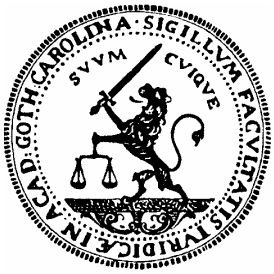

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Unwanted and Unprotected: the Right to Join Trade Unions for Irregular Workers in Sweden

Master thesis
30 points

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Contents

Summary

The notion of human rights is built on the fact that they are universal rights and thus applies to everyone without exceptions. Despite this irregular workers are denied their labour rights and their human rights due to the fact that they are living in a country unlawfully. The states use methods as regularizing irregular migrants or enabling tougher sanctions against irregular migration in order to decrease the number of irregular workers. The focus needs to shift from labeling irregular workers as an immigration problem to seeing it as a labour question. The demand for cheap labour pulls the irregular migrants to the EU and to Sweden. If the only way to ensure human rights is to be a citizen of a country then the terminology needs to change from human rights to citizen rights.

There are some human rights that are so important that they are seen as fundamental human rights and this thesis deals with three of them: the access to justice, the right to join trade unions and the freedom from discrimination.

People that enter countries without permission and in search of work often end up sacrificing their human rights in the pursuit of a better life. They are particularly vulnerable because they often lack protection. If they complain to the state in which they are unlawfully residing about maltreatment, it will lead to expulsion and if they complain to their employer it will probably lead to termination of employment. The traditional legal channels are therefore not an option for them in realizing their rights.

The access to justice is at the core of all human rights since it is a precondition of actually realizing them. In international law, as in any other legal system, respect and protection of human rights can be guaranteed only by the availability of effective judicial remedies. Access to justice in not only limited to improving or even enabling the access to courts but also includes ensuring that the outcomes of the decisions are just. Universal rights should be applicable to all and they are not sufficient if they cannot be granted in reality.

Trade unions are organizations of workers who have come together in order to improve their working conditions. They fill a key role in protecting workers in general and can fill a key role in protecting irregular workers in specific. In many countries, and particularly in Sweden, the rights for workers in general are protected through trade unions. In addition to that the access to justice is mainly exercised through the trade unions. Despite the growing numbers of irregular workers, they are in general not allowed to join trade unions and with that fact, their access to justice is challenged. There is however a right to join trade unions for irregular workers even if they are currently both unwanted and unprotected.

Sammanfattning

Mänskliga rättigheter bygger på principen om att de är universella och tillfaller alla människor utan undantag. Trots detta förvägras irreguljära migranter sina mänskliga rättigheter på grund av att de verkar olagligt i ett land. Stater använder metoder som amnestier och sanktioner för att minska antalet irreguljära migranter. Fokus måste förändras från att se irreguljära migranter som ett migrationsproblem till att se det som ett arbetsmarknadsproblem. Efterfrågan på billig arbetskraft gör att alltfler irreguljära migranter kommer till EU och till Sverige. Om vi då bara kan försäkra mänskliga rättigheter för våra medborgare borde själva terminologin förändras från mänskliga rättigheter till medborgerliga rättigheter.

Det finns de mänskliga rättigheter anses vara viktigare än andra, fundamentala mänskliga rättigheter som utgör grunden för de andra mänskliga rättigheterna och den här uppsatsen behandlar tre av dem: rätten till rättvisa, rätten att gå med i fackföreningar samt frihet från diskriminering.

Människor som vistas in länder utan att ha tillstånd till det och männsikor som arbetar i länder utan att ha tillstånd för det offrar ofta alla sina mänskliga rättigheter i strävan efter ett battre liv. De är särskilt sårbara eftersom de saknar ett rättsligt skydd. Om de kräver sina rättigheter av staten riskerar de med all sannolikhet att bli utvisade och om de kräver sina rättigheter från sina arbetsgivare kommer det förmodligen sluta med att de blir av med sin försörjning. Därför är de traditionella rättsliga möjligheterna, för att nå rättvisa inte ett alternativ för att förverkliga deras rättigheter.

Rätten till rättvisa är en fundamental rättighet därför att den är en förutsättning för att förverkliga alla rättigheter. I internationell rätt och i alla andra juridiska system kan skyddet av olika rättigheter endast tillförsäkras genom möjligheten till rättslig prövning. Rätten till rättvisa omfattar inte endast tillgången prövningar av en sak utan även tillförsäkran om att utgången av prövningen kommer att vara rättvis. Universella rättigheter skall vara tillförsäkrade alla och är otillräckliga om de inte kan förverkligas i praktiken.

Fackföreningar är till för att samla arbetare för att tillsammans förbättra sina möjligheter. De fyller en nyckelroll i samhället genom att skydda arbetagare från exploatering och de kan komma att fylla en nyckelroll i skydder för irreguljära migranter. I Sverige används fackföreningarna för att skipa rättvisa på arbetaplatser i högre utsträckning än domstolar. Men trots det ökade antalet irreguljära migranter har de fortfarande inte full möjlighet att bli medlemar i fackföreningarna. Det är trots allt en rättighet att gå med I en fackförening, även för irreguljära migranter.

Preface

I carry your heart with me

I carry your heart with me (I carry it in my heart) I am never without it (anywhere I go you go my dear: and whatever is done by me is your doing my darling)
I fear
no fate (for you are my fate my sweet) I want
no world (for beautiful you are my world, my true)
and it's you are whatever the moon has always meant
and whatever a sun will always sing is you

here is the deepest secret nobody knows
(here is the root of the root and the bud of the bud and the sky of the sky of a tree called life: which grows higher than the soul can hope or mind can hide) and this is the wonder that is keeping the stars apart

I carry your heart in my heart (I carry it in my heart)

By e.e. cummings

This thesis is primarily dedicated to the unwanted and unprotected worker. You are not invisible to me. Then I dedicated it to every person who strives to change their lives despite all the obstacles on the way, to all human beings who strive to do better and be better. In addition to that, it is dedicated to all the human beings that support other people on their path to personal fulfilment. This thesis is dedicated to all of you whose hearts I carry in mine. To my family who has supported me throughout everything (a special thanks to my mother, moja majka, my brother and my sister for being there for me from the very beginning). To all my incredible friends (especially from my group at RWI and to my girls; you know who you are). My world would stop moving without you. And finally a special thanks to my adviser Andreas Inghammar, for the valuable inputs you have offered during the process of writing this thesis.

Abbreviations

AD	Swedish Labour Court Case
C87	The ILO Convention No. 87 of 1948 concerning Freedom of Association and Protection of the Right to Organize
C97	ILO Convention No. 97 of 1949 concerning Migration for Employment (revised)
C98	ILO Convention No.98 on the Right to organize and Collective Bargaining
C111	ILO Convention No. 111 of 1958 concerning Elimination of Discrimination (employment and occupation)
C143	ILO Convention No. 143 of 19756 concerning Migrant Workers (Supplementary Provisions)
CAT	Convention against torture or other cruel, inhuman or degrading treatment.
CEDAW	Convention on Elimination of all forms of discrimination of women
CRC	Convention of the Rights of the Child
COE	Council of Europe
ECHR	European Convention on Human Rights
EMW	European Convention on Legal Status of Migrant workers
EU	European Union
ESC	European Social Charter
Eur. Ct. H.R. Ser. A	Publications of the European Court of Human Rights, Serier A: Judgements and Decisions
GA	UN General Assembly
GCIM	Global Commission on International Migration
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICMW	International Convention on the protection of the Rights of All Migrant Workers and Members of their families
ILO	International Labour Organization
LAS	The Swedish Employment Protection Act (1982)
LRA	The Swedish Judicial Procedure in Labour Disputes Act
LO	Swedish trade union confederation
MBL	Swedish Labour Co-Determination Act
NGO	Non-Governmental Organization
RF	The Swedish instrument of Government

VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 Background to the topic

”All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. “

- Article 1 of the Universal Declaration of Human Rights.

I was 16 years old when I first noticed them, the ones I would later refer to as the invisible. I had walked passed them a thousand times and not noticed them before but after I had met one of them, I saw them everywhere. Media refers to them as illegal immigrants or undocumented migrants but to me they are just invisible people on refuge. My first encounter with an irregular worker put me in a moral position of choosing whether or not to report the employer he was working for. The employer was obviously taking advantage of his irregular status since he was paid a lot less then I would have been paid, doing the same work as he did. However, reporting the employer would most definitely get the irregular worker deported but I could not stand to hear about the obvious maltreatment that the he was subjected to. I never had to make a choice in the end, since he moved away from my town to a smaller one, in order to get a better-paid job. But the knowledge of the invisible has haunted me at various occasions. I have the last years heard stories about and by irregular workers and their experiences on the labour market. These stories have left me wondering if and what labour rights an irregular person can claim and most importantly how they could claim their rights.

The world has changed since the Universal Declaration of Human Rights was first written. Due to many, mainly economical, reasons people migrate between countries, with or without permission. People that enter countries without permission and in search of work often end up sacrificing their human rights in the persuasion of a better life. They are particularly vulnerable because they often lack protection. If they complain to the state in which they are unlawfully residing about maltreatment, it will lead to expulsion and if they complain to their employer it will probably lead to termination of employment. They have nowhere to turn in order to get help and protect their rights as workers. Often they do not even know that they have rights to claim.

In many countries, and particularly in Sweden, the rights for workers in general are protected through trade unions. In addition to that the access to justice is mainly exercised through the trade unions. Despite the growing numbers of irregular workers, they are in general not allowed to join trade unions and with that fact, their access to justice is challenged.

1.2 Subject and purpose

There are some principles, within the sphere of human rights, which are more fundamental than other. This thesis will deal with three of those fundamental human rights: the access to justice, the right to join trade unions and the freedom from discrimination. Thus, this thesis is to take a closer look at the laws (international, regional and national) that regulate these principles. The reason for me choosing these three rights is that they are closely intertwined and all depend on each other from an international labour law perspective. The access to justice is essential in realizing ones labour rights and often closely linked to the right to join trade unions. In order for all, including irregular workers, to have access to justice the freedom from discrimination has to be respected.

The questions that this thesis will deal with are if irregular migrants in general and irregular workers in specific are included within the human rights sphere. What do the fundamental rights such as the freedom of discrimination, access to justice and right to join trade unions entail and are they right that can be enforced by irregular workers? In Sweden, traditionally, the right to access to justice for workers is closely linked to the trade unions and yet the majority of the trade unions do not organize irregular workers. The aim is to try to define if and how human rights are applicable to irregular workers and if Sweden is living up to its human rights obligations.

1.3 Methodology

This thesis will first and foremost list the legal framework that applies to Sweden from a human rights perspective. It will then deal with the three rights: the access to justice, the right to join trade union and the freedom from discrimination. In order to have some structure the discussion about each right will be done individually starting with the international provisions, then the regional provisions and finally the national provisions that regulate the same principle. Jurisprudence that affects the different rights will be dealt with under the respective right.

Since this thesis will deal with national, regional and international legal systems the hierarchy of sources of law will shift depending on which legal system that is explored. The different methods of valuing legal resources will naturally affect what sources I use when discussing the different legal framework. The Swedish legal system values the factual written law the highest and after that the travaux préparatoires or the jurisprudence. In which order the jurisprudence and travaux préparatoire are valued is a debated issue; if the travaux préparatoires are old more value is given to the jurisprudence and vice versa. Finally the legal doctrine is considered. [1]

[1] European Judicial Netweok in civil and commercial matters available at http://ec.europa.eu/civiljustice/legal_order/legal_order_swe_sv.htm (last accessed 2009-09-04 21:08)

The European Laws hierarchy of sources of law lists the community treaties as the most important legal source the so called primary law and then all the decisions that amount from these treaties as secondary law. The jurisprudence is also given a higher value than within the national system since the European Court can develop legal principles in areas where the primary and secondary legal sources within the EU do are ambiguous or nonexistent. [2]

The hierarchy of sources of law within the international legal framework is listed in art 31 of VLCT. It lists the factual agreement as the most important source and thereafter travaux préparatoires and legal doctrine. Art 53 of the VCLT mentions international legal principles that are derived from customs of states which are binding on all states, irrespective if they have signed a treaty or not.[3]

After dealing with the different principles, the situation for irregular workers within the trade unions in Sweden will be dealt with. In order to provide a bigger picture there will also be a chapter dealing with irregular migration and how Sweden has responded to the ongoing debate of preventing irregular migration. Finally the last chapter will entail my personal conclusions and recommendations.

1.4 Sources

This thesis is based on literature, primary and secondary sources, including articles and government reports. Jurisprudence will also be used to showcase the rights that are dealt with. At the heart of this thesis are legal instruments and doctrine concerning irregular migrants. In order to include the ongoing debate on organizing irregular workers in Swedish trade unions, articles from the media will also be used.

1.5 Delimitations

This thesis will focus on the rights of irregular migrant workers and the challenges that they face due to their irregularity. It will not deal with additional discrimination grounds such as sex or sexuality. Even though the focus is on Sweden jurisprudence concerning other countries will be used to exemplify the legal provisions mentioned. This thesis will not deal with in depth with the different ways of entering Sweden or the European Union

[2] Summaries of EU legislation available at: http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l14534_sv.htm (last accessed 2009-09-04 20:58)

[3] Navia-Nieto, Rafael, International Peremptory norms (jus cogens) and International humanitarian law, downloaded from: http://www.google.se/url?sa=t&source=web&ct=res&cd=3&url=http%3A%2F%2Fwww.iccnow.org%2Fdocuments%2FWritingColombiaEng.pdf&ei=42ihSrKUGpDZ-QaIybD7Dw&rct=j&q=jus+cogens+norms&usg=AFQjCNE7Resv5JyqU9cZkGA6MEfJG7ftwQ (last accessed 2009-09-04 21:25)

nor the legal framework concerning trafficking. This thesis will focus on the (human) rights that the irregular worker has when he or she has entered Sweden.

1.6 Defining Illegal/undocumented/irregular migrants

There are a lot of terms used to describe persons living in a country without legal authorization. They are often referred to as illegal, undocumented or irregular. The term "illegal migrants" is commonly used by media but is nowadays not as often used in legal doctrine since the label connects the migrant to criminality. An "illegal" migrant might have entered the country on a legal basis but then overstayed the visit, so the term is very misleading.[4] Former UN Special Rapporteur on the Rights of Non-citizens David Weissbrodt stated in his final report that "immigrants…even those who are in a country illegally and whose claims are not considered valid by the authorities, should not be treated as criminals".[5] So the term is misleading in more than one way since it somewhat labels the immigrants as criminals.

As early as in 1975, the UN General Assembly requested its organs and specialized agencies "to utilize in all official documents the term 'non-documented or irregular migrant workers' to define those workers that illegally and/or surreptitiously enter another country to obtain work."[6] "Undocumented migrants" is also a commonly used term but can also be misleading since it gives the illusion that these people do not have their identity papers. Most migrants have some sort of documents and sometimes use them to enter a country lawfully but overstay the permit. In addition to that migrants can also use false documents in order to enter the country, thus having documents even though they are false.[7]

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". This thesis will use the term "irregular migrant" to describe all immigrants, that are often clustered together under the alternative headings of unauthorized, undocumented or illegal migrants, who are residing in a foreign country without permission.[8]

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[4] Khaled Koser, "International migration, state security and human security", page 5 available at http://www.gcim.org/attachements/TP5.pdf (accessed on the 15th of May 2009)
[5] Weissbrodt, David Final report of the Special Rapporteur, The rights of non-citizens, PREVENTION OF DISCRIMINATION, E/CN. 4/Sub. 2/2003/23 Para 2. Available at http://www1.umn.edu/humanrts/demo/noncitizenrts2003-add3.html
[6] General assembly, thirtieth session, 2433 plenary meeting, 9 December 1975, 3449 (XXX). Measures to ensure the human right and dignity of all migrant workers, p. 90, para 2
[7] Supra note 4
[8] Parliamentary Assembly, Report "Human rights of irregular migrants", committee on Migration, Refugees and Population, COE Doc. 10924, 4 May 2006, page 2, art A7,

1.6.1 Defining irregular workers

This thesis will deal with irregular migrants in general but with irregular migrant workers in specific and therefore there is a need to define who the irregular migrant workers are. According to article 5 of the ICMW irregular workers are those who are not authorized to enter, stay or to engage in remunerated activity in the State according to the state's law and to international agreements. In short irregular migrant workers are irregular migrants who work without a permit to do so.

In order to work in Sweden there is a requirement to have a work permit according to chapter 2 section 7 of the Swedish Aliens Act (hereinafter referred to as the Aliens Act).[9] If a worker has a residence permit there is no need for a work permit according to chapter 2 section 8 of the Aliens Act. It is necessary to obtain the work permit before entering the country according to chapter 6 section 4 of the Aliens Act. An irregular worker, in this thesis, is therefore a person that is working in Sweden without a work permit and therefore in violation of Swedish law.

1.6.2 Reasons for irregular migration

A migrant can become irregular in numerous ways. The worker can initially have permission but chose to stay in the country after it expires. Some migrants have entered the country in an irregular way such as smuggling or trafficking. Others have had their residence applications denied and chosen to stay despite that.[10]

The reasons for migration in general are as diverse as the migrants themselves and the reasons for irregular migrants generally do not differ from the reasons of regular migrants. The majority of migrants leave their countries in order to pursue a better life. Factors involved can be everything from war to poor economic conditions. [11]

There are, in addition to the factors that "push" migrants to leave their countries, factors that "pull" them to certain countries. Developed countries are struggling with low birth rates and an ageing population and therefore the demand for workers in the European Union (and other developed countries) attracts migrants from all over the world. In the beginning of this millennium the UN concluded the then 15 member states of the European

[9] The SwedishAlien Act (2005:716) is available at: http://www.regeringen.se/sb/d/5805/a/66122 accessed on the 15th of May 2009.
[10] Global Commission on International Migration (GCIM), *Migration in an Interconnected World: New Directions for Action. Report of the Global Commission on International Migration*, 5 October 2005, available at: http://www.unhcr.org/refworld/docid/435f81814.html, chapter three, page 32
[11] Ibid. page 33

Union would need approximately 40 million migrants by 2050 to maintain the sizes of their populations. The lack of workers might endanger the welfare systems of many developed states in the near future.[12] The former vice-president of the European Commission Frattini stated in a speech that ”the new key message is: Europe will need more migration, since labour and skills shortages are already noticeable in a number of sectors and they will tend to increase”.[13] In Sweden the mortality rates will be higher than the birth rates by the year 2030 and the state will be in need of immigrants earlier than that in order to preserve its welfare system. [14]

The sectors of work that demand irregular workers are the least regulated sectors such as industrial workers, agriculture and construction. The reason for this is that they are the sectors of work that are hard to control for the authorities and for the trade unions. Irregular workers often work in dangerous environment without any protection and they are doing the work and receiving the payment that hardly anyone else would accept.[15]

Irregular workers function as a labour reserve that can be dispensed with when it is no longer needed which benefits both employers and the welfare state. The demand has somewhat, temporarily, decreased since the financial crisis and this validates that the “pull” factors are extremely important when it comes to irregular migration. In the midst of the recession world’s migrant workers are losing their jobs and some find no other option but to return home to poverty.[16] The majority of irregular migrants are however not returning home since they know that they will not be able to return when they are needed in the labour force again. [17]

In general the demand for workers combined with the lack of legal opportunities to migrate has increased the number of irregular migrants. The migration policies are increasingly getting tougher which does not leave migrants who wish to enter the EU, or other developed countries, many ways to enter legally. The irregular migrants are, due to their illegal residence, a hidden population and there is little reliable statistical data on how many they are. There is however a vague estimation that they constitute about 10-15% of all migrants in the world. [18]

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[12]The Human Rights of Irregular Migrants in Europe, CommDH/IssuePaper(2007)1, 17 December 2007, section I para ii available at: https://wcd.coe.int/ViewDoc.jsp?id=1237553&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679#P162_18999 (4th of may 2009 13:14)

[13] Speech at Harvard university. 7-11 2005, cited in Bureau of European policy Advisers (BEPA) European Commission, Migration and public perception, 9 october 2006, page 3

[14] http://www.dn.se/nyheter/sverige/utan-invandring-skulle-befolkningen-minska-1.865372 [without immigration the population would decrease], published 2009-05-13, Dagens Nyheter

[15] Mattsson, Krisitina (2008); De papperslösa och de aningslösa, p. 57

[16] Schuman, Michael; “ On the road again,” Time vol. 173, no. 17, April 27th 2009,page 21

[17] Thornburgh, Nathan, “Undocumented and undeterred” , Time vol. 173, no. 17, April 27th 2009, page 24

[18] Supra note 12

1.7 State soverignty and the need for immigration control

The idea of state sovereignty is that the states possess authority over their territory and with that the control over who can enter the territory. Even though the idea of universal human rights has been firmly accepted, at least in principle, by almost all states, the application of human rights to irregular migrants has been unsuccessful. Because control over immigration is characterized as essential to a nation's sovereignty the irregular migrants pose a challenge to the "core" of the state. [19] And the sovereignty has indeed been challenged the last years by a growing number of immigrants who have entered countries without the permission of the state.

International law leaves the decision whether to penalize irregular migration to the states. It is up to every country to define "illegal employment" since employment laws in general are a national matter.[20] Some international regulation does mention it e.g. art 3 of C143 which requires states to adopt all necessary and appropriate measures to suppress illegal employment of migrants. Art 6(1) of C143 further explains that national regulation or laws are needed in order to detect illegal employment. One way to achieve this is to have a work permit system, which could be used to verify if the worker is authorized to work. [21]

The European Union is restricting the possibilities for immigrants to enter the union in its "proposal for sanctions against employers of illegally staying third-country nationals". It wants to reduce the pull factor consisting of the possibility of finding work within the EU by targeting the employment of irregular migrants. The Commission proposal states that the proposal complies with fundamental human rights since it does not affect third-country nationals' rights as workers, such as the right to join a trade union. The commission proposal makes clear already at the outset that "the proposal is concerned with immigration policy, not with labour or social policy".[22] But, one could argue that one is connected to the other.

Sweden already criminalizes employment of persons, in addition to criminalizing the irregular workers, who do not have a work permit according to Chapter 20 section 5 in the Aliens Act. The current integration

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[19] Jabukowski, Laura; I*nternational commerce and udocumented workers: using trade to secute labor rights*, p. 510

[20] ILO report C87 III (1b), 87th session, Geneva, June 1999 available at http://www.ilo.org/public/english/standards/relm/ilc/ilc87/r3-1b4.htm para. 346.

[21] Ibid. para. 349.

[22] Proposal for a Directive of the European Parliament and of the council providing for sanctions against employers illegally staying third-country nationals, COM (2007) 249 p. 2. and COM (2005) 391 final. Available at http://docs.google.com/gview?a=v&q=cache%3A4PqldOfsw6AJ%3Aeur-lex.europa.eu%2FLexUriServ%2FLexUriServ.do%3Furi%3DCOM%3A2007%3A0249%3AFIN%3AEN%3APDF+COM+(2007)+249+p.+2.+and+COM+(2005)+391+final&hl=sv&gl=se&pli=1 (last accessed on the 090707 10:12)

minister Nyamko Sabuni declared the position of the current government when she said that ”I think it is sad that there are people who are living like that, but on the other hand it is the choice of grown human beings. You chose to stay yourself, and then you have created a problem for yourself, I realize that too”. [23]

The financial crisis has caused states to cling on to the state sovereignty even tighter and the protectionism against the international movement of people has increased. Politicians are trying to preserve jobs for their own nationals by imposing even harder restrictions on imported labour.[24] It is however crucial that the protectionism does not shadow the human rights obligations that states have.

[23]Kritik mot integrationsministerns uttalande om papperslösa (Criticism against the statements by the integration ministers statements concerning undocumented persons), 16th of june 2007, available at http://www.dennaonsdag.org/Denna%20Onsdag/Press/4899B40E-8CBF-466C-8911-DBD413A793AA.html (last accessed 090502 15:17)
[24]supranote 17

2 Legal framework

”Human rights and fundamental freedoms are the birthrights of all human beings; their protection and promotion is the first responsibility of Government”
Vienna Declaration and Programme of Action 1993

2.1 UN Human rights documents

There are many human rights documents and some of them are considered to constitute core human rights treaties since they are widely ratified. The ones that are particularly important in for irregular migrants already residing within a country are the UDHR, ICCPR, ICESCR, CERD and ICMW. All of the mentioned treaties, except for the ICMW, are binding for Sweden. Sweden has a dualistic approach to human rights, which means that domestic law and international law are seen as two separate legal structures. This also leads to the fact that international treaties are not directly applicable in Swedish courts. However, Swedish law is to be interpreted by courts as to agree with the international obligations that Sweden has.[25]

2.1.1 The International Convention for Migrant Workers and their families

The International Convention for Migrant Workers and their families (hereinafter referred to as ICMW) [26] is a very important instrument for the protection of irregular and regular workers and their families from exploitation and the violation of their human rights. It entered into force on the 1rst of July 2003. There were many campaigns[27] in order to promote the convention and even the European Parliament has in a resolution called for the ratification of the ICMW by the member states of the EU. [28] Despite this the convention is not binding for any country within the European Union since no European country has ratified it.[29] The ratifying states are also in general the sending states of migrant workers.

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[25] SOU 1993:40, part B page 25.
[26] International Convention on the protection of the rights of all migrant workers and members of their families, G.A. Res. 45/158, Annex, U.N. Doc. A/RES/45/158/Annex (Dec. 18, 1990)
[27] The Global Campaign for Ratification of the Convention on Rights of Migrants http://www.migrantsrights.org/
[28] European Parliment resolution on the EU’s priorities and recommendations for the 61rst session of the UN Commission on Human Rights in Geneva (14th March to 22 april), 24th February 2005, P6_TA-PROV(2005)0051, para 22. Available at: http://www.europarl.europa.eu/sides/getDoc.do;jsessionid=708814A5B7C669CD614CFDBDB3A8AFF0.node2?language=EN&pubRef=-//EP//TEXT+TA+P6-TA-2005-0051+0+DOC+XML+V0//EN accessed on the 16th of May 2009
[29] 41 countries have signed and ratified the convention, the latest being Nigera the 18th of march 2009 aavailable at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en (accessed in 090415 18:34)

The ICMW will, even if it is not binding on Sweden, be referred to in the thesis in order show an alternative to the current human rights documents that are binding for Sweden. In addition it serves as useful gauge since the reason for Sweden not ratifying the convention is that it considers that it already offers an adequate protection for all the rights within the ICMW.

The ICMW takes human rights a step further and prioritizes human rights over state sovereignty. Part III of the conventions is based on the principle of non-discrimination with respect to the rights of national and aliens (regardless of the status of the latter). The protection of irregular workers is one of the biggest reasons to why many countries are unwilling to ratify the Convention. [30] The position on whether or not to ratify the convention does not seem to differ in European countries depending on the political views. [31]

2.2 ILO Fundamental Principles and Rights at work

The ILO was founded in 1919 and its convention states that it shall protect workers including workers who are "in another country than their own". The international Labour Conference adopted the ILO Declaration on Fundamental Principles and Rights at work in 1998[32]. The ILO launched a successful campaign and the Declaration and its conventions are widely ratified.[33] Sweden has ratified all Conventions. [34] However, the fundamental principles and with that Conventions are binding for all member states of the ILO even if they have not ratified the Conventions as a consequence of the membership. The member states have an obligation to respect, to promote and to realize all the fundamental conventions. The conventions, which are relevant to this thesis, are those connected to the freedom of association and the effective recognition of the right to collective bargaining and the elimination of discrimination in respect of employment and occupation and the recommendations concerning those conventions.[35] The principles should be applicable equally to all workers regardless of migration status.

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[30] ICMW, travaux preparatoires of part III of the Convention) p. 1 available at: http://www2.ohchr.org/english/issues/migration/taskforce/legal.htm accessed on the 15th of May 2009

[31] Cholewinski; Ryszard; MacDonald, Euan: "The migrant workers convention in Europe" p. 21

[32] International Labour Organization (ILO), *ILO Declaration on Fundamental Principles and Rights at Work*, June 1988. Online. UNHCR Refworld, available at: http://www.unhcr.org/refworld/docid/425bbdf72.html [accessed 13 May 2009]

[33] International Labour Conference, 92nd Session, 2004, Report VI, Towards a fair deal for migrant workers in the global economy,Sixth item on the agenda S. 72

[34] http://www.ilo.org/ilolex/english/docs/declEU.htm accessed on the 13th of May 2009 19:53

[35] Elimination of Discrimination (employment and occupation), 1958 (No.111); on Freedom of Association and Protection of the Right to Organise, 1948 (No. 87) and on the Right to Organise and Collective Bargaining, 1949 (No. 98)

In addition to the fundamental principles the ILO has adopted two different conventions concerning migrant workers; The Migration for Employment Convention, 1949 (hereinafter C97) and The Migrant Workers (Supplementary Provisions) Convention, 1975 (hereinafter C143) and the Migrant Workers Recommendation, 1975 (No. 151). C143 was the first multilateral agreement that deals explicitly with irregular migrants and provides minimum norms. Art 1 of the C143 obliges states to "respect the basic human rights of all migrant workers," independent of their migratory status or legal situation in the host state. 11 of the EU members have ratified both ILO Conventions and Sweden is one of the countries. [36]

2.3 Regional instruments

Sweden is a member of the EU and has transferred some of its legislative power to the EU. The EU has its own legal framework, which is both separate and integrated from international and national law. The community treaties are directly binding in all member states and all the adopted directives must be integrated into national law within a given period of time.[37] If there should ever be a conflict between national law and the community law, the community law prevails; this does not apply to human rights that are found within the Swedish constitution nor the ECHR according to 10:5 RF.[38]
All binding directives from the EU have to be derived from an article in an EU treaty, and in art 136 of the Treaty of Rome it states that one of the EU community's goal should be to improve the situation of workers. Art 137:5 states that the member states have not transferred the legislative power to the EU with regard to amongst other issues the freedom of association. This exclusion is merely a theoretical since the EU has indeed adopted directives that affect the freedom of association and other areas that should have been excluded according to art 137:5. Community law will therefore be included when it affects the legal human rights principles that are discussed in this thesis. [39] The legislative measures of the EU has an impact on national legal systems which later impact human rights obligations that the states have, it is therefore utterly important to mention the community laws when they impact the human rights issues discussed within the thesis.
The ECHR is according to art 6 (2) of the treaty on the European Union considered to be a part of the European Community. This means that the EU has to respect the human rights listed in the ECHR. The suggestions for a new EU constitution entail human rights within the constitution and if it should be included into an upcoming constitution; the human rights would be directly binding upon all the member states. [40] The ECHR is a part

[36] Sweden ratified the both conventions
http://www.ilo.org/ilolex/english/newratframeE.htm
[37] http://ec.europa.eu/civiljustice/legal_order/legal_order_ec_sv.htm (last accessed 090804 23:14)
[38] Supranote 15 p. 387
[39] ibid. 390 ff.
[40] Supranote 15 p. 31

incorporated in Swedish law and on the basis of the act (1994:1219) regarding the ECHR states that the convention shall be considered as law in Sweden. In chapter 2 art 23 of the Instrument of Government (Regeringsformen 1974) it is stated that no provision may be established that is contrary to Sweden's obligations due to the ECHR.
The European Social Charter (hereinafter ESC) deals with social and economical rights and has been in force since 1961. The European committee of social rights monitors the member states, which have ratified the ESC. The member states have to submit a report every year to it. Sweden has ratified both the ESC and the ESC (revised). [41]

2.4 Universal human rights

Universal human rights[42] are said to be rights that human beings have by their mere existence and that they function as limits on the state power since the state should not be able to deny them to anyone. The phenomenon is mentioned in the preamble of the UN Charter that states that it "reaffirms our faith in fundamental human rights, in the dignity and worth of human person, in the equal right of men and women and of nations large and small…"

The UN Charter states, in its purposes, that it shall promote and encourage "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion…" At the time the Charter was written the inclusion of human rights was radical because it marked a shift from an exclusive state jurisdiction towards an international protection of individuals. It was the start towards the notion that everyone should have the same fundamental rights and freedoms independent of the state's granting of that right. [43]

The Universal Declaration of Human Rights that is the first human rights document is said to be binding since it entails human rights principles that have become customary law. It states in its first article "all human beings are born free and equal in dignity and rights". The following articles in the declaration establish rights for "everyone" without any differentiation. It therefore claims universal human rights, which means that everyone is a

[41] http://www.manskligarattigheter.gov.se/extra/pod/?action=pod_show&id=4&module_instance=2 accessed on the 8th of August 2009 11:14
[42] Charter of the United Nations (Article 55(c)), Universal Declaration of Human Rights (Preamble), International Covenant on Civil and Political Rights (Article 2(1) and 2(2)), International Covenant on Economic, Social and Cultural Rights (Article 2(2)), International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Article 7), International Convention on the Elimination of All Forms of Racial Discrimination (Preamble), European Convention for the Protection of the Human Rights and Fundamental Freedoms (Article 1), European Social Charter (Preamble),
[43] Rhona. K. M. Smith, Textbook on international human rights, p. 25ff

holder of these rights by the virtue of being human. These rights are said to ”constitute the preconditions of a life in dignity”. [44]

The ICCPR[45] is built on the same idea as the UDHR and refers to rights for ”everyone” and ”all persons”. Article 2(1) of the ICCPR recognizes certain civil and political rights in “all individuals within its territory and subject to its jurisdiction” which based on the literate meaning would include irregular migrants. In a general comment that touches upon the human rights situation for aliens it is stated that “once the alien is within the country” or as the general comment puts it “allowed to enter the territory of a State” it has a right to all the rights under the ICCPR.[46] The interesting part about this general comment is the fact that it is unclear on the fact if human rights can be denied a person because he or she is not residing in the country lawfully. However in a more recent general comment it is stated that as soon as a person is physically in a state’s territory, the rights set out in the Covenant ‘must … be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons.”[47] “Other person” could be interpreted to include irregular migrants.

The ICESCR is also built on the notion that everyone within the state’s territory is the holder of fundamental human rights. And art 1(1) of the ICMW states that it is applicable to every migrant family without any distinction whatsoever.

When it comes to regional binding documents irregular workers fall within the jurisdiction of the State in which they are residing within the meaning of article 1 of the ECHR. The only regional human rights treaty applicable to all migrants irrespective of status on in the European Union is the ECHR.

The European Social Charter also applies within the EU but according to its appendix it is only applicable to foreigners who are residing lawfully within the territory. The European Committee on Social Rights has extended the personal scope of the European Social Charter to encompass vulnerable irregular migrants. [48] In a case concerning health care for irregular migrants the ESC states that the ESC is a complement to the ECHR and that the restrictions to the rights it encompasses should be restrictive. The right that was violated, the right to health was seen to have such a close link to the human dignity that it could not be violated, irrespective of the migration

[44] Tomuchat, Christian, Human rights – between idealism and realism, p. 58
[45] International Covenant on Civil and Political Rights, Dec. 16,1966, 999 U.N.T.S. 171, 6.I.L.
[46] http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/bc561aa81bc5d86ec12563ed004aaa1b?Opendocument, para 6
[47] HRC General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant : . 26/05/2004, para. 10 Available at: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument
[48] See European Committee of Social Rights, Complaint No. 14/2003, International Federation of Human Rights Leagues (FIDH) v. France (2003) available at http://www.escr-net.org/usr_doc/Committee_Social_Rights_Decision_Merits.pdf

status.[49] Even though the case extends the ESC to irregular migrants in some aspects, it was a close call since a violation was found 7-6 votes and it is not clear to what extent the scope has been extended.

2.4.1 Human rights and vertical effects (state vs. Individual)

Human rights primarily regulate the relationship between the state and its citizens. They are designed to protect the rights of the individual since most human rights violations usually are committed by a state. Therefore effective protection against human rights abuses must be regulated within national law. [50] States can chose whether or not to integrate their international human rights obligations in their national law or adapt existing national law so that it complies with the international human rights obligations of the state. Art 26 of the VCLT states that parties to a certain treaty are required to give effect to the obligations in good faith.

2.4.2 Human rights and the horizontal effect (individual vs. Individual)

International obligations of states do not often have explicit rights that effect horizontal relationships listed within them. There is still an obligation for the State to ensure that the obligation it has signed is respected and protect individuals from violations. Some human rights may also impose a positive obligation on the state to ensure the protection of individuals against other individuals. The state establishes laws that regulate the relationship between individuals and can therefore ensure that human rights are respected. This also means that there has to be a protection for the individual even against other individuals or entities.[51] Some rights are even practiced collectively such as the freedom of association and should be protected by the state for interference from other subjects than the state. The ECtHR has on different occasions recognized the applicability of the ECHR on the relationship between individuals.[52]

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[49] Ibid para 27-30

[50] International human rights in context, third edition, parte e, states as protector and enforcers of human rights s. 1087

[51] HRC General comment 31 art 8 http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument

[52] Eur. Court H.R., Case of Young, James and Webster v. The United Kingdom, (Merits) Judgement of 13 August 1981, Series A no. 44, paras. 48 to 65 “Mr James and Mr. Webster had previously worked at the British Railways Board but were fired when a “closed shop” agreement between the British Rail and three trade unions. This agreement meant that the employees had to be members of one of these three trade unions in order to keep their jobs. The applicants were not and therefore got fired. The ECtHR found that the U.K. had violated art 11 of the ECHR by allowing “closed-shop” agreements that has such serious outcomes.”; Eur. Court H.R., Case of X and Y v. The Netherlands, (Merits) Judgement of 26 March 1985, Series A no. 91, para. 23. “The Court recalls that although the object of Article 8 (art. 8) is essentially that of protecting the individual against arbitrary interference

3 Access to justice

"Justice denied anywhere diminished justice everywhere"

Martin Luther King

3.1 International legislation

The access to justice is at the core of all human rights since it is a precondition of actually realizing them. In international law, as in any other legal system, respect and protection of human rights can be guaranteed only by the availability of effective judicial remedies. Access to justice in not only limited to improving or even enabling the access to courts but also includes ensuring that the outcomes of the decisions are just. Universal rights should be applicable to all and they are not sufficient if they cannot be granted in reality. All human beings must be able to exercise and defend the rights they are granted. In many countries, the only way to realize human rights is to have a legal status. The courts have to be accessible to everyone and the international community has realized that there is a need to reform this right beyond being a formal right.[53]

In art 6 of the UDHR it is stated that there is a right to recognition before the law and in art 7 of UDHR it is stated that every person has the right to due process. In art 8 of the UDHR further provides that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by the law."

Article 14 of the ICCPR aims at ensuring proper administration of justice. It states that "all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law…" And art 16 of the ICCPR states "everyone shall have the right to recognition everywhere as a person before the law". In a HRC general comment it is explained that "The right of access to courts and tribunals and equality before them is not limited to citizens of States parties, but must also

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by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life ...These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves."

[53] Mauro ceppelletti, Access to justice and the welfare state,, Page 1 ff. available at http://books.google.se/books?id=nH-k5I-bpFMC&pg=PA1&lpg=PA1&dq=Mauro+cappelletti+Access+to+justice+and+the+welfare+state&source=bl&ots=caAcK24a6C&sig=LGunrv9TAMzibq3Jpn52rulCmIk&hl=sv&ei=32yjSpmODYX3-Ab66tTzDw&sa=X&oi=book_result&ct=result&resnum=1#v=onepage&q=Mauro%20cappelletti%20Access%20to%20justice%20and%20the%20welfare%20state&f=false (last accessed 090813 13:50)

be available to all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction of the State party."[54] Article 26 of the ICCPR provides that all persons are "equal before the law and are entitled without any discrimination to the equal protection of the law." It further states that is in art 2 the law "shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination …" The previously mentioned general comment clarifies that aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant.[55]

Art 5(a) of the CERD protects the" right to equal treatment before the tribunals and all other organs administering justice". Art 6 of the CERD protects remedies against all discriminatory rights due to race. Art 16-18 of the ICMW deal with the access to justice. It states in art 18(1) of the ICMW that "migrant workers and members of their families shall have the right to equality with nationals of the State concerned before the courts and tribunals. In the determination of any criminal charge against them or of their rights and obligations in a suit of law, they shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." In practice their right to justice is very low by the standards of ICMW.[56] The convention offers enforcement mechanisms such as reporting and through the optional document it opens up for individual and state complaints. The state reporting is criticized for being inadequate when dealing with such a vulnerable group, since the information can easily be fabricated and bad information ignored.

3.2 Regional legislation

The regional human rights protection has also acknowledged the fact that the right to a fair trial is one of the cornerstones of democracy. Irregular migrants should also have the access to courts in order to defend their rights. The right to a fair trial is protected under art 6 of the ECHR and the right to effective remedy is protected under art 13 of the ECHR.

The individual complaint system of the ECHR under art 34 and the collective complaint mechanism of the European Social Charter can be used

[54] HRC general comment nr 32, CCPR/C/GC/32 27 august 2007 page 3, para 9, available at http://www2.ohchr.org/english/bodies/hrc/comments.htm, accessed on the 9th of august 2009 13:50

[55] U.N., Human Rights Committee, General Comment 15, The situation of aliens in accordance with the Covenant, 11/04/86, CCPR/C/27, paras. 1, 2, 4, 7, 8 and 9.

[56] COMMITTEE ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES, advanced unedited version, Distr. General, CMW/C/AZE/CO/1, 30 april 2009,

to access justice by the irregular migrants. However, this also puts them at a risk of being deported.[57]The option does however exist however domestic remedies normally have to be exhausted before using that remedy.

The European Union adopted a new directive on the 18th of June 2009, directive 2009/52/EC that deals with providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals. According to the document member states should ensure that the irregular workers get access to justice. The member states are required according to art 6(2) and art 13 of the EU Directive 2009/52/EC to file a complaint against his or her employer for unlawful behavior. The complaint may be lodged by the irregular worker or through third parties such as trade unions. The third parties will be protected from sanctions when they are aiding an irregular worker to uphold his or her rights.[58]

3.3 National legislation

In Sweden the trade unions play a significant role in accessing justice for workers. Disputes and other issues between an employer and a worker are traditionally solved between the trade unions and the employer organizations. The involvement of courts is often used a last resort even though it is an option from the very beginning of the dispute. In the beginning of the 20th century the trade unions had no role to fill but it has gradually evolved on the basis of the Labour Courts jurisprudence.[59]

As far as labour law disputes are concerned, the Swedish legislator has provided an efficient way of accessing justice. In the Labour Court procedure, the pertinent trade union acts as a party on behalf of its member. This means that the trade union provides free legal aid (most unions have their own specialist lawyers). The trade union also pays the employer´s costs caused by the trial, if the employer wins the case. If the employee is not a member of a trade union, he has of course to act on his own. But even if he has been granted legal aid, he will have to pay the employer's costs if he loses the case.[60] Which in itself could be viewed as a restriction on the access to justice.

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[57] Doc. 10924, 4 May 2006, Human rights of irregular migrants, Report Committee on Migration, Refugees and Population, Rapporteur: Mr Ed van Thijn, Netherlands, Socialist Group para. 13.5

[58] DIRECTIVE 2009/52/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:168:0024:0032:EN:PDF para 26. (last accessed 090901 23:33)

[59] The role of labour court judges in the implementation of social policies, ninth meeting of European labour court judges, Geneva 3-4 december 2001 available at: http://www.ilo.org/public/english/dialogue/ifpdial/downloads/lc_02/sweden_1.pdf page 2

[60] ibid. page 3

The Swedish Labour Court, which was founded in 1929, hears and adjudicates disputes concerning collective agreements and also function as the highest court in labour disputes. Chapter 4 article 5 of the LRA states that trade unions can process for their members rights in court.

In many cases individual bargaining in order to regulate the terms for contract is not needed because the terms are set in collective agreements between employers and trade unions. A collective agreement is an agreement that established the working conditions between an employer and a worker according to art 23 of the MBL. It binds the employers and the workers, which are members of the organizations that have signed the agreement according to art 26 of MBL. The collective agreement sets the rules for the individual agreements. The negotiation rules between trade unions and employers are also included in the collective agreements. Some decisions that are made by well-established trade unions are applicable to all workers within a workplace.

According to art 10 of the MBL every trade union can negotiate on the behalf of its member with his or her current or former employer. The right to negotiate also means that there is a right to have someone to negotiate with. [61] The issues that can be negotiated are the same issues that are included in the collective agreement such as the working situation according to art 13 and art 23 in MBL. Because trade unions have the right to negotiate with the employer they also should have the duty to monitor that all the agreement between the employer and all workers, regardless of trade union, is fulfilled. [62]

It is established in a Labour Law Court case AD 1979 nr 90 that LAS is not applicable in disputes about the nullification of a work agreement if the worker does not have a valid work permit. The case was brought to court by a trade union due to the fact that a member of their trade union, Milisan Josic, was given notice immediately after his work permit had expired. The company had not layed him off in accordance with procedures established in LAS. Mr Josic later appealed the decision and won. The company argued that the law did not apply in cases where the company itself could be punished for having a worker without a valid permit working for them, as it was and still is criminalized in the Aliens Act.

The court first established that LAS is applicable also to work agreements with foreigners. The court then stressed that the work permit was fundamental to the work agreement and if that part was not in accordance with law LAS could not be applicable. The employer should not have to be forced to follow rules which would make him or her commit a crime. The court concluded that there is a conflict between LAS and the Aliens Act. It also concluded that the social security of the worker is weakened by the outcome of the case.[63]

[61] supranote 15 p. 501
[62] prop. 1975/76:105, Bil. 1 s. 219
[63] AD 1979 nr 90, page 519

There was a dissenting judge who stated that the lack of work permit should have functioned as a valid reason for the employer to give notice and even though they had reasons for laying him off they should have done it in accordance with LAS. He thought that the company should have been sentenced to pay a fine to the worker in question. [64]

[64] ibid. 520 f

4 The right to join trade unions

"Workers of the world unite: you have nothing to lose but your chains"
Karl Marx

4.1 International provisions

Freedom of association and the right to join trade unions are rights that are regulated in most international conventions. They were included in the UDHR through two articles: art 20 and art 23. Article 20 of the UDHR states that "everyone has the right to freedom of peaceful assembly and association" and that "No one may be compelled to belong to an association". And art 23 (d) of the UDHR states "everyone has the right to form and to join trade unions for the protection of his interests". It should be noted that it says "everyone" and not "every worker" as the bearer of the rights. [65]

Article 5 of CERD also protects the rights to freedom of association and to join and form trade unions. Even though States are not obliged to provide jobs or work permits to aliens, the rights to labour and employment rights and with that the freedom of association applies to all workers as soon as an employment relationship has begun.[66]

Article 22 of the ICCPR states that **"**everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests". Article 8 of the ICESCR states that there is a right for "...everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests." The trade union is free to establish its own membership rules as long as it does not infringe on other human rights such as the freedom from discrimination.[67] The reasons for an acceptable restriction are fewer than in the ICCPR since the ICESCR requires that "no restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others". Unlike most provisions in the ICESCR this right is should be obliged directly and not progressively. [68]

These rights in both the ICCPR and the ICESCR can be restricted due to national security or public safety, public order, the protection of public health

[65] Herzfeld Olsson, Petra Facklig föreningsfrihet som mänsklig rättighet, page 120
[66] UN Committee on the Elimination of Racial Discrimination (CERD), *CERD General Recommendation XXX on Discrimination Against Non Citizens*, 1 October 2002, available at: http://www.unhcr.org/refworld/docid/45139e084.html
[67] supranote 65 p. 234
[68] ibid. p. 228

or morals or the protection of the rights and freedoms of others.[69] The restrictions are not easy to enforce since they have to be proportional to the cause. A threat to the national security must endanger the state's existence in order to be seen as a threat. In order for a restriction to be made in order to protect public health the right exercised must endanger people's physical and mental health. Public order can be used as a reason for restricting human rights when the right is endangering a crucial function of the society. In addition to a ground for the restriction it has to be viewed as necessary in a democratic society and be proportional to the goal it aims to achieve.

The provisions in the ICCPR and the ICESCR may not be used by State parties in a way that is contrary to the provisions of the ILO Conventions concerning Freedom of association and Protection of the Right to Organize according to art 22(3) of the ICCPR. This is viewed as to give "…entire legislative conformity is guaranteed with C87 in this remarkable provision, which was incorporated in the other Covenant as well". [70]

The ILO has established two Conventions that state that all workers, without distinction whatsoever, have a freedom of association and the right to organize: the Freedom of Association and Protection of the Right to Organize Convention[71]. The Right to Organize and Collective Bargaining Convention
The ILO concluded in case no. 2727 that on the basis of the ILO Constitution, the ILO Committee on Freedom of Association (the CFA) has the power to examine complaints alleging violations of freedom of association regardless if the country in question has ratified the relevant ILO Conventions.[72] The CFA is composed of an independent chairperson and three representatives each of governments, employers, and workers. If it finds that there has been a violation of freedom of association standards or principles, it issues a report through the Governing Body and makes recommendations on how the situation could be remedied. Governments have to report on the implementation of the recommendations.[73]
Article 2 of C87 states that "Workers...without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation". The only permissible exception to C87 that is mentioned in article 9 of C87 concerns the armed forces and the police. Art 10 of C87 explains that the term "organisation means any organization of workers or of employers for furthering and defending the interests of workers or of employers". Art 11 of the C87 states "each Member of the International

[69] The restrictions to the right are stated in art 22.2 ICCPR and art 8.2 ICESCR.
[70] Swepston, Human Rights Law and Freedom of Association: Development through ILO supervision, p. 172
[71] Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), *is available at* http://www.ilo.org/ilolex/cgi-lex/convde.pl?C087
[72] *Case No. 2227 (United States)*, ILO Committee on Freedom of Association, 332nd Report of the Committee on Freedom of Association, GB.288/7 (Part II) (November 2003) 142, ¶ 600, *available at* http://www.ilo.org/public/english/standards/relm/gb/docs/gb288/pdf/gb-7.pdf.
[73]http://www.ilo.org/global/What_we_do/InternationalLabourStandards/ApplyingandpromotingInternationalLabourStandards/CFA/lang--en/index.htm#P10_4138

Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise." The Convention clearly shows that it applies both to vertical and horizontal relationships and it puts a positive obligation on the state to protect the horizontal relationships.[74] These are minimum provisions and any law or regulation that protects the right more extensively will prevail according to art 19(8) of the ILO Constitution.[75] C87 was not intended to include irregular workers and does not explicitly mention their rights as it focuses on the workers lawfully residing within a country.[76] C87 also gives the trade union the right to establish its own rules and regulation according to art 3 if it respects human rights.[77]
Convention No. 98 protects workers and employers who exercise the right to organize, forbids interference in the activities of workers' and employers' organizations and promotes voluntary collective bargaining. Representation and a voice at work are important means through which migrant workers can secure other labour rights and improve their working conditions.

The ILO committee of experts has stated that "the right of organizations to draw up their constitutions and rules must be subject to the need to respect fundamental rights… This means that it would not be inconsistent with the requirements of the convention to require that the rules must not discriminate against members or potential members on the ground of race or sex". It does not violate art 3 of ILO C87 to regulate that internal provisions of trade unions must not be discriminatory. It may not be a problem with prohibitions against other grounds then sex and race but it does not say explicitly in C87 that the internal rules of trade unions must comply with human rights. [78] And the issue is not addressed by the UN treaties.

The ICMW protects the union right in two different provisions; art 26 and article 40 of the convention. Art 26 of the ICMW applies to all migrant workers irrespective of migration status. It gives them the right to join freely any trade union and to seek the aid and assistance of any trade union. Some countries opposed the fact that the convention grants union rights for irregular migrants. Art 40 of the ICMW provides the regular migrant with the right "to form associations and trade union rights in the state of employment for the protection of their economic, social, cultural and other interests. This provision has been criticized due to the fact that it is not in accordance with international standards of the ICCPR, the ICESCR and the ILO instruments. Those international provisions grant the right to freedom of association and trade unions to everyone; which is ironically enough not fully ensured within the ICMW.

[74] Supranote 65 p. 129
[75] The ILO Consitution available at http://www.ilo.org/ilolex/cgi-lex/constd.pl?19
[76] supranote 65 p. 134
[77] ibid. P. 146
[78] ibid. 519

The ILO has declared through case “General Union of Spain v. the Spanish Government” that there is a right for irregular workers to join trade unions regardless of their migration status. The case is not from Sweden but touches upon international obligations for states in general and will therefore be mentioned here.

4.1.1 The ILO and General Union of Spain v. The Spanish Government

The Spanish[79] trade union the General Union of Workers of Spain (UGT) filed a complaint, on the 23 of March 2001, against the Spanish Government. [80] The issue concerned the Spanish basic act No. 8/2000 on the rights and Freedoms of Foreigners in Spain and their Social Integration Act OL 8/2000 (herein after the Act) that entered into force on 23 January 2001. The act contained a clause that stated that only persons who are authorized to stay in Spain are entitled to join trade unions. The UGT held that the clause in the new Act restricted the right to organize and strike, freedom of assembly, demonstration and association and collective bargaining rights in an unlawful way.[81]

The trade union further claimed that the law created an unjust situation for irregular workers living in Spain. And the trade union even found it unjust based on the fact that irregular worker who had been living in the country prior to the new law now got it worse, and were treated equal to the irregular workers who arrive after the new law came into force. [82]

The trade union further claimed that the Act was in violation of the Spanish constitution[83] and that national law that deals with basic rights and freedoms shall be in compliance with the UDHR and other relevant human rights treaties that Spain has signed. [84] The trade union concluded that the ILO conventions, which Spain has signed, applied to all workers irrespective of their migration status. [85]

The Government replied, on the 26 September 2001, that the Act is based on the understanding that foreigners who reside in the country legally will

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[79] Spain has ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) just as Sweden.
[80] report No. 327, Case(s) No(s). 2121, 327th report of the committee on freedom of association, available at http://www.ilo.org/ilolex/english/newcountryframeE.htm
[81] ibid para 550
[82] ibid para 551
[83] 10.2 and 13.1 of the current Spanish Constitution, adopted in 1978. These articles establish, respectively, that "norms pertaining to the basic rights and freedoms recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and relevant international treaties and agreements ratified by Spain" and "foreigners in Spain shall enjoy the public freedoms guaranteed by the present title ("On Basic Rights and Responsibilities") in the terms established by treaties and the law".
[84]Supranote 78 para 552
[85] Ibid 554.

exercise the rights recognized by the given Act on an equal terms with Spanish nationals. According to the government of Spain the aim of the Act was to distinguish between the regular and irregular migrant workers. The restriction was not seen as having anything to do with the irregular workers ethnicity but with the fact that they are residing in the country unlawfully. The government further argued that the right to organize and the freedom of association are rights that are restricted to lawfully residing persons unlike for example the right to health care, which is a right for everyone regardless of migration status. The Spanish State Ombudsman, who dismissed an appeal on the unconstitutionality of the act because it lacked grounds.[86]

Certain obligations that the state has under human rights treaties only apply to people who are lawfully residing in the country. The Government claimed that the freedom of association and with that the right to establish and join trade unions is one of these rights.[87] The Government further argued that the ICESCR provides that countries may decide themselves whether or not to guarantee certain rights to non-nationals. In order to protect economy of Spain there was a need to limit the rights in question according to the Spanish government.

4.1.1.1 The Committee's conclusions

On the basis of the phrasing of art 2 of C87 that recognizes the rights of all workers without any distinction, the committee found it important to interpret the word “workers” broadly. Trade unions must have the right to defend the rights of all workers and they do according to C87. The committee therefore requested the Spanish Government to take the ILO convention in to regard when legislating, indirectly telling them that their actions had been unlawful. [88]

4.1.2 Hoffman Plastic Compounds, Inc. v. NLRB

The protection of the right to organize was as well put to the test with regard to an irregular worker in the United States in the case Hoffman Plastic Compounds, Inc. v. NLRB[89] (from here on the Hoffman case). Jose Castro was employed at the Hoffman Plastic Compounds Company in May of 1988. A couple of months later, in December 1988, he participated in a union organizing campaign. This resulted to him being laid off in January 1989. Mr Castro, along with the trade union brought the case to the National Labor Relations Board (hereinafter the NLRB), which decided in January

[86] Ibid 555 ff.
[87] Supranote 80 para.558
[88] Ibid. para 561 f.
[89] The Hoffman case is available at http://www.nilc.org/immsemplymnt/Hoffman_NLRB/SupremeCt_decision.pdf and the ILO judgement ILO: *332nd Report of the Committee on Freedom of Association*, Governing Body, 288th Session, Geneva, November 2003, GB.288/7 (Part II), Case No. 2227 is available at http://www.ilo.org/ilolex/english/newcountryframeE.htm

1992 that the company should pay Mr Castro back for lost wages and reinstate him. It was discovered that Mr Castro was working without proper work authorization and due to this he could not be reinstated and the company refused to pay him back. Despite the fact that he was an irregular worker the NLRB decided that the company should pay Mr Castro back for the entire time between his discharge and the day he admitted that he lacked documentation. [90]

The NLRB stated in its decision that "the most effective way to accommodated and further immigration policies ... is to provide the protections and remedies of the NLRA to undocumented workers in the same manner as to other employees". The company still refused to pay him back and appealed the decision. The Federal Court of Appeals upheld the NLRB's decision. The Supreme Court however, reversed the decisions with a vote 5-4 and denied him all back pay after his unlawful dismissal. The reason for the Supreme Court judgment was that it felt that the immigration law was superior to the labour law's protection of the right to form and join a trade union.[91]

The dissenting judges argued that the decision devided workers into two groups: one that had access to justice and one that lacked access to justice. United States law provides civil remedies such as reinstatement and back pays for anti-trade unions actions. The Back payment functions both as a punitive measure but also as a preventive measure. As the dissenting judges stated it: "in the absence of the backpay weapon, employers could conclude that they can violate the labor laws at least once with impunity ... [T]he backpay remedy is necessary; it helps make labor law enforcement credible; it makes clear that violating the labor laws will not pay." [92]

4.1.2.1 ILO's response to the Hoffman case

A federation of North American unions filed a complaint to the ILO concerning the Hoffman case. The federation claimed that the Hoffman decision violated the ILO Conventions that protect the rights of workers without any distinction. The judgment made an already vulnerable group even more vulnerable due to the fact that irregular workers will be even more reluctant to seek help in order to uphold their human rights. The ILO Committee on Freedom of Association issued a decision concerning the Hoffman case. The United States claimed that it had no international responsibilities under the ILO Declaration on Fundamental Principles and Rights at Work, C87 (upholding the right of workers to form labor unions) or C98 (establishing worker protections from acts of antiunion discrimination). Despite those arguments the committee found that the Hoffman decision violated the fundamental aims and principles behind the ILO Constitution. The Committee stated that Hoffman harmed the ILO's

[90] ILO: *332nd Report of the Committee on Freedom of Association*, Governing Body, 288th Session, Geneva, November 2003 para 556 -557
[91] Ibid para 558
[92] Ibid para 564.

ability to protect peace and social justice since it functionally denied undocumented workers in the U.S. freedom to join trade unions. The Committee criticized the Supreme Court's decision and stated that human rights should always be viewed as more important than immigration goals.

4.1.2.2 The Advisory opinion of the Inter-American court requested by the United Mexican States.

After the Hoffman decision was published, Mexico asked for an advisory opinion by the Inter-American Court of Human Rights.[93] The advisory opinion concerned the deprivation of labour right of migrant workers and how or even if it could be compatible with the human rights principles of legal quality, non-discrimination and equal and effective protection of the law which American states have promised to follow. The background for this advisory opinion was that the Mexican Government was concerned that some states in the region had interpreted and practiced laws that were incompatibility with the OAS human rights system. [94] One of the main reasons for Mexico's interest in the rights of irregular workers is the fact that it is a sending country, which means that a huge part of its population is working outside of the country. At the time of the advisory opinion was asked approximately 6 million Mexicans were working outside of the country and approximately 2,5 million workers were estimated to be irregular workers. [95] The Mexican Government wanted to know exactly what obligations states have against irregular workers on the basis of their international obligations so that it and other American states could live up to their commitments. The Court stated that human rights should be respected and guaranteed by all states and that there are certain rights that are so closely linked to the human beings dignity that they are superior to the state itself. [96]

The Court stressed the fact that the international human rights documents that are signed by states usually contain articles that oblige the states to ensure human rights to all people within its jurisdiction. [97] It is important that individuals, especially irregular migrants, know what their rights under the Covenant (and the Optional Protocol).[98] The fact that the principle of equality and non-discrimination is regulated in so many international instruments is evidence that there is a universal obligation to respect and

[93] ADVISORY OPINION OC-18/03 OF SEPTEMBER 17, 2003, REQUESTED BY THE UNITED MEXICAN STATES, *Juridical Condition and Rights of the Undocumented Migrants* available at: http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf (14th of april 10:33) page 1
[94] ibid.
[95] ibid. para 47
[96] supranote 93 para. 73
[97] ibid para 79
[98] U.N., Human Rights Committee, General Comment 3, Application of the International Covenant on Civil and Political Rights at the National Level (Article 2), 29 July 1981, CCPR/C/13, para.1 ff.

guarantee the human rights arising from that general basic principle. [99]

The Court stressed the fact that it is an obligation for every state to ensure human rights, in general for all persons residing within its borders. This means that there shall be no discrimination between citizens and non-citizens, regular and irregular workers.[100] States can discriminate irregular workers due to their migration status if it is objective, proportionate and complies with human rights. This is the case with some political rights such as voting.[101]

Labour rights however should apply to all workers since they arise from the relationship between an employer and an employee. A person who becomes an employee has fundamental human rights regardless of his or her migration status due to the fact that fundamental labour rights must be enjoyed without discrimination. The fact that a worker is irregular can therefore never be used as an excuse for depriving him his fundamental human (labour) rights. The state or citizens of a state do not have an obligation to hire irregular workers but to respect the rights of the workers when they are employed.[102] There might even be a responsibility for the state to ensure that third parties respect human rights. Not every violation against a human right that is carried out by an individual is imputable to the state. The obligation to respect and guarantee the human rights of third parties is based on the fact that States regulate relations between individuals. It is therefore obliged to ensure that fundamental human rights apply to all.[103] This means that states are internationally responsible when they tolerate actions and practices of third parties that discriminate irregular workers either because they do not recognize the same rights to them as to national workers or because they recognize the same rights to them but with some type of discrimination.[104]

The legal instrument that gives the worker the best protection shall prevail. If an international legal instrument grants a right to a worker that is not recognized in the domestic law by the State, that right should be granted to the worker if the country has ratified the legal instrument in question. There are certain labour rights that are of fundamental importance; the freedom of association and the right to join trade unions are two of those rights. The only safeguard irregular migrants have are the inalienable nature of fundamental human rights. This is closely intertwined with the principle of human dignity. Even if irregular workers are faced with the possibility of being deported there should always be a right to access justice through courts. [105]

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[99] ibid. para 86
[100] U.N., Human Rights Committee, General Comment 15, The situation of aliens in accordance with the Covenant, 11/04/86, CCPR/C/27, paras. 1-9
[101] Supra note 93 para 119
[102] ibid para 135
[103] ibid para 143 ff.
[104] Supra note 93 para 152 ff.
[105] ibid para 156 ff.

4.2 Regional legislation

The European Council of human rights has called on its member states to ratify basic human rights documents that would give irregular migrants the human rights they were entitled to. Irregular workers have their minimum rights protected among the European legal instruments: European Convention on Human Rights (1950) the European Social Charter (1961) and the revised European Social Charter (1996).[106]

There is a possibility, under certain circumstances, to restrict political rights such as the freedom of assembly. However these restrictions cannot be unreasonable.[107] The right to join a trade union in order to protect their rights as workers is not a right that can be limited.[108]

Art 11 of the ECHR states that "everyone has the freedom of peaceful assembly and the freedom of associations with others, including the right to form and to join trade unions for the protection of his interests." However restriction are made possible by law if they "are necessary in a democratic society, interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others". The ECtHR stated that due to the non-discrimination clause and obligation to ensure human rights within the state's territory, a state's higher authorities must make sure that the rights are not breached at subordinate levels.[109] The restrictions that may be posed by the member states are extensive. [110]

Art 11 of the ECHR primarily regulated the vertical relationships however it is stated in Ärtze für das Leben v. Austria that "genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of art 11 of the ECHR. Like art 8, article 11 sometimes requires positive measures to be taken, even in the sphere of relations between individuals if need be". [111]

A recent ruling of the European Court of Human Rights in the case of ASLEF v UK[112], Case C-1002/05, represents an important development in the determination of trade union autonomy. The court ruling holds that in the same way as individuals have the right to join or not to join trade unions, trade unions have the right to accept or reject membership applications. In

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[106] Resolution 1509 (2006), Human rights of irregular migrants para 9-14 available at: http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta06/Eres1509.htm
[107] Ibid. para 12.14
[108] Ibid. para 13.5
[109] *Eur. Court H.R., Case of Ireland v. the United Kingdom, Judgment of 18 January 1978, Series A No 25, para. 239.*
[110] Supranote 65. 296
[111] in Ärtze für das Leben v. Austria, p. 32
[112] ASLEF v. THE UNITED KINGDOM, Application no. 11002/05, 27th February 2007.

the case of ASLEF v. Uk Mr Lee who was a member of a far-right party called the British National party (hereinafter BNP) applied and was accepted into the trade union Amalgamated Society of Locomotive Engineers and Firemen (referred to as ASELF). A short while after his acceptence a report was sent to the General Secretary of the trade union concerning Mr Lee's involvement in the BNP. He was later expelled from the trade union because his membership of the BNP was considered to be incompatible with a membership in the trade union. His appeal was rejected and the organisation included a paragraph in their rules stating that Rule 4.1(d):

"No person shall be admitted into membership of ASLEF if by choice they are members of, supporters of, or sympathisers with, organisations which are diametrically opposed to the objects of the union, such as a fascist organisation."[113]

Mr Lee brought the case to the Employment tribunal since section 174 trade union and labour relations (consolidation) act 1992 prohibited trade unions from excluding a person on the ground of a membership in a political party. The court considered that Article 11 could not be interpreted as imposing an obligation on associations to admit whoever wished to join. The trade unions have to have control over who is to be admitted to the organization. The court accepted that by giving this right to a trade union individuals could as a result be restricted in exercising their freedom to join a trade union. In this case, the court did not believe that such a restriction had a fundamental impact on Mr Lee since he did not suffer any particular detriment. His lack of trade union membership did not impact on his right to work. There was no requirement that he should be a trade union member in order to work, and the terms of any collective agreements still applied to him equally as a non-union member. [114]
The European Social Charter (revised) states that all workers have the freedom of association. The right to organize is declared in art 5 of the ESC and it states that "With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Contracting Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this Article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations." Restrictions should be prescribed by law and be necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.

The right to join trade unions should not be viewed as a right to join any

[113]Ibid art 8-12
[114] ibid art 50 ff.

trade union against the trade union's internal rules. [115] Even though the trade unions may have their own membership rules[116] the state should ensure that these conditions for membership are not violating any rights. The individual should also be protected against exclusions that will have exceptionally hard consequences for the worker. When the membership of the trade union is the issue of violation the interest of the individual shall be viewed against the interest of the trade union as a whole. [117] Discriminatory provisions are normally viewed as unreasonable.

4.3 National legislation

The Swedish freedom of association was first determined in a central agreement called the December compromise of 1906 between the Swedish trade union confederation and the employers union. The Swedish labour court that was established in 1929 later established the freedom of association through its jurisprudence. In the beginning the freedom of association only had to be respected by the employer for those workers who were members of the trade union with which the employer had made an agreement. [118]

The freedom of association (and the right to organise) it protected under chapter 2 article 1 of the RF (the instrument of Government) and it is therefore protected from interference from the public authorities. [119] This right may only be limited due to military reasons or if it is an association that persecutes people due to discriminatory reasons according to chapter 2 art 14(2) of RF.
Foreigners are to be treated equally to citizens according to chapter 2 art 22 para. 2(1) of RF but the provision does not say anything about irregular migrants. However due to the fact that a law may not be contrary to the obligations Sweden has under the ECHR the rights must be said to apply to all within the territory of Sweden irrespective of migration status.
While the instrument of government guarantees freedom of association and the right to strike, and the 1976 Co-Determination Act (MBL) enlarges these rights. Trade unions have strong collective bargaining rights and in case of conflicts they can litigate or use collective action. The majority of the Swedish employers have signed collective agreements that apply to all workers at the workplace, including the irregular workers. [120]

The reason for having a collective labour law is mainly to achieve a power balance between the workers and the employers. A sole worker has a weak position when it comes to negotiating working agreements with the employer. Through organizing the power that employers have over their

[115] supranote 65 p. 514
[116] Appl. 10550/83, Ernest Dennis Cheall v. the U.K.
[117] Young James and Webster, 1981, p. 63
[118] supranote 65 p. 489
[119] AD 1995 nr 122
[120] http://regeringen.se/content/1/c6/09/90/06/7481398c.pdf accessed 15th of May 22:33

employees can be neutralized. [121] The connection between the collective labour law and labour law that applies to the individual is evident due to the importance of the collective agreements in Swedish law and its influence on the individual agreement. The most important law is the MBL that regulates the workers influence over their working conditions. A legal dispute concerning the interpretation of the legal substance of individual agreements or even collective agreements can be solved in civil courts, as a last resort.

Trade unions are non-profit organizations and there is no specific law that regulates non-profit organizations in Sweden. The trade unions have traditionally opposed external regulation. [122] However there is jurisprudence by courts that have set external rules for non-profit organizations and with those external rules for trade unions. The criteria for membership should be regulated within the organizations statute. The exclusion of a member may not be done on a discriminatory ground such as race or religion. [123] A membership can be adjusted if it is obviously unfair according to art 36 of AvtL, which regulates unjust conditions. However, the threshold for applying this provision is very high. Trade unions that have excluded members have had their reasons tried in court despite the fact that they have viewed the exclusion of a member as an internal question. [124] When the exclusion from a trade union has been viewed as unjust the courts have fined the trade union every month until the worker has been allowed to join the trade union[125] or nullified the decision to exclude a member. [126]

[121] supranote 65 page 18
[122] SOU 1975:1 s.606
[123] NJA 1998 s.293 and NJA 1990 s.68
[124] NJA 1946 s. 83, page 84 ff.
[125] NJA 1948 s. 516
[126] NJA 1945 s. 294

5 Freedom from discrimination

"In the end antiblack, antifemale, and all forms of discrimination are equivalent to the same thing - antihumanism"

Shirley Chisholm

5.1 International legislation

The freedom from discrimination is a right that is enshrined in almost every human rights instrument and the principle is required for the realization of universal human rights.[127] Article 2(1) of the UDHR states that "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." This principle is at the core of human rights and stresses the need for human rights to apply for all, without distinction of any kind. The principle of non-discrimination is embodied in various instruments with the obligation to respect and ensure that is applies to all within the jurisdiction of a state.

The ICESR does not have an independent non-discrimination provision; instead the non-discrimination provision in art 2(2) of the ICESCR applies to the provisions enlisted within the Convention. It states that "the State parties undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind such as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Art 3 of the ICESR further emphasizes the need for equality between the men and women.

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[127] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" (Article 3); Charter of the United Nations (Article 1(3)); Universal Declaration of Human Rights (Articles 2 and 7); International Covenant on Economic, Social and Cultural Rights (Articles 2(2) and 3); International Covenant on Civil and Political Rights (Articles 2 and 26); International Convention on the Elimination of All Forms of Racial Discrimination (Article 2); ; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Articles 1, 7, 18(1), 25, 27, 28, 43, 45(1), 48, 55 and 70); Declaration of the International Labor Organization (ILO) concerning the Fundamental Principles and Rights in Work and their Monitoring (2(d)); Convention No. 97 of the International Labor Organization (ILO) concerning Migrant Workers (revised) (Article 6); Convention No. 143 of the International Labor Organization (ILO) concerning Migrant Workers (supplementary provisions) (Articles 8 and 10) Vienna Declaration and Programme of Action, World Conference on Human Rights, 14 to 25 June 1993 (I.15; I.19; I.27; I.30; II.B.1, Articles 19 to 24; II.B.2, Articles 25 to 27); Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live (Article 5(1)(b) and 5(1)(c)); Charter of the Fundamental Rights of the European Union (Articles 20 and 21); European Convention for the Protection of Human Rights and Fundamental Freedoms (Articles 1 and 14); European Social Charter (Article 19(4), 19(5) and 19(7)); Protocol No.12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 1);

The general prohibition of discrimination in art 2(1) of ICCPR is stipulated to ensure right to all"without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The freedom from discrimination is further stressed in art 26 of the ICCPR and states that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law". In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Art 2 of CERD prohibits especially discrimination due to race and obliges the ratifying states to combat racial discrimination by all appropriate means. In art 2(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization. The General recommendation for CERD states that a distinction between a citizen and a non-citizen may only be done if it is a citizenship related right such as voting.[128] Freedom from discrimination should be protected against regardless of immigration status. [129] Art 1(1) of the ICMW prohibits distinction of all migrant workers and members of their families without distinction of any kind.

The freedom from discrimination is argued to be a jus cogens norm, which means that is it applicable regardless of the state has signed a treaty stating that it agrees with the norm. The VLCT defined jus cogens as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[130] This means that if a treaty contains provisions that violates this norm it automatically becomes void and terminates. [131] One of the strongest arguments for non-discrimination being a jus cogens norm is the fact that it is essential for the definition of human rights in general. If human rights are something you are born with, everyone has to be born with the same rights and it should therefore be prohibited to deny these rights on discriminatory grounds.

[128] Committee on the Elimination of Race Discrimination, *General Recommendation 20: Non-discriminatory implementation of rights and freedoms*, A/51/18(1996) 124 at ¶ 3.
[129] UN Committee on the Elimination of Racial Discrimination (CERD), *CERD General Recommendation XXX on Discrimination Against Non Citizens*, 1 October 2002, available at: http://www.unhcr.org/refworld/docid/45139e084.html
[130] Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 23, 1969, 115 U.N.T.S. 331 (entered into force Jan. 27, 1980).
[131] Vienna Convention on the Law of Treaties art. 64

5.2 Regional legislation

The freedom from discrimination is included in art 14 of the ECHR. The ECtHR has in numerous cases stated that for this right to be limited it is acquired objective and reasonable reasons.[132] Art 14 of the ECHR deals with the provisions within the ECHR and so the provision does not stipulate an autonomous freedom from discrimination provision. There is an autonomous non-discrimination provision listed in the optional protocol no. 12, but it is not widely adopted by the EU members. The Council of Europe has stated that irregular migrants should not be discriminated against, in accordance with Article 14 of the European Convention on Human Rights and under Protocol No. 12 to the Convention.[133]

According to art 6(1) of the Treaty on European Union the EU is founded on the principles of respect for human rights and fundamental freedoms. As mentioned before the EU has to respect the provisions enlisted in the ECHR according to art 6(2) of the Treaty on European Union. The European community also has a mandate to legislate on matters concerning non-discrimination according to art 13 of the EC Treaty. According to art 21(1) of the Charter on Fundamental Rights of the European Union any discrimination based on any ground such as sex, race, colour, ethnic, or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. The European Union has through its community law during the last decade produced numerous of directives that have been implemented and are implemented in Swedish law. The progress on the non-discrimination area has the last decade been greater in the community law than in within the ECHR. Sweden has and is currently working with the implementations of the Equal Treatment Directive (76/207/EEC), the Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (2000/43/EC), the Directive establishing a general framework for equal treatment in employment and occupation (2000/78/EC) and the Directive implementing the principle of equal treatment between men and women in the access to and supply of goods and services (2004/113/EC).

Due to the provisions in the social charter a member state is obliged to regulate the entrance to the trade unions and to prevent exclusion from trade unions due to sex, race, colour, religion, political opinion, national or social status. [134]

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[132] Cf. Eur. Court H.R., Case of Willis v. The United Kingdom, Judgement of 11 June 2002, para. 39; Eur. Court H.R., Eur. Court H.R., Case of Petrovic v. Austria, Judgment of 27 March 1998, Reports 1998-II, para. 30;

[133] D oc. 10924, 4 May 2006, Human rights of irregular migrants, Report Committee on Migration, Refugees and Population, Rapporteur: Mr Ed van Thijn, Netherlands, Socialist Group available at http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta06/Eres1509.htm para. 12.17.

[134] supranote 65 p. 519

5.3 National legislation

Swedish law regulates freedom from discrimination in chapter 2 article 15 RF, the provision states that law or other regulation may not discriminate against a citizen due to race, color or ethnic background. The right protected only deals with the rights of citizens and is intended to function as a protection for minorities within the country.

Sweden, as mentioned under regional legislation, has currently implemented European directives on discrimination in Swedish law. There is therefore a new Discrimination law (2008:567), which entered into force on the 1st of January 2009 and prohibits discrimination due to sex, identities or expressions crossing gender boundaries, ethnical belonging, religion or other belief, functional impairments, sexuality or age. The grounds of discrimination are not exhaustive and may include other grounds where people are discriminated against or may be subjected to discrimination in the society.[135] An interesting aspect is that the Swedish trade union confederation, TCO and SACO all objected to an inclusion in national law of a prohibition of discrimination that regulates the internal regulation of trade unions. The principle of equality was, according to trade unions, a principle that all non-profit organizations must abide by and it is a custom in Sweden not to regulate non-profit organizations in law. The Swedish trade union confederation stated that it was unnecessary since it already followed the provision. [136] It was further argued that the freedom from discrimination is a human right and therefore cannot be taken away by an agreement between a trade union and an employers union.[137] The Swedish discrimination law does not explicitly nullify discriminatory provisions by trade unions. The inquiry that investigated how the European directive on non-discrimination should be implemented in Sweden suggested a provision that nullifies discriminatory rules of among other organization: trade unions.[138] The former Swedish Government made the decision that such a provision was not needed.[139] According to existing Swedish jurisprudence a rule that is discriminatory may not be enforced against a member, and therefore there is no need to include a provision that states the same thing.

The discrimination act from 2009 substituted a few equality laws and among those were the Equal Opportunity Act (1999:130) that mainly dealt with discrimination at work due to ethnical belonging, religion or other belief, the law (1999:132) against discrimination at work on the grounds of functional impairments and the law (1999:133) against discrimination at work due to

[135] prop. 2002/03:65 available at http://www.riksdagen.se/Webbnav/index.aspx?nid=37&dok_id=GQ0365 p. 79 s. 79 propositionen
[136] ibid. p. 235
[137] ibid. p. 414
[138] SOU 2002:43 p. 394
[139] supranote 135 p. 156 f

sexual preferences. The new discrimination law is applicable to all who are employed by an employer; it does not state the necessity of that employment to be legal. An interesting provision is stipulated in art 11 of the Discrimination law (2008:567) and it states that no one should be discriminated against a trade union or with regard to benefits that the trade unions provide their members. Migration status is unfortunately not a listed discrimination ground but the irregular migrant workers could be protected under the unlisted grounds for discrimination. The discrimination of irregular workers could even be claimed to constitute discrimination according to ethnicity, nationality or race.

6 Trade unions and irregular workers

"We promise and ensure
That we will never
Under any circumstances
Work during worse conditions or less pay
Than what we now promise each other.
We promise each other this
With the knowledge that
If we all keep this promise
The employer must
Fulfill our demands"

The Swedish trade union vow

Trade unions are organizations of workers who have come together in order to improve their working conditions. They fill a key role to the protection workers in general and can fill a key role in protecting irregular workers in specific. The basic thing to remember is that trade unions are designed to protect workers against exploitation from their employers.

The International Confederation of Free Trade Unions (hereon after the ICTU) has taken a strong position for the human rights of irregular workers. It has urged trade unions to demand governments to legalize irregular workers and to lobby for legislation to protect those working in the underground economy. It also suggested the trade unions to work with different communities in order to provide support and legal assistance for irregular workers. In addition to that the ICTU also urges trade unions to undertake special campaigns with the aim to organize migrant workers, including those who are irregular. They have however also stated that it is difficult to do so due to their "illegality" and the risk for deportation and this makes it even more important for the trade unions to work for the regularization of irregular workers.[140]

The European Trade Union Confederation (hereon after The ETUC) has issued statements favoring the legalization of undocumented migrant workers already residing in Europe rather than granting work permits to workers from abroad.

6.1.1 The Swedish trade union confederation

The Swedish Trade Union confederation (LO) was founded at the end of the 19th century with the aim to improve the working conditions for all workers

[140] supranote 31 page 12

in Sweden.[141] It was built around the promise that if the workers united against the employers they could improve their working conditions and build up a social security system that was non-existing at that time. The Swedish Trade Union Confederation (LO) organizes 15 unions, which means that 76 percent of the blue-collar workers are organized within the confederation. Wanja Lundby-Wedin is currently the president of both LO and the European Trade Union Confederation (ETUC).

The Swedish trade unions have always been strong and the strength lies in its members and ability to include all different kind of workers. It does not organize irregular workers despite the fact that the majority of irregular workers work within the sphere of the sectors of work that are organized within the Swedish trade union confederation. The debate about how to deal with irregular workers has been an ongoing debate for some time now.[142] The trade unions involvement has so far not been an advantage for irregular workers and some irregular workers have been deported after representatives from a trade union reported the irregular worker to the employer. [143]

The vice-president of the Swedish Trade Union Confederation, Erland Olauson, made a statement in 2007 that the confederation does not want irregular workers to work within the country and therefore should not work for their rights. The reasoning was that if the confederation improves working conditions of irregular workers more irregular workers will probably choose to come to Sweden. Just as the confederation does not organize prostitutes it will not organize irregular workers because it would help to legitimize the unlawful behavior of their employers. Another reason for the confederation not organizing irregular workers might be that the number of irregular workers is not big enough for the confederation to take them into consideration. [144]

The Buiding Maintenance Workers' Union (Fastighetsanställdas förbund) is one of the trade unions within the confederation that advocates for the right for irregular workers to join trade unions within the Confederation. It argued in a motion to the congress of the confederation of trade unions in Sweden that the situation for irregular workers was horrific and that the current situation of exclusion is bad for both the irregular workers as well as for the regular workers. The irregular workers are paid less and therefore keep the salary level down, since the employers use irregular workers because they settle for less payment. It is further argued that the trade unions should all support the irregular workers since no person is illegal. It demanded, amongst other things, that the confederation established ways in which it could organize irregular workers, that the confederations should work for harsher punishments for the employers who have exploited irregular

[141] http://www.lo.se/home/lo/home.nsf/unidView/2E308529CD05C933C12570FC00413403
[142] supranote 15 p. 121
[143] http://www.arbetaren.se/articles/inrikes20080318
[144] supranote 15 p. 122 ff.

workers and for the decriminalization of irregular workers. [145] At the same congress the trade union SEKO had a motion that wanted the LO to work for regularization of irregular workers that had not committed harsh criminal acts. [146]

The board of LO responded and stated that the confederation has cooperation with the ”association for undocumented” but that it would strengthen the cooperation as a result of the motions. It further stated that ”to support workers regardless of migration status” is important due to human but also rational reasons.[147] The confederation stated that although a regularization of irregular migrants would in fact improve their situation it would also attract more irregular migrants. It did not want to make a decision that would make more people live irregularly in the country in hopes of becoming citizens in the future. Because of the bill that the Building Maintenance Workers' Union (Fastighetsanställdas förbund) sent to the LO Congress, the congress decided that it needed to work for the decriminalization of irregular workers and find ways to help the irregular workers. As with prostitution, it is the customer, or in this cases the employer, not the exploited worker, who should be punished.[148]

The LO also stated that the irregular workers cannot be traditional members of the unions since they might risk dismissal and deportation due to the membership. The trade unions do not accept illegal employment or lower wages than they have set through collective agreements. All workers must be protected against exploitation regardless of migration status or trade union membership; the question is how they will protect them and why they cannot find a way to include them in the union.[149] Other reasons for the exclusion could, as suggested by others, be that irregular workers represent a threat to the Union members.[150] In a small survey that the confederation conducted 70% of its members felt that it should organize irregular workers. [151] While the Confederation is still hesitating to include the irregular workers some trade unions within the confederation have slowly begun to open their doors to irregular workers. This shows that the argument that the trade unions are legitimizing irregular migration by organizing irregular workers is not an accepted argument in all trade unions of the confederation. The trade union Kommunal has decided to accept anyone that applies for a membership and help him or her as best they can.[152] The Building

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[145] http://www.lo.se/kongress/2008/motion3.nsf/89b6a2f566c99419c1256e9f0031cb40/dc3f74e3e42c5877c12573a200535fd0?OpenDocument 3rd of May 2009 22:43

[146] http://www.lo.se/kongress/2008/motion3.nsf/89b6a2f566c99419c1256e9f0031cb40/450e6cd30cf286fbc12573a0004e3ae1?OpenDocument 3rd of May 2009 22:51

[147] http://www.lo.se/kongress/2008/motion3.nsf/89b6a2f566c99419c1256e9f0031cb40/8f99fa4240b24e07c12573aa0051e271?OpenDocument 3rd of May 2009 22:56

[148] http://www.lo.se/home/lo/home.nsf/unidView/056E99085D1AF938C12570440057B316

[149] http://www.bolagsfakta.se/?option=com_compropressrelease&id=18624&uuid=af99e8b2-d2db-102b-a308-3009a0063f27

[150] supranote p. 114 ff.

[151] http://www.lotidningen.se/?id_item=21952 5th of may

[152] http://www.mypaper.se/show/text.asp?pid=345219434465409&page=7 (The trade union and the undocumented)10th of May 2009

Maintenance Workers' Union is questioning what should be prioritised; the law or the collective agreements that the employers are violating by paying the irregular workers less? [153] By choosing to include irregular workers into the trade union it has answered the question quite simply: collective agreements should be prioritized.

The SAC (the syndacalist trade union) was for a long time the only trade union that organized irregular workers. There has been some criticism of the organization of the SAC mainly because the critics say that it divides workers into an A and a B group. The focus should be on legalizing them and working for an amnesty. [154]

6.1.2 The labour union center for irregular workers

The Swedish Trade Union Confederation has tried to improve the situation for irregular workers by opening up a labour union center for irregular workers that will provide assistance to them. It is a collaboration between different trade unions and trade union confederations and of course the center for irregular migrants.[155] It still has a limited reach since it is located in Stockholm and is only open one day a week, but it is nevertheless an improvement since it shows a will to help the irregular workers that has not before been demonstrated.

Instead of meeting the demand for equal treatment with other workers and including them into the trade unions an irregular "labour union centre" was created, where irregular migrants may go in order to receive support by trade union representatives. It has had it first successful case this year in negotiating with an employer on behalf of an irregular worker and the irregular worker finally received the correct payment. [156] The Centre has so far not been a success, since the trade union representatives have no experience dealing with the special situation of the irregular workers. [157] However, having a centre is a success in itself since it marks a shift in the policy towards irregular workers.

The trade unions are forced to face some crucial questions when organizing irregular workers. How far can they go in their pursuit of better working conditions for their members that are irregular workers? The legal situation within the national law when it comes to whether or not any labour law is applicable to irregular workers is unclear. If the trade union could take the issue to the Labour Court it would most certainly mean that the irregular worker would risk deportation. This has not occurred yet as the "regular"

[153] http://www.malmedel.nu/text.php?textID=3458
[154] http://www.arbetaren.se/articles/inrikes20071114
[155] http://www.lo.se/home/lo/home.nsf/unidView/0FBC34CFAF3FD9A7C12574B90049D480 6ht of May 2009 12:29
[156] http://www.lag-avtal.se/art/8626 accesed on the 12th of May 10:05
[157] http://www.lag-avtal.se/art/8467

work conflicts are settled quite easily between the trade union and the employer.[158]

6.1.3 European trade unions and their practices

The degree to which trade unions support and become involved in labour issues faced by irregular workers varies substantially amongst the various EU member states. When Spain introduced a migration law that denied irregular workers the right to join trade unions, to go on strike, the freedom of assembly and demonstration the three major trade unions made a common statement saying that they would not obey the law. [159] There are trade unions in other countries who have shown their support to the irregular workers that exist in their country by providing legal assistance and working for regularization.[160] It shows that there can be an organization without the irregular workers being immediately expelled.

[158] http://www.malmedel.nu/text.php?textID=3458

[159] In January2001, three major trade unions in Spain, the UGT (Union General de Trabajadores), CCOO (Comisiones Obreras) and CGT (Confederación General de Trabajo) made a public announcement that the law goes against immigrant workers. The trade unions stated that they would not follow the law that states that undocumented migrants cannot join, and thus allow undocumented migrants to be members of their trade unions.

[160] Major trade unions in France such as the CGT and SUD-PTT support undocumented migrants that come together in the *collectifs des sans papiers*. In Italy, trade unions have been active in denouncing exploitative working conditions of undocumented migrants. CISL-CESIL will support a worker and will denounce exploitative conditions, even if the worker is undocumented.

7 Dealing with irregular migration

"Whatcha gonna do when they come for you, work aint honest but it pays the bills"

Erykah Badu

7.1 Sanctions

Since irregular migration challenges the state sovereignty the states are more than eager to find ways in order to combat the phenomenon. Some of the measures taken in order to combat the informal labour market are taken with the aim to ensure that employers respect labour legislation. Article 6(1) of C87 calls for the definition and application of sanctions in respect of the illegal employment of migrant workers. The provision further states in article 6(2) that "where an employer is prosecuted by virtue of the provision made in pursuance of this Article, he shall have the right to furnish proof of his good faith". The sanctions vary from fines to imprisonment and it is up to each country to regulate what they find the most appropriate. The provisions are in conformity with the convention as long as its aim is to prevent "illegal employment". [161]

The way that the EU has chosen to combat irregular workers is to fine the employers who decide to hire them according to art 3 of the EU directive 2009/52/EC (hereinafter the EU directive). [162] The EU directive further lists options that the employer also should be required to do, in order not to be held liable for employing an irregular migrant, such as to ask for the work permit prior to the employment and notify the authorities so that they may validate the work permit.[163] In addition the employer should have to pay financial sanctions according to art 5 of the EU directive and have to pay for the cost of sending back the irregular worker, who will naturally be deported. [164] The EU directive also grants the irregular worker some rights against the employer despite the irregular migration status. It states that "The employer should in any event be required to pay to the third-country nationals any outstanding remuneration for the work which they have undertaken and any outstanding taxes and social security contributions."[165]

The EU directive contains minimum standards and it is therefore not a problem that Sweden has a stricter regulation. [166] Although it should be

[161] http://www.ilo.org/public/english/standards/relm/ilc/ilc87/r3-1b4.htm, para 354 ff
[162] supranote 58para 1
[163] ibid. 9ff
[164] http://www.brysselkontoret.se/home/bryssel/fackligt.nsf/unidview/206FCB279F95F41DC1257554002EB850, last accessed on the 10th of august2009
[165] supranote 58 14 f
[166] ibid. para 4

mentioned that both the employer and the irregular workers are criminalized in Swedish law.

7.2 Access to work permits

When possibilities to legally enter the continent are restricted immigrants tend to find other solutions. Last year, the ILO Global Report on Forced Labour highlighted that "the recent rise in labour trafficking may basically be attributed to imbalances between labour supply and the availability of legal work in a place where the jobseeker is legally entitled to reside."[167] The ILO Workers' Consultation had a strong view that legal migration should be facilitated as a means of combating trafficking and irregular movements.

The Swedish Government has recognized that it is crucial to open up more legal ways of entering the country in order to work. The Act amending the Alien Act entered into force in November of 2008.[168] The object of the Act is to make the foreign labour migration easier. In the petition it is emphasized that Sweden will continue to have the policy that residence and work permits should be obtained prior to entering the country.[169] Asylum seekers may apply for residence permit even after having entered Swedish territory. Furthermore, it explained that it is of the utmost importance that a system is not produced which enables a person to enter Swedish territory in order to get access to the labour market, the reason being that this might lead to the undermining of the right to asylum and its legitimacy as well as lead to increased costs for the reception of asylum seekers.

The Left Party of Sweden criticized the Act because it felt that it would be completely unreasonable to exclude undocumented migrants from the possibility of applying for a residence permit in a system with expanded possibilities of immigration of foreign labour given that this would mean that persons already living and working in Sweden would be expelled while at the same time other foreigners would be "imported" to do the same work.[170]

[168] Available at http://www.regeringen.se/content/1/c6/11/83/77/107e027f.pdf accessed 15th of May 10:37
[169] Prop. 2007/08:147 p. 47p
[170] Motion 2007/08:Sf27.

7.3 Regularization – the way to human rights?

The public has been fed images of a flood of unwelcome entrants, and of threats to their societies and identities. In the process, immigrants have sometimes been stigmatized, vilified, even dehumanized. In the process, an essential truth has been lost. The vast majority of migrants are industrious, courageous, and determined. They don't want a free ride. They want a fair opportunity. They are not criminals or terrorists. They are law-abiding. They don't want to live apart. They want to integrate, while retaining their identity.

Kofi Annan, Secretary-General of the United Nations,
Addressing the European Parliament on 29 January 2004.

As previously mentioned it is the right of the state to determine who may enter the country. The reason for regularizing workers is to turn the informal labour market into a formal market. This also limits the abuse of workers and opens up for contributions of a larger working group that will benefit welfare society.[171]

Most member states argue that there are only two alternatives when dealing with irregular migrants: either regularization or a return to the country of origin. The immigrants who cannot be sent home should be regularized because it will benefit both the immigrant and the country in which he is residing. [172] There could of course be posed criterias that would have to be fulfilled in order to get a citizenship. Migrant workers with irregular status may be said to earn a right to legal status if they meet certain minimum conditions.[173]

The governments who use amnesties as a method of regularization usually use it when there are a lot of irregular migrants present in the country. The best way to do so is to make the process as simple as possible. In some countries it is not the workers who have to register their existence when an amnesty is given but their employers. This system is odd since the employer who is exploiting the worker is also the one in charge of regularizing him or her.[174]

A decision to regularize is a controversial decision, especially within the European Union. The European Commission adopted a council decision that stated that all members within the European Community who wished to or had taken measures concerning migration and asylum had to inform the commission and the other member states if the action would influence other

[171] https://wcd.coe.int/ViewDoc.jsp?id=1237553&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679#P282_44335 section IV
[172] supranote 65 p. 399
[173] International Labour Conference, 92nd Session, 2004, Report VI, Towards a fair deal for migrant workers in the global economy,Sixth item on the agenda, page 120
[174] ibid. page122 f

states. [175] The discussion on irregular migrants in general have been on the agenda in Sweden for the last couple of years, mainly on living up to other human rights commitments as the right to health. One way is to legalize their existence in the country and another one is to make sure that they really leave the country, the latter one is what is what the current migration minister Billström seems to be advocating. [176]

There are negative aspects involved for the employers of course since a worker with a work permit is more expensive. There is a risk that an employer will exchange a regularized worker for a new irregular worker due to the increasing costs involved. The irregularity of the workers helps in keeping down their wages.[177] As an irregular worker described the situation himself "If you open your mouth the employer kicks you out. They say that there are plenty of irregular workers that would want the work. They are right. There is a hard concurrence for illegal work. The russians and afghans are willing to work for 15-20 kr an hour. They are ruining the market even for us. Employers feel that we should be grateful that they are giving us work. They think they are doing a good deed by going us work. They are only after the money. They always want new workers, so that they can pay minimum wages. They promise to raise the wages once you have learned the work, but they kick you out and hire a new one."[178]

[175] Counsil decision 2006/688/EC of 5 of Oct 2006 on the establishment of a mutual information mechanism concerning Member States' measures in the areas of asylum and immigration, OJ L 283, 14.10.2006, pp. 40-3
[176] http://www.dn.se/kultur-noje/billstroms-metod-ar-oacceptabel-1.599569 (Billströms's method in unacceptable) 10th of May 2009
[177] Gregor Noll, The Asylum System, migrant networks and the informal labour market p. 12ff
[178] Ibid. p. 298

8 Conclusions and recommendations

"We have learned that the rule of law delayed is lasting peace denied, and that justice is a handmaiden of true peace."
Kofi- Annan, former secretary-general of the UN

It has been concluded throughout this thesis that human rights are supposed to be universal rights. The idea is that we are all born with a set of rights that no one, not even the state can deny us. In contrast to the universal human rights is the principle of state sovereignty and the exclusive right of the state to regulate the possibility to enter its territory. The problem is with reconciling the two principles since state sovereignty includes the right for states to control their borders and irregular workers are violating that right by entering the country for work unlawfully. Although irregular workers lack the authorization (or the right) to enter, reside or work within the country their human rights granted to them by their mere inclusion in the human race should be respected. The problem is to uphold them in a national state system since filing a complaint in order to claim a right will most certainly get the worker expelled from the country. The irregular worker will not risk being deported so the situation opens up for abuse and exploitation from employers since the irregular worker wishes to stay in the country.

In AD 1979 nr 90 the Swedish Labour Court ruled that the Alien Act was given higher priority than the labour law despite the fact that the company in question had fired a worker in an unlawful way.[179] The reasoning to why it gave priority to the Aliens Act was that the employer should not have to be forced to follow rules that would make him or her commit a crime. There is no way of knowing if the Swedish courts would uphold the same idea today or not but it makes it even more uncertain if an irregular worker could claim his or her rights through the legal channels in Sweden. In the Hoffman case from the US the court also gave the immigration law priority over the labour law and denied an irregular worker his back payment since he had violated the states immigration laws.

Regardless of the fact that the irregular worker is unlawfully employed, there is still a legal relationship between the employer and the worker. Labour rights however should apply to all workers since they arise from the relationship between an employer and an employee. There might even be a responsibility for the state to ensure that third parties respect human rights. Not every violation against a human right that is carried out by an individual is imputable to the state. The obligation to respect and guarantee the human rights of third parties is based on the fact that States regulate relations between individuals. It is therefore obliged to ensure that fundamental human

[179] supranote 63

rights apply to all. This means that states are internationally responsible when they tolerate actions and practices of third parties that discriminate irregular workers either because they do not recognize the same rights to them as to national workers or because they recognize the same rights to them but with some type of discrimination. The new EU directive 2009/52/EC suggest that a change might be occurring in Swedish law soon since it grants the irregular worker some rights against the employer despite the irregular migration status. It states both that the State has a obligation to ensure access to justice for irregular workers and that the employer should be required to pay the irregular worker for the work that he or she has undertaken. This opens up the door for Sweden to recognize horizontal rights for all regardless of immigration status but it does not state if the irregular worker will be deported or not after using the legal channels. The possibility of being deported will most certainly keep the irregular worker from using the legal channels even if the possibilities to enforce their right will increase. However, the possibilities to access justice for those irregular workers that have been subjected to exceptionally harsh exploitation and that are willing to be deported in order to claim their rights are hopefully increasing. Sweden should at least adopt a policy on its position when dealing with irregular workers.

The access to justice is a principle on which the entire human rights system leans on. There is no point in having rights if they cannot be enforced. The access to justice is traditionally dependent on courts, which have to follow the law and hence would have to deport irregular workers who claim their rights through judicial channels. Legal aid should be available and the threat of expulsion should not outweigh the incentive to bring a claim to the courts. The access to justice, especially in Sweden, can be accessed in alternative ways including through the aid of trade unions. The international conventions and treaties do not deal with alternative way of accessing justice directly but since they regulate the right to join trade unions they include it indirectly. The trade unions are a very important channel to uphold the right to justice since it is a way for the irregular worker to uphold his or her rights without having to go through the traditional legal channels. It can help prevent exploitation of the worker and mediation and collective action is more effective and less intimidating for irregular workers.

Swedish trade unions have a strong position in society at large and they have historically been a strong protection for workers against exploitation by employers. The Swedish trade confederation has decided not to organize the irregular workers because they are unauthorized residents of Sweden. The new EU directive 2009/52/EC introduces the possibility for trade unions to lodge complaints against employers for unlawful behavior and be protected from sanctions when they are aiding them to access justice. This poses a possibility for the trade unions to act, and more importantly, disables the argument that they are committing crimes by aiding irregular workers. In my opinion the Swedish Trade confederation, and trade unions in general, have double standards concerning the question of organizing irregular workers. On one hand it does not want irregular workers to settle for wages under the

standards set in collective agreements but on the other hand they do not want to or do not adapt their membership in order to organize them. The ironic aspect is that it is my strongest belief that by empowering the irregular workers and improving their work situation the demand for irregular workers will decrease. An important reason for the demand for irregular workers is the fact that they are paid less and are performing duties for a payment that hardly anyone that can uphold their rights would do. The center for irregular workers is a step in the right direction but the inclusion of irregular workers within the regular trade unions is crucial. It would send a clear signal to xenophobic forces within the trade unions that the irregular workers are not a threat to the working force of Sweden, but a part of it. It is my opinion that the trade unions should take a step towards changing their systems in order to include all workers, regardless of migration status. Trade unions have the right to establish their own rules and decide who can become members of the trade union as long as it does not infringe on other human rights such as the freedom from discrimination.[180] The freedom from discrimination does not list immigration as a ground for discrimination but since the list in Swedish law is not exhaustive it could be included. The discrimination of irregular workers could even be claimed to constitute discrimination on the basis of ethnicity, nationality or race. The ILO declared in the General Union of Spain v. the Spanish Government that irregular workers have the right to join trade unions. However in that case it was the state that had denied them access to the trade unions, not the trade union itself. In practice it is hard to imagine that a irregular worker would bring the matter of exclusion from a trade union to court.

States pose sanctions when dealing with irregular migration since they view it as a huge problem. Sweden currently criminalizes both the irregular worker and the employer. If there should be posed sanctions on anyone it is my personal belief that it should be the employer that should be criminalized and therefore I believe that the irregular worker should be decriminalized. The reason for my opinion is similar to the reasoning when dealing with prostitution: the prostitute is not criminalized in Sweden due to the fact that she is already in a vulnerable position. I therefore do not believe in punishing the irregular worker but the employer who uses the irregular worker. The end result will however be the same since if the employer knows that the sanctions that they might face are harsh the demand for irregular workers will decrease, at least for a period of time.

Regularization is a good way of ensuring that the irregular workers get access to their fundamental rights. There are two long-term problems that might occur when using regularization as a way of dealing with irregular workers. The first problem is that when using regularization as an option it will probably lead to regularizations meaning that it could attract more irregular workers to the country as has happened in Spain. The second problem is what regularization will lead to from a human rights perspective. The whole point with human rights has been that every human being carries the rights by its

[180] supranote 65 p. 234

mere existence. How do we keep defending that belief if the only way to realize human rights is to become a citizen? We are slowly devaluating the thought of human rights to being simple citizenship rights. Of course, our entire systems are built around the notion of nation states and the civil contract between the state and the citizen, but should human rights not be a contract beyond the reach of the state? There is a need to clarify and adapt human rights law to the current situation in a globalized world. The risk is otherwise that the human rights system will lose its legitimacy if it fails to include those who need it the most.

In order to truly fight irregular migration, if the desire exists, the European Union and Sweden have to stop combating the consequences by imposing harder migration controls and instead deal with the roots of the problems. States should make a shift from treating the irregular migration as a migration "problem" to treating it as a labour issue. The irregular migration is just the consequences of the demand for cheap labour that exists within different countries. By enabling more legal ways to enter the European union and Sweden in order to work the irregular migration flows might decrease significantly.

In conclusion the access to justice is a corner stone in ensuring human rights for all and for the irregular workers in Sweden the trade unions are they key to it. And in order to truly speak about universal human rights, the most vulnerable and marginalized groups, such as the irregular workers, have to be able to make use of their rights. Irregular workers have not only have the need to join trade unions in order to access justice but they have the right to join trade unions even if they are still unwanted and unprotected.

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Convention against torture or other cruel, inhuman or degrading treatment.

Convention on Elimination of all forms of discrimination of women
Convention of the Rights of the Child

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