



***Exploitative Labour Relations and Legal  
Consciousness of Irregular Migrant  
Workers in the Netherlands***

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## 1. Introduction

Humankind's oldest 'poverty reduction strategy' is to migrate. People migrate to improve their lives and, as William Lacy Swing, the Director General of the International Organization of Migration (IOM) put it, when doing so they expect that their rights will be respected.<sup>1</sup> This was one of the main issues of Swing's address at the celebration of IOM's twenty years in the Netherlands in December 2010. The theme of the celebration was: 'Migration for the Benefit of All!'. The University of Amsterdam was approached to cover this theme from a migrant perspective, which resulted in this report.<sup>2</sup>

Because of their precarious position in the Netherlands, irregular migrants are potential victims of trafficking. The issue of trafficking in human beings is gaining more attention in the Netherlands, initially mainly in connection with prostitution but now increasingly also with regard to other forms of exploitation.<sup>3</sup> Given the relevance of combating human trafficking of irregular migrants, we decided to take this topical issue as a starting point for our research.

Trafficking in human beings is a serious crime and a gross violation of the fundamental rights of the victim. The Palermo Protocol<sup>4</sup> is one of the main international legal frameworks adopted to combat trafficking. In Dutch law it is punishable as trafficking in human beings to forcibly recruit, transport, move, accommodate or shelter another person with the intention of exploiting that other person.<sup>5</sup> Exploitation is at the core of human trafficking. Exploitation occurs in the sex industry but it also happens in other sectors of the economy when someone is made to work under such bad conditions and circumstances in which human rights are infringed.<sup>6</sup> In other words, labour exploitation – in situations

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<sup>1</sup> 'Marking IOM's Twenty years in the Netherlands', Address by William Lacy Swing, Director General IOM, held on December 14, 2010, The Hague, the Netherlands.

<sup>2</sup> The research and reporting was supervised by Dr. Jeroen Doornik (Faculty of Political Science) and Dr. Tesseltje de Lange (Faculty of Law). We would like to thank Saskia Peters, the NGO representatives, IOM project officers and staff for their kind assistance in this research.

<sup>3</sup> Starting with the landmark decision of the Dutch Supreme Court of 27 October 2009 (LJN: BI7097). See also reports of the national rapporteur on human trafficking (*Bureau Nationaal Rapporteur Mensenhandel*) available at: <http://www.bnrm.nl/>; BLinN, 'Uitgebeit en in de bak! Slachtoffers van mensenhandel in vreemdelingendetentie', 2009. Prepared by B. Boermans, available at [www.blinn.nl](http://www.blinn.nl/); BLinN 'Uitbuiting in andere sectoren dan de seksindustrie', 2010. Prepared by Eline Willemsen.

<sup>4</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against transnational organised crime (Palermo Protocol). Other instruments on or related to the issue of trafficking in Human Beings: 1930 ILO Convention on Forced or Compulsory Labour; the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; CoE Convention on Action against Trafficking in Human Beings in 2005; Article 4 of the European Convention on Human Rights prohibits slavery and forced labour.

<sup>5</sup> Article 273f Dutch Penal Code.

<sup>6</sup> Initially human trafficking was associated in particular with exploitation in the sex industry. In the Netherlands criminal legislation on human trafficking was broadened (following implementation of the Palermo Protocol) to include labour exploitation outside the sex industry on the first of January 2005. See H. de Jonge van Ellemeet and M. Smit, *Trafficking for Exploitation Outside the Sex Industry*. In: C. Van den Anker and J. Doornik (Eds.) *Trafficking and women's rights* (Pallgrave Macmillan, 2006) p. 219-232.

other than the sex industry – is one of the situations which is brought under the classification trafficking in human beings.

Cyrus, Vogel and de Boer<sup>7</sup> introduced the picture of a ‘pyramid of exploitation’ to illustrate the gradual and cumulative dynamics of exploitation: ‘The base of the pyramid consists of the predominantly mutually agree-upon cases, the cases disguised by the use of subtle forms of coercion, or exploitative employment that was later forced on the persons affected. Openly coercive exploitation forms the fine tip of the pyramid, numerically very small.’<sup>8</sup> To put it differently, the top of the pyramid represents actual labour exploitation (as prohibited by the Dutch penal code), whereas the whole area down stands for violations of the right to fair working conditions amounting to exploitative labour relations. We will use the term ‘exploitative labour relations’ for all employment situations in which the right to fair working conditions is not respected.

### *1.1 Rights-Based Approach*

Irregular migrant workers are often victims of exploitative labour relations. For this research ‘irregular migrant’ (or: undocumented migrant) is defined as an alien who is staying in a country without legal residence rights.<sup>9</sup> Because of the precarious legal position in the country in which they work, irregular migrants easily fall prey to extortion and are highly vulnerable to abuse and exploitation by among others employers.<sup>10</sup> In order to combat labour exploitation of especially irregular migrant workers which are at the top of the pyramid, one should start by fighting the violations occurring at the bottom (exploitative labour relations not (yet) amounting to labour exploitation). An important step in fighting exploitative labour relations would be to guarantee *inter alia* the right to fair working conditions of irregular migrants.<sup>11</sup> Hence, a so called rights-based approach should be considered.<sup>12</sup>

Currently, however, it seems that the focus is on combating trafficking, and thus labour exploitation, by means of prosecuting perpetrators and fighting illegal migration, but that there is little attention for the (labour) rights of the irregular migrant being a victim of exploitative labour relations. Even when a human

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<sup>7</sup> Berliner Bündnis gegen Menschenhandel zum Zweck der Arbeitsausbeutung (BBGM), ‘Menschenhandel zum Zweck der Arbeitsausbeutung: Eine explorative Untersuchung zu Erscheinungsformen, Ursachen und Umfang in ausgewählten Branchen in Berlin und Brandenburg’, 2010. Prepared by N. Cyrus, D. Vogel and K. De Boer. Available at: [www.gegen-menschenhandel.de](http://www.gegen-menschenhandel.de)

<sup>8</sup> *Ibid.* Passage taken from English summary. Available at: <http://www.gegen-menschenhandel.de/Downloads/BBGM%20Studie%20September%202010.pdf>.

<sup>9</sup> In this report we will use the term irregular or undocumented migrant instead of illegal migrant as preferred by the Council of Europe. See Council of Europe, Parliamentary Assembly, Resolution 1509 (2006) ‘Human Rights of Irregular Migrants’, point. 7

<sup>10</sup> ILO publication: *International labour migration. A rights-based approach* (International Labour Office, 2010, Geneva) p. 99; M. LeVoy, and S. Craenen, ‘Undocumented Migrants in the Workplace: A rights-Based Approach’ (2007, available at: [http://www.migration-boell.de/web/migration/46\\_1388.asp](http://www.migration-boell.de/web/migration/46_1388.asp))

<sup>11</sup> See PICUM report ‘Ten Ways to Protect Undocumented Migrant Workers’ 2005 (available at: <http://www.picum.org/article/reports>)

<sup>12</sup> LeVoy, and Craenen 2007; PICUM report 2005.

rights-based approach is advocated, it predominantly deals with protection of rights once a person is already a (possible) victim of human trafficking.<sup>13</sup>

The Platform for International Cooperation on Undocumented Migrants (PICUM) proposes that the fact that irregular migrant workers are frequently hired because they are cheap and exploitable should be made the point of departure.<sup>14</sup> Accordingly, obstacles to the enforcement of irregular migrant workers' rights should be analysed and removed.<sup>15</sup> This rights-based approach should entail that undocumented workers will, as much as possible, have the same workplace rights as documented workers and that these rights should include: minimum wages, maximum working hours and overtime pay, workers' compensation in case of work-related accidents, compensation in case of dismissal and the right to organise; because equal rights reduce the incentives for unscrupulous employers to hire irregular migrant workers.<sup>16</sup> The International Labour Organization also sees room for the development of this rights-based approach as an alternative to the penal approach:

'Most countries have focussed on confronting forced labour and trafficking through the criminal law with a tendency to overlook the valuable and complementary role of labour inspectors. Yet, a country's labour law can provide a useful entry point to combat such practices. Enforcement of labour law through inspections as well as the labour courts can be an additional strategy that allows for outcomes and approaches to these problems as an alternative to penal sanctions'<sup>17</sup>

Against this background the first part of this exploratory research seeks to investigate whether and to what extent the Netherlands adopts such a rights-based approach. As we have seen above, the right to fair working conditions can be of great importance in preventing exploitative labour relations. Therefore, this research will focus on this particular human right. In order to get an understanding of the situation in the Netherlands regarding labour rights of irregular migrant workers we will examine: 1) what the international and European legal obligations of the Netherlands are as regards labour rights of irregular migrants, with a focus on fair working conditions; 2) the implementation of the right to fair working conditions in national law; 3) whether the effective realisation for

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<sup>13</sup>Bureau Nationaal Rapporteur Mensenhandel, *Achtste Rapportage Nationaal Rapporteur Mensenhandel* (2010), p. 39; Bureau Nationaal Rapporteur Mensenhandel, *Zevende Rapportage Nationaal Rapporteur Mensenhandel* (2009), p.77; Adviescommissie voor Vreemdelingenzaken, 'De mens beschermd en de handel bestreden. Een advies over een evenwichtig beschermingsregime voor slachtoffers van mensenhandel' (ACVZ, 2009, Den Haag); Interview Dutch Social Intelligence and Investigation Service (*SIOD*) 6 December 2010.

<sup>14</sup> Le Voy, and Craenen 2007; PICUM report 2005.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.* And as an additional point Le Voy and Craenen state that: 'If hired anyways, the damage done to the general labour market will be minimised because the undocumented workers' 'competitive edge' over regularly employed workers will be reduced.'

<sup>17</sup> ILO LAB/ADMIN: *Labour inspection in Europe: Undeclared Work, Migration, Trafficking* (International Labour Office, 2010, Geneva) p. 31. See also: ILO: *ILO Multilateral Framework on Labour Migration; Non-binding principles and guidelines for a rights-based approach to labour migration* (International Labour Office, 2006, Geneva)

irregular migrant workers of the right to fair working conditions is ensured in the Netherlands.

### 1.2 Legal Consciousness

After the implementation of international treaties in national law, the next phase in the realisation of human rights is their internalisation. Without this, Falk asserts, 'the impact of international standards is likely to be uneven and sporadic, both domestically and globally'.<sup>18</sup> As Oomen remarked, there is little interest in the actual implementation and internalisation of human rights in countries like the Netherlands.<sup>19</sup> Next to working on human rights awareness with national institutions, adopting a bottom-up perspective it is of great relevance in this respect. The second aim of this exploratory research is to investigate the consciousness of irregular migrant workers of their human rights from such a bottom-up perspective.

Legal consciousness has been defined in various ways.<sup>20</sup> We will adopt the perspective that 'consciousness of law is reflected in both people's understanding of their rights *as well as* their efforts to enact those rights.'<sup>21</sup> Many studies of legal consciousness have shown that how individuals experience law in their ordinary lives is of central importance for understanding law's influence on societal change.<sup>22</sup> Marshall emphasises that if individuals decline to enact their rights by rejecting their significance to remedy an injustice, they do not participate in the continuing construction of legality that strengthens the law.<sup>23</sup> 'When rights remain idle, law's ability to shape meanings and opportunities and practices is diminished.'<sup>24</sup> In our context, if irregular migrant workers – for whatever reason – not invoke their rights, the rights-based approach can never develop into an adequate alternative to the penal approach to labour exploitation. Therefore, the following questions form the basis of the second part of our exploratory research: 1) What is irregular migrant workers understanding of their labour rights in the Netherlands? 2) Are they willing to try to effectuate these rights in practice?

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<sup>18</sup> R. Falk, *Human Rights Horizons: A Pursuit of Justice in a Globalizing World* (Routledge, 2000, New York) p. 61.

<sup>19</sup> B. M. Oomen, 'Mensenrechten gemobiliseerd? Over private actoren, proefprocessen en een (te) passieve overheid' In: *Internationalisering, veiligheid en recht* (Kenniskamer, 2010, Ministerie van Justitie).

<sup>20</sup> S.S. Silbey 'After Legal Consciousness' (2005) *Annual Review of Law and Social Science*, vol. 1, p. 323-268, p. 334; M. McCann, *On Legal Rights Consciousness: A Challenging Analytical Tradition*. In: B. Fleury-Steiner and L.B. Nielsen (eds.) *The New Civil Rights Research: A Constitutive Approach* (Dartmouth/Ashgate, 2006, Burlington).

<sup>21</sup> B. Fleury-Steiner and L.B. Nielsen, *A Constitutive Perspective of Rights*. In: B. Fleury-Steiner and L.B. Nielsen (eds.) *The New Civil Rights Research: A Constitutive Approach* (Dartmouth/Ashgate, 2006, Burlington) p. 4.

<sup>22</sup> *Ibid.* p. 3-4 for references.

<sup>23</sup> A. Marshall, 'Idle rights: employees' rights consciousness and the construction of sexual harassment policies' (2005) *Law & Society Review*, vol. 39, p. 83–124, p. 89.

<sup>24</sup> *Ibid.* See also B. A. Quinn, 'The Paradox of Complaining: Law, Humor and Harassment in the Everyday Work World' (2000) *Law and Social Inquiry*, vol. 25, p.1151–85; K. Bumiller, *The Civil Rights Society: The Social Construction of Victims* (Johns Hopkins University Press, 1988, Baltimore)

### 1.3 Methodology

The first part of our exploratory research is conducted through legal desk research based on the study of international and national law, jurisprudence and literature. In addition, we interviewed staff members of the *Expertise Centrum Mensenhandel en Mensensmokkel*, the Dutch Labour Inspectorate and the Social Intelligence and Investigation Service (*SIOD*) as well as representatives of Okia Foundation and BLinN. Three lawyers with experience in assisting irregular migrants in labour law cases, an expert in the field of Dutch labour law and representatives of a trade union have been consulted as well.

The second part of the research, dealing with the migrant perspective regarding labour rights, is primarily based on empirical data collection in the form of questionnaires and personal interviews conducted with irregular migrants (previously) working in the Netherlands themselves. The irregular migrants were contacted at the consultation hours of the IOM, where a first indication of their willingness to cooperate and their suitability for the research was made. Moreover, migrants held in aliens detention centres were contacted. An important advantage of interviewing this group, was the likelihood of the heightened probability of discovering cases of labour exploitation or violation of labour rights, as these migrants were likely to be detained as a result of their presence in a situation of irregular labour combined with their illegal stay.

If applicable, the migrant was first presented a copy of the short questionnaire to inquire shortly into the main thought on matters of work experience and understanding of labour rights. After completion of the short questionnaire, the possibility existed to elaborate more on these issues in an extended interview, dealing again with the subjective experience of employment, the understanding of labour rights, and, subsequently the willingness to enforce these rights through means of a legal procedure.

The information acquired from these conversations subsequently served to uncover signs of exploitative labour relations and presence of legal consciousness among irregular migrants working in the Netherlands. This research, however, is qualitative in nature and does not pretend, regarding the relative small number of migrants that was taken into account, to be representative for the total amount of cases of labour exploitation among illegal migrants in the Netherlands. Moreover, since the average IOM-client can not be taken to represent the average irregular migrant working in the Netherlands properly, this preliminary study is primarily intended to assess the presence of exploitative labour relations and legal consciousness among irregular migrants working in the Netherlands who report themselves at IOM consultation hours.

Lastly, there was no prior selection on the basis of nationality in the selection of migrants. As the format of this research does not enable representative numbers of various nationalities to be included, any selection on such a basis was avoided. When a prior selection based on specific nationalities would have been made, potential cases of labour exploitation and violation of labour rights in general would categorically have been excluded, while the advantages of classifying on the basis of nationality would not have been realised due to the lack of representativeness within the categories used. However, to realise the informative

value of this research to its fullest extent, the nationalities of the respondents are mentioned, amongst others with the purpose of comparing the nationalities included in this research sample with the nationalities most represented among the IOM-clients who report themselves at the consultation hours in general.



## *Part 1: Institutional Perspective*

### **2. International and European Legal Obligations of the Netherlands as Regards Labour Rights of Irregular Migrant Workers**

According to the Ad hoc Working Group on Irregular Migrants set up by the Council of Europe the current economic and political approach to migration may easily undermine the human rights dimension of migration.<sup>25</sup> This relates to so-called ‘chain reasoning’, which starts with the argument that irregular migrants have no right of access and consequently other facilities or rights are denied to them as well.<sup>26</sup> However, even though irregular migrant workers are staying ‘illegally’ in the Netherlands, they still do have rights. These rights are laid down in several international instruments.<sup>27</sup>

It has been argued that safeguarding minimum rights removes irregular migrants from the dependency situation they are in, so they can emancipate and make different choices.<sup>28</sup> An important step in fighting exploitative labour relations between Dutch employers and irregular migrant workers would be to guarantee their labour rights.<sup>29</sup> The following section will discuss the instruments which protect the right to fair working conditions for irregular migrant workers and address the instruments containing the rights important in effectuating the right fair working conditions.<sup>30</sup>

#### *2.1 United Nations and the International Labour Organization*

The Universal Declaration of Human Rights (UDHR)<sup>31</sup> constitutes the foundation of all international human rights instruments. Although, declarations are not binding, the UDHR has been accepted as part of customary international law and is now considered binding upon all states.<sup>32</sup> The UDHR contains a non-discrimination clause in Article 2 stating that everyone is entitled to all rights set forth in the 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.’<sup>33</sup> Whereupon Article 23 reads:

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<sup>25</sup> Council of Europe, ‘Report of the Ad hoc Working Group on Irregular Migrants’ (*MG-AD*), rapporteur: R. Cholewinski, Doc. MG-AD (2003) 3.

<sup>26</sup> *Ibid.* See also: R. Cholewinski, *Study on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights*, (Council of Europe Publishing, 2005, Strasbourg) p. 27.

<sup>27</sup> See for an overview: Platform for International Cooperation on Undocumented Migrants (PICUM), ‘Undocumented Migrants Have Rights! An Overview of the International Human Rights Framework’, 2007 (available at: <http://www.picum.org/article/reports>).

<sup>28</sup> T. Strik, ‘Illegalen: een grensoverschrijdend punt van zorg’ *Migrantenrecht*, 2008, vol. 9-10, p. 316.

<sup>29</sup> See PICUM report ‘Ten Ways to Protect Undocumented Migrant Workers’ 2005 (available at: <http://www.picum.org/article/reports>)

<sup>30</sup> The aim is not to give an extensive overview of *all* instruments that might grant rights to irregular migrant workers, but only the ones most relevant for the rights-based approach discussed in this report.

<sup>31</sup> Universal Declaration of Human Rights, (adopted 10 December 1948, G.A. res. 217A (III))

<sup>32</sup> Many of UDHR provisions have been codified in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The implementation of both Covenants is monitored by two separate supervising bodies, whereas the UDHR lacks such a body. Hence, when laying legal claims reference is mostly made to the Covenants. Both instruments will be discussed below.

<sup>33</sup> (Emphasis added)

- ‘(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.  
 (2) Everyone, without any discrimination, has the right to equal pay for equal work.  
 (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.  
 (4) Everyone has the right to form and to join trade unions for the protection of his interests.’

Subsequently, Article 24 recognises the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay. Combining Article 2 with Articles 23 and 24 would lead to the conclusion that irregular migrant workers are entitled to the rights laid down in Article 23 and 24 in the same way as nationals and regular migrants. However, as pointed out by Cholewinski,<sup>34</sup> some provisions (including Article 23) have been interpreted as excluding aliens from their protection.<sup>35</sup> Nevertheless, the interpretation that irregular migrant workers are entitled in any case to equal treatment in respect of fair working conditions receives much support nowadays,<sup>36</sup> and has as such not been contested by the Dutch government. Yet, it has not ratified the treaties which explicitly protect right to fair working conditions of irregular migrant workers as we will see below.

The right to fair working conditions of irregular migrant workers is explicitly protected in the International Convention for the Protection of the Rights of All Migrant Workers (ICRMW)<sup>37</sup> and ILO-Convention No.143.<sup>38</sup> The Netherlands has neither ratified the ICRMW nor the ILO-Convention.<sup>39</sup> It is however a party to ILO-Convention No.97 concerning migration for employment<sup>40</sup> but this

<sup>34</sup> See R. Cholewinski, *Migrant Workers in International Human Rights Law*, 1<sup>st</sup> Ed. (Clarendon Press, 1997, Oxford) p. 48-50.

<sup>35</sup> *Ibid.* p. 50. Cholewinski emphasised that any restrictions imposed by states upon aliens’ rights might be justified by the limitation clause contained in Article 29(2) UDHR, which reads: ‘In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.’

<sup>36</sup> The European Trade Union Confederation (ETUC) asked for ‘a recognition that *every person – with proper documents or not – is to be valued and respected as a human being and should be entitled to the basic human rights and minimum labour standards*’ in ‘Illegal immigration: ETUC calls for enforcement of minimum labour standards and decent working conditions as a priority’, ETUC, Brussels, 2006 (available at: <http://www.etuc.org/a/2699>). See also R. Cholewinski 2005, p. 54; S. Carrera and M. Merlino ‘Undocumented Immigrants and Rights in the EU Addressing the Gap between Social Science Research and Policy-making in the Stockholm Programme?’ *Center for European Policy Studies: Liberty and Security in Europe/December 2009*, para. 30 (available at <http://www.ceps.eu>).

<sup>37</sup> International Convention on the Protection of the Rights of All Migrant Workers and their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3.

<sup>38</sup> Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (adopted 24 June 1975, entered into force 12 September 1978) (ILO-Convention No. 143).

<sup>39</sup> However, this does not mean that the Netherlands is not bound by the obligation to guarantee irregular migrant workers the right to fair working conditions as we will see below.

<sup>40</sup> Convention concerning Migration for Employment (adopted 1 July 1949, entered into force 22 January 1952) (ILO-Convention No. 97).

convention only gives rights to immigrants *lawfully* in the territory (Article 6). ILO-Convention No.143 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers was the first attempt to address the situation of irregular migrants<sup>41</sup> and has not been ratified by the Netherlands.<sup>42</sup> With regard to the ICRMW, the Netherlands explained that it has not signed the Convention because it is ‘opposed in principle to rights that could be derived from this Convention by aliens without legal residence rights.’<sup>43</sup> In this respect the government also referred to the Linkage Act (*Koppelingswet*)<sup>44</sup> which distinguishes between foreigners with and without legal residence status, and the consequences of that distinction for entitlement to social security benefits.<sup>45</sup> It clarified this issue by stating that:

‘the Netherlands secures rights to social security to both legal and illegal migrants. Certain basic needs of illegal migrants are secured, but it would go too far to bring the level of access to social rights of illegal migrants to the same level as those of legal migrants. (...) undocumented migrants have access to education, legal aid, and health.’<sup>46</sup>

The Linkage Act was also one of the reasons for not ratifying ILO-Convention No.143.<sup>47</sup> Whether this difference in treatment between regular and irregular migrants is permissible remains questionable in the light of its international obligations, in particular the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>48 49</sup> The Netherlands, being a party to this Covenant is held, according to Article 2(2), to guarantee the rights enunciated therein to be exercised without discrimination of any kind. According to the Committee on Economic, Social and Cultural Rights (CESCR) – which monitors the implementation of the Convention – the rights apply to everyone, including migrant workers, *regardless of legal status and documentation*.<sup>50</sup> Consequently,

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<sup>41</sup> E. Fornalé ‘Challenges in the Protection of Migrant Workers’ Rights: the Italian Case’ (2010) paper prepared for ESF workshop “Migrant Legality an Employment in Europe”, IMES, University of Amsterdam, p. 10.

<sup>42</sup> For current status of ratifications see: <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C143> (last visited 11 October 2010)

<sup>43</sup> UN Human Rights Council Working Group, National Report of the Netherlands submitted to Working Group on the Universal Periodic Review (2008) A/HRC/WG.6/1/NLD/1, para.22. The Netherlands has still not signed the Convention see for status of signatures and ratifications: [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-13&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en) (last visited 11 October 2010).

<sup>44</sup> *Koppelingswet* of 1 July 1998, incorporated in Article 10 of the Dutch Aliens Act 2000.

<sup>45</sup> UN CESCR Combined fourth and fifth periodic reports of the Netherlands on implementation of ICESCR (2009) E/C.12/NLD/4-5 para. 8

<sup>46</sup> Report of the Human Rights Council Working Group on the Universal Periodic Review: The Netherlands (2008) A/HRC/8/31, para. 62

<sup>47</sup> Letter from Dutch Minister of Social Affairs to Parliament (*Kamerstukken II* 2003-2004, 29427 nr. 3)

<sup>48</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

<sup>49</sup> For a discussion see e.g. K. Kapuy, ‘Bescherming voor illegal migranten? Internationale mensenrechtenverdragen en sociale zekerheid’ *Migrantenrecht*, 2009, vol. 6, p. 246-251; NJCM, Addendum to the Joint Parallel Report to the Combined Fourth and Fifth Periodic Report of the Netherlands on the ICESCR, as submitted to the CESCR by seventeen Dutch NGOs and other civil society actors in October 2009, p. 21-23.

<sup>50</sup> CESCR General Comment No. 20, on Article 2 paragraph 2 (2009) UN doc. E/C.12/GC/20, para. 30. The Committee on Economic, Social and Cultural rights is an expert body with the task

even though the Netherlands has not signed the ICRMW or ILO-Convention No.143, it is still bound by the provisions of the ICESCR, given that these are applicable to irregular migrants.

Articles 6-8 ICESCR guarantee more or less the same rights as laid down in Articles 23 and 24 UDHR. Article 6 provides for the right to work,<sup>51</sup> Article 7 for the right to the enjoyment of just and favourable working conditions<sup>52</sup> and Article 8 contains the right to form and join trade unions.<sup>53</sup> The latter right must be guaranteed to *everyone* but can be restricted under certain conditions.<sup>54</sup> The right to work and the right to just and favourable working conditions must also be

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of monitoring implementation and compliance with the ICESCR. Although its General Comments are not legally binding, they are of great authority in interpreting the Convention.

<sup>51</sup> Article 6 reads:

‘1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.’

<sup>52</sup> Article 7 reads: ‘The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays’

<sup>53</sup> Article 8 reads:

‘1. The States Parties to the present Covenant undertake to ensure:

(a) The right of 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. 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;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations 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;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.’

<sup>54</sup> That is: the restriction must be prescribed by law and be 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 (Article 8 (1)(a)ICESCR).

guaranteed to *everyone* and no provision is made for specific limitations on these rights. Hence, also no limitations apply with regard to (irregular) migrants.<sup>55</sup> The general limitation clause of Article 4 ICESCR could be invoked by States to limit rights granted by the Covenant, but ‘only such limitations as determined by law in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.’ As regards the right to work it had been generally accepted that migrant workers may be required to obtain authorisation (a permit) in order to have access to the labour market.<sup>56</sup> Still, it can also be argued that the right to work should be granted to everyone on the territory of developed countries,<sup>57</sup> and that accepting the practice of work permits as justification for not guaranteeing the right to work is outdated. Especially in the light of the recent CESCR General Comment rejection of that interpretation would seem convincing. The CESCR emphasised ‘that the Covenant expressly recognises the rights of “everyone” to the various Covenant rights such as, *inter alia*, the right to work, just and favourable conditions of work (..).’<sup>58</sup> Subsequently, the Committee stressed that the ground of nationality should not bar access to Covenant rights since these apply to everyone including ‘migrant workers and victims of international trafficking, *regardless of legal status and documentation*.’<sup>59</sup> We will however not elaborate on the extent to which the right to work – or the right to social security<sup>60</sup> – applies to irregular migrants but rather focus on the unambiguous obligation to protect the right to fair working conditions<sup>61</sup> once a migrant worker – regular or not – is *de facto* working in the host country.<sup>62</sup> The Committee emphasises that differential treatment can be allowed only when the justification for differentiation is *reasonable* and *objective*: ‘This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and

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<sup>55</sup> See Cholewinski 1997, p. 60.

<sup>56</sup> M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A perspective on its Development*, 1<sup>st</sup> Ed. (Clarendon Press, 1995, Oxford) p. 213.

<sup>57</sup> *Ibid.*. Craven states that it might be argued that the Covenant in specifically allowing for the differential treatment by developing countries of non-nationals under Article 2(3) (which reads: ‘Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals’), impliedly rules out the possibility of limitations being imposed upon equal access to employment in *developed* countries.

<sup>58</sup> CESCR General Comment No. 20, on Article 2 paragraph 2 (2009) UN doc. E/C.12/GC/20, para. 3.

<sup>59</sup> *Ibid.* Para. 30 (emphasis added)

<sup>60</sup> For a discussion on the topic see: Council of Europe, Committee of Experts on Standard-Setting Instruments in the Field of Social Security, ‘Exploratory Report on the Access to Social Protection for Illegal Labour Migrants’, prepared by P. Schoukens and D. Pieters, Doc. CS-CO (2004) 3.

<sup>61</sup> When not ratifying e.g. ILO-Convention No. 143, the Government did not state as a reason that irregular migrant workers have no right to fair working conditions equal to nationals. It mainly had problems with the equality of treatment with nationals in respect in particular of guarantees of security of employment, the provision of alternative employment and social security (Linkage Act). Hence, the Government has not opposed to irregular migrant workers having the right to fair working conditions (*Kamerstukken II* 2003-2004, 29427 nr. 3).

<sup>62</sup> See also: Council of Europe, Parliamentary Assembly, Resolution 1509 (2006) ‘Human Rights of Irregular Migrants’. Under 13.5 the Assembly explicitly considered that regarding economic and social rights *minimum* rights: ‘irregular migrants in work (..) should be entitled to fair wages, reasonable working conditions, compensation for accidents, access to a court to defend their rights and also freedom to form and to join a trade union.’ The right to work is not mentioned and the right to social security only under certain conditions.

solely for the purpose of promoting the general welfare in a democratic society.’<sup>63</sup> Because of the abuses on the labour market which would go with denying irregular migrants the right to fair working conditions, it seems clear that differential treatment with regard to this right would not meet the criteria. In fact, with a view to preventing and combating labour exploitation – to which the Dutch government committed itself<sup>64</sup> – protection of fair working conditions would constitute an essential instrument.<sup>65</sup>

Guaranteeing the right to the enjoyment of just and favourable working conditions entails the obligation of the Netherlands to respect, protect and fulfil.<sup>66</sup> The right includes equal and fair remuneration for work, which as a minimum provides workers with a decent living (corresponds to minimum wage), safe and healthy working conditions, reasonable limitation of working hours and periodic holidays.<sup>67</sup>

In addition to this specific provision, Article 26 of the International Covenant on Civil and Political Rights (ICCPR)<sup>68</sup> stipulates the general principle of equal treatment or non-discrimination: ‘All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.’ It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. According to the Human Rights Committee – which is entrusted with supervising implementation of the Convention – Article 26 constitutes an autonomous right and is thus *not* limited to the rights laid down in the ICCPR.<sup>69</sup>

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<sup>63</sup> CESCR General Comment No. 20, on Article 2 paragraph 2 (2009) UN doc. E/C.12/GC/20, para. 13.

<sup>64</sup> By signing amongst others the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children Rights (adopted 2000, entered into force 25 December 2003) 2237 UNTS 319 (Palermo Protocol) and the CoE Convention on Action against Trafficking in Human Beings. (2005, entered into force 1 February 2008) CETS No.197. Labour exploitation is one of the situations falling under the definition of trafficking in human beings

<sup>65</sup> It can serve as an alternative to the penal approach. ILO LAB/ADMIN 2010, p.31.

<sup>66</sup> Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997) UN Doc. E/C.12/2000/13, para. 6.

<sup>67</sup> Article 7 reads: ‘The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays’

<sup>68</sup> International Covenant on Civil and Political Rights (adopted 16 December 1996, entered into force 23 March 1976) 999 UNTS 17.

<sup>69</sup> HRC General Comment No. 18, Non-discrimination (1994) U.N. Doc. HRI/GEN/1/Rev.1 at 26, para. 12. Also by the adoption of its views in the cases *Broeks*, *Danning*, and *Zwaan-de Vries* all against the Netherlands, pertaining to social security entitlements, the Human Rights Committee found that the provision also applies to economic and social rights. C. Tomuschat *Human Rights: Between Idealism and Realism*, 2<sup>nd</sup> ed. (Oxford University Press, 2008, Oxford) p.205. Although

This interpretation of the Covenant has met opposition. The Netherlands, but also France and Germany, opposed to applying Article 26 also to social rights which are not laid down in the ICCPR.<sup>70</sup> Furthermore, the Covenant provides in Article 14 for the right to a fair trial for all persons without discrimination and the right to form and join trade unions is recognised in Article 11.

## 2.2 Council of Europe

The European Convention on Human Rights (ECHR)<sup>71</sup> also contains the prohibition of non-discrimination, which is laid down in Article 14. Following this Article the rights *laid down in the Convention* are applicable to everyone without distinction. Consequently, the right to form and join trade unions (Article 11) and the right to a fair trial (Article 6) are applicable to irregular migrant workers, regular migrant workers and Dutch nationals alike. This is particularly important since the right to fair trial requires ‘effective access to court’ which can imply that the State must provide for legal aid.<sup>72</sup> For irregular migrant workers, this might be very important since otherwise it might not be possible to bring a claim in order to enforce the right to fair working conditions. Furthermore, an obligation equivalent to Article 26 ICCPR, is to be found in Protocol 12 to the ECHR.<sup>73</sup> It adds to Article 14 a general prohibition of discrimination. The protocol prescribes that rights set forth in national law as well as rights granted by international law must be secured without discrimination. Thus not only the rights contained in the Convention, but *any right* specifically granted to individuals,<sup>74</sup> including the right to fair working conditions.<sup>75</sup>

Another instrument emanating from the Council of Europe is the European Social Charter.<sup>76</sup> The Charter provides for the right to just conditions of work, safe and healthy working conditions and fair remuneration (Articles 2-4). However, these rights apply to foreigners ‘only in so far as they are nationals of other Contracting Parties *lawfully* resident or working regularly within the territory of the Contracting Party concerned.’<sup>77</sup> The Charter is thus of no help to irregular migrant workers in respect of protection of fair working conditions.

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the Committee’s views are not legally binding are authoritative interpretations on the merits of the cases brought before it, and thus considered of great importance.

<sup>70</sup> Tomuschat 2008, p.221.

<sup>71</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS. No.5.

<sup>72</sup> ECHR, *Airey v. Ireland*, 9 October 1979, Series A, No 32: (1979-80) 3 EHRR 592, para 26.

<sup>73</sup> Twelfth Protocol (adopted 4 November 2000, entered into force 1 April 2005) ETS No. 177. Ratified by the Netherlands.

<sup>74</sup> Explanatory Report to Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (2000) ETS No. 177.

<sup>75</sup> This would imply that also ILO Conventions which are ratified by the Netherlands and which apply to workers in general would also apply to irregular migrant workers in a non-discriminatory manner.

<sup>76</sup> European Social Charter (adopted in 1961, revised 1996, entered into force 1999) ETS No. 163.

<sup>77</sup> Explanatory Report to the Revised European Social Charter (1996) ETS No. 163. Para. 147 (emphasis added).

### 2.3 European Union Legislation

Current EU labour law is directed towards regular migrant workers only.<sup>78</sup> However, areas of importance for migrant workers such as employment protection, remuneration and industrial injury are subject only to the most fragmented legislative efforts anyway.<sup>79</sup> There has been a call for a directive establishing a common set of rights for *all* migrant workers in the EU – ensuring, *inter alia*, equal pay for equal work, decent working conditions and collective organisation,<sup>80</sup> but legislation in this direction is unlikely to occur. Although, there is no specific protection on fair working conditions of irregular migrant workers at EU level, the recent Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals<sup>81</sup> – adopted in the field of immigration policy – should be of benefit to the migrant. According to the preamble, the objective of the Directive is ‘to counteract illegal immigration by acting against the employment pull factor’ but it should also be seen as ‘complementary to measures to counter undeclared work and exploitation’.<sup>82</sup> Still, the primary aim has not been to prevent exploitation or to minimise the risks of the irregular migrants at work, but rather to reduce the attraction for migrants to illegally enter the European Union by further prohibiting the possibilities to work without permission and by increasing the possibilities of legal sanctions against employers not complying with the legislation.<sup>83</sup> Nevertheless, it grants in Article 6 a right to back payment of outstanding remuneration to the irregularly employed third country national. The agreed level of remuneration which the worker can claim shall be presumed to be at least as high as minimum wage, agreed by collective agreements or in accordance with established practice in the sector, unless the employer or employee can prove otherwise, while respecting the mandatory national provisions on wages.<sup>84</sup> In order to apply the back payment rule, it shall be presumed the employment relationship was of at least three months duration unless, among others, the employer or the employee can prove otherwise.<sup>85</sup> In addition, the irregularly employed shall have the possibility to introduce a claim and be systematically and objectively informed about their rights before the enforcement of any return decision.<sup>86</sup> In short, the Directive places a clear

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<sup>78</sup> Undocumented Workers Transition (UWT) project, ‘Undocumented Migration Overview’ (2007) p. 15 (available at: [http://www.undocumentedmigrants.eu/country/country\\_home.cfm](http://www.undocumentedmigrants.eu/country/country_home.cfm))

<sup>79</sup> A. Inghammar, ‘The Employment Contract Revisited. Undocumented Migrant Workers and the Intersection between International Standards, Immigration Policy and Employment Law’ *European Journal of Migration and Law*, 2010, vol. 12, p. 198.

<sup>80</sup> S. Carrera and Merlino 2009, para. 4. of ‘Conclusions and Policy Recommendations’.

<sup>81</sup> Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals (adopted 18 June 2009, transposed into national law by 20 July 2011) OJ L 168/24.

<sup>82</sup> See also S. Peers, ‘Legislative Update: EC Immigration and Asylum Law Attracting and Deterring Labour Migration: The Blue Card and Employer Sanctions Directives’, *European Journal of Migration and Law*, 2009, Vol. 11, p. 387-426.

<sup>83</sup> A. Inghammar 2010 p. 200.

<sup>84</sup> Article 6(1)(a) Directive. 2009/52/EC.

<sup>85</sup> Article 6(3) Directive. 2009/52/EC

<sup>86</sup> Article 6(2) Directive. 2009/52/EC. Hence, there must be an effective compliance mechanism (Article 13).



obligation on the Netherlands to ensure that irregular migrant workers can claim their labour right to fair and equal remuneration by 2011.<sup>87</sup>

#### 2.4 Conclusion

Following international obligations of the Netherlands under the ICESCR, ICCPR and ECHR irregular migrant workers in the Netherlands have a right to just and favourable working conditions, a right to form and join trade unions to make it easier to exercise the right, and a right to a fair trial in order to enforce both these rights when necessary. The general principle of non discrimination laid down in the ICCPR and Protocol 12 to the ECHR further strengthens this position. Furthermore, the recent EU Directive 2009/52 specifically grants irregular migrants workers the right to back payment of outstanding remuneration. This is a truly tangible right which the Dutch State must guarantee as from July 2011 by informing migrant workers about their rights and by making it possible to bring a claim.

However, the fact that irregular migrants are entitled to rights is often in conflict with official discourse and immigration policies of states that advance their non-entitlement to basic social and economic rights.<sup>88</sup> The Dutch statement with regard to the Linkage Act demonstrates that the Netherlands also communicates such conflicting discourse. How the Netherlands complies with its international obligations in respect of labour rights will be discussed in the following section. Since EU Directive 2009/52 needs to be transposed into national law by July 2011, the implementation period has not yet expired so the way in which the Directive is implemented cannot yet be discussed.

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<sup>87</sup> See also P. Krop, T. de Lange and M. Tjebbes, 'Richtlijn 2009/52 Sancties tegen werkgevers van illegaal verblijvende derdelanders' *Migrantenrecht*, 2009, vol 8, p. 336-346.

<sup>88</sup> See S. Carrera and M. Merlino 2009, p. 24.

### 3. Implementation of International Legal Obligations

We have seen in the previous section, that the system of Human Rights protection of the United Nations, also known as the International Bill of Human Rights,<sup>89</sup> imposes certain obligations on the Netherlands. International law does not prescribe a specific method of implementation; it is only the result that matters.<sup>90</sup> The Netherlands has a so-called monist approach to international law,<sup>91</sup> which entails that a treaty as such can be transposed from the international level into the national legal order so that its rules form part of the Dutch legal order to the same degree as any other legal rule of national origin.<sup>92</sup> However, the mere transposition of international human rights instruments into Dutch law does not suffice; the full and effective realisation of the rights must ultimately be achieved.<sup>93</sup> With regard to the rights laid down in the ICESCR and ICCPR, three different types of specific obligations can be distinguished: the obligation to respect, protect and fulfil the rights recognised in the Covenants.<sup>94</sup> The next part will discuss how the Netherlands seeks to fulfil its obligations starting from the perspective of the right to just and favourable working conditions as the central right along which the other rights will be discussed.

#### 3.1 Right to Just and Favourable Working Conditions in the Netherlands

The right to just and favourable working conditions is stipulated in Article 7 of the ICESCR. Article 2(1) outlines the basic obligations in relation to the rights laid down in the Covenant:

‘Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.’

In addition to these rather vague, and open to interpretation description of the duties upon the State parties, the more concrete obligation to respect, protect and fulfil has been recognised.<sup>95</sup> The Committee on Economic, Social and Cultural Rights took over this tripartite model.<sup>96</sup> The specific implications of these duties will be discussed here.

##### 3.1.1 Obligation to Respect

The obligation to respect requires the Netherlands ‘to abstain from performing, sponsoring or tolerating any practice, policy or legal measure violating the

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<sup>89</sup> The Universal Declaration of Human Rights (UDHR) of 1948 together with the ICESCR, ICCPR and both its optional protocols constitute the International Bill of Human Rights. See <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>

<sup>90</sup> C. Tomuschat 2008, p. 111.

<sup>91</sup> C. Kortmann, *Constitutioneel Recht*, 6th Ed. (Kluwer, 2008, Deventer) p.182.

<sup>92</sup> C. Tomuschat 2008, p. 111.

<sup>93</sup> See Article 2 (1) ICESCR and Article 2 ICCPR.

<sup>94</sup> See Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997) UN Doc. E/C.12/2000/13, para. 6

<sup>95</sup> Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997) UN Doc. E/C.12/2000/13, para. 6.

<sup>96</sup> C. Tomuschat 2008, p. 43; CESCR General Comment No. 12, on Article 11(1999), UN doc. E/C.12/1999/5.

integrity of individuals or infringing upon their freedom to use those material or other resources available to them in ways they find most appropriate to satisfy economic, social and cultural rights.<sup>97</sup> This constitutes a so-called negative obligation protecting individuals from arbitrary interference with the enjoyment of their rights. As regards the particular right under review, it places an obligation on the State to refrain from interfering with the right to fair working conditions for example by not enacting legislation which discriminates between irregular migrant workers and regular migrant workers regarding conditions of work. No legislation has been enacted which explicitly interferes with the right to fair working conditions for irregular migrant workers. The government should also respect the rights to organise and assemble freely since these are essential for the assertion of demands by individuals entitled to rights.<sup>98</sup> No specific restrictions on these rights and other self-help initiatives have been imposed. We will see in paragraph 4.3 that trade union initiatives to unite and organise all workers, including irregular migrant, workers are emerging.

In respect of the right to work the obligation stretches as far as prohibiting forced or compulsory labour.<sup>99</sup> The right to work and the right to fair working conditions are interconnected and interdependent,<sup>100</sup> so this would also be important for the purpose of respecting the right to fair working conditions. Forced labour is prohibited in the Netherlands.<sup>101</sup>

### 3.1.2 *Obligation to Protect*

The obligation to protect requires the State *and its agents* to prevent a violation of the worker's right by any other individual or non-state actor. Where a third party infringes the right to fair working conditions, public authorities should act to preclude further violations and to guarantee access to legal remedies. In addition, effective measures should be established to protect persons from discrimination, harassment or other threats.<sup>102</sup> So the State has a positive duty to protect irregular migrant workers from interference by their employers of their right to fair working conditions. It is for the State to devise an adequate legal framework which ensures that violations by private individuals or companies are punishable or, in any case, subject to a procedure of civil compensation.<sup>103</sup> It has been explicitly pointed out by the CESCR that legislation may be indispensable in order to comply with Article 7 ICESCR.<sup>104</sup>

#### 3.1.2.1 *Legislative Framework*

Legislation on fair working conditions has been developed in the Netherlands as part of public as well as private law. In private law, regulation on fair working

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<sup>97</sup> *Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions* (United Nations Publications, 2005, New York and Geneva), p.15.

<sup>98</sup> *Ibid.*

<sup>99</sup> CESCR General Comment No. 18, on Article 6 (2006) UN doc. E/C.12/GC/18, para. 23

<sup>100</sup> CESCR General Comment No. 18, on Article 6 (2006) UN doc. E/C.12/GC/18, para. 2 and 8.

<sup>101</sup> It is prohibited *inter alia* by Article 4 ECHR and Article 273f of the Dutch Penal Code penalises trafficking in human beings, which includes labour exploitation.

<sup>102</sup> *Economic, Social and Cultural Rights: Handbook* 2005, p.17.

<sup>103</sup> Report of the Special Rapporteur Mr. El Hadji Guissé on the Question of the Impunity of Perpetrators of Human Rights Violations (1996) UN doc. E/CN.4/Sub.2/1996/15, para. 135.

<sup>104</sup> CESCR General Comment No. 3, on Article 2(1) (1990) UN doc. E/1991/23 para. 3.

conditions is mainly covered by so-called individual labour law.<sup>105</sup> In general, the duties and obligations of employers and employees are laid down in Chapter 10 of Book 7 of the Dutch Civil Code (CC).<sup>106</sup> However, all these provisions are only applicable to employment contracts.<sup>107</sup> Issues related to proving the existence of an employment contract will be discussed in paragraph 4.2 and 4.4. Amongst others the duty of the employer to pay (fair) wages (Art. 7:616-618 CC), not discriminate/ treat workers equally (Art. 7:646-649 CC) and protect workers at the workplace/ safe and healthy working environment (Art. 7:658 CC) are laid down. In addition to these general provisions, specific laws have been adopted which regulate the duties of the employer towards the employee in more detail. These laws have a public law character and are subject to supervision by public authorities.

If we go back to the specific requirements in Article 7 ICESCR we see that the right involves first ‘remuneration which provides all workers as a minimum with: (i) fair wages and equal remuneration for work of equal value without distinction of any kind (..) with equal pay for equal work; and (ii) a decent living for themselves and their families (..)’. The Minimum Wage and Minimum Holiday Allowance Act<sup>108</sup> (hereafter: Minimum Wage Act) provides for minimum wages for adults<sup>109</sup> as well as young workers. This amount is indexed twice a year and allegedly provides sufficient income to guarantee a decent standard of living.<sup>110</sup> It also prescribes that every employee is legally entitled to be paid a minimum holiday allowance.<sup>111</sup> Workers who are paid less than the minimum wage may apply to the civil courts to force the employer to correct the difference. In addition, the Labour Inspectorate supervises compliance with the Act<sup>112</sup> and can launch investigations. It will report its findings to stakeholders, including trade unions, who may then decide to bring a civil case. In addition, the Labour Inspectorate can impose administrative penalties in case of non compliance,<sup>113</sup> and perhaps even more important for the worker, the employer will also still be required to pay the amount of wage and/or holiday allowance that was unlawfully not paid. If the employer fails to do this the Labour Inspectorate can impose a

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<sup>105</sup> There is a distinction between individual and collective labour law. The former focuses on the contract of employment, the rights and duties of the individual employer and worker, dismissal law etc. The latter include trade union law, collective bargaining, collective agreements and so on. See A.T.J.M. Jacobs, *Labour Law in the Netherlands*, 1<sup>st</sup> ed. (Kluwer Law International, 2004, The Hague), p. 31.

<sup>106</sup> Civil Code (*Burgerlijk Wetboek, Boek 7*) last amended 30 June 2010, *Stb.* 2010, 274.

<sup>107</sup> The definition of employment contract is thus of decisive importance. Article 7:610 Civil Code states that a contract of employment is a contract whereby one party (employee) undertakes to perform work in the service of another party (employer) for remuneration during a given period. See A.T.J.M. Jacobs 2004, p. 46.

<sup>108</sup> Minimum Wage and Minimum Holiday Allowance Act 1968 (*Wet Minimumloon en Minimumvakantiebijslag*) *Stb.* 1968, 657. Last amended 1 November 2010, *Stcrt.* 2010, 17432.

<sup>109</sup> Articles 7 and 8 Minimum Wage and Minimum Holiday Allowance Act.

<sup>110</sup> Combined fourth and fifth periodic reports of the Netherlands on implementation of ICESCR (2009) E/C.12/NLD/4-5 para. 133.

<sup>111</sup> Article 15 Minimum Wage and Minimum Holiday Allowance Act.

<sup>112</sup> Article 18a Minimum Wage and Minimum Holiday Allowance Act; Article 1.1 Regulation on Supervising Officials based on the Social Affairs and Employment (*Aanwijzingsregeling toezichthoudende ambtenaren en ambtenaren met specifieke uitvoeringstaken op grond van SZW wetgeving*) *Stcrt.* 19 Oktober 2000, nr. 203 / p. 10.

<sup>113</sup> Articles 18b and 18c Minimum Wage and Minimum Holiday Allowance Act.

penalty order (*last onder dwangsom*)<sup>114</sup> for each day that the employer continues to be in default. In addition, the Aliens Employment Act<sup>115</sup> – which prohibits employers and private individuals from employing foreigners who do not have free access to the Dutch labour market without a valid employment permit – provides next to administrative and criminal penalties for a civil rule which has the character of a penalty.<sup>116</sup> Article 23 provides that in case an employer employed an alien contrary to the Aliens Employment Act, the presumption is that the alien has worked the previous six months in return for remuneration which is common for that particular type of employment. In case the irregular migrant worker wants to bring a claim against the employer, this reversal of proof could be helpful.

Secondly, Article 7 ICESCR requires the State to ensure safe and healthy working conditions. The Working Conditions Act<sup>117</sup> describes the main features for health and safety policy and together with the Working Conditions Decree sets objectives for the degree to which employees must be protected against work-related risks. The Labour Inspectorate is responsible for enforcement and monitoring compliance with the Working Conditions legislation.<sup>118</sup> It regulates among others on aggression and violence, harmful noise, asbestos, cancer-causing substances and vibrations.<sup>119</sup>

A third requirement to be found in Article 7 ICESCR involves ‘rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays’. To this end the Working Hours Act<sup>120</sup> has been adopted. The Act has been simplified as from 2007 and contains fewer rules in relation to the regulation of working hours. It consists of four rules providing for restrictions in relation to the maximum number of working hours: a maximum of 12 hours a shift; a maximum of 60 hours a week; no more than 55 hours a week on average over a four-week period; and, for every 16-week period, no more than 48 hours a week on average.<sup>121</sup> It also prescribes rules on breaks.<sup>122</sup> Furthermore, the Act contains the prohibition on child labour.<sup>123</sup> Again, it is the task of the Labour Inspectorate to ensure that the working hours and rest periods specified in the Working Hours Act are not violated.<sup>124</sup> It also checks whether proper records

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<sup>114</sup> Article 18n Minimum Wage and Minimum Holiday Allowance Act.

<sup>115</sup> Aliens Employment Act 1994 (*Wet Arbeid Vreemdelingen*) *Stb.* 1994, 959. Last amended 18 November 2010, *Stb.* 2010, 800.

<sup>116</sup> A. Kuijjer *et al.*, *Nederlands Vreemdelingenrecht*, 6th Ed. (Boom Juridische Uitgevers, 2005, Den Haag), p. 572.

<sup>117</sup> Working Conditions Act 1998 (*Arbeidsomstandighedenwet*) *Stb.* 1999, 184. Last amended 1 January 2007, *Stb.* 2006, 673.

<sup>118</sup> Article 24 Working Conditions Act; Article 1.1 Regulation on Supervising Officials based on the Social Affairs and Employment.

<sup>119</sup> [http://www.arbeidsinspectie.nl/english/working\\_conditions/](http://www.arbeidsinspectie.nl/english/working_conditions/)

<sup>120</sup> Working Hours Act 1995 (*Arbeidstijdenwet*) *Stb.* 1995, 598. Last amended 1 April 2007, *Stb.* 2006, 632.

<sup>121</sup> See for comment on the new law: M. Grüneil at *European Industrial Relations Observatory online* (‘eironline’), available at:

<http://www.eurofound.europa.eu/eiro/2007/05/articles/nl0705029i.htm>

<sup>122</sup> Chapter 5 Working Hours Act.

<sup>123</sup> Article 3:2 Working Hours Act.

<sup>124</sup> Article 1.1 Regulation on Supervising Officials based on the Social Affairs and Employment.

are maintained of the hours worked. If violations are detected the Labour Inspectorate can impose penalties.<sup>125</sup>

The State has thus devised an adequate legal framework which ensures that violations by employers of the right to fair and equal remuneration, safe and healthy working conditions, and reasonable limitation of working hours are subject to penalties and under certain circumstances subject to a procedure of civil compensation. Hereby it fulfils one of its conditions stemming from the obligation to protect, namely taking steps through legislation to prevent third parties from violating rights of workers. Whether these legislative safeguards really have the effect of protecting workers against abuses by employers in practice will be discussed in section 4 when we look at the effective realisation.

### 3.1.2.2 Access to Legal Remedies

Another element of the obligation to protect is to guarantee access to legal remedies in case of violations. Article 6 ECHR (fair trial) plays an important role in this respect. The right to a fair trial comprises, as we have seen above, 'effective access to court' which can imply that the State must provide for legal aid.<sup>126</sup> In the Netherlands, individuals who cannot afford a lawyer are entitled to legal assistance. The Linkage Act does not apply to legal aid because of the protection provided by Article 6 ECHR.<sup>127</sup> Hence, irregular migrants have in principle access to legal aid.<sup>128</sup>

The CESCR emphasised that where a right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.<sup>129</sup> With regard to the right to fair remuneration, this could be the case. The Labour Inspectorate is not able to detect all situations of underpayment and even if it does, it must be willing to impose a penalty in order to force the employer to pay outstanding remuneration to the irregular migrant worker. Therefore, access to a civil court to claim the right would be indispensable. The CESCR also indicated that some Articles of the ICESCR are capable of immediate judicial protection and enforcement, including Article 2(2) on non-discrimination and Article 7(a)(i) ICESCR (fair wages and equal remuneration).<sup>130</sup> This would be possible in the Netherlands since the 'qualified' monistic system allows provisions of treaties to be applied if they are binding on all persons and have been published,<sup>131</sup> which would be the case with the two provisions mentioned. In short, access to a court seems possible since irregular migrants without sufficient means are entitled to legal aid and the international provisions allow for immediate judicial protection. However, the latter safeguard seems superfluous in case of the Netherlands, since national regulations on minimum wages can also be invoked directly before a civil court.

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<sup>125</sup> Chapter 8 and 10 Working Hours Act.

<sup>126</sup> ECHR, *Airey v. Ireland*, 9 October 1979, Series A, No 32: (1979-80) 3 EHRR 592, para 26.

<sup>127</sup> R. Cholewinski 2005, p. 56.

<sup>128</sup> The Linkage Act does not exclude irregular migrants from access to legal aid. Article 10(2) Aliens Act 2000.

<sup>129</sup> CESCR General Comment No. 9, on the Domestic Application of the Covenant (1998), UN doc. E/C.12/1998/24, para. 9.

<sup>130</sup> CESCR General Comment No. 3, on Article 2(1) (1990) UN doc. E/1991/23 para. 3.

<sup>131</sup> Article 93 Dutch Constitution (*Grondwet*).

### 3.1.2.3 Effective Measures to Protect from Discrimination, Harassment and Other Threats

The obligation to protect also involves taking effective measures to protect individuals from discrimination, harassment and other threats, also by non-state actors. Again, the State itself, but also its agents (including the Labour Inspectorate) should not discriminate when exercising their tasks. In this respect, the general prohibition on discrimination stemming from ratification of the 12<sup>th</sup> Optional Protocol provides extra support to meet the obligation. The protocol explicitly prescribes that rights set forth in national law as well as rights granted by international law must be secured without discrimination on *any ground*. So the Labour Inspectorate when enforcing the laws which it is supposed to supervise must treat workers, with or without documents, equally. For example, it should use its authority to impose a penalty order to force the employer to pay outstanding remuneration that was unlawfully not paid, in a non-discriminatory manner:<sup>132</sup> in situations in which irregular migrant workers are underpaid the competence should be exercised as well.<sup>133</sup> In other words, the Labour Inspectorate is legally competent and even obliged to provide irregular migrant workers with the same protection as regular workers. In section 4 we will discuss whether this actually happens in practice.

Guaranteeing the right to fair working conditions is closely related to the problem of labour exploitation. As explained before, if the right to fair working conditions is not guaranteed, exploitative labour relations are likely to arise. Harassment and threats are common in these exploitative labour relations. In order to protect individuals from discrimination, harassment and other threats the State has to – next to acting itself in non-discriminatory and correct way – exercise ‘due diligence’ in controlling the behaviour of non-state actors.<sup>134</sup> One of the measures taken in order to protect individuals from harassment and other threats would be the criminalisation of labour exploitation. Article 273f of the Dutch Penal Code<sup>135</sup> penalises trafficking in human beings, and labour exploitation is one of the situations falling under the classification of trafficking. So in addition to merely prohibiting forced labour (one of the measures ensuring compliance with the obligation to respect) the obligation to protect requires prohibition of forced or compulsory labour *by non-State actors*.<sup>136</sup>

Several government organisations, all grouped under the responsibility of the Dutch Ministry of Social Affairs and Employment, are involved in the detection of and protection against labour exploitation.<sup>137</sup> The Labour Inspectorate has a role in detecting exploitation. It should pass on indications of exploitation and human trafficking to other services, such as the Social Intelligence and Investigation Service (*SIOD*) and the Coordination Centre for Combating Human Trafficking (*CoMensha*).<sup>138</sup> The task of the *SIOD* is to fight criminality, including

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<sup>132</sup> Explanatory Report to ECHR Protocol No. 12, para. 22.

<sup>133</sup> See also: T. de Lange, *Employer sanctions: an instrument of immigration control?* In: J. Doornik (ed.), *The Future of Migration Controls in Europe* (Amsterdam University Press, forthcoming 2011)

<sup>134</sup> Maastricht Guidelines (n), para. 18.

<sup>135</sup> Penal Code (*Wetboek van Strafrecht*)

<sup>136</sup> CESCR General Comment No. 18, on Article 6 (2006) UN doc. E/C.12/GC/18, para. 23

<sup>137</sup> This Ministry presented in September 2010 a plan to merge these organisations into one Inspection (*Inspectie SZW*). *Jaarplan 2011 (Kamerstukken II 2010-2011, 26 448, nr. 443)*

<sup>138</sup> [http://www.arbeidsinspectie.nl/english/illegal\\_employment/](http://www.arbeidsinspectie.nl/english/illegal_employment/)

labour exploitation, in the social-economic field. Although the *SIOD* is very much focussed on punishing the perpetrator (which is understandable given its criminal law function), it does strive for a ‘human rights-based approach’.<sup>139</sup> This entails in the particular context that during investigation and interventions the rights of the potential victim of labour exploitation are taken into account. The investigators bring the potential victims in contact with aid organisations (*Slachtofferhulp* or *BLinN*).<sup>140</sup> With respect to the rights-based approach referred to in the introduction (workplace rights) the *SIOD* – unlike the Labour Inspectorate – has a less prominent role. It is not equipped to impose coercive measures to ensure outstanding payments. The *SIOD* is therefore currently not concerned with ensuring individual labour rights.

### 3.1.3 *Obligation to Fulfil*

The obligation to fulfil requires positive measures by the State when other measures proved to be not sufficient in ensuring the full realisation of the right. These may include establishing both legislative and policy recognition of the right (e.g. acknowledgement by Labour Inspectorate of the right to fair working conditions for irregular migrants, provisions which explicitly stipulate that the rights also applies to irregular migrants), undertaking comprehensive legislative and policy review of all laws, regulations and other directives having a negative bearing on the fulfilment of the right (reconsidering different tasks of Labour Inspectorate?) and the provision of public services (one could think of help desks for irregular migrant workers).<sup>141</sup> Ultimately the obligation comprises those active measures by a Government necessary to guarantee everyone opportunities to have full access to all entitlements to rights that cannot be secured through exclusively personal efforts.<sup>142</sup> In other words, the obligation to fulfil amounts to ensuring the effective realisation of the right to fair working conditions, which will be dealt with in the following section when looking at the different issues influencing the effective realisation.

### 3.2 *Conclusion*

Guaranteeing the right to fair working conditions comprises the obligation to respect, protect and fulfil that right. The so-called negative duty to respect requires no arbitrary interference with the right on part of the State. It entails abstention from performing, sponsoring or tolerating any practice, policy or legal measure infringing upon one’s freedom to enjoy the right to fair working conditions. This includes not enacting legislation which discriminates between irregular migrant workers and regular migrant workers as regards conditions of work and. The Netherlands seems to fulfil this requirement.

The positive duty to protect requires the Netherlands to protect irregular migrant workers from interference by non-state actors (their employers) of their right to fair working conditions. It is for the State to devise an adequate legal framework which ensures that violations by private individuals or companies are punishable or, in any case, subject to a procedure of civil compensation. Such a general framework is in place. Access to legal remedies is in principle arranged for as well. As regards protection from discrimination we see that the Labour

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<sup>139</sup> Interview *SIOD* 6 December 2010

<sup>140</sup> *Ibid.*

<sup>141</sup> *Economic, Social and Cultural Rights: Handbook* 2005, p. 18-19.

<sup>142</sup> *Ibid.* p. 19



Inspectorate is legally competent and even obliged (based on equal treatment provisions) to provide irregular migrant workers with the same protection as regular workers. Severe infringements of the right to fair working conditions can amount to labour exploitation and the criminalisation of labour exploitation constitutes an action contributing to compliance with the obligation to protect. Moreover, protecting individuals requires the Netherlands to exercise due diligence in controlling behaviour of non-state actors. At this point we see a close connection to the third obligation

The obligation to fulfil comes down to ensuring the effective realisation of the right to fair working conditions. Compliance with this obligation will be dealt with in the following section when looking at the practical issues influencing effective realisation of the right.

#### 4. Effective Realisation of the Right to Fair Working Conditions

We have seen that respect for- and protection of the right to fair working conditions should be and is for a large part accommodated for in Dutch legislation. Consequently, relying exclusively on law and regulation effectuation of irregular migrants' right to fair working conditions should be possible given that: 1) there is legislation which gives the Labour Inspectorate tools to force employers to comply with the regulation on working conditions; 2) there is legislation protecting their rights as a worker which they can invoke before civil courts and they are in principle entitled to legal aid and; 3) as we have seen in section 2, they have the right to become a member of a trade union, which can assist in the protection of their interests. But then the question arises whether it is actually possible in practice to effectively realise the right. What are the issues influencing the effective realisation of the right to fair working conditions? What positive measures by the State could contribute to achieving the effective realisation of the right for irregular migrant workers in the same way as other workers?

##### 4.1 Role of the Labour Inspectorate

The first issue affecting the effective realisation of the right to fair working conditions of irregular migrants is the variety of tasks entrusted to the Dutch Labour Inspectorate. The Inspectorate has the task, next to supervising the Minimum Wage Act, Working Conditions Act and Working Hours Act, to monitor compliance with the Aliens Employment Act.<sup>143</sup> The Act is designed to regulate entry of migrant workers in order to protect the Dutch labour market and combat illegal employment.<sup>144</sup> It prohibits employing foreigners without an employment permit (*tewerkstellingsvergunning*).<sup>145</sup> In principle, the employer will only be allowed to employ migrant workers from outside the EU when there is no labour available in the Netherlands or elsewhere in the EU.<sup>146</sup> The employment permit which allows the employer to hire the migrant is linked to the migrant's application for a residence permit for the purpose of employment under the Aliens Act.<sup>147</sup> Both applications must be submitted simultaneously and the migrant is only eligible for a residence permit for the purpose of employment once the employment permit is granted to the employer.<sup>148</sup> Hence, the procedures of the Aliens Employment Act and the Aliens Act are intertwined. The Aliens Employment Act including the prohibition to employ aliens without an employment permit constitutes the labour market aspect of Dutch restrictive immigration policy.<sup>149</sup> Consequently supervision and enforcement of the Act is closely related to immigration control as we will see below.

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<sup>143</sup> Article 1.1 Regulation on Supervising Officials based on the Social Affairs and Employment.

<sup>144</sup> Explanatory memorandum to the Aliens Employment Act (*Kamerstukken II* 1993-1994, 23574 nr. 3); Kuijer *et al.* 2005, p. 567.

<sup>145</sup> Article 2 (1) Aliens Employment Act.

<sup>146</sup> Article 8 (1) Aliens Employment Act; Kuijer *et al.* 2005, p. 568, 580.

<sup>147</sup> Article 14 (2) Aliens Act in conjunction with Article 3.4 (1)(f) Aliens Decree; Kuijer *et al.* 2005, p. 582.

<sup>148</sup> Kuijer *et al.* 2005, p. 582.

<sup>149</sup> Explanatory memorandum to the Aliens Employment Act (*Kamerstukken II* 1993-1994, 23574 nr. 3, p. 5). See also Kuijer *et al.* 2005, p. 568.

The Labour Inspectorate is part of the Ministry of Social Affairs and Employment and is comprised of three departments.<sup>150</sup> Relevant here are the Working Conditions Department – which supervises compliance with the Working Conditions Act and Working Hours Act – and the Labour Market Fraud Department instituted to monitor compliance with the Aliens Employment Act and the Minimum Wage Act in order to protect the Dutch labour market and restrict unfair competition. When the latter department of the Inspectorate checks for illegal employment it often works together in so-called intervention teams with among others the Aliens Police and the Social Intelligence and Investigation Service (*SIOD*).<sup>151</sup> The Labour Inspectorate focuses on the employer since it can fine the employer, not the employee. However, in order to establish whether the employer is acting in accordance with the Aliens Employment Act, it must determine the nationality and the residence status of the worker. If it is established that the worker is residing irregularly<sup>152</sup> in the Netherlands he can be held by the Aliens Police, placed in detention and subsequently expelled. When the inspection is not carried out in an intervention team the Aliens Police will nevertheless be informed.<sup>153</sup> Within Dutch policy, the multidisciplinary approach (cooperation and data sharing between different officials and public bodies) is strongly encouraged and increasingly applied. In this respect the Inspectorate's Labour Market Fraud Department when enforcing the Aliens Employment Act cooperates intensively with the Aliens Police but also with the Immigration and Naturalisation Service.<sup>154</sup> Hence, the Inspectorate constitutes an important link in the process of migration control.

As from 2007 the Labour Market Fraud Department also has the task to supervise and enforce of the Minimum Wage Act in order to increase compliance with the Act.<sup>155</sup> As a result, one single department has the task to combat illegal employment and look after workers' right to minimum wage. The obligation to act in a strict non-discriminatory manner with regard to guaranteeing this labour right – also to irregular migrant workers – is often not met. It should be emphasised that – regardless of the reasons for granting the Inspectorate the authority to issue penalty reports accompanied by penalty orders in case of non-compliance with the Minimum Wage Act – once this power is in place it should

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<sup>150</sup> See <http://www.arbeidsinspectie.nl/organisatie/organisatiestructuur/>

<sup>151</sup> *Ibid*; Annual Report of the Labour Inspectorate 2009 (Available in Dutch at: <http://www.arbeidsinspectie.nl/actueel/publicaties/>) p. 32.

<sup>152</sup> It should be pointed out that not every violation of the Aliens Employment Act concerns the employment of irregular migrants. Also regular migrants (e.g. Bulgarians and Romanians but also migrants with a residence permit for the purpose of study) can be illegally employed. The right to reside is granted for a particular purpose and thus does not automatically include a right to work in the Netherlands (See Article 14 (2) Aliens Act in conjunction with Article 3.4 Aliens Decree).

<sup>153</sup> Interview Labour Inspectorate 2 December 2010.

<sup>154</sup> *Ibid*.

<sup>155</sup> Until 2007 there was no administrative law enforcement of this Act, only the possibility to launch a complaint to the Labour Inspectorate in case of underpayment or to start a civil procedure. This policy had been changed mainly because of the access to the Dutch labour market of workers from Eastern European EU Member States. It was expected that these workers would, even less than their Dutch colleagues, be inclined to file a complaint or start a procedure and thus more government intervention would be needed to ensure payment of minimum wages (*Kamerstukken II*, 2006-2007, 30 678 nr. 3). In enforcing the Act the focus is therefore mainly on underpayment of workers from MOE- (Middle- Eastern European) countries (interview Labour Inspectorate 2 December 2010).

be used without discrimination,<sup>156</sup> particularly in light of the international obligation to guarantee the right to *everyone*. We found that the Labour Inspectorate investigates only whether employers of irregular migrant workers violate the Minimum Wage Act in situations where regularly residing migrants (in particular Romanians and Bulgarians) or regular workers are involved as well. In situations where only irregular migrant workers are detected – and thus no underpaid regular workers or regular migrants are involved – the employer is fined for violation of the Aliens Employment Act but no investigation into potential violations of the Minimum Wage Act is started.<sup>157</sup> Consequently, it will not be clear whether the irregular migrant has been underpaid and if so, what compensation he should receive. The instrument of a penalty order as a means of putting pressure to ensure payment of outstanding remuneration is thus also not used. The table presented below is illustrative of this policy.

**Table 1: Inspections on Compliance with the Aliens Employment Act (AEA) + Minimum Wage Act (MWA) and results<sup>158</sup>**

	<b>2007</b>	<b>2008</b>	<b>2009</b>
Number of Inspections	10931	10381	9723
% Violations Found During Inspections	18%	16%	17%
Number of Inspected Employers	12800	13200	12700
Number of Detected Illegally Employed Workers	2894	2007	2506
Number of Detected Underpaid Workers	250	420	540
Number of Penalty Reports AEA	3003	2093	2276
Number of Penalty Reports MWA	4	53	84

From the figures in 4<sup>th</sup> and the 5<sup>th</sup> row of this table one can clearly see the difference between the number of detected illegally employed workers and the number of detected underpaid workers. It is obvious that much less underpaid workers than illegally employed workers are detected if the Inspectorate does not investigate into underpayment of illegally employed workers in cases where no legally employed workers or regular migrants are involved.<sup>159</sup> Although not all illegally employed workers are irregular migrants,<sup>160</sup> a substantial part is. It is also very likely that violations of the Aliens Employment Act coincide with violations of the Minimum Wage Act. The Labour Inspectorate acknowledges that in case

<sup>156</sup> See section 3.1.2.3.

<sup>157</sup> Interview Labour Inspectorate 2 December 2010.

<sup>158</sup> Table taken from Annual Report of the Labour Inspectorate 2009 (p. 31) and translated into English.

<sup>159</sup> The Labour Inspectorate pointed out that it is much harder to prove the underpayment of irregular migrants since there usually is no administration or other proof of the duration of the employment relation and the connected payment and that workers are not always willing to cooperate. This explanation can account for a part of the difference in detected underpaid workers and penalty reports drawn up. The Inspectorate does not use the legal presumption of Article 23 Aliens Employment Act when investigating underpayment because that Act knows a different employer definition than the Minimum Wage Act. Interview Labour Inspectorate 2 December 2010.

<sup>160</sup> One can think of citizens from Romania and Bulgaria (they are allowed to stay in the Netherlands but the employer still needs an employment permit to hire them) or migrants with a residence permit but not for the purpose of employment but for e.g. study.

the Aliens Employment Act is infringed the risk of underpayment is very high<sup>161</sup> Therefore, according to the Labour Inspectorate, the financial profit the employer made by underpaying the irregular migrant is calculated in the fine.<sup>162</sup> By not investigating compliance with the Minimum Wage Act the Inspectorate turns a blind eye towards possible infringements of the irregular migrant's right to minimum wage. This maybe partly due to limited capacity and related policy choices,<sup>163</sup> but there also seems to be a government-wide feeling of restraint towards ensuring payment of outstanding remuneration since this would be a bonus for the irregular migrant which would of itself constitute a pull factor.<sup>164</sup> The government seems not to think in terms of irregular migrants' rights but in terms of achieving policy goals in particular fighting illegal employment and residence. Although achieving these goals might be legitimate, it entails neglect of irregular migrants' human rights.<sup>165</sup>

We have seen that the Labour Market Fraud Department has the task on the one hand to combat illegal employment – and is thus involved in migration control – and on the other preserve workers right to minimum wage.<sup>166</sup> When combining this with the Working Conditions Department's responsibility to protect workers' safety and health on the worksite, the Labour Inspectorate can be considered as wearing a 'double hat': protecting workers and contributing to migration control. These two tasks seem irreconcilable if the Inspectorate is to protect certain labour rights of *all* workers. Research done into illegal labour in greenhouses further illustrates that this 'double hat' constitutes an obstacle to the effective realisation of the right to fair working conditions of irregular migrants<sup>167</sup> The 2004 report confirms that in case an irregular migrant would report maltreatment to the Labour Inspectorate, the Aliens Police will be informed.<sup>168</sup> The Inspectorate confirmed that in case the Working Conditions Department would receive such a notification of an irregular migrant, the migrant's presence will in principle be communicated to the Labour Market Fraud Department and subsequently to the Police.<sup>169</sup> This will evidently lead to irregular migrants who see their right to fair

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<sup>161</sup> Interview Labour Inspectorate 2 December 2010.

<sup>162</sup> *Ibid.*

<sup>163</sup> The Labour Inspectorate emphasised that proving violations of the Minimum Wage Act (especially in case of irregular migrants since often there is no written proof) can be very difficult and is thus labour intensive. Hence, also for efficiency reasons no priority is given to ensuring compliance with the Act in case of irregular migrant in situations concerning *only* irregular migrants. Interview 2 December 2010.

<sup>164</sup> T. de Lange, forthcoming 2011; Dutch Comment on Commission Proposal Directive 2009/52/EC. *Eerste kamer* BCN 550,1 available at:

[http://www.eerstekamer.nl/eu/behandeling/20070704/bnc\\_fiche\\_die\\_1025\\_07/f=/vhm7dbar6hgk.d oc](http://www.eerstekamer.nl/eu/behandeling/20070704/bnc_fiche_die_1025_07/f=/vhm7dbar6hgk.d oc)

<sup>165</sup> See also section 4.4.

<sup>166</sup> The Labour Inspectorate emphasises that its main concern is to fine the employer and not to support the employee. However, this is closely connected in of case of fining the employer for non-compliance with the Minimum Wage Act since this entails payment of outstanding remuneration to the worker and the Inspectorate can impose a penalty order in case of non-compliance.

<sup>167</sup> A. Benseddik and M. Bijl, *Onzichtbaar achter glas: Onderzoek naar de bijdrage van illegalen in de glastuinbouw van het westland*, (Stek and Stichting Okia, 2004, Den Haag)

<sup>168</sup> *Ibid.* p. 139.

<sup>169</sup> It depends on the Working Conditions Department official dealing with the notification whether he/she will communicate the irregular presence of the migrant to the Labour Market

working conditions violated not reporting abuses to the Labour Inspectorate. In 2007 the Dutch Rapporteur on Human Trafficking recommended that the government should consider making it possible for irregular migrants to report abuses in the workplace to the Labour Inspectorate *without running the risk of aliens' detention and expulsion*.<sup>170</sup> Until now, this policy of administrative linkage has not been changed.<sup>171</sup> The ILO Committee of Experts on the Application of Conventions and Recommendations stated that 'the primary duty of labour inspectors is to protect workers and not to enforce immigration law.'<sup>172</sup> This stance has been reiterated in a recent ILO publication, where it was again emphasised that labour inspection and enforcement must be separate and distinct from immigration inspection and enforcement.<sup>173</sup> The fact that the Dutch Labour Inspectorate has the task to combat illegal employment through enforcement of the Aliens Employment Act and is thus involved in migration inspection makes that labour inspection and immigration inspection are not strictly separate. We have seen that this has negative implications on the fulfilment of irregular migrant's right to fair working conditions. Instead of the Dutch policy of administrative linkage (the multidisciplinary approach) a firewall should be created between migration enforcement and enforcement of workplace rights<sup>174</sup> in order to ensure better protection of fair working conditions for irregular migrants. In view of all of this, it should be reassessed whether the Dutch Labour Inspectorate is the right public body to enforce the Aliens Employment Act.

#### 4.2 Access to Court and Civil Proceedings

When the Labour Inspectorate is not enforcing the rights of irregular migrants, the way to civil courts is still open. We have seen that irregular migrants without sufficient means are in principle eligible for legal aid. Also in case the migrant worker would want to bring a claim against the employer in order to receive outstanding remuneration or compensation for damages occurred at the workplace. However, several factors might complicate the access to court and the chances of successfully bringing a claim against the employer.

Firstly, obtaining access to legal assistance. The primary concern in this respect is of course whether irregular migrants are able to find their way to legal aid. This issue will be dealt with in the following sections when legal consciousness of irregular migrants will be discussed. For now we will look at the possibilities of obtaining legal assistance. The Dutch legal aid system consists of a twofold model: First, the Legal Service Counter (*Juridisch Loket*) provides primary legal advice. Legal matters are clarified and information and advice given. Second, if necessary, clients will be referred to a private lawyer or a mediator. Clients can

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Fraud Department (and to the Aliens Police), but in principle the different departments should share information on this point. Interview Labour Inspectorate 2 December 2010.

<sup>170</sup> Bureau Nationaal Rapporteur Mensenhandel, *Vijfde Rapportage Nationaal Rapporteur Mensenhandel* (2007) recommendation 14, p. 278. (emphasis added)

<sup>171</sup> Interview Labour Inspectorate 2 December 2010.

<sup>172</sup> Referred to in: ILO *International labour migration. A rights-based approach*, 2010, p. 173.

<sup>173</sup> *Ibid.*

<sup>174</sup> See on this 'firewall' between immigration law enforcement and the protection of basic human rights: J. H. Carens, 'The Rights of Irregular Migrants' (2008) *Ethics & International Affairs* Vol 22, Issue 2, p. 177.

also apply for help from a lawyer directly.<sup>175</sup> The lawyer assisting the irregular migrant worker can apply to the Legal Aid Board for a monetary allowance (*toevoeging*). Eligibility for legal aid is based on both the migrant's annual income and his assets. In order to verify his income, a tax and social insurance number (*BSN-nummer*) or a so-called alien number must be presented. In case of irregular migrants, this is a problem, since they lack such a number. Other documents must be provided to show the person has no or only little income. The Legal Aid Board will not share information with the Aliens Police. If the irregular migrant is incapable to provide any documents concerning income, this does not mean the allowance will not be granted. If the Legal Aid Board is not able to check the income of the migrant, he will in any case have to pay a fee, which is currently €100,-.<sup>176</sup> After consulting three lawyers we found that they have different experiences concerning the issue of obtaining a government subsidy for irregular migrants. Two lawyers and BLinN (Bonded Labour in the Netherlands),<sup>177</sup> have not encountered many difficulties in receiving allowances for irregular migrants. One person argued that, being a lawyer, there is risk of not receiving the allowance because of problems in calculating the irregular migrant's income and assets. This involves a risk for the lawyer in combination with the uncertainty of being able to collect the fee the migrant has to pay himself. The amount of work implicated in applying for an allowance (in case the migrant is not forwarded by the Legal Service Counter) and the uncertainties in receiving funding and the migrant's own fee, can make the lawyer less willing to assist irregular migrants. Nevertheless, overall this problem was not confirmed.

Second, problems arise when the irregular migrant has already been expelled (or returned through IOM's voluntary return programme) but still wants to claim his rights or is being expelled in the course of legal proceedings. As we have seen above, when abuses at the workplace are detected by the Labour Inspectorate, the chances of arrest and subsequent expulsion are high.<sup>178</sup> Trade Unions willing to support irregular migrant workers also point to this problem. They lose contact with the person having a claim against the employer, because irregular migrants are held in Aliens Detention and subsequently sent back to their home country.<sup>179</sup> In case the irregular migrant is abroad two issues might arise which decrease chances of successfully initiating or completing judicial proceedings. Firstly, everyone without place of residence or habitual residence in the Netherlands can be obliged, in case the opposite party so requires, to provide security for legal costs which he might be ordered to pay in case he loses.<sup>180</sup> Since legal costs can amount to a considerable sum, it will not be possible for the irregular migrant to

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<sup>175</sup> Information available at website Legal Aid Board: <http://www.rvr.org/binaries/about-rvr/default-opmaakvoorsel-brochure-legal-aid--rvr90265-ve.pdf>

<sup>176</sup> [http://www.rvr.org/nl/subhome\\_rz/rechtsbijs\\_tandverlener.Inkomensgrenzen.html](http://www.rvr.org/nl/subhome_rz/rechtsbijs_tandverlener.Inkomensgrenzen.html).

<sup>177</sup> BLinN works to improve the position of victims of human trafficking (including labour exploitation) and has experience in helping irregular migrant workers to claim their labour rights.

<sup>178</sup> See A. Benseddik and M. Bijl (n) p.139.

<sup>179</sup> According to a trade union representative, meeting 19 October 2010: *'Als Bond lopen wij er regelmatig tegenaan dat illegale werknemers, die een claim richting een werkgever hebben, uit ons zicht verdwijnen, omdat zij in vreemdelingenbewaring komen, vervolgens op het vliegtuig naar het thuisland worden gezet en zij daarna niet meer te vinden zijn. Eigenlijk zouden deze mensen in Nederland moeten kunnen blijven hangende de afdoening van hun arbeidsrechtelijke claim. Hun claim en recht blijven anders volstrekt illusoir.'*

<sup>180</sup> Article 224(1) Code of Judicial Proceeding (*Wetboek van Rechtsvordering*).

secure such an amount of money, which would ban his access to court. However, this seems to be a theoretical problem. Two of the three lawyers consulted did not know of – let alone defended – cases in which this instrument was invoked. Moreover, there is no obligation to provide security for legal costs in case this would entail that the complainant has no effective access to court.<sup>181</sup> In case of expelled irregular migrants, this would most likely be the case. The problem does not occur if the migrant is still in the Netherlands. Secondly, the claimant should appear in court to clarify his case upon request of the judge. Not appearing upon request can be justified in case there are serious reasons for not showing up in court; being forced to leave the Netherlands should constitute such a reason in our view. However, it is up to the judge to decide whether non-appearance is justified and he can draw the conclusions he considers appropriate.<sup>182</sup> In practice, not being able to clarify and explain the situation has adverse effects on the irregular migrant's position in the legal proceedings.

Finally, the difficulty of proving the employment relation and its duration is an important factor weakening the chances of successfully bringing a claim against the employer. More often than not, employment contracts are not in place. This is a problem of the 'system' which irregular migrant workers find themselves in, as will be explained in paragraph 4.4. As regards proving the duration of the employment Article 23 of the Aliens Employment Act (discussed above in 3.1.2.1) offers a solution – in theory – by providing for the legal presumption that the migrant employed contrary to the Act, worked for the employer the previous six months. However, Article 23 proved to be of no avail since there are no cases known in which the Article has been successfully invoked.<sup>183</sup> The Article seems to be relatively unknown to many lawyers.<sup>184</sup>

#### 4.3 Trade Unions

We have seen that the right to join a trade union is laid down in several international instruments<sup>185</sup> and applicable to everyone including irregular migrants. When they are able to assert their rights through trade unions unfair competition between employers who respect the labour laws and those who do not (i.e. those who are only searching for a cheap and pliable workforce) will be reduced.<sup>186</sup> It has been argued that trade unions are important actors in ensuring fair working conditions for irregular migrants. They can include irregular migrants in their membership structures and assist them to organise themselves in the protection of their interests.<sup>187</sup> As from 2002 the Dutch trade union *FNV Bondgenoten* officially accepted irregular migrant workers as members, which at the time infuriated the Dutch Minister of Social Affairs who was in favour of handling illegality with an iron fist.<sup>188</sup> The trade union kept a straight back and

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<sup>181</sup> Article 224(2)(d) Code of Judicial Proceeding (*Wetboek van Rechtsvordering*).

<sup>182</sup> Article 22 Code of Judicial Proceeding (*Wetboek van Rechtsvordering*).

<sup>183</sup> I.H. van den Berg & T. de Lange in: P.F. van der Heijden *et al. Arbeidsrecht Tekst en Commentaar*, 5th Ed. (Kluwer, 2008, Deventer) p. 763.

<sup>184</sup> Impression based on response to question posed on the subject by supervisor T. de Lange to hundred lawyers specialised in labour law at the Annual Conference of the Dutch Society of Labour Law, 23 September 2010: <http://www.verenigingvoorarbeidsrecht.nl/bijeenkomsten.html>

<sup>185</sup> ICESCR (Article 8), ICCPR (Article 11) and ECHR (Article 8).

<sup>186</sup> ILO *International labour migration. A rights-based approach* 2010 p. 80.

<sup>187</sup> R. Cholewinski 2005, p. 57.

<sup>188</sup> P. Feenstra, 'FNV organiseert illegalen', *Trouw* 2 Mai 2002.



tried to involve irregular migrants in their organisation for it believed every worker should be subject to equal and decent working conditions. Due to the changing labour relations (more fragmented work, not knowing colleagues) which will be described in the next paragraph it is difficult for irregular migrants to find their way to trade unions and thus also difficult for trade unions to reach them. It requires great effort of the unions to trace irregular migrants, and to involve them in collective actions.<sup>189</sup> For domestic workers there is such an initiative. Trade union representatives hold meetings to inform domestic workers about their rights, in an effort to mobilise and organise them by becoming a member of the union.<sup>190</sup>

An obstacle to enjoying the benefits of being involved in a trade union would be that irregular migrant workers might not be able to afford the membership fee.<sup>191</sup> The union's legal assistance is in principle only available for members. However, it has been said that exceptions could be made in case of large-scale or gross labour rights violations which have attracted much publicity. In that situation cases could be initiated on behalf irregular migrants not being a member.<sup>192</sup> However, even if trade unions are willing to support irregular migrant workers they encounter the problem pointed out earlier, namely that once the Labour Inspectorate is informed about the presence of irregular migrant workers they are placed in Aliens Detention and often expelled soon after.

#### *4.4 Reforms and Subsequent Changes in Employment Relations*

The 'system', as referred to earlier, in which irregular migrant workers find themselves nowadays, is characterised by the existence of many employment agencies, subcontractors, the temporary nature of jobs and working on different locations.<sup>193</sup> The research conducted into employment of irregular migrant workers in the greenhouses<sup>194</sup> is illustrative of the several issues irregular migrant workers in different sectors are confronted with. The researchers found that during the nineties the recruitment and employment of irregular migrants in the greenhouses changed. The changes stem from developments in the sector (growing international competition leads to up scaling and a shift from manual work to automatic processes; work is put out to contractors in order to accommodate the fluctuating needs of the companies)<sup>195</sup> as well as amended government policies.<sup>196</sup> The employer became subject to criminal penalties (which were in 2005 replaced by administrative penalties)<sup>197</sup> when employing workers without an employment permit and the irregular migrant worker could be

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<sup>189</sup> Interview Okia Foundation 4 November 2010.

<sup>190</sup> FNV 'Union of Domestic Workers and Cleaners' information meeting of 17 November 2010.

<sup>191</sup> Membership fee for undocumented domestic workers amounts to €100,- per year payable each time in advance for one whole year.

<sup>192</sup> According to a trade union representative, meeting 19 October 2010.

<sup>193</sup> Interviews with irregular migrant workers November 2010.

<sup>194</sup> A. Benseddik and M. Bijl 2004.

<sup>195</sup> Growing international competition forces companies to make use of the cheapest and most flexible labour possible. In this respect IOM initiated the 'Buy Responsibly' campaign in effort raise awareness among consumers of products and services provided by trafficked and exploited labour. Hopefully thereby eliminating the demand for the cheap goods and huge profits desired by consumers and businesses the world over.

<sup>196</sup> A. Benseddik and M. Bijl 2004, p. 169.

<sup>197</sup> See A.P. Klap and T. de Lange, 'Marktordening via het werkgeversbegrip van de Wet Arbeid Vreemdelingen' (2008) *Sociaal Maandblad Arbeid*, Vol 63, p. 390-396.

expelled. In that period the financial risks of employing irregular migrants increased since more inspections were carried out and the penalties had been raised. The fact that as from 1992 the irregular migrant worker was no longer granted a tax and social insurance number (*BSN-nummer*) – in combination with the enactment of the Linkage Act 1998<sup>198</sup> – to an increase of undeclared work amongst irregular migrant workers. Consequently, identity- and tax and social insurance number-fraud and tax evasion became inherent to their employment. The employment via sub-contractors or employment agencies was used as a construction to avoid the greenhouse-owner's liability for illegal employment.<sup>199</sup> This way of recruiting led to fragmented employment. It caused workers to work at varying hours and on different worksites. Due to temporary employment at different locations they no longer know their colleagues, which makes them stand 'alone' and not able to unite to collectively stand up against the employer.<sup>200</sup> Another construction in which the worker has no direct relation to the employer is the phenomenon of the so-called 'stand in'. Person X is registered as an employee and taxes are being paid but others (irregular migrants) are performing the actual work.<sup>201</sup> On paper this person can have many jobs, which in fact are carried out by others who are paid less than minimum wage by person X. Nevertheless, this does not mean that the worker would not be able to claim his right to minimum wage. He should direct his claim to both the official employer and person X and then it is very likely that either one of them can be held responsible for underpayment. However, it depends on the specific circumstances and whether sufficient proof is presented to support the employment relation and again it would be difficult to prove the employment relation with either the official employer or person X.

No longer granting tax- and social security numbers and the enactment of the Linkage Act led to the irregular migrant's further exclusion from society and contributed to the irregular migrant's vulnerability. The fact that employers pay taxes can serve as evidence of the employment relation. As a result of which the worker can challenge e.g. payment below minimum wage.<sup>202</sup> If irregular migrants are not working directly for the employer (which often is no longer the case because of the risk of higher penalties) – and even if they do work directly for the employer they have no tax and social insurance number and thus no taxes are being paid – it has become much more difficult to prove the employment relation. Here we clearly see that the measures taken by the government (which obviously have implications for all sectors, not only the greenhouse-sector) directed at

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<sup>198</sup> Irregular migrant who already possessed tax and social insurance number could still profit from the declared work until 1998. With the enactment of the Linkage Act all data of the different administration were linked and irregular migrants excluded from the social security system. A. Benseddik and M. Bijl 2004, p. 56, 111.

<sup>199</sup> *Ibid.* p. 170. Avoiding liability has become much more difficult as from 2005 when everyone in the chain of employers/ sponsors (so the subcontractor but also the actual employer) could separately be fined for not having a work permit for the employee. A.P. Klap and T. de Lange 2008.

<sup>200</sup> Interview Okia Foundation 4 November 2010.

<sup>201</sup> B. Garcés-Mascreñas and J. Doomernik, 'Exploratory Study on Trafficking and Labour Exploitation among West African Immigrants in the Netherlands' *ILO Working Paper* (International Labour Office, 2007, Geneva) p. 14-15, 23; V. Mazzucato, 'The double engagement: transnationalism and integration. Ghanaian migrants' lives between Ghana and the Netherlands' (2008) *Journal of Ethnic and Migration Studies*, Vol 34 (2), 199-216, p. 209.

<sup>202</sup> A. Benseddik and M. Bijl 2004, p. 170.

excluding irregular migrants from society, weakens the position of the workers against employers.<sup>203</sup> This definitely does not contribute to the effective realisation of the right to fair working conditions of irregular migrants and even advances exploitative labour relations.

#### *4.5 Conclusion*

The effective realisation of the right to fair working conditions of irregular migrants is influenced by several issues. First of all, the fact that the Dutch Labour Inspectorate has been endowed with supervising on the one hand the Minimum Wage Act, Working Conditions Act and Working Hours Act, but on the other the Aliens Employment Act raises problems. Because of its 'double hat' the Labour Inspectorate is not solely concerned with the protection of workers but also plays an important role in the migration control. This has two important implications: 1) it deters irregular migrants from resorting to the Labour Inspectorate in case of abuses and 2) the Inspectorate does not act in a strict non-discriminatory manner with regard to guaranteeing the rights of irregular all workers under the Minimum Wage Act. Second, as regards the access to court we see no obstacles which cannot be overcome. However, finding the way to a lawyer constitutes the first impediment. Moreover, it does also depend on the willingness of lawyers to take the effort to assist irregular migrant worker since this can involve issues such as staying in touch when client has been expelled, pleading case when migrant is not there and sometimes risk of not receiving payments. What certainly does complicate matters is the problem of proving the existence and the duration of the employment relationship. Third, the possibility for irregular migrants to assert rights through trade unions exists. However, the payment of a membership fee may constitute a barrier to enjoying the benefits of being involved in a trade union. Furthermore, due to the rise of fragmented employment it is difficult for trade unions to reach irregular migrants. Moreover, even if trade unions are in touch with irregular migrants, the problem (closely related to the concerns connected with the Labour Inspectorate) of losing contact due to arrest, detention and subsequent expulsion remains. Finally, several measures taken in the nineties and more recent years, such as limiting the possibility to obtain a tax and social insurance number, the enactment of the Linkage Act and high fines for employers of irregular migrants, together with the growing international competition in many sectors contributed to the marginalisation of the irregular migrants position in the Netherlands. Again, it looks as if the government does not think in terms of irregular migrants' rights, but in terms of fighting illegal employment and residence. As a result of the government measures irregular migrants became even more vulnerable and less able to stand up against exploiting employers. In other words, these developments made it more difficult to secure through exclusively personal efforts the right to fair working conditions and that is where the government should step in.

#### *Positive Measures*

We have seen in paragraph 3.1.3 that the obligation to fulfil comprises those active measures by a Government necessary to guarantee everyone opportunities to have full access to all entitlements to rights that cannot be secured through exclusively personal efforts. Although not all points discussed are exclusively

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<sup>203</sup> *Ibid.* P. 170.

within the direct capacity of the government, it is clear that it did not contribute to the effective realisation of the right to fair working conditions of irregular migrants by taking the measures directed at excluding irregular migrants from society and by conferring upon the Labour Inspectorate the task to protect workers but at the same time enforce the Aliens Employment Act.

In order to fully comply with the obligation to fulfil and thus guarantee the effective realisation of the right to fair working conditions for irregular migrants taking positive measures seems indispensable. These measures should include: 1) reconsidering the different tasks of the Labour Inspectorate in order to have labour inspection strictly separate from migration inspection; 2) providing public services – in their own language - to inform irregular migrants on their rights and how to enforce them; and 3) reconsider the measures excluding irregular migrants from society.

## ***Part 2: Migrant Perspective***

The following sections will serve to highlight the migrant perspective on exploitative labour relations and to provide an insight in the legal consciousness of irregular migrant workers. The migrant perspective will be presented as the result of both the short factual questionnaire inquiring only superficially into the work-experience and rights-understanding of irregular migrants, and the more extended interviews providing a more in-depth analysis of these issues and irregular migrant workers' legal consciousness in general. The short questionnaire has been completed by 42 people, of whom 31 were prepared or able to be engaged in the extended interview. The subsequent paragraphs, presenting the results of this two-fold analysis, will be structured as follows:

- 1) A presentation of the results from the short questionnaire shall be given, indicating the number and nationalities of the respondents and an overview of the answers given to the questions relating to both the subjective experience of their employment and the initial understanding of labour rights of irregular migrants in the Netherlands.
- 2) The results from the extended interviews will be analysed, subdivided into two different aspects:
  - a. Subjective experience of irregular employment in the Netherlands. This includes the respondents experience of the work itself, the way he/she was treated by the boss and/or colleagues, their judgement about the related conditions and the general evaluation of the situation of working and/or work-seeking as an irregular migrant in the Netherlands.
  - b. Legal consciousness. This is meant to indicate both the degree to which irregular migrants are aware of their labour rights as an irregular worker in the Netherlands, called 'understanding', and their subsequent willingness to attempt to enforce these rights. The analysis regarding understanding includes both initial awareness and recognition of several specific rights after being informed about them. Subsequently, regardless of the fact whether any initial understanding of labour rights was present, the migrants' willingness to enforce his/her legal rights regarding working conditions is assessed. The inclination to take legal steps after consciousness has been established is taken as an indicator of both the belief in and the importance attached to the legal guaranteeing of labour rights of irregular migrants in the Netherlands.

In conclusion, the results from the short questionnaire and the extended interviews will be combined in order to present a preliminary answer to the question of the legal consciousness regarding labour rights of irregular migrants in the Netherlands, implying both their understanding of these rights and their subsequent willingness to enforce them by taking legal measures.

A discussion of the results of the preceding paragraphs will be presented at the end of this section, offering a brief analysis of possible distortions due to specific characteristics of this research. These remarks serve to enable a nuanced analysis

of the conclusions presented, to hint briefly at the complex reality lying behind both the respondents' considerations and the implications thereof for the supposed results of this research.

### 5. The Short Questionnaire

The short questionnaire is attached in the annex of this report, and will only be duplicated insofar as necessary for the understanding of the research results. Firstly, an overview of the nationalities of the respondents will be presented, derived from the first question on the questionnaire. Combining the 31 short questionnaires which were followed by an extended interview with the 11 whereof the respondent was not able or willing to engage in further cooperation, the total number of short questionnaires issued comes to 42. Among these the following nationalities were represented, in order of decreasing number:

Brazil	9
Ukraine	8
Indonesia	5
Philippines	3
Iraq	2
China, Guinea, Nigeria, Burkina Faso, Nepal, Surinam, Ghana, Morocco, Sierra Leone, Malaysia, Colombia, Venezuela, Mexico, Algeria, Stateless (previously Turkish)	1

It should be noted that this composition of nationalities is not in any way representative of the total number of IOM-clients who visit the consultation hours with the intention of voluntary return<sup>204</sup>, let alone of the total number of irregular migrants in the Netherlands. Nevertheless, as nationality is not a determining aspect concerning the results of this research, this lack of representativeness has no necessary consequences for the reliability of the information on both legal consciousness and willingness to enforce labour rights among irregular migrants in the Netherlands. In addition, 9 out of the 42 respondents were female, while 33 of them were male. However, no further conclusions will be drawn relating the respondents' sex to their nationality or their work experience, as the lack of representative numbers prevents the establishment of any reliable conclusions regarding the connection between these matters.

Resulting from the selection on both IOM-clients and irregular migrants with past work experience, it can be stated that none of the respondents had a residence permit or a proof of legal stay in the Netherlands, and that all of them had worked during their stay, a statement confirmed by the results of the questionnaires. However, the personal experience of employment as an irregular migrant in the Netherlands is somewhat more diverse. In response to the question 'How did you experience your work here?', the respondents were given the opportunity to

<sup>204</sup> As for 2010 the nationalities most represented among the voluntarily returning migrants at the IOM consultation hours are – in order of decreasing amount – , the following: the Iraqi, Brazilian, Macedonian, Georgian, Ukrainian, Chinese and Indonesian nationality. (IOM: Jaaroverzicht Terugkeer 2010, available at: <http://www.iom-nederland.nl/dsresource?objectid=3580&type=org>

indicate their satisfaction among a scale ranging from: very good – good – neutral – bad – very bad, ensuring some opportunity for diversification among the answers given.

Among the 42 respondents, the following results were found:

Very Good	6
Good	16
Neutral	7
Bad	9
Very Bad	4

These results show a high degree of diversification on the subjective experience of employment as an irregular migrant in the Netherlands. However, the number of respondents evaluating their work experience as ‘Good’ or even ‘Very Good’ almost doubles the number of respondents indicating it as ‘Bad’ or ‘Very Bad’. While these results show a preliminary inclination towards a positive evaluation of the work experience, the interpretation of these answers is highly dependent on the information derived from the extended interviews. In a more extended conversation, both the positive and the negative evaluations seemed to be influenced by a lot of alternative factors not explicitly derived from such a one-dimensional inquiry. The paragraph concerned with the ‘subjective experience’ as part of the processing of the extended interviews deals with the positive, neutral or negative evaluations of the own working experience(s) more extensively.

Lastly, a first inquiry into the rights-understanding of irregular migrants regarding labour rights is made along the following lines: in response to the question ‘What do you think about labour rights of irregular migrants?’, the respondents were offered three different options. The following presentation directly includes the number of respondents preferring that particular answer:

‘Irregular migrants have no labour rights’	25
‘Irregular migrants have some labour rights, but less than legal workers and Dutch residents’	9
‘Irregular migrants have the same labour rights as legal workers and Dutch residents’	8

Clearly, the majority of the respondents is of the opinion that irregular migrants have no labour rights at all, the minority left is fairly equally divided between the answers stating that irregular migrants have ‘some’ or the ‘same’ labour rights as legal workers and Dutch residents have. The first preliminary answer to the question of rights-understanding among irregular migrants can therefore be summarised by stating that most irregular migrants in the Netherlands are not aware of the labour rights they have when employed illegally. Even more, not only are they not aware, for the majority they strongly believe that irregular migrants are not entitled to any labour rights at all. Meanwhile, it must be noted that the concept of ‘no labour rights’ was not specified in any way, rendering its

specific interpretation a fairly subjective phenomenon. However, the exact definition of 'labour rights' did not seem to be directly relevant to most respondents at the time, as most answers were based on practical experience rather than juridical understanding. This answer should foremostly be seen as presenting a feeling of being in a situation where 'just' treatment is not common or expected. Therefore, the lack of a precise definition of the concept of 'no labour rights' at this point was partly implied by the lack of relevance of this specific concept for the respondents themselves in describing as well as estimating the rights applicable to their situation. Again, this conclusion shall be refined by encompassing the results from the extended interviews in the paragraphs to follow.



## **6. Extended Interviews**

As indicated, the conclusions stated above only serve to grant a preliminary glance at some indications of the eventual results concerning work experience and rights-understanding among irregular migrants in the Netherlands. A far more informed analysis can be derived from the 31 extended interviews that were conducted with all the respondents indicating their willingness for continued cooperation. As these conversations provide us with the opportunity to substantiate as well as fundamentally nuance the claims presented, a detailed analysis of the various personal statements regarding these issues will be presented below. This diversity is however both a major strength and a pitfall, as it makes it so much harder to quantify or generalise any supposed results. However, as some general trends are to discern despite the individual diversity, the following paragraphs will primarily be concerned with identifying the common and most prevalent factors appearing throughout these individual stories. Sometimes these are in conflict or even contradictory to each other, but as the issues of experience of work, rights-understanding and willingness to enforce labour rights are as least as complex and multi-sided as all these 31 individual stories are unique and different from each other, the aim is not to present a clear-cut answer to all the questions stated above, but to present the reality of employment among irregular migrants in the Netherlands in all its actual diversity.

### *6.1 Experience of Employment*

As indicated by the results from the short questionnaire, most irregular migrants in the Netherlands evaluate their work experience as positive. This positive evaluation, however, is the potential consequence of many different reasonings. Some of these concerning the actual circumstances of the employment, while others primarily relate to external circumstances, for example the lack of alternative options. This paragraph will explain the three most prevalent reasonings given as an explanation for the subjective positive evaluation of work experience in the Netherlands, which can be summarised as follows:

- a) Satisfaction with the actual conditions and circumstances of employment.
- b) Lack of alternative options in finding irregular employment.
- c) Relativisation due to the application of different standards.

There is a potential high degree of interconnectedness between these three different reasonings, which has to be kept in mind detailing with their individual logic. However, it is important to discuss them separately from each other with the purpose of clarifying the difference in relative weight each reasoning might have in a particular story. Interestingly, at least the last two reasonings can also be applied to substantiate more negative evaluations regarding work experience. The last section of this paragraph will deal with outspoken dissatisfaction concerning the conditions of employment, whereupon a general conclusion will be drawn clarifying the most important factors determining an irregular migrant's personal evaluation of his/her work experience in the Netherlands.

- a) Satisfaction with the actual conditions and circumstances of employment*

As indicated by the results from the short questionnaire, only a small minority of irregular migrants evaluates their experience of employment in the Netherlands as 'Very Good'. Among the people who were interviewed however, quite a lot seemed to be pretty pleased with the work they got to do. Numerous examples are available, of which only a few will be selected here. Of the people who evaluated their work as very positive, the payment and the treatment they received from their employers were determining factors. For example, several cases are available of women who worked in private households, earning about 10 euros an hour and working 5 to 6 days a week. They considered their employers as nice people, who treated them well and even gave them extras sometimes, in the form of clothes, food or a bonus. They liked their employment and were able to cover their daily expenses with it and even save some, to their satisfaction. The main reasons for return among these people seem to have more to do with personal circumstances – family matters, pregnancy etc. – than with dissatisfaction concerning the search for or the conditions of employment. But not only women, also men from different nationalities, working for example in restaurants, the cleaning business or the building sector expressed to be fairly pleased with their work situation. They generally liked the work they did, had a good time with – mostly also irregular – colleagues and considered the payment they received as fair enough, while it enabled them to at least sustain a living for themselves in the Netherlands and often to save some part to send it to their families back home as remittances.

However, an often-heard matter of concern was the fact that they were not always able to find enough work. While explicitly expressing their satisfaction with the working conditions when actually employed, many respondents also mentioned that for them the main problem was to find work in the first place. Rather than being concerned about working hours or underpayment, their main concern was to get employed at all, a factor partly explaining the reasoning behind the following section:

*b) Lack of alternative options in finding irregular employment*

A common factor among almost all – satisfied and less satisfied – irregular migrants was that it was very hard for them to find a job in the Netherlands. Most of them eventually found employment through friends, or via a broader network of contacts, often from the same nationality as the respondent. This difficulty in finding irregular employment in the first place seems to have a two-fold effect on the migrants' judgement of their work experience. Firstly, it leads them to accept conditions or circumstances that they would not have agreed with would they have had the possibility to get employed elsewhere – a reasoning which will be dealt with more extensively in the paragraph concerning dissatisfaction. Another effect, however, creates roots of dissatisfaction among people who were not at all dissatisfied with the work they got to do, but only with the fairly little amount of work they were able to find. This results in a relative high number of people stating their appreciation of the work itself, but experiencing problems – sometimes even causing their decision to return home – as they were simply not able to find enough work to properly support themselves and thereby continue their stay in the Netherlands. In most cases, these people would have accepted immediately a larger amount of the work they did at present, even if this would

include underpayment or other unfavourable conditions, as long as the financial compensation would enable them to pay for their rent, their food and other daily expenses. There are several reasons for people not being able to find enough employment to support themselves in the long run, including being offered only very irregular work, or regular work for only a few hours a day, or being hired only for a very short period of time (for example, during peak season or for a particular assignment), after which the complicated search for a new job starts all over again. Especially the insecurity inherently connected to the professional existence of an irregular migrant, caused a lot of frustration among the respondents for being a very tangible consequence of their illegal status and the disadvantages related to it. None of the respondents was very willing to express their dissatisfaction about this insecurity to their employer, for fear of losing the little or irregular work they still had. This, in turn, is another explaining factor for the satisfaction and even gratitude expressed towards an employer for the mere fact of giving the irregular migrant any work at all. Because, as several respondents remarked in similar phrases: ‘To have little work and earn some money is still better than not earning any money at all.’ This logic led many of them to accept and appreciate the work they were offered, almost regardless of the specific circumstances and conditions related to general insecurity, working hours and underpayment.

*c) Relativisation due to the application of different standards*

Combined with the lack of alternative options in finding irregular employment, the relativisation often found among irregular migrants due to the application of different standards, led many of them to – quite satisfied – accept circumstances and conditions which would in no way be in compliance with Dutch regulations. Labour rights like holiday allowance, regular breaks at specified times and a maximum of 8 working hours a day on average, are far from common good in countries like Brazil, the Ukraine or Indonesia. This subjectively formed acceptance of certain conditions has a high correlation with the standards applied in the country of the respondents’ origin. As Dutch standards generally do not coincide with the standards applied in the countries where irregular migrants working in the Netherlands are originally from, a huge gap exists between the subjective experience of these migrants and the Dutch law concerning working conditions. Many circumstances which would not be allowed under Dutch law turn out to be widely accepted and even appreciated among irregular migrants, as long as they represent an improvement compared with the situation they came from. A telling example is this Ukrainian man, employed in the building sector, who had to work every day from 06.30 to 23.00 for an average payment of 8 euros a day<sup>205</sup>. While he was certainly dissatisfied with this extreme lack of proportionality between the hours he worked and the payment he received, he nevertheless remarked that he would rather continue to work in the Netherlands, as the payment he receives here is still significantly higher than the payment he

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<sup>205</sup> The legal gross minimum wage in the Netherlands per day accounts to 65,35 euros for anyone between 23 and 65 years of age, for the period between the 1<sup>st</sup> of July 2010 and the 1<sup>st</sup> of January 2011. A gross minimum wage per hour would account to 8,17 euros when an average working day of 8 hours is assumed. (*Ministerie van Sociale Zaken en Werkgelegenheid*, via <http://www.rijksoverheid.nl/onderwerpen/minimuloon/vraag-en-antwoord/hoe-hoog-is-het-minimuloon.html>, last visited 23 December 2010).

would receive for this kind of work back in the Ukraine. Another interesting example was presented by, another, Ukrainian man who stated that he considered the conditions of his work and the treatment by his boss as 'normal'. Inquiring into his specific situation, it became clear that he worked on average 6 hours a day for 7 to 9 euros an hour. Moreover, he too had frequently been confronted with forced job-changes because of being fired immediately when he was no longer needed. Despite these facts, the man himself considered the circumstances of his job as normal, felt treated like everyone else in similar jobs and had therefore no reason to complain about his particular situation. Subjective relativisation seems to be determining when it comes to minimum wage as well. As minimum wage is a right not frequently guaranteed, let alone enforced, in the countries where most respondents are originally from, their evaluation of the payment they receive does not seem to be guided by it. A far more important criterion is the fact whether their payment enables them to support themselves properly during their stay in the Netherlands, covering daily expenses and the costs of housing. As long as this condition is fulfilled, due to long working hours or to substantive payment, respondents generally tend to be more or less satisfied with their work situation. Strengthening this accepting attitude in some cases is the fact that many irregular migrants hold very durable aspirations and expectations for the future, resulting in a strong belief in the possibility that things might eventually get better. This Ukrainian man mentioned before, working over 16 hours for 8 euros a day, used an old Ukrainian proverb to describe this feeling. It was translated as 'The hope is the last', meaning that even under consistently harsh conditions, people continue to hold the belief that their present situation might improve in time.

In conclusion, it can be stated that most respondents in this research evaluated their work experience as relatively positive. Some were outspokenly pleased with the conditions of the work and the payment they received, but for most the situation was more nuanced. Generally, a lot of acceptance prevails concerning working hours, underpayment and secondary labour rights. The problems, and thereby the main causes of dissatisfaction, arise from the fact that most people are not able to find a regular job granting them a sufficient amount of working hours to sustain a living properly. While it must be noted that this goal would be achieved sooner if employers would respect labour rights, and especially minimum wage, this does not seem to be the focus of the migrants themselves. As being employed is such a central precondition for continued stay and even survival in the Netherlands, a feeling of gratitude towards employers prevails more often, for the mere fact of offering them a job that grants them at least some money. The frustration subsequently is focused on the hardships they endure when searching for employment, and trying to replace one job with another in case of dismissal.

However, the difficulty in finding employment is not the sole factor accounting for dissatisfaction among irregular migrants working in the Netherlands. Among the people who were outspokenly dissatisfied with their working experiences, a set of common factors is discernible as well. Extreme underpayment is one factor, ranging from 3 to 5 euros an hour to 8-10 euros for a whole working day. Another is the workload, the employer demanding double the amount of work that would humanly be possible to execute for someone in a particular time period, making it impossible to ever meet the employers standards. When combined with very long

working hours, about 10-12 hours for many, and for some even up to 16 hours a day, the situation gets even worse. A third, and interesting reason, is the respondents being well aware of the fact that their employer deliberately takes advantage of their situation as an illegal worker. A man from Burkina Faso, who suffered from both long working hours and an extremely heavy workload, stated it as follows: 'I know my boss knew I had no papers, and that he was making advantage of that. He hired me only when there was a lot of work, and if I would complain, I would lose my job without any compensation because he knew I had no papers and so I could not claim anything.' A man from Sierra Leone with a similar experience, and similar awareness of the fact that his employer exploited him because of his illegal status, confirms this story but adds the following: 'Still, I had to accept it as I need work to survive, and it is better to earn something than nothing at all.' Here, the effects of the lack of alternative options when it comes to finding irregular employment, clearly reveal themselves. Another factor adding to the dissatisfaction prevalent among these respondents is the difference they felt between the way in which they themselves were treated, and the way in which legal, or Dutch colleagues – or sometimes even other irregular migrant workers but of a different nationality – were treated. Many of them confirm, and even a lot of respondents who were quite satisfied with their work situation do, that a huge difference exists between the situation, the possibilities and the treatment of people working with and without the right papers. Concerning working conditions, this results in legal, or Dutch colleagues being given higher payments, more favourable working hours and leaving the harsher and more unpleasant jobs for their undocumented colleagues to do. This kind of social hierarchy is also common among undocumented migrants themselves, an example is several Ukrainian men expressing their feeling of being discriminated by mainly their Polish and Turkish colleagues, as both groups generally consider themselves of higher status than the Ukrainians. This discrimination was also seen in the treatment of employees by their employers, as one Ukrainian man noted that all of his Turkish colleagues were able to work more hours a day, in his view due to their better position in Dutch society. Working more hours meant a privilege to him, for as he struggled to earn enough money to support himself, any extra hour of work would improve his situation. In general, dissatisfaction with the circumstances and conditions of their employment among irregular migrants in the Netherlands is due to the fact of them being very well aware of their substandard and discriminatory treatment by both colleagues and employers, resulting in various hardships and difficulties in sustaining a proper living here. One could describe this situation as being a parallel society without labour rights.

## *6.2 Legal Consciousness*

Legal consciousness addresses both the understanding of irregular migrants of their lawful labour rights, and their subsequent willingness to attempt to enforce those rights, by means of a legal procedure. This section will firstly deal with the migrants' understanding of their labour rights, after which an assessment will be made of their subsequent willingness to try to enforce these rights by legal means.

### *6.2.1. Understanding of Labour Rights*

The results of the interviews regarding understanding among irregular migrants of their own labour rights as irregular workers in the Netherlands, are relatively straightforward. With a few exceptions, irregular migrants seem not to be aware

of any legal rights they have in their position. The general feeling is that because of their illegal status, they are not entitled to any of the rights legal workers and Dutch residents have. What is more, the issue of legal rights does not seem to have a lot of importance for most of the respondents. When asked ‘Do you think that undocumented migrants have the same labour rights as legal workers and residents of the Netherlands?’, the answer most often given is something like ‘No, I do not think so. We are illegal and therefore we are treated differently than people who have papers.’ This formulation gives a first indication of the fact that actual treatment is far more important and determining to most irregular migrants than the legal rights they are formally entitled to. Most respondents do not base their answers on supposed knowledge of legal labour rights in the Dutch law-system, but on their own experiences in the workplace. Here, almost without exception, the rights formally guaranteed are not adhered to by employers, or at least not in all their facets. This feeling is reinforced by the fact that some respondents directly experienced the difference in treatment between them and their legal colleagues, who were paid more, had to make less – or sometimes exactly the opposite: were allowed more working hours – and were confronted with less insecurity concerning their employment. However, most respondents worked in an environment where all, or at least the main part, of their colleagues were irregular migrants themselves. Between them, difference existed as well, for example along nationality or duration of employment at the same employer. All these facts contribute to the view that your actual functioning combined with your illegal status determines the way in which you are treated, and not any formal definition of legal labour rights for irregular migrants in the Netherlands. This view directly addresses the feeling of being responsible for your own destiny, at least for some of the interviewees. As one Moroccan boy expressed it: ‘It does not matter if you are legal or illegal, as long as you do your work well. If you respect your boss, he will respect you and you will be treated well.’ The current situation, enabling many employers to disregard legal labour rights in as much as it serves their interest, despite the formal prohibition and regular, but insufficient controls by for example the labour inspectorate, does not seem to grant much possibilities to irregular migrants for legal support. As long as the institutional framework needed to actually enforce the labour rights formally guaranteed, is lacking, personal behaviour and rather coincidental circumstances concerning employment and employer, will remain determining for the extent to which labour rights of irregular migrants in the Netherlands will be guaranteed.

For the minority who thought irregular migrants to have some, or even all, of the labour rights legal workers and Dutch residents have, a common factor is nevertheless their inability to enforce those rights. A feeling exists that only people with papers are in a position to claim any rights at all, as for an irregular migrant worker demanding their lawful labour rights can result in direct dismissal, without any compensation. This is a risk that many or even most respondents do not take, as their survival and continued stay in the Netherlands are dependent on the job they have and with it the amount of money they are able to make. Due to the situation of dependency that characterises their relationship with the employer, any efforts in the direction of rights-enforcement are likely to be unsuccessful or even avoided in the first place. Most irregular migrants are not aware of the legal rights they have, but even if they were, this formal situation has no similarity to the actual possibilities they have for enforcing or demanding these

lawful rights. A big difference is therefore to discern between the rights irregular migrants are formally entitled to, and the rights they are being granted or able to claim – even if understanding is present or established – in practice. An implication of this difference between theory and practice is that a first effort at enlarging the congruence between these two facets should not be aimed at improving the rights-understanding of the irregular migrants themselves, but at the institutional and juridical possibilities in assuring and verifying the observation of these rights by the responsible employers.

However, despite the general absence of accurate rights-understanding among irregular migrants in the Netherlands, some respondents did express, besides dissatisfaction, a feeling of being treated unjustly by their employers. Regardless of the fact what conditions legal rights guarantee and to what extent they apply to their particular situation, these people felt that they were treated in a way no human being should be treated. A universal feeling of unfairness emerged when confronted with certain situations. Respondents expressed to be aware of the fact that they were not treated justly by their employer, or even being exploited by him due to him taking advantage of their illegal situation. An example comes from an Ukrainian man, earning only 20 euros a day for 10 hours of work. He even tried to speak to his boss about this severe form of underpayment, especially since some of his colleagues earned almost 4 times the amount of money for the same hours of work, but this never had any effect as there were no possibilities for him to enforce a better and more equal treatment. As the choice of employees is abundant, and as everyone needs work in order to survive, the power-relationship between employer and irregular employee is highly unilateral. While this universal consciousness of equality and fair treatment might substantiate some optimism regarding the – future – rights-awareness of irregular migrants, the main obstacle is formed again by the implementation of these lawfully guaranteed rights into the actual working situation. As long as the relationship between employer and irregular employee remains characterised by severe dependency, resulting in a highly unequal power distribution, there will be very little possibilities for migrants who feel disregarded in their labour rights to force any compensation or rights-adherence on their employers.

#### *6.2.2. Willingness to Enforce*

Having determined the gap existing between the formal definition of labour rights for irregular migrants in the Netherlands, and the way in which they are adhered to in practice by many employers, the most relevant question concerns the possibilities for decreasing the incongruence between both realities. As labour rights are in principle enforceable through the legal system, similar possibilities do exist for irregular migrants willing to claim their rights. However, while it must be noted that such attempts are far from guaranteed to be successful, due to the various legal requirements that need to be met, the often quite lengthy legal procedure and the efforts needed to acquire the financial means, they nevertheless present one of the few possibilities to irregular migrants for actually enforcing their lawful labour rights. To assess the potential willingness of the respondents to get engaged in such a procedure with the purpose of forcing their previous employer to compensate – for example by issuing a claim to minimum wage – for their neglected labour rights, the question ‘If possible, would you be willing to go to court to claim these rights?’ was asked. The answers to this question, while

recognising a high degree of interconnectedness between them, can be classified as follows:

a) Not applicable.

These respondents, who constituted the majority, were pleased with the situation they found themselves in during their work experience. They felt in no way neglected in their labour rights, let alone abused and exploited because of their illegal status. These were mainly the people who considered it to be their main problem that it is hard for an irregular migrant to find enough work to support himself, rather than that the conditions of the work itself were problematic. They expressed their satisfaction with the way in which they were treated by their employers, felt treated justly and had no reason trying to enforce compensation for anything. They were mainly happy to work, glad with the – sometimes little – amount of money that they were able to make and were not aware of their legal labour rights, or in case of awareness, did not feel that their treatment showed a significant difference with the conditions guaranteed in Dutch labour law.

b) No, because of practical constraints.

A smaller, but still significant, proportion of the respondents showed some interest in enforcing, but expressed hesitation due to practical circumstances. For example, because of the irregular nature of a lot of the work the respondents executed, many of them had worked for many different employers within a quite limited period of time. This resulted in them working for the same boss on average only a few weeks, or at most a few months. This again, is often their main point of complaint, rendering the factors over which a legal procedure could be started, less relevant. Another practical factor making it quite hard to legally enforce neglected labour rights is the fact that many irregular migrants were employed via intermediaries, resulting in a work relationship in which their employer was not directly responsible for the wages they were paid, the amount of work they were able to do, the timely organisation etc. These intermediaries were often friends or family, or in any case personal contacts of the respondents themselves, adding a social aspect to the general hesitation in applying for compensation via legal measures. A third practical constraint is that several respondents worked on the papers of someone else – for example, an Ukrainian national working on the papers of a legal Polish employee – thereby constituting a formally legal working relationship, at least in the eyes of the employer. In practice, fraud with identity papers would be just as illegal as disrespecting labour rights, rendering it far from advantageous for these irregular migrants to start a legal procedure concerning their work experience. A last practical constraint is that most of the respondents were not employed with and handed a written contract, resulting them feeling unable to proof their employment sufficiently. This does not mean that the related employment is exempted from the lawful labour rights concerning employment, however, as a written contract is not legally necessary to proof employment when it is assumed as a consequence of alternative evidence. Still, it does mean that it is a lot harder to proof the duration and nature of the employment, and sometimes even the fact of being employed by a certain employer at all. Moreover, the mere feeling of not being able to proof their employment with a valid contract on the part of the irregular migrants



themselves, is a considerable obstacle for them to actively attempt to claim their lawful labour rights. The absence of written contracts in most cases of employment is again attributable to the lack of power in practice for these irregular migrants to enforce their rights. Most employments were stipulated by the employer unilaterally, leaving the employee no choice but to accept the predetermined conditions.

c) No, because of personal hesitation.

Several personal motivations could prevent an irregular migrant from claiming his/her lawful labour rights if neglected, as a few individual interviewees exemplify. One factor is the fear for reprisals, for example direct dismissal after which the complicated search for a new job starts all over again. Another factor has to do with social considerations and personal morals, for a few respondents remarked that issuing a complaint against an employer who initially granted them employment, would be rather ungrateful. Especially since these jobs were mostly taken on after mutually agreeing on the conditions, they consider it as unfair to attempt to force the previous employer to respect the lawfully guaranteed labour rights, if initially compliance with other standards – even if formally illegal – was established. Even as most employments were initiated on terms unilaterally determined by the employer, the fact of the employee agreeing on them rendered them mutually accepted in the eyes of many of the respondents. Another personal factor withholding several respondents was the wish not to damage contacts who initially helped finding them employment. This could concern friends, acquaintances or other personal contacts, who were themselves dependent on their – irregular – network for their extended stay and survival in the Netherlands. Another concern is the opportunities for a possible future return, for themselves, or for a friend or relative. Apparently, a quite significant feeling of solidarity exists between irregular migrants among themselves, even as the internal power relations are far from divided equally, as for example intermediaries who often take just as much advantage – or even more – of the illegal migrants' vulnerability as the employers do, are also considered to be part of this community, and deserving the same kind of protection as a consequence thereof.

d) Yes, if possible.

The smallest fraction of respondents was formed by the ones who stated that they absolutely would like to issue a claim concerning neglected labour rights, almost all of whom were not aware of the fact that they themselves were entitled to these rights beforehand. Often, they asked out of own initiative about the possibilities to claim these rights when they were told irregular migrants as well are entitled to them. These people generally feel mistreated, taken advantage of and sometimes even exploited because of their illegal position. Telling is the example of this Ukrainian man, who stated that he would definitely be interested in claiming, as he felt that whenever he got a job, he worked hard and did his job well. Therefore he feels that he should earn the same amount of money as other people do, and that the fact that his employer paid him so much less due to his illegal status was definitely proof of unfair treatment. However, as another Ukrainian man adds, still some distrust or scepticism exists regarding the likely effectiveness of such an attempt. This man wonders whether such a procedure could ever work out

fruitfully for him as an irregular worker, and especially since he is returning now – an aspect typical of IOM-clients, but naturally not applying to all irregular workers – he feels that it is already too late for him to initiate such an attempt. Even when explained that presence in the Netherlands is no necessary condition for the completion of the legal procedure, he still feels that because his employment as well as his stay in the Netherlands is over, such an attempt would most likely be useless to him. However, this feeling was not shared by all the respondents in this category. Two others, a Chinese and another Ukrainian man, explicitly expressed the wish to be informed further about the possibilities to enforce their rights, without significant concerns about the fruitfulness of this attempt. The doubts mentioned by the more sceptic respondents were not shared by them, resulting in a determined intention to actually try to enforce their labour rights. In general, it could be concluded that despite some distrust concerning the likely effectiveness of such an attempt, a certain proportion of the people who genuinely feel mistreated during their employment in the Netherlands, would be interested in attempting to claim their neglected labour rights by means of a legal procedure.

## **7. Discussion**

Several factors are worth mentioning when considering the conclusions of the sections presented above, for their potential impact on the results acquired regarding both their origin and their reliability. This research concerns the work experience, rights-understanding and subsequent willingness to enforce of irregular migrants in the Netherlands, but is based only on the experiences of irregular migrants who reported themselves at the consultation hours of the IOM. This fact of selective representation has a number of significant implications:

First, while this research does not pretend to be representative even merely of the total number of IOM-clients, the fact that the results are based solely on results acquired from them renders the conclusions somewhat less relevant with regard to the situation of the irregular migrant in the Netherlands in general. As IOM-clients are assumed to possess a certain freedom of movement, number of social contacts and possibility of acquiring information to be able to contact the IOM in the first place, these facts contribute to the fact that their situation may not be representative for the general situation of irregular migrants in the Netherlands. Especially when it concerns the matter of labour exploitation or violation of labour rights in general, it could be that the average IOM-client is in a rather favourable position. This is not to mean that no IOM-client can be in a situation of severe exploitation without much possibility for freedom of movement or own initiative, especially when respondents interviewed in aliens detention are concerned, but it does mean that the likelihood of discovering these cases is probably less than would be in a representative sample of the total population of irregular migrants in the Netherlands. In any case, these people are able of leaving their employer, getting fired and switching employment, implying that they are not in a situation of forced and bound labour from which they can not possibly escape on their own initiative. As already indicated, the main reasons for return for most respondents were either the fact of not being able to find enough work to support themselves, or reasons of a more personal nature like being tired of the constant fear of being apprehended and family circumstances. As implied by labour exploitation and violation of labour rights in general, the more severe cases are less likely to be able to end this situation on own initiative for reasons of dependency, and possibly force and threats. Therefore, while assuming that these are present among the total number of irregular migrants working in the Netherlands, the likelihood of discovering them among IOM-clients is less than it would have been in a random sample of the total population of irregular migrants working in the Netherlands.

Secondly, a more detailed matter of concern needs to be mentioned. As implied by the mission and statements of the IOM, only irregular migrants who lack the financial means to provide for their own return home, are assisted. This means that no suspicion needs to be present of sufficient financial means while applying at a consultation hour. A consequence of this condition is the expectation that several respondents might have trivialised the amount of work and money they actually acquired during their stay in the Netherlands, for fear of losing the assistance of the IOM. Telling was the fact that many people started their response to the question 'Have you worked in the Netherlands?' with a remark like 'No, not really.', but after inquiring more specifically, it turned out that they had indeed worked, but mainly irregularly, or just not continuously. As confirmed

by various IOM-project officers responsible for the consultation hours and involved in the research, the estimation is that trivializing the amount of hours worked – and the related payment – might be a perceived necessity to safeguard the personal interest of being assisted in both the organisation and the financing of the return home. The potential underestimation of the amount worked and the payments received is a factor to be considered when analysing the results presented above concerning both work experience and legal consciousness.

## **8. Conclusion**

The first part of this exploratory research sought to investigate whether and to what extent the Netherlands adopts a rights-based approach to combating exploitative labour relations. Firstly, we found that the international obligations of the Netherlands under United Nations (ICESCR, ICCPR) and Council of Europe (ECHR) treaties require that irregular migrants are granted a right to just and favourable working conditions, a right to form and join trade unions to make it easier to exercise the right, and a right to a fair trial in order to enforce both these rights when necessary.

Subsequently, we looked at the implementation in particular of the right to fair working conditions. Guaranteeing the right to fair working conditions as laid down in Article 7 ICESCR comprises the obligation to respect, protect and fulfil that right. The Netherlands seems to fulfil the duty to respect, which entails no arbitrary interference on part of the State with the enjoyment of right to fair working conditions. The positive duty to protect requires the Netherlands to protect irregular migrant workers from interference by non-state actors (their employers) of their right to fair working conditions. The State has devised a general legal framework which ensures that violations by private individuals or companies are punishable or, in any case, subject to a procedure of civil compensation. The obligation also requires the Netherlands to exercise due diligence in controlling behaviour of non-state actors. This relates to the obligation to fulfil, which ultimately comprises those active measures by a government necessary to guarantee everyone opportunities to have full access to all rights that cannot be secured through exclusively personal efforts. In other words, ensuring the effective realisation of the right to fair working conditions.

In that respect, we finally examined the practical issues influencing the effective realisation of the right to fair working conditions to establish whether the obligation to fulfil has been met. The effective realisation of the right to fair working conditions of irregular migrants is influenced by several issues. First of all, the fact that the Dutch Labour Inspectorate is a 'double hatted' organisation raises problems. It is concerned with, on the one hand, the protection of workers but on the other implicated in the migration control. Consequently, 1) irregular migrants are deterred from resorting to the Labour Inspectorate in case of abuses and 2) the Inspectorate does not act in a strict non-discriminatory manner with regard to guaranteeing the rights of irregular migrant workers under the Minimum Wage Act. The second issue concerns access to court. Once migrants find their way to legal aid, access to court is dependent partly upon the willingness of lawyers to take the effort to assist irregular migrant workers. This can involve issues such as staying in touch when a client has been expelled, pleading the case when migrant is not there and sometimes the risk of not receiving payments. Moreover, difficulty of proving the existence and the duration of the employment relation constitutes an important barrier to successfully claiming rights. The provision in the Aliens Employment Act designed especially to lessen this burden of proof has never been used to that effect. Thirdly, although the possibility of irregular migrants to assert rights through trade unions exists, the payment of a membership fee may constitute a barrier to enjoying the benefits of being involved in a trade union. Furthermore, due to the rise of fragmented and temporary employment it is difficult for trade unions to reach irregular migrants.

Moreover, even if trade unions are in touch with irregular migrants, the problem of losing contact due to arrest, detention and subsequent expulsion remains. Finally, several measures taken in the nineties and more recent years, such as limiting the possibility to obtain a tax and social insurance number, the enactment of the Linkage Act and high fines for employers of irregular migrants, together with the growing international competition in many sectors contributed to the marginalisation of the irregular migrants position in the Netherlands. As a result of these developments and government measures irregular migrants became even more vulnerable and less able to stand up against exploiting employers.

We have seen that the obligation to fulfil comprises those active measures by a government necessary to guarantee everyone opportunities to have full access to all entitlements to rights that cannot be secured through exclusively personal efforts. Although not all points discussed are exclusively within the direct capacity of the government, the government measures excluding irregular migrants from society had a negative impact on the possibilities for irregular migrants to secure through exclusively personal efforts the right to fair working conditions. Moreover, by conferring upon the Labour Inspectorate the task to protect workers but at the same time enforce the Aliens Employment Act the Netherlands does not actively support the most vulnerable and marginalised in guaranteeing their right to fair working conditions.

In order to have effective realisation of fair working conditions for irregular migrants, the government should consider taking positive measures. These measures should include: 1) reconsidering the different tasks of the Labour Inspectorate in order to have labour inspection strictly separate from migration inspection; 2) providing public services – in their own language - to inform irregular migrants on their rights and how to enforce them; and 3) reconsider the measures excluding irregular migrants from society.

If these points would be acknowledged, this could pave the way for the rights-based approach to combating exploitative labour relations advocated by PICUM and supported by the ILO.

However, if irregular migrant workers – for whatever reason – do not invoke their rights, the rights-based approach can never develop into an adequate alternative to the penal approach to labour exploitation. Acknowledging that the effective implementation and actual realisation of the lawfully guaranteed labour rights of irregular migrants working in the Netherlands is not solely dependent on the institutional and juridical provisions serving to ensure their adherence, the subjective experience of the irregular migrants themselves is a highly determining factor. For their initiative, or at least cooperation, is required to effectively combat exploitative labour relations through establishment and actual implementation of the rights-based approach.

Both their experience of the work situation in the Netherlands and the extent to which they are aware of and willing to enforce their labour rights, are of determining influence when it comes to assessing the actual realisation of the labour rights of irregular migrants working in the Netherlands. The second part of this research first attempted to gain insight in the degree of satisfaction with the

conditions of employment in the present situation, and subsequently tried to investigate the amount of rights-understanding among irregular migrants in the Netherlands. Both factors determine the likelihood of actual willingness to enforce these rights by legal means, a necessary condition for the effective removal of exploitative labour relations in the Netherlands.

The experience of the current employment situation can be said to be relatively positive for most interviewed irregular migrants in the Netherlands. The majority of the respondents interviewed evaluated their work experience as fairly good, and were pleased with the conditions of their employment, the treatment by their employer and the payments they received. However, this positive evaluation is inherently connected, and for a part even due to the lack of alternative possibilities for finding employment and the application of different standards regarding work conditions among irregular migrants in the Netherlands. Moreover, gratitude and satisfaction with the often little amount of work and related payments prevail, for any income means improvement and heightened opportunities for extended stay in the Netherlands. Still, distinct dissatisfaction is present among some, due to conditions of severe underpayment, extreme or very irregular working hours and discriminatory practices by both colleagues and employers. However, respondents generally felt an overarching impossibility to counteract these conditions due to their illegal position and related lack of opportunities to enforce their rights – for fear of losing their job, being betrayed to the Dutch authorities or damaging their network.

Understanding of labour rights among irregular migrants is near absent in most cases. The prevailing view is that irregular migrants are not entitled to any of the labour rights legal migrant workers and Dutch residents have. This is based on the fact that a difference in treatment between these groups is experienced, both with regard to working conditions and the mere possibility to work in itself. Enforcing any supposed labour rights is deemed impossible because of the illegal status, which restrains most irregular migrants from trying it in the first place, for fear of reprisals resulting in a situation worse than their initial position. Moreover, both practical and personal motivation could heighten the threshold for claiming even further, concerning issues such as highly fragmented and temporary employment, the absence of a valid contract and feelings of solidarity towards contacts who initially assisted in finding an employment. The exception, however, consists of respondents who genuinely feel mistreated by their employer and are more than willing to attempt to force adherence to their lawful labour rights, with retroactive effect. They feel abused and even exploited because of their irregular situation, and are well aware of the fact that their previous employer was deliberately taking advantage of their vulnerable and dependent situation. Despite some scepticism concerning the possible results, these respondents evidently expressed the willingness to attempt to enforce their labour rights by means of a legal procedure.

In conclusion, this exploratory research demonstrates that combating exploitative labour relations through a rights-based approach in the Netherlands can prove to be a complex undertaking, for which both institutional reforms at the (sub-)state level, as well as individual understanding and willingness to enforce labour rights for irregular migrant workers are necessary conditions. The rights-based approach

can only be a viable alternative when the institutional steps to which the Dutch government is legally obliged are taken, resulting in more protection and awareness-raising among irregular migrants. However, even if these measures are taken, it remains doubtful whether irregular migrants will be willing to actually enforce their rights. From our empirical research it appears that a vast majority is currently not willing to take such steps for various reasons. Although many of these reasons relate to the existence of a parallel society without *de facto* labour rights – which *could* be changed through State action – the fact that they are just glad to have a job, are grateful for that and do not want to damage their contacts proved to be decisive in not claiming rights. Nevertheless, the creation of more awareness of rights and enforcement possibilities would be a first step towards dissolving the parallel society which is a necessary requirement for abolishing exploitative labour relations in the Netherlands.



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## Annex I: Short Questionnaire



IOM International Organization for Migration  
IOM Internationale Organisatie voor Migratie

### Questionnaire Research University of Amsterdam / IOM

1) What is your nationality?

.....

2) Do you have a residence permit or a proof of legal stay in the Netherlands?

Yes

No

3) Have you worked in the Netherlands?

Yes

No

4) How did you experience your work here?

1	2	3	4	5
Very good	good	neutral	bad	very bad

5) What do you think about labour rights of irregular migrants?

- Irregular migrants have no labour rights
- Irregular migrants have some labour rights, but less than legal workers and Dutch residents
- Irregular migrants have the same labour rights as legal workers and Dutch residents with regard to payment and working conditions

6) Are you willing to cooperate with a further interview about your labour experience (anonymous) by another colleague?

Yes

No

Please use backside for additional information related to questions 3, 4, 5 and 6

## **Annex II: Guideline for Extended Interviews**

### **Main Questionnaire**

- 1) Have you worked in the Netherlands?
- 2) How did you experience your work here?
- 3) Did your experience match your previous expectations about working in the Netherlands?
- 4) Was it hard for you to find a job when arriving in the Netherlands?
- 5) Do you think that illegal migrants have the same labour rights as legal workers and residents of the Netherlands?
- 6) Which labour rights do illegal migrants in the Netherlands have? Which rights do you think you are personally entitled to?
  - a) The right to minimum wage.
  - b) The right to safe and healthy working conditions.
  - c) The right to a reasonable limitation of working hours, including regular breaks and days off.
  - d) The right to decent housing/a sufficient amount of privacy.
- 7) Do you experience a difference between the rights just mentioned and the conditions guaranteed in them, and your personal situation while working in the Netherlands?
- 8) If possible, would you be willing to go to court to claim these rights?