, *Ten Ways to Protect Undocumented Migrant Workers*, 2005 (www.picum.org) at pp. 91-93.

Concerning the reporting of immigration status, in a recent survey on labor inspection carried out by a Committee of Experts in the International Labor Organization (ILO), the committee recalls that **“the primary duty of labor inspectors is to protect workers and not to enforce immigration law.”** The Committee elaborates further on the role of inspectors towards undocumented workers:

With the exception of a few countries, only the employer is held accountable for illegal employment as such, with the workers involved in principle being seen as victims. However, where the workers concerned are foreigners residing illegally in the country, they are doubly penalized in that, in addition to losing their job they face the threat of expulsion, if not actual expulsion. Nonetheless, the fact that labor inspection in general has the power to enter establishments without prior authorization allows it more easily than other institutions to put an end to abusive working conditions of which foreign workers in an irregular situation are often the victim, and to ensure that workers benefit from recognized rights. In these circumstances, the function of verifying the legality of employment should have as its corollary the reinstatement of the statutory rights of all the workers if it is to be compatible with the objective of labor inspection. This objective can only be met if the workers covered are convinced that the primary task of the inspectorate is to enforce the legal provisions relating to the conditions of work and protection of workers.¹¹

PICUM is concerned that the labor inspectorate in a number of member states of the European Union is obliged to report a worker’s irregular status to the immigration authorities. Not only does this seriously undermine the rights of undocumented workers, but also erodes the rights of workers in general, since unscrupulous employers will determine that they have much to gain by exploiting their workers due to the lack of enforcement of labor laws.

4.2 Undocumented workers’ protection in labor laws: theory versus practice

Tackling the issue of irregular employment should incorporate measures to strengthen undocumented workers’ rights. One way to uphold the fundamental rights of undocumented workers is to ensure that they have access to mechanisms for redress if they are exploited or abused by their employers.

PICUM’s research has shown that labor laws in a number of EU member states guarantee that fair labor conditions - embodied in the right to fair wages, safe and healthy working conditions, the right to organize, as well as the right to equality before the law – cover undocumented workers once they have entered into a labor relation with their employer. In recent years, industrial and administrative tribunals in some EU member states have issued rulings to award workers’ compensation to undocumented workers or their families when the worker was injured or killed on the job, and unpaid wages when the worker was not paid by the employer.¹² A novel case in Belgium also demonstrated that these rights can also be upheld even if a worker is deported to his/her country of origin.¹³

¹¹ See *General Survey: Labour Inspection, carried out by the Committee of Experts*, Report III (Part 1B), International Labor Conference, 95th Session (Geneva: ILO, 2006), (<http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-iii-1b.pdf>) at paragraph 78.

¹² Cases were highlighted in France, Germany, Portugal, Spain, and the UK. See PICUM, *Ten Ways to Protect Undocumented Migrant Workers*, 2005 (www.picum.org), pp. 74-90.

¹³ The Organization for Undocumented Workers (OR.C.A. <http://www.orcasite.be/>) has reported that the Social Inspection Unit of the Federal Public Service of Employer, Labor and Social Dialogue of the Brussels Capital Region succeeded in settling a case recently brought forth by an undocumented construction worker against his employer, which resulted in the worker’s unpaid wages subsequently being restored to him in Brazil after he had been deported from Belgium.

While labor laws theoretically extend protection to undocumented workers in some member states, the situation in practice is much different. The following are some of the main obstacles that prevent undocumented workers from effectively exercising their rights in the legal system:

- Fear of making a complaint:
 - Undocumented workers are often afraid to use official mechanisms to file a complaint, for fear that their irregular status might become known and would cause them to be deported.
- Lack of proof of employment:
 - If an undocumented worker decides to file an official complaint, they have to have proof to support their case. In the absence of a written contract, an undocumented worker has to provide other forms of proof of employment, a task which is not very simple.
- Lack of accountability of employers:
 - In many of the industries where undocumented workers experience exploitation and abuse, the use of a sub-contracting system makes it difficult to hold employers accountable, since workers may often be separated from the main employers by several degrees due to the different sub-contractors who are hired along the supply chain. Such a system allows employers to transfer the blame for alleged exploitation or abuse of workers to sub-contractors, who can avoid accountability through the use of false identification and incorrect contact information.
- Cost and length of time required to file a case:
 - Launching a case incurs many different costs, which undocumented workers are often unlikely to be able to pay. It is also not uncommon for workers who file claims to wait long time periods (in some cases, even years) before a judgment is passed, but in the meantime they have no guarantees of work or social benefits due to their irregular situation.

To ensure that undocumented workers can effectively defend their rights, they must have a guarantee that if they file a complaint against their employer, their situation of vulnerability will be treated in confidentiality and will remain the main focus of concern. This would entail that the worker would not be deported simply because s/he has dared to seek protection. Besides the aforementioned de-linking of immigration status with labor inspection, another means of ensuring that workers can defend their rights without being deported would be to issue a temporary “bridging visa” that would allow an undocumented worker who has been the victim of workplace exploitation to have a six-month temporary residence permit as well as access to basic social protection (e.g. emergency accommodation and payments) to bridge them into new employment. This proposal has been forwarded by the Migrants Rights Center Ireland (MRCI) in response to an increasing number of migrant workers alleging workplace exploitation and bringing action against their employers in Ireland, many of whom are undocumented and in a particularly vulnerable situation.¹⁴

4.3 Collecting information from workers in cooperation with NGOs

PICUM welcomes that the communication highlights the need to collect information “directly from undocumented workers in cooperation with NGOs” as a means to support policies to fight irregular employment.

¹⁴ See Migrant Rights Center Ireland (MRCI) “Access to Social Protection in Seeking Legal Redress Against Workplace Exploitation – A Potential Case Against Ireland Before the European Social Committee (European Social Charter)?” (www.mrci.ie)

Many civil society organizations (including both NGOs as well as trade unions) provide direct assistance to undocumented workers who are exploited or abused by their employers, and thus have acquired a fair share of expertise about the labor conditions in the different sectors in which these workers are employed, the legal and other means available for undocumented workers to seek redress, as well as the way in which irregular migration status impacts these workers' general living conditions in EU Member States. PICUM asks for more clarification on what type of information and which NGOs are envisaged, and also a guarantee that these civil society organizations will not be penalized or criminalized for providing humanitarian assistance to undocumented workers.

Recommendations:

To ensure that the fundamental rights of undocumented workers remain a key tenet of how the EU addresses irregular employment, PICUM recommends the following:

- Safeguard the right to equality before the law, by ensuring that undocumented workers' irregular status does not obstruct them from filing complaints against unscrupulous employers in labor or administrative courts.
- Safeguard the right to organize by law, by ensuring that legislation is unbiased and does not exclude undocumented workers from exercising the right to join a trade union.
- Strengthen the role of labor inspection in its primary duty of protecting workers and not enforcing immigration law, by:
 - De-linking immigration status with workplace inspection, to ensure that undocumented workers can safely file a complaint against an abusive employer without being threatened with deportation or without being deported.
 - Investing in training and awareness-raising measures to inform labor inspectors, undocumented workers, and those offering them assistance (e.g. NGOs, trade unions, local authorities) about the possibilities for filing an official complaint.
- Strengthen the capacities of civil society (e.g. NGOs, trade unions, professionals from diverse fields) to continue to provide expertise concerning undocumented workers' living and working conditions by:
 - Ensuring that they are not penalized or criminalized for providing assistance to undocumented workers.
 - Allowing them to maintain a relation of confidentiality and trust with undocumented workers, by not obliging them to reveal sensitive personal data and/or data about their workplace without the worker's agreement.
- Ratify the International Convention for the Protection of the Rights of All Migrant Workers and the Members of Their Families (1990), which reiterates a number of rights applicable to migrant workers and their families, including various rights applicable to undocumented workers.

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