

PATHWAYS OUT OF IRREGULARITY
EUROPEAN MIGRATION NETWORK, NORWAY
CONFERENCE IN OSLO 10 OCTOBER 2011, HOTEL BRISTOL

This conference was sponsored by The Norwegian Ministry of Foreign Affairs and the Norwegian Ministry of Justice. In addition to representatives from EMN Norway, the conference organisers, and scheduled expert speakers from around Europe, 130 representatives from a large number of institutions, public and private from several countries attended. Jan Paul Brekke, Institute for Social Research (IFS), moderated.

Pål K. Lønseth, Norwegian Deputy Minister of Justice, opened the conference and welcomed the attendees. He restated the Norwegian policy of cooperation with Europe with respect to migration (referring e.g. to the Schengen and Dublin cooperation agreements) and called return the primary pathway out of irregularity. He suggested that asylum requests were often used as a disguise for other forms of migration, but underlined that seeking a better standard of living does not constitute a need for international protection and that misuse of the asylum system undermines support for legitimate asylum seekers. He saw it as unfair to reward persons whose stay is illegal with status and that such policy would attract more people who do not require protection. In regard to amnesties in other European countries, he clarified Norway's position as not necessarily being comparable to the other countries as "exceptional circumstances" do not prevail in Norway. However, he pointed out that Norway grants residence takes "humanitarian grounds" into consideration and thus approximates other countries, e.g. in particular as regards children with strong links to Norway, even if established during illegal stay. But emphasized, nevertheless, that such considerations must be balanced against immigration control. How to manage challenges of migration in a legal, regulated and responsible manner? The deputy minister stated that any migration management must be ethical and in respect of human dignity and international law. He also mentioned that in regard to the migration/development nexus; targeted projects have positive results. In conclusion to intervention, Lønseth stated: "The pathway out of irregularity is return to the home country".

Jan-Paul Brekke next introduced the EMN cooperation and explained the Norwegian National Contact Point (NCP).

That was followed by Vigdis Vevstad of Vevstad Consulting/ISF, speaking on behalf of the conference organisers. She pointed out that the need to fight irregular migration is one of five dominant commitments undertaken by the European Council, in addition to enhancing efficiency of border control, legal migration, building an EU asylum system and creating a global partnership for migration and development. She introduced the three topics of the conference: 1 Return, Readmission Agreements, 2 Continued Irregularity and 3 Regularization. She emphasized and exemplified some of the many dilemmas we are confronted with when discussing the issue of irregular migration. Further, she mentioned the need to distinguish between different categories of migrants as different rules apply, while stressing that all migrants, whether "regular" or "irregular", must be treated humanely and with dignity. The heading "Pathways out of irregularity" was chosen with care. It indicates the need to find

solutions, for States and migrants alike. So what to do if return does not work? How to deal with “people in limbo”. Is there or should there be a “humanitarian space” beyond State interference? the possibility that regularization schemes may be counter-productive (pull more migrants). She ended her overview by introducing the third topic of the day; regularizations. Further, she reminded the audience that the European Commission and Council have called for a more coordinated effort and less unilateral action in regard to migration management, flagging on a personal basis a conviction that a coordinated approach brings better guarantees than a unilateral approach.

Ryszard Cholewinski, ILO, presented a comprehensive approach to addressing irregular migration: Labour, Rights, and Social Cohesion. He argued, in particular, that labour is a significant, if not the dominant, factor in all migration (globally, irregular migration is a labour issue), and that labour and social issues should be considered on their own merit. He stated that irregular migration has been considered in too close proximity with criminality and law enforcement. This was also reflected in language, “illegal” vs “irregular”, where the first is still being used by States whereas, for example, the Commission uses the latter. Language is important. It impacts on the measures we adopt. Cholewinski further stressed that the question of rights is of paramount importance. A rights-based approach is essential in order to prevent marginalization and social exclusion, creation of an underclass.

Labour: 214 mill migrants of which approximately 10-15% of migrant population globally is illegal. He further stressed that irregular migration is a global phenomenon. Globalization has failed to create appropriate work opportunities in developing countries of origin and there is a growing and young population at the same time as a continued demand for high and low skill in destination countries. No significant reduction of demand had been seen in the context of the economic crises. Irregulars are considered a cheap, flexible and docile labour force. Further, there is a demographic issue whereby a stronger demand for labour migration is inevitable in the near future.

Rights: States have the prerogative of border control, but Cholewinski underlined that irregular migrants are entitled to human rights and labour rights protection. No one is illegal (UDHR art 6) was referred to. He then illustrated the core human rights and labour rights instruments.

Social cohesion: He emphasized the importance to avoid the creation of an underclass and advised rather to develop possibilities for regularization. Further, he advised on creating more legal migration channels, to recognize the demand for low skill sectors like agriculture and food production and domestic work and not just focus on temporary or circular migration.

Summing up, Cholewinski stressed the need to understand the issue as a labour issue in the context of globalization and demography; the need for a comprehensive approach and the need for rooting the topic in law.

Kristina Touzenis, IOM, spoke on Return of Children – International Legal Protection? She pointed out that children migrate extensively for economic reasons, especially between developing countries. And that children and migration is more than children and return. In addition to more general protection (available to both adults and children), the CRC affords specific rights to children and protects every child within the State’s jurisdiction regardless of nationality and immigration status. Art 10 on family reunification, art 36 on protection from

exploitation and art 37 on protection against torture, are the provisions most often violated. CRC is the first instrument gathering political, social and cultural rights into one. It is a holistic instrument.

Among the guiding principles of CRC, she emphasized art 2 on non-discrimination as very important for non national children. Further, art 3 containing the principle of best interest of the child. Art 5 evolving capacity – children from 0-18 are not all alike. There is no rigid definition of children. They have different experiences and different levels of maturity. Provisions must be considered together. Although family reunification is seen as a right of the child, it often means return, which may not always be beneficial. She therefore pointed to an extraterritorial duty on the returning State to safeguard returning children. She also advocated for strong cooperation between returning and receiving states. Placing a child in limbo, and especially, in detention is not in the keeping of the spirit of CRC.

Turning next to The Returns Directive as an Operational and Efficient Tool and the Usefulness of Readmission Agreements, Ellen-Sofie Terland, Ministry of Justice, Norway, elaborated on the opening remarks of the Deputy minister of Justice, Pål K. Lønseth, tying the credibility of the asylum system to an effective returns policy. She pointed out that internal disagreement within Europe has prevented The Returns Directive from being fully implemented. The Return Directive was implemented in Norway on 24 December 2010. Some legal amendments were required in regard to voluntary return, expulsion, detention and return of unaccompanied minors and in defining the term “risk of absconding”. Has made Norwegian practice both more restrictive and more liberal, depending on the area. For example; the use of unlimited entry bans has been reduced – now only made in exceptional cases (e.g. serious threat to public order). Further, fundamental human rights are emphasized in implementation. Measuring effects of the Directive is a complex issue and premature. Some important countries have not yet implemented the Directive. Voluntary returns are considered the primary solution and there was an initial spike in voluntary returns when the Returns Directive went into effect, but that has not continued. However, she said it is too early to tell if it is effective. She admitted to changing her mind on the usefulness of Readmission Agreements, having at first thought they would diminish the authority of the State to effect returns. In practice, she has rather found that they reduce tension between States, and have proven to be a useful and practical tool to overcome obstacles for return. In Norway, Readmission Agreements are used most with Vietnam, Afghanistan, Russia and Iraq. The agreement with Iraq has increased voluntary returns. She did note, however, that it might be confusing when the EU enters into Readmission Agreements on behalf of all of its Member States and several States enter into parallel bi-lateral agreements.

Liv Feijen, currently at the Graduate Institute of International Studies, Geneva (on leave from UNHCR), continued with her presentation, “Return in Safety and Dignity” of irregulars found not in need of international protection. She emphasized the need to avoid simplistic assumptions and solutions. For example, myths in regard to return indicating that efficient returns bring down numbers of new arrivals as there is no empirical evidence suggesting this is so. Another myth, according to Feijen, is that the majority of asylum seekers will go underground if they know the departure date. According to her, studies on alternatives to return and detention do not support his supposition. However, she underlined the main rule as being that efficient return should be

carried out to those who are not in need of international protection and that this is key to the international protection system. But, she clearly indicated that there have to be exceptions as there are, for different reasons, non-returnable persons, e.g. unsuccessful asylum seekers who, through no fault of their own, cannot return (authorities at home do not want to cooperate, there is difficulty in establishing nationality and id, compelling humanitarian reasons, technical obstacles). To her mind, these should be granted some form of lawful residence and legal status. She pointed to many countries affording irregular migrants a status based on humanitarian and similar grounds when return is not possible, but they are not afforded protection under the Refugee and Convention. Currently EU countries have different practices in regard to humanitarian statuses. It is a grey area. In regard to voluntary vs forced return, she pointed at voluntary return taking place without harassment, arbitrary detention or physical threats. Voluntary return is absence of refusal to return (IOM). Whereas mandatory return means a removal order has been issued and different compliance measures belong in a legal grey area. She pointed to examples of inappropriate use of force and the need for proportionality. Feijen suggested making use of the Council of Europe's Twenty Guidelines for voluntary returns with respect to forced returns procedures and that IATA documents may provide useful guidance. She advocated for non-detention in these cases, as empirical evidence indicates that detention leads to more problems both for the individual and the State in the long run. The Returns Directive now limits detention to 18 months, but that is more than what some States used to impose. The Council of Europe 20 Guidelines also call for monitoring of returns.

After a break for lunch, the topic of "Continued Irregularity" was approached.

First out was Michèle LeVoy, PICUM (Platform for International Cooperation on Undocumented Migrants), Brussels, who made an intervention under the heading "Providing Sufficient Humanitarian Space". Her main thesis was a more flexible system despite some disparity among States, that conformity should not be used to justify the lowest common denominator and to stifle subjective individual consideration. The backdrop for her talk was 15,000 people having died during the past 12 years while trying to come to Europe. And that conditions for those who reach Europe leave a lot to be desired. She pointed at the correlation between the level of irregular migration, the demand for labour and poorly designed immigration systems. She concurred with Ryszard Cholewinski that labour law enforcement should be separated from immigration law enforcement. Further, LeVoy referred to a forthcoming study by FRA on Fundamental Rights of Irregular Migrants (due in Nov 2011). In connexion with the question of creating fair working conditions, she pointed at NGOs trying to empower workers, inform consumers, establish cooperation among migrant organizations, trade unions, etc. According to her, trade unions are increasingly aware of undocumented worker issues. She cited two Greek Supreme Court rulings on labour rights of undocumented workers as well as some lower court decisions in Ireland and elsewhere. FRA is launching a case study on access to health care for undocumented migrants (October). It is known that access to health care is inconsistent in Member States. Most States only provide emergency care to irregulars, as well as preventive care based on public health issues, while some countries provide full access to their systems (Spain, Italy). Also, some countries, such as Norway, may have laws limiting health care for irregulars. A general problem concerns access to mental health care. PICUM is giving

strengthened attention to children who are with caregivers in an irregular situation. These children are basically invisible. Children of traditional school age (6-16) generally have access to education. Others not so much; but two European Committee on Social Rights rulings (French and Dutch) have ruled in favor of undocumented migrant children. It is also difficult for women to report exposure to (domestic) violence, for fear of being deported; but Spain provides more protection for women in these situations (2004 Gender Based Violence Act) which is the most comprehensive measure in the EU. In conclusion, LeVoy referred i.a. to the relevant framework of international law. Further, the need to address barriers: legal, structural, administrative and financial which prevent irregular migrants from accessing rights and services. She emphasized the need to protect the dignity of irregular migrants who have experienced violence and to stop criminalizing organizations who provide services.

Karl Harald Søvig, University of Bergen, then presented preliminary findings from the PROVIR (Provisions of Welfare to Irregular Migrants) project, a research project on irregular migrants in Norway. The aim is to test if restrictions on access to welfare services is a legitimate and effective tool in migration control. Norway is an interesting case as it has a good welfare system. Different estimates on numbers of irregulars, in 2008 18000 (SSB statistics). According to Søvig, there is some indication to the contrary, that continued irregularity is harmful both to the individuals directly affected and to society at large. Søvig referred to legislation at the international and national levels. Indicating two approaches: the basic human rights approach (nevertheless, asking what is a basic right? What is emergency health care?) and the discrimination approach (but asking, who to compare with? Nationals or to other temporary groups?) In accordance with Norwegian legislation, all persons on the territory have a right to absolutely necessary health care which cannot wait. But the persons concerned (except children) have to pay for it. He questioned whether this practice is in conformity with Norway's international convention obligations. He suggested that it is difficult for irregular migrants to discern their rights, that it is necessary to distinguish better among sub-groups, that States should facilitate integration, that irregular migrants should enjoy confidentiality in line with citizens, and generally, that much is about using laws that already exist.

The concluding topic of the conference, Regularization, was first covered by Albert Kraller, ICMPD (International Centre for Migration Policy Development), with a presentation entitled "Regularization of Irregular Migrants in Europe". His remarks were based on a study on Member States' practice in regard to regularization published in 2009, commissioned by the European Commission. This study confirmed strong opposition among EU Member States against general regularizations, but widespread regularizations on a case by case basis, especially on humanitarian grounds, and usually not referred to as regularization, but as some sort of status adjustment. Lack of enforcement of returns decisions (50% in 2005-07 and 60% in 2008-10), including a rising number of non-removable persons, has created a trend to institute various regularization programmes, both temporary and permanent, and mostly the latter since 1990. This research indicates that regularization programmes have helped to eliminate what had amounted to denial of justice in a number of countries and freed up resources to treat individual cases better. Further, evidence suggests that there is no major migratory impact of regularization programmes. Further, there is no evidence that legalized migrants move to other

Member States and little evidence of stimulation of future migration flows caused by regularization. There was, however, some limited evidence of stimulation of flows of former residents to participate in regularization opportunities. Kraler further suggested that large scale regularization programmes, at macro level, have had significant fiscal impact, but negligible if small numbers. At micro level, post regularization employment outcomes have shown some upward mobility. In conclusion, Kraler i.a. suggested that irregular migrants are not a homogeneous group and the need to find pragmatic solutions continues. He pointed to the continued need for adjustment measures because there will always be an enforcement gap due to human rights obligations and that there is a judicial development in regard to ECHR art 8. Regularization helps, according to Kraler, regarding access to rights, but does not fix all ills, like precarious employment. He also drew the conclusion, that fears around regularization has not been substantiated by research findings and that its should be seen as a pragmatic solution which does not necessarily undermine migration control.

The topic of regularization was concluded by three recent national examples, from Spain, Sweden and Belgium.

The example from Spain was presented by Kayamba Tshitshi, General Coordinator of Studies, Escuela de Profesionales de Inmigración y de Cooperación. His conclusion was that massive (over one million during 1985-2005) amnesties were useful in the Spanish situation, although they had raised concern in other Schengen States. He also suggested that Illegal (unregulated) work perpetuates irregular migration. He cited six regularization processes in Spain during 1985-2005, with several grounds for gaining regularity, including a quota system based on origin and the labour market sector, family and social integration, and exceptional circumstances, such as for victims of human trafficking. Spanish concerns related to a possible pull factor effect and to the concern raised by cooperating countries.

From Sweden, Michael Williams, Church of Sweden, presented a second example of how a public campaign, instigated by the Church of Sweden and the NGO community and focusing mainly on the situation of children in an irregular situation, had overcome a majority opposition both in Parliament and in the Swedish population at large. This led to a temporary amnesty act in 2005 and a new Aliens Act which entered into force in March 2006 which allows for giving consideration to situations e.g. of new protection needs of the person concerned, non-enforceable removal order, medical grounds, home country which will admit own citizen, long stay in Sweden and "a matter of humanitarian desirability".

The third example, from Belgium, was presented by Jörg Gebhard, Belgian NCP EMN. His experience was one where, until 1999, regularizations had only been carried out on a case by case basis. Some cases were pending for years, until the Samira Adamu case (returnee suffocated by police while being transported) stopped returns in 1998. In 1999, a regularization law was passed. After 1999, it took five years to process the 32,000 cases started during a 3-week window of opportunity (and later expanded to 40,000) under the new law. Again, exceptions (on humanitarian grounds, emphasis on family ties) became more a rule than the

exceptions; which, in 2009, lead to new instructions based on “local anchoring” and new exclusion criteria. Fully 130,000 have been regularized in Belgium since 1995.

Towards the end of the conference, a few questions from the audience were covered, e.g. if the examples cited had produced a new and significant pull of new migrants. None of the presenters had seen any evidence of this, but could not verify that there is not a pull effect, either.

Another issue raised was the impact of a declining native population, and the need for new workers. Sweden was offered as an example of a State that had looked forward and realized this and adjusted its stance on immigration accordingly: here, asylum seekers can, for example, seek work and get permits after failing their asylum claims.