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1

The Asylum System, Migrant Networks and the Informal Labour Market

GREGOR NOLL* **

1. INTRODUCTION

2004 was a landmark year for migrant agricultural workers in Spain. Previously, many workers lacked residence permits which placed them at the margins of the community. Now, the Spanish government had made a controversial decision:[1] the status of a large fraction would be 'regularised',[2] or, as media had it, they would receive residence permits as the result of an 'amnesty'. The government had come to understand that these workers were needed, and that it was not possible to return them to their home countries. By granting the permits, the state gave migrant

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** I am indebted to Peggy Oscarsson for translating parts of this text from an earlier work ('Asylsystemet, migrantnätverk och den informella arbetsmarknaden' ['The Asylum System, Migrant Networks and the Informal Labour Market'], in S Gustafsson, L Oxelheim och N Wahl, *Europaperspektiv 2006. Årsbok för Europaforskning* (Santérus Förlag, Stockholm 2006), pp 125–42). The present text and the arguments made therein is not identical with that earlier work. Thanks are also due to Jennie Magnusson for research assistance.

[1] Regularisation decisions are controversial not least with neighbouring states. Within the EU, the controversy on whether regularisations in one state leads to secondary flows to the next, has led to the adoption of a binding norm stating that 'Member States shall communicate to the Commission and the other Member States information on the measures which they intend to take, or have recently taken, in the areas of asylum and immigration, where these measures are publicly available and are likely to have a significant impact on several Member States or on the European Union as a whole'. (Council Decision 2006/688/EC of 5 Oct 2006 on the establishment of a mutual information mechanism concerning Member States' measures in the areas of asylum and immigration, OJ L 283, 14.10.2006, pp 40–3.)

[2] See FJ Moreno Fuentes, 'The regularisation of undocumented migrants as a mechanism for the 'emerging' of the Spanish underground economy', *Unidad de Políticas Comparadas Working Paper 05–06* (Jun 2005). Regularisation policies are no new phenomenon and account for the presence of sizeable migrant populations in countries such as France, Italy, Spain and Portugal. See UN DESA, World Economic and Social Affairs. International Migration (UN, New York 2004) *UN Doc No E/2004/75/Rev.1/Add.1*, pp 46–7; A Levinson, *The Regularisation of Unauthorized Migrants: Literature Survey and Country Case Studies* (Centre on Migration, Policy and Society, University of Oxford, Oxford 2005).

workers the chance to defend themselves against exploitation in the informal sector.

Many of these workers had made their way as undocumented migrants from North Africa to Spain in open boats under considerable risk to life and limb.[3] To avoid being returned upon coming in contact with Spanish authorities, they regularly applied for asylum upon arrival. However, only a few were recognised as refugees or as other persons in need of international protection. Many of those refused permission for residence managed to remain on Spanish territory. In time they found work, eg in the large greenhouse operations, which provide the tomatoes and cucumbers Europeans would buy in their supermarkets.

The regularisation of undocumented migrants in Spain shows that whether we like it or not, the asylum system and the labour market are closely intertwined. The demand for cheap tomatoes, and cheap labour to grow them, were more important in the decision than international conventions or humanitarian concerns. Traditionally, refugee lawyers have been careful to keep the labour market and asylum conceptually separate, mostly for fear that the grant of asylum will be made conditional on the manpower needs of the labour market. However, this separation has not stopped states from applying a broad range of restrictions designed to make the road to asylum more difficult to navigate. Is it not time to alter our perspective, and ask whether the informal labour market and migrants' own networks in fact provide a fundamental form of protection?

Governments attempting to regulate labour markets and control immigration are confronted with difficult questions. In the past, there was general agreement that the asylum system should not be exploited as a side entrance to the labour market. The two systems—asylum and labour market—were to be planned and maintained separately. But if migration is a prerequisite for asylum, does not increasingly stiffer migration control block escape for those under persecution? Prices for smuggling go up, and smugglers seek new routes, yet irregular migration continues, and the informal labour market flourishes. Here we must ask an irreverent question: is there any point in having both systems? And can the crux of the matter be that both are repeatedly branded as an 'illegal' phenomena which must be 'battled' like enemies?

Or, to combine both questions in one: is the asylum system a way to regulate the informal labour market within the EU?[4]

[3] For an excellent overview, see T Spijkerboer 'The Human Costs of Border Control', Briefing Paper, European Parliament, *IP/C/LIBE/FWC/2005-23/SC1,* quoting one source documenting some 7000 deaths at European borders in the period from 1993–2006.

[4] For a comprehensive overview, see GJ Borjas and J Crisp (eds), *Poverty, International Migration and Asylum* (Basingstoke, Palgrave Macmillan, 2005). On the impact of undocumented migration on domestic labour markets, see J Hjarnø, *Illegal Immigrants and Developments in the Labour Markets of the EU* (Aldershot, Ashgate publishers, 2003).

2. THE ASYLUM SYSTEM: A WINDOW TO THE INFORMAL LABOUR MARKET?

In order to understand the relationship of migration, asylum and labour market, we need to be aware of two simple legal rules. First, all nation states have the right to regulate immigration.[5] This right comprises a state's personal sovereignty and has ancient origins in international law. States are free to allow immigration of foreign labour one day, and prohibit it the next. States can also recruit well-educated labour from abroad, while refusing entry to those with little or no education.

However, by signing conventions on human rights and refugee law, states have come to an agreement for limiting the application of this right. This brings us to the second rule we should remember. Today, personal sovereignty is limited primarily by the prohibition against returning foreigners to countries in which they risk persecution. This rule is well established. It is a fundamental part of international law (the 1951 Refugee Convention[6] and the Convention against Torture[7]), European law (dealt with in a separate section below) as well as Member States' domestic law. The moment a migrant claims that persecution awaits upon return, the state shall evaluate the risk of such persecution before deportation (certain exceptions exist, but these do not detract from the practical significance of the principle). This provides undocumented migrants with a possibility to avoid immediate return to the country of origin by seeking asylum and to wait for a decision in the new country. If we reflect upon the hard lessons of the 1930s and 40s, when refugees from totalitarian states were deported from liberal democracies on the basis of states' personal sovereignty, then we understand why this rule of non-refoulement badly needed to be codified.

During the 50s and 60s, few regarded the prohibition of refoulement as a hindrance to effective immigration control. The Iron Curtain prevented many from leaving their home countries. But there was also a workable alternative to the asylum system: many industrialised countries required

[5] In 1892, the US Supreme Court affirmed that there was 'an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to its self–preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe'. (US Supreme Court, *Nishimura Ekiu v United States*, 142 US 651, 659, 1892.) In 1955, Judge Read formulated this right as follows in his dissenting opinion in Nottebohm: 'When an alien comes to the frontier, seeking admission, either as a settler or on a visit, the State has an unfettered right to refuse admission'. (ICJ, *Nottebohm Case*, ICJ Reports 1955, p 46.)

[6] Convention relating to the Status of Refugees, 28 Jul 1951, 189 UNTS 137 [1951 Refugee Convention, abbreviated GC]. In the following, reference to the 1951 Refugee Convention covers the Convention as modified by the Protocol relating to the Status of Refugees, 31 Jan 1967, 606 UNTS 267.

[7] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res 39/46, annex, 39 UN GAOR Supp (No 51) at 197, UN Doc A/39/51 (1984).

foreign labour. However, after the energy crisis this door closed, and only the asylum system remained.

By necessity, the prohibitions of refoulement under international law also offer a shortcut for persons wishing to enter the EU for employment opportunities rather than as forced migrants. Let us look at the example of migrants who arrive in Europe without an entry permit and who support themselves in the informal sector, without seeking contact with the authorities. When such migrants are discovered by the authorities, they might file an application for asylum as a defence against immediate deportation. In cases where these migrants are not taken into custody, there are opportunities to engage again in the informal sector while the application for asylum is processed. Governments usually label this kind of behaviour as 'abuse', but a good market liberal would sooner consider it completely rational behaviour. In addition, the long waiting times inherent in the asylum process encourage such actions. It sometimes takes years to evaluate a case, and in many cases evaluations take at least six months.

However, it is virtually impossible to say anything about how many asylum applicants should 'really' be seen as hidden labour immigrants. Persons who flee to another country must still support themselves and their families, so it is quite understandable that these people seek a place in the labour market. In many cases, it is impossible to isolate the motive for flight from the labour motive. So, statements about pervasive abuse of the asylum system must be taken for what they are: governments' attempts to maximise their own freedom of action while playing down the significance of human rights and refugee law as constraints.

3. CAN THE LAW DO AWAY WITH THE INFORMAL LABOUR MARKET FOR MIGRANTS?

The informal labour market and undocumented migration have one thing in common: we know little about their size. Estimates claim that up to 16 per cent of the EU's gross national product is created in the informal sector,[8] which of course is not only composed of third country nationals without work permits, but also includes citizens and legal residents of the EU. One assumes that most undocumented migrants end up in occupations which do not require formal education.[9] The construction industry, agriculture,

[8] A scientific source estimates the underground economy to account for 16 percent of GDP in OSCE countries (1999–2003). See F Schneider, 'The Size of the Shadow Economies of 145 Countries all over the World: First Results over the Period 1999 to 2003' (2004), *IZA Discussion Paper No 1431*, p 28.

[9] R Black et al, 'A Survey of the Illegally Resident Population in Detention' (2005), *Home Office Online Report 20/05*, p 26.

cleaning and other service occupations are often cited as typical examples. Many migrants have no opportunity to use the education or qualifications they have, since formal rules for recognition of these qualifications and language barriers stand in the way. Also, low-qualification jobs in the EU can offer far better pay than more advanced occupations in the home country.

What do we know then, about what is often termed 'illegal immigration'?[10] The statistical basis is not especially broad. The European Commission asserts that the number of these people entering the EU annually is in six figures, but also warns that no proof exists to support more precise estimates.[11] In addition, nothing is known about undocumented migrants leaving the EU. By consequence, we know almost nothing about the number of undocumented migrants remaining at any given point in time in the EU. Anyone who studies the statistics more carefully, soon realises that it is impossible to track a sufficient number of persons through the entire migration process, to draw more concrete conclusions about what happens after entry.

Public debate tends to overfocus on the number of asylum seekers. The reason that such statistics exist is simply that asylum applicants contact the authorities. Such contacts can be counted. But these figures say very little about undocumented migration as a whole. A good number of asylum seekers enter the country with some kind of visa, and can hardly be considered 'illegal immigrants'.[12] Regardless of whether entry occurs with or without the necessary travel documents, asylum applicants who receive residence permits for protection reasons, should also be removed from the statistics. But what happens to those who are denied asylum? Some leave the country voluntarily, and some by forced deportation. Some go 'underground', which can mean either that they are still in the country, or that they have travelled to another country, where authorities once again count them as asylum seekers, or regard them as 'undocumented immigrants. While there is a risk that some undocumented migrants are amongst us without anyone noticing, there is also a risk of counting some twice.

[10] I shall not use this terminology of 'illegal migration', since there is a human right to leave any country, including one's own, and there is a right to apply for asylum, even when one does not possess an entry permit. Rather, I shall use the terminology of the 1990 Migrant Workers Convention and term migrants who enter or remain in a destination country, without being allowed to do so, as 'undocumented migrants'.

[11] European Commission, *Communication from the Commission on Policy priorities in the fight against illegal immigration of third-country nationals*, COM(2006) 402 final, 19 Jul 2006, Annex.

[12] In a recent UK study, based on interviews with 83 migrants detained between Dec 2001 and Mar 2002, 60% had entered illegally. This leaves a good number of legal entries. Given the limited size of the sample, I would like to warn from any extrapolations. In particular, it cannot be inferred that some 40% of all third country nationals entering the EU with a valid permit will eventually become undocumented migrants. R Black et al, 'A Survey of the Illegally Resident Population in Detention.' (2005), *Home Office Online Report 20/05*, p 20.

Since it is so difficult to count migrants, perhaps we should calculate the revenue they generate. Both immigrants with residence permits and undocumented migrants send part of their earnings to family members remaining in the country of origin. Altogether, these so-called 'remittances' form the second most important source of income for many states in the south and are exceeded only by foreign direct investments (FDI).[13] They are more important than international aid, which comes in third place.[14] In 1999 remittances to less developed countries amounted to 60 billion dollars.[15] Therefore, an emigration country in Sub-Saharan Africa would be foolish in preventing its citizens from travelling to and working in the EU so a Member State such as Italy could more easily control immigration. It would be a net loss, because remittances from its citizens would drop significantly. While dramatic increases have occurred in recent years, it is politically improbable that the EU will increase aid to a level tantamount to 'buying out' the value of remittances in the foreseeable future. Therefore, we may draw the conclusion that the EU and the Member States do not necessarily possess the economic muscle required to match that of migrant networks. This fundamental fact is often forgotten in 'the fight against illegal immigration'.

Neither liberalisation nor control can do away with undocumented migration and informal labour markets. Let us look at liberalisation first. Would it not be wise to allow more people to migrate in order to 'dry up' undocumented migration and the informal labour market for migrants? It is unlikely that this strategy would succeed. First of all, we must realise that the EU will continue to attract migrant workers for quite some time. The differences between migrants' countries and the EU in terms of employment opportunities and the protection of human rights are so great that it would require an indefinite amount of time to balance them, in the perspective of increased legal migration. The economic integration which took place recently within the EU after new members' entry seems like a fresh breath of air compared to the long-term and very complex redistributions that integration between

[13] 'International remittances received by developing countries—expected to reach $167 billion in 2005—have doubled in the past 5 years as a result of (a) the increased scrutiny of flows since the terrorist attacks of Sep 2001, (b) changes in the industry that support remittances (lower costs, expanding networks), (c) improvements in data recording, (d) the depreciation of the dollar (which raises the dollar value of remittances denominated in other currencies), and (e) growth in the migrant stock and incomes. However, records still underestimate the full scale of remittances, because payments made through informal, unrecorded channels are not captured. Econometric analysis and available household surveys suggest that unrecorded flows through informal channels may conservatively add 50% (or more) of recorded flows.' (World Bank, *Global Economic Prospects. Economic Implications of Migration and Remittance*s, (Washington 2006), p xiii.)

[14] N Nyberg-Sørensen, N Van Hear, P Engberg-Pedersen 'The Migration-Development Nexus Evidence and Policy Options State-of-the-Art Overview' (2002), *International Migration* 40 (5), pp 3–47, at p 19.

[15] *Ibid*.

the EU and migrant countries would require. The conditions for allowing free labour immigration *within* the EU and EEA are therefore completely different from those for allowing free labour immigration *to* the EU and EEA. In migration research, the relationship between income adjustment and migration is described as 'the migration hump': as long as significant differences in income persist, many people will migrate. It is only when differences are evened to the level between, say Sweden and Poland, that the number of migrants will be reduced to the trickle we now celebrate as a great victory for integration within Europe. Only then have we overcome the 'hump' and the migration curve flattens out. From a purely political point of view, the migration hump stands in the way of an extensive legalisation strategy, since we as citizens of the EU rightly suspect that a large, income-equalising, global migration will result in consequences for our own privileges.

And what about more extensive migration control? First of all, we must remember that the Member States and the EU have invested heavily in such controls. Institutionalised sharing of information and practices amongst Member States began as early as the 1990s, and military resources have become involved in border control in maritime surveillance operations. With FRONTEX, an EU border control agency has been created. Each time controls increase at one point of a border, the flow of migrants moves to another point of entry. And each time new control techniques are put in place, smugglers and migrant networks respond with counterstrategies. These cat-and-mouse tactics can have grim results. When the Member States began to collect fingerprint information for undocumented immigrants and make them accessible in an intrastate database, reports surfaced describing how asylum seekers burned their fingers for fear of being returned to another EU country which would reject their application.

We must also remind ourselves that an unduly strict immigration policy has economic repercussions in the EU. In order to develop its economy, the EU must allow people to move back and forth over Union borders with a minimum of bureaucratic hassles. Visa rules must not be too restrictive, since we would risk losing valuable business opportunities as well as technology and knowledge exchange. In other words, immigration control allows a kind of protectionist balancing act, and this has effects on integration policy. If we see that people are mistreated and discriminated against at the border, then, yes, they will be mistreated and discriminated against in the community as well. This in turn can undermine the EU as an attractive workplace for highly educated and trained persons.

4. WHAT IS THE EU DOING?

Up to this point, I have described the issue at hand more from the perspective of a single nation state perspective than the EU perspective. I think this approach continues to provide a more accurate picture: the issue is

really between the nation state and migrant networks. However, reality has become more complicated now that the EU increasingly profiles itself as a driving force in immigration and asylum issues.

We all know why. During the 90s, the EU began to take seriously the right of free movement for persons within the internal market, and removed the inner barrier preventing this movement. At the same time, governments did not wish to give asylum seekers and undocumented migrants the possibility to use this freedom of movement. One could say that the rubble remaining after the old barriers were torn down was used to build higher, more impassable outer barriers. In addition, governments established administrative control measures which allowed the Member States to track how asylum seekers and other migrants moved within the EU. It was this European integration process—and thus migration *within* EU—which forced the Union to address migration *to* the EU, including asylum issues. The outer barrier surrounding the external borders of EU and its 'flanking measures' in the domain of law, offer abundant evidence that the Union considered the primary issue to be the right to freedom of movement for EU citizens.

If we examine this process more closely,[16] we find that it is a patchwork quilt of national law, international law, and, slowly but surely, EC law. The Member States were eager to preserve personal sovereignty, and retained a hand on the controls. The result has been an imbalanced and inconsistent policy on the part of the EU. True enough, it has produced a vast quantity of instruments through the years, but most of these have been non-binding. With the exception of the 1990 Dublin and Schengen Conventions and binding visa requirements incepted in 1995, the integration process has begun in earnest only after the adoption of the Amsterdam Treaty in 1999. With this, EC law could be established on a larger scale, thereby allowing norms to be set which have a good chance of being accepted in Member States' domestic legal systems. Many of the EC instruments, however, are relatively new, and it is too early to draw conclusion about their effects on Member States' law and practice.[17]

The image of strict dictate from Brussels is therefore unjustified for the issue at hand. The laws the EU has produced are hallmarked by an attitude of respect for domestic legislation, cautious harmonisation is preferred over aggressive unification: the first step merely acts to create a 'level playing field' with minimum norms requiring little change in Member States' law and practice. In the next step, which has just started at the time of writing,

[16] See chs 4–8 in G Noll, *Negotiating Asylum. The EU acquis, Extraterritorial Protection and the Common Market of Deflection* (Martinus Nijhoff Publishers, The Hague, 2000).

[17] At the time of writing, the European Commission has commissioned a study of the transposition of 10 directives in the asylum and immigration fields, accepted to be finalised in early 2008.

the legislative work is intended to be more ambitious. The long absence of the European Court of Justice (ECJ) as a driving force in the field of immigration and asylum is very evident. Why has the ECJ been so silent? Because the Member States quite simply have not given it the same competence within the area of undocumented migration as for other integration issues. It is only since the Treaty of Amsterdam that the ECJ has been empowered to make preliminary rulings in this subject matter.[18]

Let us look more closely at the most important components of EU policy and legislation. If we consider immigration, we can quickly state two things. The Union has invested considerably in shared control of its external borders. Common databases (the Schengen database SIS and the fingerprint database Eurodac), common standards for border control, and the obligation upon Member States which have been remiss in their control to take back immigrants, are some of the major elements. But in the question of which persons the Union shall allow to enter, we have received only negatively formulated answers: no asylum seekers, and no undocumented migrants. Only during recent years have laws been passed which facilitate certain foreigners' movement into and within the EU. What is remarkable is that these rules apply to a kind of upper class among migrants, a class consisting mainly of researchers and students. The EU has also managed to draw up binding norms on family reunification[19] and long-time resident third country nationals.[20] Both of these, however, diminish Member States' right to decide who may enter and remain on their territory only in quite marginal ways.

An ominous silence surrounds the issue that interests us most: how shall the EU approach less qualified immigrants—those who typically find themselves in the informal sector? This is the point on which it is most difficult to agree. In 2001 the European Commission proposed a directive on this exact issue.[21] It was quickly rejected by Member States in the Council. To put it in a nutshell: a migration control policy exists, but a policy for migration is noticeably absent. We can agree that borders must be controlled, but we cannot agree on who should be allowed to cross these borders.

What does current asylum policy look like? Since 1999, a Common European Asylum System (CEAS) has been established, which provides a binding minimum regulation.[22] Among other things, the system will provide

[18] Compare the limitations in Art 68 ECT with the standard formula of Art 234 ECT.

[19] Council Dir 2003/86/EC of 22 Sep 2003 on the right to family reunification, OJ L 251, 3.10.2003, pp 12–18.

[20] Council Dir 2003/109/EC of 25 Nov 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16, 23.1.2004, pp 44–53.

[21] Proposal for a Council Dir on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, COM/2001/0386 final, OJ C 332E, 27.11.2001, pp 248–56.

[22] The initiative stemmed from the 1999 European Council at Tampere (Finland). See Tampere European Council, *Presidency Conclusions*, 15 and 16 Oct 1999, Section A.

answers regarding who shall receive protection, and what rights this protection affords (both aspects are discussed in the so-called Qualification Directive of 2004[23]) and minimum standards for the reception of asylum seekers[24] as well as for the asylum procedure.[25] The most powerful legislation today is the 2003 Dublin Regulation, which allocated state responsibility for processing asylum claims on the assumption that all Member States offer approximately the same level of protection[26]. The Dublin Regulation has been sharply criticised, since in fact the Member States show considerable differences in their protection systems. In addition, it creates a skewed distribution which is a disadvantage to states possessing land or maritime borders also serving as outer borders for the EU. The regulation is perhaps the apparent example of how protection interests have taken a back seat to calls for control.

But despite EU legislation and restrictive policies on the part of the Member States, undocumented migrants continue to make their way into Europe. Indeed, it is possible that even those who would have valid reasons for demanding protection choose the informal sector over the asylum system, and avoid contact with authorities as much as possible. In this respect, we see a *privatisation* of the protection system. Partly, the welfare state is replaced by well-intentioned individuals, who conceal undocumented migrants, and who arrange food, living quarters and health care on a precarious philanthropic basis. Also, the formal labour market is replaced by the informal sector. Furthermore, the economic contributions of migrants remain unseen, since they cannot be measured in regular ways, such as tax revenues. Sociologist Anja Weiss has described EU migration and asylum policy in considerably harsher terms, namely as a way to keep the low-qualification labour cheap.[27] Undocumented migrants cannot claim any rights or make any demands, because then they will be sent back. In the next section, we shall study whether this explanation really holds water.

[23] Council Dir 2004/83/EC of 29 Apr 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 204/24, 30.9.2005, pp 12–23.

[24] Council Dir 2003/9/EC of 27 Jan 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31, 6.2.2003, p 18–25.

[25] Council Dir 2005/85/EC of 1 Dec 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326, 13.12.2005, p 13–34.

[26] Council Reg (EC) No 343/2003 of 18 Feb 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50, 25.2.2003, pp 1–10.

[27] A Weiss, 'Raumrelationen als zentraler Aspekt weltweiter Ungleichheiten,' *Eurozine* 2002, available at <http://eurozine.com/pdf/2002-04-25-weiss-de.pdf> (last accessed on 15 Feb 2007).

5. THE HIDDEN PRODUCTIVITY OF ASYLUM LAW

Must we have such a confusing and contradictory system? EU institutions and Member States see themselves as confronted with a substantial dilemma. States cannot admit to their citizens that they are unable to fully regulate immigration, and that migrant networks exert considerable control over it. In many election campaigns, the fear of immigration plays a decisive role and can be exploited to win votes, even when the candidate has no real will or desire to bring about significant change in the system. What politician and what state would really want to be seen as building a new Berlin Wall around Europe, and order border police to use firearms to turn away asylum seekers and undocumented migrants? Do politicians really want to tell consumers that food and living costs will increase, since the authorities are going to prosecute business owners who employ illegal labour? It seems the political advantages of maintaining the status quo tip the scales.

At the same time, technical solutions are available that could be applied without having to revolutionise the state or the welfare society. Economically, states would benefit from hiring more asylum processing staff and thereby significantly shorten the asylum process. This in turn would result in reduced costs for housing and custody, and ensure that the asylum seeker would not suffer emotionally from prolonged uncertainty while waiting for a decision (the occurrence of severe withdrawal behaviour amongst asylum-seeking children in the Swedish system is one of the most drastic examples of this problem)[28]. In Sweden this has been suggested repeatedly, but the asylum system has not received additional funds for processing asylum applications. How do we explain this?

Another technical improvement is the proposal to let asylum seekers contact the Member State embassies in their home region and file an application for asylum (so-called Protected Entry Procedures).[29] Primary advantages would be that the smugglers' monopoly on information would be undermined, and applicants would receive authoritative answers regarding their chances of receiving protection *before* any migration decision is made. The proposal was discussed on the EU level, but received a lukewarm response from the Member States. Why? Here are two examples of clearly irrational behaviour on the part of the Member States—examples in which rhetoric and action are in glaring contrast. How can we explain such contradictions?

There are two approaches—one economic and one related to the politics of identity. The economic approach sees the asylum system as a doorway to

[28] See the *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt. Mission to Sweden.* UN. Doc. No. A/HRC/4/28/Add.2, 28 February 2007, p 20–22.

[29] G Noll, J Fagerlund and F Liebaut, *Study on the Feasibility Of Processing Asylum Claims Outside the EU Against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure* (Luxemburg: European Communities, 2003).

the illegitimate sphere of our economy. Irregular migrants end up outside official minimum wage mechanisms and work for far lower wages than legal residents and citizens. They comprise a labour reserve that can be dispensed with when it is no longer needed, something both employers and the welfare state can use to their advantage.[30] All this presumes that the official immigration policy is very restrictive. The system filters away the majority of migrants and guarantees that the informal labour market is not flooded with too many immigrants. The asylum system then becomes the door that stands ajar, letting in a small number of immigrants, with the blessing of the state and employers, and under the guise of human compassion. The number of immigrants can vary, but the main thing is that the infrastructure is maintained: authorities judge applicants' cases and accommodate asylum seekers during the process, and the migrant networks send some of these persons into the informal sector. Immigrants finance the journey themselves and take all the risks. The mechanism is distinguished by a surplus, since migrants know that the majority of applicants will be refused a residence permit, and will be removed from the country if apprehended. Immigrants have no chance of creating a base for renegotiating these conditions, such as, say a union. The illegal aspect is therefore a crucial tool, both for keeping wages low and for limiting the number of people in the informal sector, while silencing questions about legitimacy. After all, the official position is that the informal sector must be eradicated, and that rejected asylum seekers will be deported.

The system appears to prioritise young, single men: they are best at coping with the physical hardships of smuggling and can quickly assimilate themselves in the informal sector without having to consider the needs of an accompanying family. Since the informal sector primarily recruits uneducated labour, long years of study are not an advantage. This can be another reason why older persons are less interesting. Lengthy processing times in the asylum process are necessary in order to give the informal labour market a chance to absorb a certain amount of asylum seekers, and to ensure that uncertainty of the outcome will diminish migrants' wage expectations. Offering asylum via embassies merely complicates matters and brings up the question of who shall pay for the journey. In this way, long processing times and the refusal to allow asylum granted via embassies indicate how humanitarian objectives have been subordinated to labour market policy. From an economic perspective, it is rhetorically wise to preserve a strict division between labour market policy and asylum policy. As soon as the interaction of migration, the informal labour market and asylum becomes apparent, it becomes impossible to exploit immigration issues in an election campaign. The concept of a

[30] This would neatly posit such persons in a 'glocalised' underclass, characterised by its immobility in terms of entitlement. See A Weiss, 'The Transnationalization of Social Inequality: Conceptualizing Social Positions on a World Scale' (2005), *Current Sociology*, Vol 53, No 4, pp 707–28.

regulated, completely legal labour market reveals itself to be an illusion equal to that of a thoroughly non-political and humane asylum policy.

Does the economic theory provide a fair picture? It cannot provide a comprehensive explanation. Its underhanded objective—cheap labour—could be realised through a more humane asylum system. The uncertainty and waiting during a long asylum process overwhelm some asylum seekers, and such persons are now allowed to stay for humanitarian reasons developed during the application process. From a purely economic perspective, this is rather pointless and costly for the welfare state. This is where the identity-political approach comes in. The basis for this thesis is that a community does not constitute itself once and for all, for everyone, for example through a document as a form of government, but instead constitutes itself continually. A typical question of constitutional character is who is a member of the community, and who is outside the community. The Member States must quite simply establish a certain level of tangible exclusion in order to constitute themselves, and thereby the EU.

This exclusion occurs more seldom at the Member State's border: controls have been reduced by the free internal market, and the flanking measures such as increased EU border control cannot be pushed too far for fear of damaging trade. In a time when the physical migration control meets with such problems, governments merely move the exclusion from country borders to other fora—such as the asylum process. We might experience such exclusion as brutal and unfair—the so-called apathetic children come to mind—but even in the most disturbing cases it serves a purpose: it demonstrates the state's unlimited power over membership in the community. How could refugees believe they could put themselves above the law of the national state? In the asylum process, such persons are put back in their place in the national state system, either by being returned to the country of origin, or by becoming part of the asylum country's community. If necessary, the monopoly of violence is validated in the deportation process. This is made all too clear when police forcibly remove deportees from a church where the congregation has offered protection, or when deportees are injured or even die during enforced return.

From an economic standpoint, it is difficult to explain the use of violence, especially when used against deportees. Here, it seems as if the informal economy and the politics of identity are in symbiosis. Those who claim the asylum system to be merely a concealed labour policy or merely a protection mechanism for the persecuted, are mistaken and miss its performance of communal identity.[31]

[31] The violent aspects of the asylum system can be meaningfully analysed by drawing on the theory of imitative violence developed by René Girard. The scapegoat is sacrificed to avert the spread of violence in a community, and the sacrificial violence is presented as a divine command. See R Girard, *Violence and the Sacred* (John Hopkins University Press, Baltimore 1977).

6. CONCLUSIONS

Can we progress away from this symbiosis between market and identity? I doubt it. Those who believe the problem can be solved by increasing legal immigration of labour ignore the fact that a working permit makes the migrant visible and a possessor of certain rights, and therefore more expensive. Even the most generous programme for legal immigration or for normalisation of existing undocumented labour runs out at some point. In addition, such programmes run out before the demand is satisfied, since the need for labour in the north is not so great that the surplus from the south will diminish in the foreseeable future. As such there will always be room for a new informal labour market beside the formal one. A radical measure would be to deregulate the labour market completely, and allow free labour immigration to the EU and its Member States. However, this contradicts the idea of a united welfare community within the national state or attempts to develop such a community within the EU. Hoping that new demographic needs will open the door for new immigration is hoping for too much. As Jan Ekberg's research has shown, immigration can address the problem of an aging European population only to a small extent.[32]

And those who insist in the traditional manner that the asylum system must be completely separated from the informal labour market are on thin ice. Australia has put such a separation into practice, isolating asylum seekers who arrive without entry visas in closed compounds while they wait for a decision. Of course, asylum seekers in custody cannot be recruited by the informal labour market. The price in terms of human suffering is indeed high. This might raise issues under human rights law.

Some hope perhaps that increased control on the EU level will help. I am sceptical in this case as well. First, we ought to recall that all significant changes on policy for migration and asylum must be accepted by a qualified majority in the EU Council of Ministers. Within the EU, the Member States hold very divergent opinions about the issue. Some countries are more dependent upon foreign labour in the informal sector than others. Their geopolitical situation also plays a role: Malta has different interests than those of Sweden, and Poland concerns itself with other threats than does France. It has been a long road to agreement on the watered-down minimum norms we have today, and more substantial changes in course are unlikely. Secondly, no real reasons exist to bring about a radical shift in policy. EU sees itself as under great pressure from the competition from other regions in the global market. Why should the EU act differently from a country that wished to maximise its ability to compete? Thirdly, the EU desperately needs an identity. If the real power

[32] J Ekberg, 'Kan invandrare underlätta försörjningen av en åldrande befolkning?' [Can immigrants facilitate support of an ageing population?] in *Ekonomisk Debatt* nr 4 (2004).

over the asylum process and deportations were in fact delegated to the EU, EU representatives would likely reproduce the states' behaviour, but on the Union level. In other words, the system would be presented with a certain amount of arbitrariness to demonstrate both internally and externally who is sovereign.

Is it possible to think beyond the existing system? We could start by openly discussing our dependence upon the informal sector and in particular the networks of foreign employees in this sector. We could exert pressure on employers in the illegal labour market, while making clear for consumers that the price of their tomatoes, pizza, monthly rent or office cleaning is too low to be based on legal labour. These are extremely unpopular political measures, but they would have far more potential change than further militarisation of migration control. We would also need to speak openly about the downsides of our prioritisation of civil and political human rights. In particular, their priority over economic human rights in asylum law is arbitrary, considering the indivisible nature of human rights. Migration can reveal itself to be a stronger force for realising human rights than all monitoring bodies, courts, and overseas development assistance programs combined.

Another alternative is to have EU Member States set unified quotas for legal labour migration, thereby transforming parts of the existing illegal labour market for unskilled persons to a legal one. This is no trivial demand, because the EU competes with other states using disenfranchised labour to reduce costs. The EU must then establish itself as an accessible presence in migrant's home regions and, when possible, inform potential migrants about available opportunities for asylum and if it will be possible for them to work. This would establish an authoritative, reliable source of information which would effectively contradict smugglers' false information. However, the effects of a legal labour immigration programme and protected entry procedures should not be overestimated.

The real challenge lies in the next step: the creation of transregional mechanisms which link employment, welfare and political representation. It is here that our political creativity will be tested to its limits.

A beginning would be the creation of a permanent system of negotiation for the liberalisation of migration, in tandem with the WTO process. According to Professor Dani Rodrik's calculation, greater economic potential would be realised through temporary working permits for persons from the Global South, than through the liberalisation of trade we see happening now.[33] Lastly, we would need to include migrant networks in the political

[33] D Rodrik, 'Comments at the Conference on "Immigration Policy and the Welfare State"' (Trieste, Jun 23, 2001), available at http://ksghome.harvard.edu/~drodrik/Comments%20on%20Immigration%20Conference.doc> (last accessed on 15 Feb 2007).

process around immigration and integration. These networks have proven that they can surpass the state when it comes to organising freedom of movement, employment and basic protection of its members. Keeping them outside the political process will perpetuate the problems I have described here. Inviting them into the debate would endow EU policies with a badly needed dose of legitimacy.