



Using Legal Strategies to Enforce Undocumented Migrants' Human Rights

WORKSHOP REPORT



PLATFORM FOR INTERNATIONAL COOPERATION ON
UNDOCUMENTED MIGRANTS

On June 15th, 2012, over 200 participants gathered to attend PICUM's international workshop "Using Legal Strategies to Enforce Undocumented Migrants' Human Rights". Over 200 frontline service providers, legal experts, and representatives from key monitoring and reporting bodies, came together to explore strategies through which to advance undocumented migrants' rights at national, regional and international levels. This report is a summary and consolidation of the information and strategic advice that was shared by a variety of actors during this workshop.

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SIGRID RAUSING TRUST

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Introduction

The use of legal avenues is vital in not only in *upholding* the rights of undocumented migrants, but also in *promoting the progress* of these human rights. This report explores opportunities to engage with legal systems on both national and international levels and showcases current trends and developments in using existing law as a tool to enforce undocumented migrants' rights.

In addition to domestic remedies, there are many international legal provisions that apply to undocumented migrants and that NGOs may wish to engage with. These fall broadly within three key international institutions: the European Union, the Council of Europe and the United Nations. The comparative advantages and disadvantages of engaging with mechanisms provided by these bodies are discussed throughout.

PICUM envisages that providing a practical guide into each institution, insight into initiatives involving civil society organisations and strategic advice from legal experts will help to develop and improve the capacities of relevant organisations and advocates to engage with various legal channels and ultimately provide greater levels of justice for undocumented migrants.

ABOUT PICUM

Founded as an initiative of grassroots organisations, The Platform for International Cooperation on Undocumented Migrants (PICUM) represents a network of more than 140 organizations and 160 individual advocates working with undocumented migrants in more than 38 countries, primarily in Europe, as well as in other world regions. With over ten years of evidence, experience and expertise on undocumented migrants, PICUM promotes recognition of their fundamental rights, providing an essential link between local realities and the debates at policy level.



National Courts

National courts will be the starting point for many legal strategies regarding undocumented migrants. Engaging with national courts can be an effective way of reiterating the rights of migrants to authorities, building national case law and standards that will support undocumented migrants in the future, and holding countries accountable to both national and international human rights standards. Even when it seems necessary to ultimately seek legal redress with an international institution, supranational mechanisms often require the exhaustion of national remedies first, so a basic knowledge of how to do so is of key importance.

This section presents some examples of national court decisions in favour of undocumented migrants, and discusses the importance of building case law. Furthermore, the role of NGOs is key in providing undocumented migrants with reliable information on their rights when seeking access to justice and in facilitating early contact with a lawyer, before approaching a national court; advice and preparation early on in the legal process are often significant in the successfulness of the case. This section will therefore also endeavour to provide a practical guide as to how NGOs may assist undocumented migrants in gathering evidence, building strategic alliances and highlighting some common barriers to justice.



expert insight



Duty of the State to Ensure Care for Undocumented Children Developments in Dutch National Courts

TEUN DE VRIES

Judge de Vries is the Vice President in the International Chamber of the Administrative High Court in Utrecht, the highest court in the Netherlands in social security matters. He also takes active interest in engaging with international mechanisms, and has been involved in 20 cases in which preliminary questions of legal interpretation have been brought to the European Court of Justice.



Since 1998 the Dutch Administrative court has seen many cases concerning access to services, benefits and social assistance for undocumented people, as national legislation passed in 1998¹ links entitlement of benefits and facilities to residence status, therefore preventing national courts from granting undocumented migrants access to social benefits. As judges, we often focus on articles that imply unequal treatment. The unequal treatment of persons in relation to social services and benefits on grounds of residence status is generally justified in the Netherlands by the objectives of the Benefits Entitlement Act.

At first, the Administrative High Court ruled that the Benefit Entitlement Act would not, in general, be in breach of rights guaranteed by international treaties, such as the *European Convention on Human Rights* (ECHR), the *European Social Charter* (ESC) and the *International Covenant on Economic, Social and Cultural Rights*. More recently however, the Administrative High Court has made some exceptions to this interpretation. I will present two of these exceptions.

The Benefit Entitlement Act (1998) is a very significant piece of legislation for undocumented people in the Netherlands, as it links entitlement of benefits and facilities to residence status. Without a residence status, migrants are not entitled to any benefits. The law is meant to discourage undocumented residents and prevent them from becoming settled. During some procedures, migrants, especially asylum seekers, are entitled to some benefits, but this only extends to free education, free legal assistance and free emergency medical assistance.



¹ See: *Benefit Entitlement Act (Koppelingswet)*, Act of 26 March 1998, Stb. 1998, 203.

...

Case 1: Refusal of access to shelter for homeless undocumented migrants

The first case related to the refusal of a sleeping place for an undocumented man in a homeless shelter in Rotterdam.² According to national legislation³, the city was technically able to provide shelter, and *despite fulfilling all necessary conditions*, the man was refused shelter because he was undocumented. He invoked Article 8 of the European Convention on Human Rights.⁴ The court ruled that the very essence of the European Convention is respect for human dignity and human freedom, and that the respect for private life, in Article 8, comprises the physical and the psychological integrity of a person. The court found that this reasoning can, under certain circumstances, lead to a positive obligation of the state to realise these rights. Children and vulnerable people *do* have a special right to protection in this respect. The court ruled that the man involved was vulnerable due to existing medical problems. This was the special circumstance on which the court ruled that the State had a positive obligation to secure a place in the homeless shelter for this man.

Case 2: Refusal of child allowance for parents with an irregular migration status

The second case concerned the refusal of child allowance for parents who had been living in the Netherlands for a very long time without a residence permit.⁵ Child allowance in the Netherlands is only a recognised right for families with a regular residence status. The Administrative High Court ruled that the State had no positive obligation based on Article 8, because the parents involved were not vulnerable persons and therefore, unequal treatment would be justified. However, the court noted that unequal treatment must not be based on grounds of nationality and established that the Dutch government has a duty of care for children staying in the Netherlands, if four conditions are met:

- I. the family claiming child allowance has resided in the Netherlands with their children for a very long time;
- II. they have reported their presence in some way to the government;
- III. at some point in time had a regular residence status in the Netherlands and requested child allowance during this time;
- IV. would be residents in the Netherlands if they had a Dutch nationality or residence permit.

The court's decision is, with regards to the protection of the best interests of children, in line with the obligations mentioned in the United Nations Convention on the Rights of the Child⁶.

These two examples give a good idea of the possibility of applying international human rights in national procedures, both to enforce the rights of undocumented persons and to build case law which can influence decisions in the future. While they are small results in exceptional cases, they are still results.

² Judgement of 19 April 2010, nr. 09/1082 WM0. Available in Dutch on [here](#) LJN: BM0956.

³ See: Social Support Act, "Wet maatschappelijke ondersteuning (Wmo)", 1 July 2006.

⁴ Article 8: 'Right to respect for private and family life'

⁵ Netherlands, Administrative High Court, LJN: BR1905, No. 08/659515, July 2011.

⁶ UN Convention on the Rights of the Child (CRC)

special focus 1



This section is the result of discussions at PICUM's Annual Workshop 2012 in which participants developed responses to a case study involving an undocumented woman living with an abusive partner or spouse. While PICUM's focus on violence against undocumented women does consider broader forms of violence, such as that waged by employers or on the street, this section is more specific to cases in which the perpetrator is a partner or spouse.

Building a Case: Gender-Based Violence against Undocumented Women



Undocumented women living in situations of violence and exploitation face numerous difficulties to provide evidence about their abuse. The isolation, lack of access to medical services and difficulties to contact authorities make it particularly hard for them to obtain evidence.

As the penal codes in many parts of Europe enable women to report violence up to two years after the incident, it is important to gather evidence to retain this option. Judges may consider evidence from sources other than the police and the more thoroughly and professionally this evidence is documented, the better chance it has of holding up in court.

Evidence is not the only consideration though; this section begins by highlighting some practical steps *out of court* that migrant community organisations and NGOs can take from their first contact with an undocumented woman subject to gender-based violence, and even preparatory steps they may be taking beforehand. This section also offers some practical advice regarding the legal procedure *in court* so that undocumented women may avail of legal protection mechanisms. Finally, there is some reflection on the importance of *awareness*.

Out of Court

First Contact

For an NGO approached by an undocumented woman reporting gender-based violence, the first thing to do is to take a detailed statement for future reference. The woman may be fearful and unsure of her position so immediately approaching other authorities or organisations may not be an appropriate step. However, having one person trained and confident in how to record a statement of gender-based violence that will stand up in court could prove to be invaluable.

Evidence

Evidence is central when using legal avenues for undocumented women experiencing gender-based violence because, in most cases, there are no witnesses apart from the woman and the aggressor, and without evidence it is her word against his. The collection of evidence is an on-going procedure that should begin before taking the case to court.

From first contact with the woman, evidence collection is vital, and there are many ways that small pieces of evidence can be collected to build a strong case. *Evidence could include:*

Documentation

- **Phone records:** Any calls the woman has made to the emergency services to report violence, even if she did not leave her name or any details. The police should have a log of the call that can be accessed.
- **Medical reports:** Any doctor or hospital reports if the woman has received treatment for injuries in the past, even if she did not state at the time that they were the result of gender-based violence. Also, psychiatric or psychological reports of both the woman, any children, even the aggressor if possible, can be presented in court.

- **Photographs** of any injuries. Note that there are specific regulations as to what will be accepted in court: for example, photos should be well lit and some courts require that the photo show the woman's face and the injury with a tape measure held to it.
- **Personal correspondence:** Any diaries, letters or emails sent by the woman detailing the violence.

Supporting Testimonies

- If there is a child or children involved, teachers or support workers at the child's school may be able to provide accounts of the child being upset, coming to school with injuries, mentioning the violence at home, the mother coming to school with injuries or any other evidence that may suggest violence at home.
- Witness accounts from the child.
- Not always easy to attain, but if the aggressor has an ex-wife or partner willing to testify that he was violent to her also this can be particularly strong in court.
- Indirect witnesses such as friends, colleagues or neighbours who may have seen the injuries sustained by the woman or neighbours who may have heard the abuse taking place.
- It is important to remember that all evidence must be clear, relevant and confirm what the woman says. Discrepancies in dates and descriptions of events will undermine a case, so attention to detail and consistency is crucial.

Networking

For NGOs often dealing with undocumented women who experience gender-based abuse, having a network of organisations, supporting professionals and a referral system is vital.

Important places to forge relationships and build awareness include:

- **Special police units.** Some countries have special police units that are aware and trained in dealing with undocumented women and partner violence; developing relationships with units like these may result in a more positive and sensitive treatment of the woman's case and greater evidence to provide in court. Even if such a unit this does not exist, building an alliance with local police can be beneficial in order to convince them to prioritise the issue of domestic violence, rather than reporting undocumented women to immigration authorities.
- **Legal professionals** who are willing to offer their services, from general advice regarding the collecting of evidence, to free legal aid for individuals. Domestic lawyers may not be extensively informed as to how to take a case to an international court. In such circumstances contacting an organisation, such as the Aire Centre UK, which specialises in these kinds of cases, may be more beneficial.
- **Refuges or shelters** where the woman can stay, possibly anonymously and regardless of whether she is documented, without fear that she may be tracked down by her partner. This is often a source of difficulty but in many states there is a positive obligation to house vulnerable people and children. NGOs should be aware of the legal provisions in their country relating to this. If the woman wishes to stay in the family home and fears contact with the police, give her the number of an organisation or refuge that is aware of her situation and will be able to help in an emergency.
- **Interpreters and translators** are important resources so contact with people or organisations that can help with any translation issues can be useful.
- **Health professionals**, such as doctors and psychologists, who will help the woman even if she does not have insurance or a residence permit.

expert insight

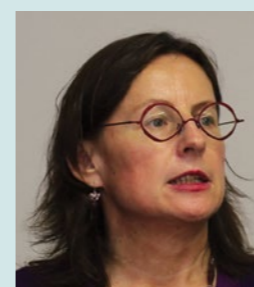


Keeping Options Open

ROSA LOGAR, Women Against Violence Europe (WAVE)



Rosa Logar is a national and international women's human rights activist and a co-founder of both the European network WAVE in 1994 and the first Austrian women's shelter in 1978. Further fields of work include violence prevention advocacy, training for police, judges and other professionals as well as research.



NGOs may ask an undocumented woman who has experienced gender-based violence and is seeking help or advice "Is it okay if we document your injuries and take a photo? You might not want to use it now, but things can change later on and it may become useful". The NGO should explain that they will keep it confidential and ensure that the woman does not feel pressured into taking a course of action that she does not feel comfortable with. It is important for NGOs to work and encourage women who are experiencing violence, or fear they are at risk of violence, to take steps so that they may be in a more powerful position and have more options available to them in the future.

In Court Considerations

When an undocumented woman brings a case involving gender based violence to court, there are several outcomes that can be sought: regularisation in her country of residence, compensation for the abuse suffered and a prosecution against her violent partner.

The woman's case should first be brought to the national court. If, after having exhausted all national remedies, the woman still has a well-founded concern that national courts have ruled against her fundamental rights as established in the European Convention on Human Rights, the case could be taken the *European Court of Human Rights*. In addition, national NGOs can lodge a collective complaint procedure against the state, in line with the guarantees established within the *European Social Charter*.

Lodging a complaint to an international body or court is a strategic move but may not directly benefit the individual as quickly as a national court could, although it may result in changes in national laws and practices to better support women in similar positions in the future. It is crucial not to start legal proceedings without full support and confidence from the woman, and never if the woman is unstable or the family is in danger in any way. If the woman does decide to engage with the national courts, there are certain challenges and issues she should be prepared to face.

Responding to Common Questions

It is important for NGOs to know the nuances in the law, the barriers they may face and common strategies used by opposing lawyers or judges so as to avoid pitfalls that will undermine the woman's case and obstruct justice.

It is not uncommon for defence lawyers to suggest that an undocumented woman may only be reporting abuse so as to gain residence status. If the woman has never been documented, this can be rebutted by showing attempts she has made to regularise, possibly even sabotages of the application by her partner, for example signing a citizenship form in the wrong colour pen or filling it out incorrectly so as to ensure it will be rejected. Although this does not prove violence, it could help prove that the husband had manipulated the woman into a position of dependency and vulnerability.

Questions in the court as to why the woman chose to stay with her husband for as long as she did, or why she would continue to expose her children to the violence, can often be addressed by citing any of the following factors: absence of, or lack of knowledge about, emergency shelters for undocumented women and their children; fear that the man may find and punish her or her children; lack of knowledge about organisations offering support; fear of being deported and/or separated from her children (a threat commonly used by violent partners towards undocumented women) and reluctance to separate due to religious or cultural factors.

Lastly, there have been cases, particularly in Mexico, in which, upon leaving the family home to escape gender-based violence, a woman has been accused of abandonment of her children and thus lost custody. This can often be avoided by the woman reporting the gender-based violence to a judge *before* leaving the home.

These are some common examples but there are, of course, many more technicalities that NGOs should be aware of when building and taking forward a case of gender-based violence towards an undocumented woman. Expert legal advice is irreplaceable to this end.

Residency Issues

An undocumented woman taking a perpetrator to court may simultaneously be arguing a case for her right to stay in the country. Legal advice can be beneficial in determining the best legal avenue to use in order to achieve this. However, claims are commonly based on:

- **A 'humanitarian' case:** if the woman proves the abuse she may be recognised as a vulnerable person and entitled to some form of humanitarian visa.

- **Employment history:** lengths of employment often give rise to residence rights.
- **Children:** particularly if they were born in the country or have spent a substantial amount of their young life residing in the country of concern.
- **Asylum:** if the woman does not wish to return to her country of origin because she feels in danger, she may have a case for asylum.

Awareness

Aside from the court, working to increase awareness for undocumented women experiencing violence should be an on-going activity undertaken by relevant NGOs. Firstly, awareness must be raised regarding the need to improve access to provisions and services. Secondly, awareness among undocumented women themselves needs to be raised; they may have a limited knowledge of what services and help is available to them, what entitlements they may have and what courses of action are open to them if they suffer gender-based violence. There is extensive information on both of these issues in PICUM's recent report, Strategies to End Double Violence Against Undocumented Women - Protecting Rights and Ensuring Justice.

TAKE ACTION



- **Training within the NGO:** undertaking training within the NGO will ensure that, when proceeding with a case, the evidence will stand up in court and the case will not be undermined by administrative or procedural errors.
- **Collecting evidence:** if a woman is not ready to take a case of gender-based violence to court or to leave an abusive partner, or even if she is not currently experiencing violence but feels she may be at risk, she may still collect evidence in case her circumstances change. NGOs can facilitate this.
- **Networking and building alliances:** Building a solid network of support with individuals and organisations with expertise in dealing with violence against women will prove invaluable and should ensure that when an undocumented woman does want to report a case of gender violence, or find a safe place to stay, the NGO is already in contact with some key actors to provide assistance.

special focus 2



This section is the result of discussions at PICUM's Annual Workshop 2012 in which participants developed responses to a case study involving an undocumented woman experiencing labour exploitation on a mushroom farm.

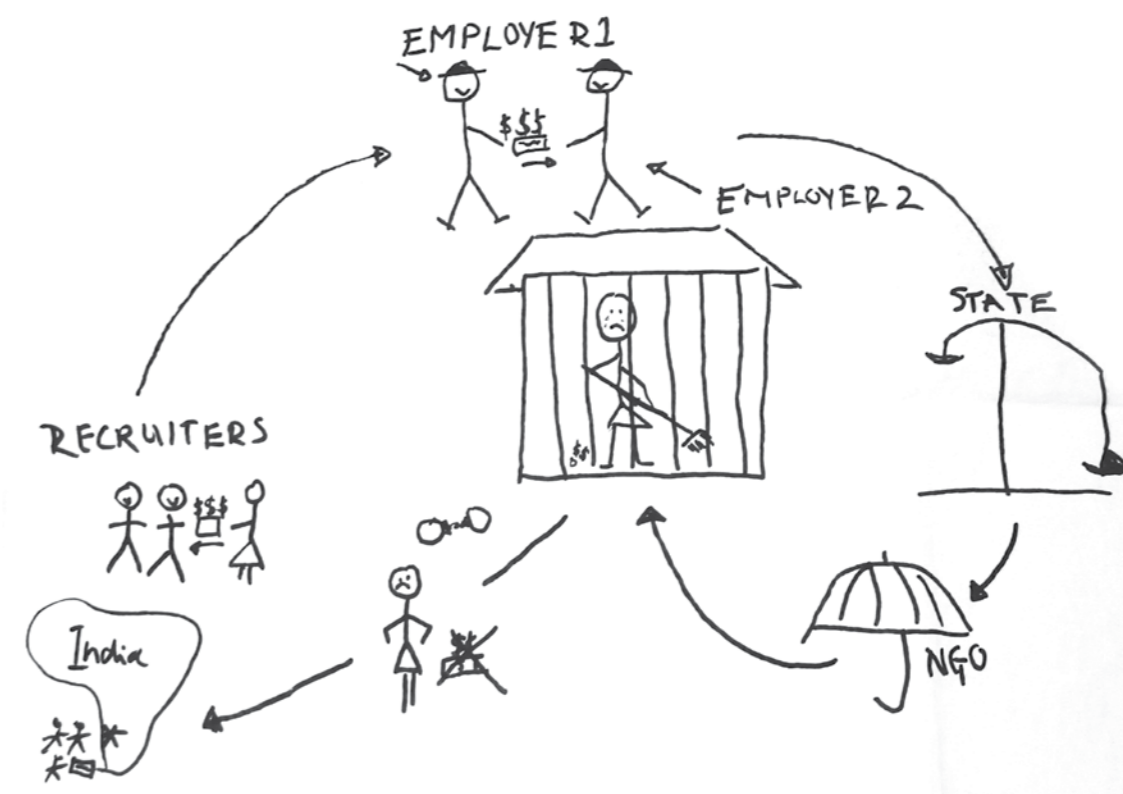
Building a Case: Labour Exploitation of Undocumented Workers

Undocumented migrants are often very vulnerable to labour exploitation, which can include wage theft, work related injuries and poor working conditions. It can sometimes amount to inhuman treatment. Migrant workers are often forced to work in exploitative conditions and are afraid to leave due to threats from the employer or fear of deportation.

Labour exploitation can be dealt with in or out of court and there are benefits to both strategies. Out of court mediation with employers or a naming and shaming method may provide quicker and easier redress for the individual and is often the first port of call. However, this is not always successful and in these cases migrants may take their employers to the national courts for their violations and seek legal redress. Taking strategic cases

to court, with the support of the individual, may also result in a greater collective gain by developing case law, bringing greater visibility to the issue of labour exploitation and encouraging the implementation of labour standards. NGOs can assist with this by helping to expose employers' poor working practises to society and to the courts.

This section will discuss the importance of relevant issues *in court*, such as how migrant workers may use evidence to protect themselves from labour exploitation and to ensure that, if labour exploitation does occur, legal mechanisms can be successfully engaged with. It also has a focus on preventative methods *out of court*, such as how advocacy and strategic activity can help to push for higher enforced labour standards and prevent exploitation of undocumented workers in the future.



realities on the ground



A Fight for Legal Redress Following Labour Exploitation

Mohammad Younis came to Ireland from Pakistan with a one-year employment permit. After commencing a job as a chef at a restaurant, he was ill-treated and suffered extreme exploitation at the hands of his employer. Forced into slave-like conditions, Mohammad's employer allowed his employment permit to expire and Mohammad worked undocumented and in conditions that violated not only employment law but basic human rights standards, for seven years. Eventually Mohammad came into contact with the *Migrants Rights Centre Ireland* (MRCI) and began the process to attain justice.

Mohammad's case was submitted under the Irish trafficking legislation, which does not represent proper legal redress to forced labour and extreme labour exploitation as it does not identify trafficking when there is no cross-border movement. As Ireland is a party to the European Convention on Human Rights, which provides safety against slavery and forced labour, many advocates believe that the lack of protective legislation renders Ireland in breach of its own international legal obligations. MRCI continue to campaign for this to be addressed by means of a better interpretation of the current law (e.g. encompassing internal recruitment) or by introducing specific legislation that provides protection for all victims of forced labour.

In Mohammad's case, the Gardai (police force of the Republic of Ireland) failed to see trafficking and dismissed it simply as an employment matter. However, there were several other options available to Mohammad with respect to accessing justice. He took his case, with the support of MRCI, to the Labour Court for breaches on employment law. Mohammad had been working 77 hour-long weeks, was paid significantly below minimum wage and had no time off. He was regularly threatened by his employer and forced to live in very poor conditions with other migrants employed by the restaurant.

The Rights Commissioner of the Irish Labour Relations Commission⁷ ruled that Mohammad was entitled to €92,000 in compensation from his employer for the employment rights breaches; the employer appealed but the Labour Court upheld the decision. Mohammad's employer then took the case to the High Court. On 31 August 2012, on the basis that, according to current employment legislation in Ireland, an employment contract cannot be recognised "*in the absence of the appropriate employment permit*", the High Court⁸ annulled the award of €92,000 to Mohammad, thereby leaving undocumented workers in Ireland without any protection from exploitation under current labour laws. Solicitor James McGill acting for Mohammad Younis stated that they will be examining all possible avenues including challenging the decision in the Supreme Court and the European Court of Human Rights.

During the process MRCI stressed the importance of working *with* Mohammad, as opposed to simply on his behalf. Mohammad has gone on to become an activist for others in similar circumstances and participates in action groups under MRCI. The increased media attention that he has drawn has been beneficial by 'naming and shaming' the employer and putting pressure on him to comply with the court's decision.

Compensation is only one side of the issue though. Even if the employer does pay compensation to Mohammad, there are no sanctions for imposing exploitative labour conditions. There is no criminal prosecution for these actions; Irish law still does not recognise forced labour as criminal activity in itself, unless partnered with trafficking across the border.



In Court Considerations

Cases of labour exploitation are normally addressed on national level through two different strategies: *breach of employment law* or under *anti-trafficking laws*. Methods differ under both of these strategies but there are some key areas of concern for both.

Evidence

It is notoriously difficult to provide evidence of labour exploitation and for this reason workers need to be proactive in collecting it. Legal systems are starting to develop the principle that if a worker can prove employment relationship with their employer then the burden of proof is on the employer to prove that they met legal working conditions.

Some methods of proving employment include:

- **In depth knowledge of the workplace:** for example a detailed floor plan of a restaurant kitchen or a house.
- **Leaving a 'mark':** domestic workers can signal their presence in the workplace by reporting things such as something they had left under the bed when cleaning.
- **Photos of the work place:** these are particularly powerful if they show the exploitative conditions.
- **Written records** of hours worked, pay received and duties.
- **A report or statement** from a labour inspector.
- **Statements** from other employees.

This can be an on-going process and a protectionist measure for workers in case their labour conditions deteriorate in the future. NGOs must raise awareness among undocumented workers to carry out these activities to protect themselves and to ensure the success of legal actions in cases of exploitation.

Residence Status Concerns

Reporting labour exploitation or bringing a case to court often results in proceedings related to the migration status of the worker and depending on the practice of the country concerned, possible arrest and an increased risk of deportation. Currently, in many EU countries, labour rights agencies and immigration enforcement agencies are closely linked, and it may be compulsory for labour inspectors to report undocumented migrants to immigration agencies. Elsewhere however, this is not the case and labour inspectors' first obligation is to uphold workers' conditions regardless of their residence status.

NGOs and undocumented workers should also be aware of what provisions are available for an undocumented migrant with a pending labour court case – there may be a 'bridging' visa or entitlements to certain facilities such as health care or shelter. The opportunities for gaining, or retaining, residence status in the country of employment after the case has been decided must also be explored.

The EU Employers' Sanctions Directive⁹ addresses the issue of undeclared work performed by undocumented workers by establishing sanctions and measures against employers and attempts to harmonise national level practice in such cases. The Directive also foresees some additional protections for undocumented workers such as the possibility of states to issue residence permits for the duration of the proceedings¹⁰. It will remain to be seen how the provisions in the directive will be implemented in practice and if they will improve access to labour rights for undocumented workers in the future.

⁹ Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

¹⁰ Ibid; see Art 13.4 and Art 6.5.

⁷ In Ireland, the Rights Commissioner Service, a service of the Labour Relations Commission, investigates disputes, grievances and claims that individuals or small groups of workers make under employment legislation and issue the findings on their investigations in the form of either decisions or non-binding recommendations, depending on the legislation under which a case is decided. Rights Commissioners are independent in the performance of their duties.

⁸ *Hussein v The Labour Court & Anor* [2012] IEHC 364



Out of Court

Strategic Campaigning

To ensure that *strategic cases* are brought to court they must be considered within a wider context. Without advocacy and follow-up alongside legal action, the collective gain from these court cases, even if they are successful, will be limited. Media attention, naming and shaming and political pressure can all help to ensure that employers comply with court decisions and labour standards.

Prevention

It is important to not only consider remedies, but prevention and sustainable change. Alongside bringing strategic cases to court, alliance building and advocacy with trade unionists, legal professionals, relevant NGOs, state agencies, immigration officials, labour rights officials and the media is key in facilitating changes in the system and enabling positive developments for undocumented migrants who are suffering labour exploitation, or may be at risk in the future. For example, as a result of *Migrants' Rights Centre Ireland's* (MRCI) campaigning, Irish labour rights agencies began to conduct inspections within private homes. This has the benefit of not being restricted to an individual worker and will theoretically raise standards for all domestic workers, many of whom are migrants.

Lastly, working alongside migrants, particularly in informing them of their rights and what options are available to them, is an essential activity for NGOs in order to empower migrants in obtaining their rights for themselves.¹¹

¹¹ An example of this is MRCI's "Know Your Rights" leaflet, detailing employment rights, which they distribute to undocumented migrants.

TAKE ACTION



- **Evidence collection:** NGOs must raise awareness within migrant communities to protect themselves via the on-going collection of evidence regarding their working hours, pay and conditions.
- **Threats to residence status:** NGOs should endeavour to educate themselves and migrant workers on what the repercussions of reporting labour exploitation may be in their country, and how they can avoid possible deportation.
- **Advocacy:** Raising awareness is key in order to increase the level of enforced labour standards for all workers.

European Union



The European Union is an economic and political partnership currently between 27 member States. Legal mechanisms have become increasingly significant after the entry into force of the Lisbon Treaty in 2009, which enabled the *European Charter of Fundamental Rights* to become legally binding. The Charter applies to all persons regardless of residence status apart from the articles explicitly narrowing the scope to European citizens.

This section will examine the various ways of engaging with EU legal mechanisms, from strategies to reach the *European Court of Justice* to submitting a case to the *General Court*. Expert opinions, NGO experience and an individual's success in seeking justice via the EU are also included.

Courts

There are two main courts within the European Union institutions:

- *The European Court of Justice* (ECJ), based in Luxembourg, has the responsibility of interpreting EU law and ensuring the law is respected and applied in the same way in all the EU member states.
- *The General Court* supports the Court of Justice with its workload and provides a direct legal recourse for individuals. Individuals, companies or organisations can bring cases before the General Court if they feel their rights have been infringed by an EU institution. Its chamber is made up of at least one judge from each member state.



The EU Courts give rulings on the cases brought before them and may intervene in various ways by interpreting EU law provisions, ruling against a member state for failure to fulfil an obligation, sanctioning EU bodies for failure to act or issuing a decision on direct actions brought by individuals.

European Charter of Fundamental Rights

The *European Charter of Fundamental Rights* (ECFR) is a consolidation of many international human rights treaties. It lists all of the fundamental rights under seven headings: dignity, freedoms, equality, solidarity, citizens' rights, justice and general provisions.¹²



When it was established in 2000, the ECFR was not a legally binding document. However, the Treaty of Lisbon (2007) gave rise to the ECFR gaining full legal effect in 2009. The majority of the ECFR provides rights independently of migration status. However, it is important to bear in mind that the Charter is not an all-purpose human rights instrument for the European Union, but, on the contrary, is intended to have a rather limited scope, being addressed only to the EU institutions and to member states only when they are implementing EU law.

¹² [European Charter of Fundamental Rights](#)

The European Union's Approach towards Irregular Migrants

Since the creation of the area of freedom, security and justice in the European Union at the European Council meeting on 15-16 October 1999 in Tampere, Finland, the EU has had competence to develop common policies on asylum and immigration. These policies have been strongly framed around the prevention of irregular migration and the facilitation of return, with a strong focus dedicated to border control, the fight against trafficking of human beings and repatriation of migrants.¹³

The strong emphasis on border control has overshadowed the relevance and need to address other causes of irregularity, such as inadequate visa and residence policies, administrative failures, etc. Similarly, the insufficient focus on the human rights dimension in border management has led to lack of protections for migrants, deaths at the sea and grave human rights violations in the treatment of undocumented migrants by member states and border control agencies and a lack of responsibility when these violations do occur¹⁴.

¹³ [Presidency Conclusions](#)

¹⁴ See [Council of Europe Parliamentary Assembly report "Lives lost in the Mediterranean Sea: who is responsible?"](#), 29 March 2012.

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The Accountability Gap

SERGIO CARRERA, Centre of European Policy Studies (CEPS)



Sergio Carrera is the Head of Section and a Senior Research Fellow at CEPS and has several years' experience in policy advising. He is also an external expert on 'freedom, security and justice' for the European Economic and Social Committee and has acted as an external expert for the European Parliament Civil Liberties, Justice and Home Affairs Committee in the field of migration and integration.



At European level, the accountability gap and the shifting of responsibility between border control agencies is a big challenge in the accessibility of effective remedies. For instance, irregular migrants who attempt to cross the Mediterranean Sea may encounter a number of national, European and international agencies patrolling the waters. However, this multi-actor framework means it is far from clear who is doing what. Who is controlling? Who is surveying? Is it Frontex¹⁵, is it NATO¹⁶ or EASO¹⁷? Who is protecting these people and who takes responsibility when no one protects them? Who takes responsibility when profound violations of the fundamental rights of undocumented migrants occur?

Civil society is key in bringing the claims of undocumented migrants to adequate jurisdictions: national and supranational courts. Adequate jurisdictions will provide remedies when these violations of international law occur, and the agencies at fault must be forced to recognise and fulfil their responsibilities to prevent similar violations in the future.

¹⁵ Formally the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

¹⁶ North Atlantic Treaty Organization.

¹⁷ European Asylum Support Office.

One way to address violations of undocumented migrants' rights at the border is by bringing cases to 'adequate jurisdictions'. Not all national or supranational courts will provide adequate remedies and not all courts will be relevant or accessible for every case, so it is key for NGOs to *strategically target* the platform they use to seek justice and progress in establishing human rights for undocumented migrants. This is particularly true within the European Union; it is notoriously difficult for an individual to bring a case to the European Court of Justice (ECJ) as this court has historically had a greater role in

dealing with interpretations of EU law, not application. The ECJ is also reluctant to refer to itself as a 'human rights court', as its mandate is not limited to human rights concerns, but encompasses all issues relating to the interpretation and application of EU law.

However, with the new legal status of the Charter of Fundamental Rights, the Court must evolve and begin to also fulfil the role of a human rights court. Opportunities to advance case law and challenge the role of the ECJ may arise from this.

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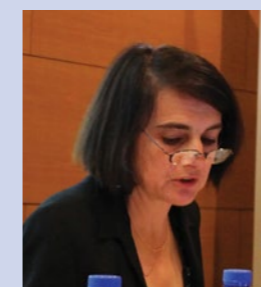


Difficulties Facing NGOs in Engaging with the European Court of Justice (ECJ)

CLAIRE RODIER, Groupe d'Information et de Soutien des Immigrés (Group of Information and Support for Immigrants, GISTI)

gisti, groupe d'information et de soutien des immigrés

Claire Rodier is a lawyer at GISTI and a co-founder of Euro-African network Migreurop. Primarily focussing on European policies concerning migration and asylum, she has co-authored numerous publications on these topics.



GISTI has persistently tried to engage with the legal mechanisms of the European Union. In 2006 GISTI and ten other NGOs requested that the European Commission initiate proceedings against Italy, regarding the deportation of nearly 1,500 undocumented migrants who had arrived on boats from Libya. This was done with a view to bring the case before the European Court of Justice.

There had been grave violations of EU Charter of Fundamental Rights regarding inhuman and degrading treatment, collective expulsions, the principle of *non-refoulement* and removal to a country lacking minimum guarantees of protection. Nonetheless, the European Court of Justice responded by declaring that it lacked jurisdictional competence on the protection of fundamental rights of foreigners.

GISTI believes that this renders the ECJ in violation of its own procedure. Article 47 of the European Charter of Fundamental Rights (ECFR) states that there must be effective remedies to human rights violations. The European Court of Justice *is*, in fact, very much responsible for ensuring human rights are not violated, and must develop so as to fulfil this role.

It is important to note that this process occurred in 2006, before the ECFR gained its legally binding status, so a similar case brought now may have a different conclusion. NGOs should continue to challenge the role of the ECJ.

Methods for Impact on an EU Level

A limitation of the *European Court of Justice* is that there is no formal third party intervention procedure; there is not a general right for individuals to directly appeal to the ECJ. As a general rule, only member states, institutions of the European Union and national courts can refer cases to the Court of Justice.¹⁸ It is not usually possible for citizens to bring cases against other citizens, companies or member states to the court.

European Court of Justice

- ✗ individual appeals are not accepted
- ✓ only member states, EU institutions and national courts can lodge complaints
- ✓ NGO written statements, observations and interpretations are accepted

Such cases must instead be brought before the national courts. This makes national courts very important in trying to reach the ECJ. However, reaching the ECJ via national courts can be a lengthy procedure and can prove to be very inaccessible for NGOs. Often it is a case of putting a lot of money, time and effort into a national court case and simply hoping that it will be referred to the ECJ.

Nonetheless, there are other possible ways that NGOs can directly or indirectly reach the courts of the European Union. Once a case has been referred to the ECJ an effective method for NGOs to have an impact is the publishing of written statements, observations and/or interpretations regarding a case under consideration. This could take the form of annexing an opinion to an applicant's written submission. The *UN Refugee Agency* (UNHCR) have used this method to reach the ECJ.¹⁹ It is also much easier to bring cases to the General Court rather than the ECJ as this process is free and available to individuals, companies and organisations.²⁰

Bringing a Case to the General Court²¹

Bringing a case to the General Court is free and available to individuals, companies and organisations. There are two phases to bringing a case to the General Court: a written phase and an oral phase.

General Court

- ✓ Free and available to individuals, organisations and companies
- ✓ Possibility for legal aid

The Written Phase

The written phase begins with an application drawn up by a lawyer or agent which is sent to the Registry.²² The main points of the action are published in a notice, in all official languages, in the Official Journal of the European Union. The Registrar sends the application to the other party to the case, which then has a period within which to file a defence. The applicant may file a reply, within a certain time-limit, to which the defendant may respond with a rejoinder. At this point any stakeholders may also submit an intervention support or opposing either party, to which the parties may respond.

The Oral Phase

The oral phase constitutes a public hearing in which the judges can put questions to the parties' representatives. The Judge-Rapporteur will summarise the proceedings in a report which will be publically available. The judges then deliberate on the basis of a draft judgment prepared by the Judge-Rapporteur and the judgment is delivered at a public hearing.

Interim Measures

Interim measures are provisional measures, whilst the case is on-going. They are available on ruling by the President of the General Court who will judge if the measures are urgent and if serious and irreparable harm may be caused without them.

¹⁸ For the limited exceptions to this rule see [here](#).

¹⁹ An example of UNHCR annexing such an opinion to a case in the ECJ can be found [here](#).

²⁰ Further information on bringing cases to the ECJ, including 'advice to counsel appearing before the Court', can be found [here](#).

²¹ Source, and further information, can be found [here](#). Further information for applicants can be found [here](#).

²² Step by step details of the format and content of an application can be found [here](#).

TAKE ACTION



- If you have a case in which an individual's rights have been infringed by an EU institution and want to seek legal redress in the General Court then the first step is to lodge the complaint. Simple instructions of how to format, construct and submit an application can be found [here](#).
- There is a possibility to apply for legal aid for cases being brought to the General Court. For further information, a downloadable form and contact details please [click here](#).
- For further general information and information on bringing a case to the General Court please [click here](#); the 'Other useful information' section is particularly helpful.

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Building on Case Law within the EU: Ruiz Zambrano v Office National de l'Emploi (ONEm)²³

PIERRE ROBERT, *Dayez Avocats Associés* (Dayez Associate Lawyers)

Pierre Robert is a lawyer at Dayez Avocats Associés and a Member of the Belgian Bar Association since 1999. Specialized in immigration law and migration policies, Pierre Robert is the President of the "Syndicat des Avocats pour la Démocratie" and an active member of the European Association of Lawyers for Democracy.



Mr Gerardo Ruiz Zambrano, a Colombian national who had fled violence in Colombia with his family, brought legal proceedings to the European Court of Justice challenging the decision of the Belgian national employment office in refusing his applications for a residence permit on the grounds that, as an ascendant of minor Belgian children, he is entitled to reside and work in Belgium.

Originally, Mr Zambrano had filed for asylum in Belgium. The claim was unsuccessful but the asylum authorities declared that he could not be deported back to Colombia.

Subsequently, Mr Zambrano's wife gave birth to their second child. As both of Mr. Zambrano's children were born in Belgium and were not entitled to the Colombian nationality according to Colombian laws, Mr Zambrano's children had a right to Belgian citizenship. He submitted a request for a residence

²³ C-34/09, *Ruiz Zambrano v Office National de l'Emploi* (ONEm), [2011] E.C.R. I-0000, judgment of 8 March 2011. Full judgment available [here](#).



...

permit for himself, his wife and their first child in 2004, which was refused by the foreign office, which stated that the residence permits could not be granted as the Belgian citizenship acquired by the children was a result of fraud.

Throughout this time Mr Zambrano had been working and paying social contributions, although he didn't have a work permit. When his workplace was patrolled he was fired. Mr Zambrano's request for unemployment benefit was rejected. This decision was brought before the European Court of Justice by the *Tribunal du Travail de Bruxelles*.

THE CHEN RULING

Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department [2004] provides significant case law on rights that arise for irregular migrants who wish to stay in a particular state with children or dependants who do have residence status. In 2000 Kunqian Catherine Zhu was born in Northern Ireland to Chinese national parents with temporary residency in the UK. By virtue of being born on the island of Ireland, the child was entitled to Irish citizenship.

The parents applied for permits to reside in Wales with their daughter, which they believed they were entitled to due to their child's status as an EU national. British authorities rejected Chen's application but, after appeal, the case was eventually referred to the European Court of Justice. Here it was ruled that denying the mother residence status, at a time when her daughter was unable to take care of herself, would violate [Article 18 of the EC Treaty](#) and the [Council Directive 90/364](#). It was declared that the mother be given residency in Wales.

The Chen ruling was significant in Mr Zambrano's case. Pierre Robert stressed the importance of using a variety of strategies in court and not ruling out any issues that had been mentioned in the national courts, even if they seemed secondary. Pierre Robert used characteristics of EU law and case law to argue that, whilst he was working, Mr Zambrano had a temporary residence permit to remain in Belgium.

Eventually, the Court of Justice ruled that Article 20²⁴ of the Treaty on the Functioning of the European Union (TFEU) prevents a member state from denying an undocumented parent of an EU citizen the right to work and reside in the country of the child's citizenship.²⁵

²⁴ Treaty on the Functioning of the European Union, available [here](#).

²⁵ C-34/09, *Ruiz Zambrano v Office National de l'Emploi* (ONEm), [2011] E.C.R. I-0000, judgment of 8 March 2011, para 45. Full judgment available [here](#).

²⁶ See for example: Case C- 434/09: *Shirley McCarthy v. Secretary of State for the Home Department*. Full judgment available [here](#). In this case, referred to the ECJ by the UK Supreme Court, the ECJ clarified that EU family reunification laws could only be invoked where an EU citizen has moved to another member state. The same principle was reiterated by the ECJ in Case C-256/11, *Dereci and others v Bundesministerium für Inneres*. [Full judgment available [here](#)] and in Case C-40/11, *Yoshikazu Iida v. Stadt Ulm*. [Full Judgment available [here](#)].

The European Court of Justice's ruling in the Zambrano case has established jurisprudence across the EU. Courts in Ireland, Denmark, Austria, Germany and the UK have since asked the ECJ for clarifications. The ECJ has subsequently issued a set of decisions that significantly narrow the scope of the Zambrano precedent, clarifying more in depth cases in which EU law on family reunification would not be applicable.²⁶

The Council of Europe



The Council of Europe (CoE) is an international organisation focused on developing common and democratic principles throughout Europe. It is based on fundamental values of human rights, democracy and rule of law. There are currently 47 member states within the CoE.²⁷

This section examines two key bodies of the Council of Europe: the *European Court of Human Rights* and the *European Social Charter*.

The *Court of Human Rights* is a powerful mechanism for ensuring respect for the human rights of undocumented migrants as set out in the European Convention on Human Rights. This report outlines some key articles relevant to undocumented migrants in the convention and discusses how to bring a case to the Court of Human Rights, with practical guidance and analytical NGO experience.

The *Social Charter* section is concerned primarily with the collective complaints procedure; it contains in depth strategic advice, including input from an NGO with direct experience and an expert from within the Council of Europe. Collective complaints, if used successfully, have the advantage of addressing recurring violations of human rights concerning a particular group, rather than with individuals, so may help to bring about wide-reaching change for thousands of undocumented migrants.

Key Bodies

The Committee of Ministers – The decision-making body, made up of the ministers of foreign affairs of each member state;

The Parliamentary Assembly (PACE) – The deliberative body, made up of members appointed by national governments of each member state. The assembly has initiated many international treaties;²⁸

The European Court of Human Rights (ECtHR) – The judicial body, open to all member states and individuals regardless of nationality. Based in Strasbourg, it safeguards the rights outlined in the European Convention on Human Rights;

- *The European Convention on Human Rights (ECHR)* – International treaty protecting human rights and fundamental freedoms for the member states, first established in 1950.²⁹ All member states of the Council of Europe are parties to this treaty;

The Commissioner of Human Rights – An independent institution within the Council of Europe. Its mandate is to promote awareness of and respect for human rights by carrying out country visits and developing dialogue with national authorities and civil society, reporting on key national issues and advising on the implementation of human rights³⁰;

The European Committee of Social Rights (ECSR, referenced throughout as 'the Committee') – The mission of the Committee is to judge that member states are in conformity in law and in practice with the provisions of the European Social Charter;

- *The European Social Charter* – First adopted in 1961, and then revised in 1996, it is the counterpart to the European Convention on Human Rights in the sphere of economic and social rights. It guarantees the enjoyment, without discrimination, of social and economic rights.³¹

²⁷ Full list of Council of Europe member states can be found [here](#).

²⁸ Full list of Council of Europe treaties can be found [here](#).

²⁹ Detailed description of ECHR can be found [here](#).

³⁰ Currently, the Commissioner for Human Rights is Mr. Nils Muižnieks. He was elected on 24 January 2012 by the Parliamentary Assembly and took up his position on 1 April 2012. He is the third Commissioner, succeeding Thomas Hammarberg (2006-2012) and Alvaro Gil-Robles (1999-2006).

³¹ Revised Social Charter available [here](#).

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The Role of the Parliamentary Assembly of the Council of Europe

TINEKE STRIK, Dutch Member of the Parliamentary Assembly of the Council of Europe (PACE)

Tineke Strik has been a member of the Dutch Senate for the Green Party since 2007. On behalf of the Dutch Parliament, she is a member of PACE and vice chair of the Migration Committee. She was also Rapporteur on the Council of Europe report 'Lives lost at the Mediterranean, who is responsible?'



As a member of the *Parliamentary Assembly of the Council of Europe* (PACE) it is important to be clear on what the Council of Europe is and what it is not within the discussion of migration. As we are a human rights based organisation our approach is based on human rights, not on migration management. The assembly is interested in the people rather than the process.

It is important to know how the Council of Europe works and how to use its mechanisms for undocumented migrants, otherwise there is a danger that the issue will get increasingly marginalised to a few lone voices on the left of the political spectrum. The human rights of undocumented migrants should not be reserved as the issue of the left parties. It is a matter of human civilisation and dignity.

The parliamentarians that make up the Assembly have a double mandate: the first is that of national parliamentarians, the second is that of members of the Assembly. Therefore, they can have an impact at both national and international level. It is important that NGOs are aware of who the PACE parliamentarians are in their country and lobby them on a national level.³²

The Parliamentary Assembly is often grandly referred to as 'the conscience of Europe', as it has been prepared in the past to speak out on difficult issues and push member states and their governments. The Assembly often adopts resolutions based on fact-finding and comparative reports. NGOs can contribute to these fact finding reports and they can use these for advocating, because the more reports are referred to stronger they get. As NGOs, you can influence your national parliamentarians and the Parliamentary Assembly to take up issues.

It has been recognised that the *European Social Charter* has the potential to advance the issue of social rights of irregular migrants. There are certainly restrictions to the charter but we are beginning to see more and more landmark judgements coming out of the court concerning migrants and asylum seekers.

³² List of current parliamentarians can be found [here](#).

European Court of Human Rights (ECtHR)

The *European Court of Human Rights* is a significant tool in the protection of the rights of undocumented migrants. It has two major advantages over the Social Charter: firstly, undocumented migrants fall within the scope of application of the European Convention on Human Rights (ECHR), as the convention protects the fundamental rights of every person, with no discrimination on grounds of nationality or immigration status; secondly, judgements delivered by the ECtHR are legally binding for member states.³³



European Court of Human Rights

- ✓ cases can be brought by individuals
- ✓ judgements are legally binding
- ✗ no direct access; national level legal remedies must be exhausted first
- ✗ cases must be brought within 6 months of final domestic judgement

³³ Despite this, governments have a wide margin of discretion concerning undocumented migrants through the principle reiterated by the ECtHR that "contracting states have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens." In *Hussein Mossi and Others v Sweden* [2005]

KEY ARTICLES RELEVANT TO UNDOCUMENTED MIGRANTS WITHIN THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

Article 3 – Prohibition of Torture

Article 3 is an absolute right; protection against torture or inhuman or degrading treatment is always applicable and to all persons. It also implies an obligation not to expel an individual to a country where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment. Recent cases have also included insufficient access to shelter as amounting to 'inhuman or degrading treatment'.



Relevant Case Law

- *Hirsi Jamaa and Others v Italy* [2012]³⁴. Somali migrants travelling from Libya were intercepted by Italian authorities and sent back to Libya. Italian lawyers helped lodge a complaint to the ECtHR. The Court found a violation of Article 3 due to the risks the migrants faced in returning to Libya.
- *M.S.S. v Belgium and Greece* [2011].³⁵ An asylum seeker in Greece was left homeless and living in extreme poverty for months whilst waiting for his asylum procedure to be completed. The ECtHR found this to be a violation of Article 3, with his insufficient access to shelter and facilities amounting to inhuman treatment.

³⁴ *Hirsi Jamaa and Others v Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012.

³⁵ *M.S.S. v Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011.



Article 5 – Right to Liberty and Security

Article 5 provides protection from arbitrary detention. There are specific conditions under which a person may be detained. The most relevant of these, regarding undocumented migrants, is 'for the purpose of deportation or extradition and as long as expulsion/ extradition proceedings are being conducted.'



Relevant Case Law

- *Popov v France* [2012].³⁶ Family with a five month old baby and a three year old child were denied asylum and detained. The case was found to violate Articles 3, 5 and 8.

Article 8 – Right to Private and Family Life

Article 8 can have particular relevance to undocumented migrants on the issue of family reunification. In some circumstances, relatives of a resident of the state may be admitted to also reside there.



Relevant Case Law

- *Osman v Denmark* [2011].³⁷ Osman, a Somali national holding a valid residence permit and residing with her family in Denmark, had to leave and stay in Kenya for two years to take care of a family member. Upon returning to Denmark she was not granted a visa and thus re-entered irregularly. The failure to reinstate her residence was found to violate Article 8 by the ECtHR.

³⁶ *Popov v. France*, Requête nos 39472/07 et 39474/07, Council of Europe: European Court of Human Rights, 19 January 2012.

³⁷ *Osman v. Denmark*, Application no. 38058/09, Council of Europe: European Court of Human Rights, 14 June 2011, available [here](#).

Allegations of Human Rights Violations

Allegations of violations of the European Convention on Human Rights can be brought to the ECtHR in three ways:

1. By individuals³⁸ or third parties on behalf of individuals.³⁹
2. Interventions by the Commissioner.
3. By one state against another.

In order to be entitled to bring a case to the European Court of Human Rights, the following requirements have to be fulfilled:⁴⁰

All the available legal remedies in the member state concerned must have been exhausted. Usually, this will mean an application to the appropriate court, followed by an appeal, where applicable, and even a further appeal to a higher court such as the supreme court or constitutional court, if there is one.

³⁸ In contrast to the European Social Charter *anyone* is permitted to bring a case to the ECtHR once the domestic remedies have been exhausted.

³⁹ Extensive information on how to make an application to the ECtHR can be found [here](#), the links on the left hand side under 'Apply to the Court' are also useful.

⁴⁰ European Court of Human Rights "Questions and Answers"

The application to the ECtHR should be lodged within six months from the date of the final decision at domestic level (generally speaking, the judgment of the highest court). After that period, the court would reject the application.

Interim Measures

Interim measures can be requested as an emergency procedure. They involve the European Court of Human Rights directing a state to take provisional measures whilst the court continues to examine a particular case. It often consists of requesting a state to refrain from doing something. It has been successfully used in the case of undocumented migrants being deported. For example, the *Groupe d'Information et de Soutien des Immigrés* (Group of Information and Support for Immigrants, GISTI) applied for interim measures to be taken against France in 2008 to prevent the deportation of 11 asylum seekers whilst the court examined whether the deportation would violate the ECHR. The court directed that the asylum seekers be allowed to stay in France while the case was taking place. Later it was ruled that their deportation would violate Article 3 of the Convention and the expulsion was stopped entirely.⁴¹

⁴¹ Full details of how to request an interim measure can be found [here](#).

TAKE ACTION



- Extensive information on how to make an application to the ECtHR can be found [here](#). The links on the left hand side under 'Apply to the Court' are also very useful and provide an admissibility checklist, an application pack for individuals which is available in over 30 languages and an online application form.
- If interim measures are required in the meantime then details of how to request such measures can be found [here](#), along with the contact details.

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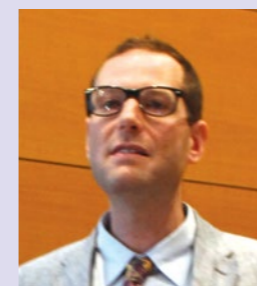


How NGOs Can Create Opportunities in the European Court of Human Rights



ADAM WEISS, Legal Director of AIRE Centre UK

The AIRE Centre is a specialist law centre based in the UK whose mission is to promote awareness of European legal rights and assist marginalised individuals and those in vulnerable circumstances to assert those rights. The AIRE Centre provides free legal advice and also litigates cases before the European Court of Human Rights.



It is important to not only look at what the current case law *is*, but also what it *could* be, and to explore the opportunities that exist for litigation before the European Court of Human Rights with regards to Article 8.

There are often cases of migrants who have been in the country for quite some time but have been unable to regularise; they may have family, a job and a life in this country. *Osman v Denmark* (see previous text box) is an example of one of these cases, brought by the AIRE Centre, and shows some of the strategies that can be used; the AIRE Centre made several arguments based not only around Article 8 but also the allegation that Osman's father had trafficked her out of Denmark.⁴²

The case law of the European Court of Human Rights on undocumented migrants has not always been very helpful. In the case of *Ahmed v Austria* [1996], the ECtHR ruled that deporting Ahmed to Somalia would be a violation of Article 3 and that he must be allowed to stay in Austria. However, the Court did not have jurisdiction to specify what kind of status he was entitled to. Fifteen months after this judgment Mr. Ahmed committed suicide. He was left in limbo in Austria; not able to work, sleeping rough and with no access to social rights.

⁴² This argument did not stand up in court but shows the different angles cases can be looked at from.

...

Likewise, in *Ponomaryov v Bulgaria*, the Court dismissed the case saying that 'Article 8 cannot be construed as guaranteeing, as such, the right to a particular type of residence permit'.

However, there is some hope, with better case law starting to appear. There are an increasing number of expulsion cases being brought under Article 8. When a state tries to deport someone who has been in the country for a long time and maybe has family there, things tend to kick into action; lawyers get involved and the decision is challenged.⁴³ The general principle that the state cannot expulse people if they have a private or family life established forms a solid basis for asserting the rights of undocumented migrants.

There is a body of case law also relating to people who have been unlawfully refused documents, that is, people who were entitled to residence status but could not regularise.⁴⁴

The next step in the case law, logically, is the situation of undocumented migrants who have never had residence status in the state they are living in. These are migrants who are not necessarily threatened with expulsion, who are living the daily grind of not having documents, not being able to get declared work, not being able to rent a home formally, unable to open a bank account, living on the margins of society as a result. In this situation it is important to consider case law on Article 8 ECHR to identify cases that might have potential in the European Court of Human Rights. In particular, it is important to assess: whether the case engages *the right to respect for private and family life*, according to previous case law; whether there is a *positive obligation* of the State involved; whether *migration control follows a legitimate aim*; whether the State is acting in accordance with the law and; whether *the action is proportionate and necessary in a democratic society*.

⁴³ Recent examples include: *Nunez v Norway* [2011] and *A.A. v UK* [2011]

⁴⁴ For example *Aristimuño Mendizabal v France* [2005]

European Social Charter

The Charter is most significant for undocumented migrants due to the collective complaints mechanism.



What is a Collective Complaint?

Under a Protocol opened for signature in 1995, which came into force in 1998, complaints regarding possible violations of the rights set out in the Charter may be lodged with the European Committee of Social Rights.⁴⁵ Following a collective complaint, the Committee issues a decision, which suggests measures for the member state concerned to rectify the situation. The rights laid out in the Social Charter fall under the following categories:

- Housing
- Health
- Education
- Employment
- Social and legal protection
- Movement of persons
- Non discrimination

The Council of Europe has published a report as to how the Social Charter relates to migrants which can be found here. It is important to note however, that the report refers to migrants in general, not specifically to undocumented migrants.

Who Can Lodge a Collective Complaint?

To determine if a collective complaint could be a relevant case for the Committee, the following must be considered:

1. It must be within a state that has accepted the procedure.

There are fifteen member states which have accepted the collective complaints procedure and in which collective complaints can be lodged.⁴⁶

2. The collective complaint must come from an organisation that is entitled to lodge it.

Organisations that can currently lodge a collective complaint are: the *European Trade Union Confederation* (ETUC), *BusinessEurope* (formerly UNICE) and the *International Organisation of Employers* (IOE), Non-governmental organisations (NGOs) with participative status with the Council of Europe⁴⁷ which includes PICUM, and employers' organisations and trade unions in the country concerned.⁴⁸

When drafting collective complaint to be lodged to the Committee of Social Rights, it can be useful to take into account the procedures and formal requirements available on the [Council of Europe website](#).

Collective Complaints

- ✗ Individuals not permitted to submit complaints, however accredited NGOs⁴⁹ do have this capacity
- ✓ Have been used twice successfully with regards to undocumented children
- ✓ Potential for wide-reaching legal and procedural changes
- ✗ Recommendations not legally binding

⁴⁵ The full version of the rights set out in the Social Charter can be found [here](#).

⁴⁶ PICUM has been granted a participatory status and has therefore the capacity to lodge a complaint to the Committee of Social Rights

⁴⁷ These countries and the year they accepted the Collective Complaints Procedure are as follows: Belgium (2003), Bulgaria (2000), Croatia (2003), Cyprus (1998), Czech Republic (2012), Finland (2002) France (1999), Greece (1998), Ireland (2000), Italy (1997), Netherlands (2006), Norway (1997), Portugal (1998), Slovenia (1999) and Sweden (1998).

⁴⁸ There are currently 77 NGOs with this capability. The most recent list drawn up by the Governmental Committee (January 2012) can be found [here](#). PICUM has held this status since 2012. Instructions in how to enrol for this capacity can be found [here](#).

⁴⁹ Finland has also agreed to receive collective complaints from National NGOs.

expert insight



Involving Relevant Actors is Key for NGO Success – Case Study from the Netherlands



PIM FISCHER, Fischer Advocaten (Fischer Lawyers) and
CARLA VAN OS, Defence for Children International

Pim Fischer works as a lawyer in Haarlem. Specialised in social rights, he supported the collective complaint to the European Committee of Social Rights against the Dutch policy to evict undocumented children from reception centres together with Carla van Os, Migration and Children's Rights Advocate and Legal Expert at Defence for Children International.



Pim Fischer

Lodging a collective complaint can be a very long process, and it is not a solution in itself. As the recommendations are not legally binding it must be ensured that the complaint is followed through with positive actions by the state involved to resolve the issue.

To do this will require many courses of action and many relevant actors. *Defence for Children International* (DCI) experienced this first hand when they lodged a collective complaint against the Netherlands, regarding the right of irregular children to shelter, on 4 February 2008.⁵⁰



Carla van Os

In response to the collective complaint, the *Committee of Social Rights* concluded that the Dutch policy of refusing shelter to undocumented children violated Article 17, paragraph 1⁵¹ and Article 31, and paragraph 2⁵² of the *European Social Charter* (ESC). Whereas a 2003 collective complaint brought against France was won by 7 members to 6, the DCI case was won unanimously.⁵³ However, as DCI soon discovered, winning the case is only half of the battle. The Netherlands rejected the Committee of Ministers' recommendations, correctly stating that the recommendations were not legally binding. "A political lobbying process is also needed besides the legal strategy," stressed Carla van Os of *Defence for Children International*.

DCI responded by building a coalition of NGOs and local migrant organisations to put pressure on the Dutch government. They campaigned to make members of parliament aware of the complaint and to attract media activity and public support. A national campaign day was organised in which bus shelters, a common place of shelter for irregular children, were occupied throughout

⁵⁰ *Defence for Children International (DCI) v Netherlands* [2008]

⁵¹ Article 17 details the right of children and young persons to social, legal and economic protection, with a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities

⁵² Article 31 details the right to housing, paragraph 3 is to make the price of housing accessible to those without adequate resources.

⁵³ *International Federation of Human Rights Leagues (FIDH) v France* [2003] This is the only other collective complaint to have been brought in the Council of Europe regarding the rights on undocumented migrants.

...

the Netherlands. These strategies put pressure on the state to respond to the recommendations of the Committee of Ministers. Slowly, the decision became more known in the Netherlands and more institutions started to work at least within the spirit of that decision.

Although the Dutch government began to react, difficulties still arose during the process. For example, in order to fulfil the child's right to shelter the state proposed separating irregular children from their parents. DCI continued to lobby in the national courts, which declared this 'solution' a new violation, namely of the right to family life. Pim Fischer, of Fischer Lawyers, who assisted in the lodging of the complaint, emphasised the influence that both the collective lobbying and continuation of legal pressure had as more Dutch courts decided that the state had an obligation to house not only homeless irregular children, but their parents too. Pim reasoned that "if children are vulnerable, and if it is true that vulnerable people have a right to shelter, then it should be the same for adults if we can prove that they are vulnerable."

DCI also put time and effort into informing the Child Protection Council and Youth Care about the danger of separating families, their main strategy being to emphasise how protection of a child's right to family must take priority over immigration control. They reiterated that they were simply arguing for the basic human rights of children, regardless of their residence status. "It's not about asylum procedures, migration policies or return policies," explained DCI's Carla van Os. "It's just about human dignity".

When the Netherlands submitted their subsequent report to the Committee, DCI also submitted a report, along with other NGOs, to the Committee.⁵⁴ The Committee was not satisfied with how the Netherlands had addressed the issue and DCI's report helped them to continue their political lobbying. Some concrete results were the recognition by the state that further action was needed, and the building of family location centres followed.⁵⁵

The development in reasoning by the Dutch courts has had other encouraging effects in the Netherlands. There is a positive trend emerging as courts have begun to shift the focus away from residence status and have started to enforce human rights for people who are declared vulnerable, regardless of their residence status.⁵⁶

DCI credit their perseverance and advocacy strategies in continuing to ensure that the Netherlands is aware of issues surrounding undocumented migrants. Reflecting on the case, Carla van Os shared: "It is a long, long, long process. You need a lot of actors and creativity and patience of course, but it is very worthwhile."

⁵⁴ A copy of the report can be found [here](#).

⁵⁵ Family location centres are not without problems and not all families find them useful. In December 2011 UNICEF and Defence for Children International visited the locations and concluded that the centres are not fit for children but DCI acknowledge that the situation has somewhat improved with the lodging of the collective complaint.

⁵⁶ 6 April 2010 (BM0846) Administrative Court of Utrecht was the first subsequent decision well motivated by the ECSR decision; it involved the right to shelter for a mother and child. Other Administrative High Court (CRvB) decisions include: CRvB 19 April 2010 (BM0956) (shelter for vulnerable adult) CRvB 30 May 2011 (BQ6438) (shelter mother and child) CRvB 9 September 2011 (BT1738) (concerning extremely vulnerable yet undesirable alien) CRvB 14 March 2012 (BV9270) (housing for mother and child)

Further Issues Concerning Collective Complaints

Limitations of the Charter

There is an appendix to the European Social Charter stating that only nationals of the member states that are party to the Charter are entitled to the protection of the Charter. Furthermore, only regularly residing nationals are included under the Charter, with the exception of refugees. This may seem extremely limiting; however, in 2011 the Committee prepared a letter inviting governments to make independent declarations to extend the charter to include all persons. Although none of the parties to the Charter took up this invitation there have been cases in which the Committee has ruled in favour of undocumented migrant children.

Case Law

Consideration must be given as to what extent case law may be used in support of future collective complaints. At the time of writing, there have only been two successful collective complaints regarding undocumented migrants; both of these were regarding the rights of children.⁵⁷ Furthermore, the Committee has so far only recognised the right to human dignity for undocumented migrants. However, there is an emerging jurisprudential principle of not excluding undocumented migrants from society and from their human rights. This could form the basis of pushing the boundaries of case law further.

Law or Practice

A collective complaint may be brought against a state on the basis of their *law* or their *practice*. So even if the law is good, a collective complaint may still be lodged if the law is not enforced.

Strategic Arguments

Broad, sweeping complaints may be less likely to succeed. Legislative bodies can be cautious as to the effects large changes in legislation or case law can have. Therefore, the more strategic approach may be to base arguments on specific issues, particularly when collective complaints regarding undocumented migrants are relatively uncommon.

Governments 'Not Accepting' Committee of Ministers' Recommendations

The Committee of Ministers is the decision-making body of the Council of Europe and has the mandate to monitor member states' compliance with their obligations under the Social Charter. The Committee intervenes in the final stage of the collective complaints procedure, adopting, after the case has been examined and determined by the European Committee of Social Rights, a resolution to request a member state to bring national practice or laws into conformity with the charter.

Recommendations made by the Committee of Ministers are not legally binding and there are cases of state governments dismissing recommendations on these grounds. This was the case in the collective complaints concerning undocumented children against both France and the Netherlands. However, in France, after national courts started following the Committee's recommendations on the assumption that, with similar reasoning, they would have reached the same result with or without the Social Charter, the French government finally issued a circular on 16 March 2005 upholding the Committee's recommendations.⁵⁸ Courts in the Netherlands⁵⁹ also chose to respect the recommendations made by the Committee, stating that, whilst they are not legally binding, the legal significance of the recommendations in interpreting national and international law cannot be denied. This is another example of why lobbying and political and legal pressures are central in achieving results.

TAKE ACTION



- In order to become involved with a collective complaint you must first have the support of an NGO with participatory status to be entitled to formally lodge the complaint. There are currently 77 NGOs with this capability, the list can be found [here](#). PICUM has held this status since 2012.
- If, as an NGO, you wish to enrol for participatory status, instructions in how to do so, along with the contact details, can be found [here](#).

⁵⁷ *International Federation of Human Rights Leagues (FIDH) v France* [2003] and *Defence for Children International (DCI) v Netherlands* [2008]

⁵⁸ See: *Circulaire DHOS/DSS/DGAS n. 2005-141 of 16 March 2005*. The circular provides that "all care and treatment dispensed to minors resident in France who are not effectively beneficiaries under the State medical assistance scheme is designed to meet the urgency requirement".

⁵⁹ On 9 August 2010, following the decision of the European Committee of Social Rights and criticisms of the Council of Europe, the Dutch Justice Minister decided to temporarily stop the withdrawal of shelter for families with children, awaiting a final decision of the Court of Appeal in The Hague. The Hague Court of Appeal ruled on 27 July 2010 that the state must provide children with an adequate housing, daily care, education and medical care. The full judgment of the Court of Appeal is available [here](#). For more information see: Anneke Stoffelen, "Asielkinderen niet op straat", *Volkskrant*, 10 August 2010. See also: "Addendum to the Joint Parallel Report to the Combined Fourth and Fifth Periodic Report of the Netherlands on the International Covenant of Economic, Social and Cultural Rights (ICESCR)", 28 October 2009, p. 23m available [here](#).

expert insight



Applicability of the European Social Charter to Undocumented Migrants

LUIS JIMENA QUESADA, President of the European Committee of Social Rights (ECSR)

As well as being the president of the ECSR, Luis Jimena Quesada is a professor of constitutional law in the University of Valencia, Spain. He is also a substitute judge at the High Court of Justice of the Valencia Autonomous Community (Administrative Chamber), where he has been the Judge-Rapporteur of several hundreds of decisions.



In principle, the existing case law of the European Social Charter on undocumented migrants only applies to children, but invoking and making use of the right to human dignity has been consolidated. It has now become established case law. So how can this case law be extended? NGOs and lawyers play an essential role in developing the case law and therefore developing the effectiveness of the human rights protection of the charter.

Firstly, there should be a focus on launching more collective complaints in relation to other rights of undocumented children. Currently, there is only case law on access to healthcare and shelter for children. There must be a mass consolidation of the protection of children to include all rights.

Secondly, new possibilities for intermediate cases can be explored. The question whether asylum seekers are considered 'regular' or 'irregular' needs to be challenged. Can the allowance for refugees be pushed to include asylum seekers too? Furthermore, can the protections of children be pushed to include vulnerable adults too in relation to all rights and in all circumstances?

Finally, NGOs should find synergies between international instruments and legal interpretations. Many international instruments, including the Social Charter, use the *favor libertatis* principle: it states that if national legislation is found that is more favourable to the enjoyment of freedom and human rights than that provided under the charter, then the charter must apply this national legislation throughout. Therefore, through collective complaints, national legislation and case law can be built that will impact on the entire Social Charter.



United Nations



The United Nations is an international organisation committed to maintaining international peace and security, developing friendly relations among nations and promoting social progress, better living standards and human rights. It is made up of 193 member states.⁶⁰

This section will examine some of the relevant strategies under two main mechanisms. Firstly, the section on the United Nations treaty bodies includes advice in filing a complaint or making a submission to a relevant treaty body and how to participate in state reports to the treaty bodies. Secondly, the section on the Charter of the United Nations⁶¹ includes mechanisms such as the Universal Periodic Review and Special Procedures.

Key Bodies⁶²

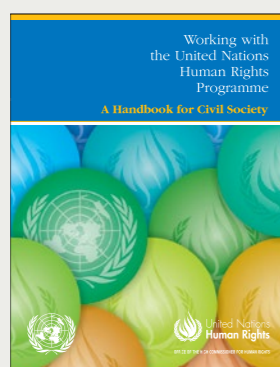
General Assembly - The main deliberative, policymaking and representative organ, made up of representatives of all 193 member states.

International Court of Justice - The principal judicial organ. The court's role is to settle, in accordance with international law, legal disputes *submitted to it by states* and to give advisory opinions on legal questions referred to it by authorised UN organs and specialised agencies. It is composed of 15 judges, who are elected for terms of office of nine years by the UN General Assembly and the Security Council.

Economic and Social Council - One of the principal organs of the UN. It is the central forum for discussion of economic and social issues and responsible for co-ordinating other UN bodies and agencies working with such issues, including the Commission on the Status of Women.

Human Rights Council - An inter-governmental body responsible for strengthening the promotion and protection of human rights and for addressing situations of human rights violations. It was created in 2006, replacing the Commission on Human Rights. The Council established the *Universal Periodic Review*, and is also concerned with *Special Procedures*.

The UN published its own handbook in 2008 entitled *Working with the United Nations Human Rights Programme: A Handbook for Civil Society*, which contains extensive information on how NGOs can engage with the United Nations.



⁶⁰ Full list of UN Member States can be found [here](#).

⁶¹ The International Bill of Human Rights falls under this Charter. The bill is made up of several components, most of which can be found [here](#).

⁶² There are many more bodies and institutions under the UN, an overview can be found [here](#) and a comprehensive list can be found [here](#).

Treaty Based Mechanisms

Treaties

There are nine core human rights treaties established by the UN, six of which have been ratified by all 27 EU member states⁶³. Once a state has ratified or acceded to a treaty it has an obligation to take steps to ensure that everyone in the state can enjoy the rights set out in the treaty. This obligation can be used to put political pressure on EU member states. Each treaty also has a corresponding *treaty monitoring body*, comprising of independent experts. The nine core treaties and treaty monitoring bodies are as follows:

- 1. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)** 1965, monitored by the Committee on the Elimination of Racial Discrimination.
- 2. International Covenant on Civil and Political Rights (ICCPR)** 1966, monitored by the Human Rights Committee.
- 3. International Covenant on Economic, Social and Cultural Rights (ICESCR)** 1966, monitored by the Committee on Economic, Social and Cultural Rights.
- 4. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)** 1979, monitored by the Committee on the Elimination of Discrimination against Women.
- 5. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT)** 1984, monitored by the Committee against Torture.
- 6. Convention on the Rights of the Child (CRC)** 1989, monitored by the Committee on the Rights of the Child.
- 7. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW)** 1990, monitored by the Committee on Migrant Workers.⁶⁴
- 8. Convention on the Rights of Persons with Disabilities (CRPD)** 2006, monitored by the Committee on the Rights of Persons with Disabilities.⁶⁵
- 9. International Convention for the Protection of All Persons from Enforced Disappearance (ICAED)** 2010, monitored by the Committee on Enforced Disappearance.

⁶³ The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) 1990 has not yet been ratified by any EU member state, although a number of UN member states which are countries of destination for migrants have ratified the CMW. Finland, Ireland and the Netherlands have signed but not yet ratified the Convention on the Rights of Persons with Disabilities (CRPD) 2006. The International Convention for the Protection of All Persons from Enforced Disappearance (ICAED) 2010 has been ratified by six member states: Austria, Belgium, France, Germany, the Netherlands and Spain. More information on the status of ratifications are available [here](#).

Treaty Based Mechanisms

- ✓ NGO written statements, observations and recommendations accepted as 'shadow reports' during country reviews by treaty monitoring bodies
- ✓ Ability of individuals to submit complaints of treaty violations to the treaty bodies
- ✗ Not all treaty bodies accept individual complaints or communications

The UN system focuses largely on monitoring states' fulfilment of treaty obligations. In addition to the human rights reporting system, whereby states produce periodic reports addressing the extent to which they meet international legal obligations, individuals and groups are also able to lodge human rights complaints.⁶⁶

The ability of individuals and states to raise complaints of human rights violations in an international arena brings real meaning to the rights enshrined in the human rights treaties.

Bringing Human Rights Violations to the Treaty Bodies

The treaty bodies all operate in slightly different ways and have varying procedures and approaches. However, there are three main ways in which complaints of human rights violations can be brought to a human rights treaty body:

- i. Individual communications;
- ii. State to state complaints;
- iii. Inquiries.

⁶⁴ See status of [ratifications of the Migrant Workers' Convention](#)

⁶⁵ This convention is the first and only UN human rights treaty signed and ratified by the European Union as a legal entity. More information is available [here](#).

⁶⁶ "Submitting a complaint on an alleged human Rights procedures" (Handbook, pp.155-157, found [here](#).)



Individual Communications

Individual communications or complaints of violations of the human rights treaties must be brought to the relevant treaty body. Not all bodies accept individual communications⁶⁷ and those that do may not accept them on all articles or protocols of the treaty. Furthermore, the state which the violation is being brought against must have ratified the relevant treaty⁶⁸ and have accepted the competence of the corresponding treaty monitoring body.⁶⁹

If this is not the case, other procedures within the UN may be more relevant, for example the [1503 Procedure](#). The Human Rights Council has a mandate under the 1503 procedure to examine consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms taking place in any country in the world. Anyone may submit a complaint of human rights violations, with reliable direct evidence, to the Council for consideration. The procedure is not meant to provide direct redress to the victims of human rights violations; however, the Council will participate in working group discussions and subsequent actions may include keeping the situation under review, appointing an independent expert for further investigation and/or submitting recommendations to the Council's parent body, the Economic and Social Council. An advantage of this procedure is that, unlike individual communications under the treaty bodies, any state can be reviewed; there is no relevance as to whether they are party to the treaty in violation.

State to State Complaints

There are provisions to enable state parties to bring a complaint against another state party, although this has never been used⁷⁰.

Inquiries

Two of the treaty bodies, the *Committee against Torture* (CAT) and *Committee on the Elimination of Discrimination against Women* (CEDAW), are entitled to initiate inquiries if they receive reliable information of serious, grave or systematic violations of the conventions in a state party that has recognised the competence of the relevant committee. This may result in further investigation, possibly a mission to the state in question and comments or recommendations from the committee.

TAKE ACTION



- For full, treaty-specific descriptions on how to bring an individual complaint to a treaty monitoring body see part 1 of the UN's [Fact Sheet No. 7: Complaints Procedures](#).
- A model complaint form can be found [here](#), along with the contact details.
- The country to which the complaint is being made must have ratified the relevant treaty; to check whether your country is ratified to a specific treaty click [here](#).
- More general information on the treaties and treaty bodies, and further information on the three methods of bringing human rights violations to the treaty bodies, can be found the UN's [Fact Sheet No. 30: Human Rights Treaty Systems](#) and in part IV of the UN's [Handbook for Civil Society](#).

⁶⁷ Currently only HRC, CERD, CAT and CEDAW consider communications by individuals under certain circumstances.

⁶⁸ For a list of state ratifications to the human rights treaties go [here](#). See the EiF column under the relevant treaty for the dates of ratification, it will state NP if the state is not a party. Alternatively, this [third party website](#) has similar, useful information.

⁶⁹ Also note that individual communications cannot be brought regarding the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families until 10 member states have agreed to Article 77 of the treaty.

⁷⁰ For more information see page 36 of the UN's [Fact Sheet No. 30: Human Rights Treaty Systems](#).

Other Ways of Engaging with Treaty Bodies

Shadow and Alternative Reports

When a state ratifies a UN treaty, it imposes an obligation upon itself to submit regular reports to the monitoring committee.⁷¹ In addition to the government report, the committee will consider relevant information from other sources, such as NGOs, other intergovernmental institutions, academic institutions and the press; these are called shadow reports. Based on the collective information and subsequent dialogue the committee will publish any concerns and recommendations as 'concluding observations'.

Shadow reporting by civil society is essential to ensure that states document their compliance with human rights obligations accurately and, in turn, to ensure that they meet these obligations. The reports can build political pressure for states to comply and are a useful advocacy tool. NGOs can also use the reports to push for specific recommendations. Sometimes states cannot or do not submit a report and in these cases it is possible for NGOs to submit an alternative report.

It is important to consider *timing* when submitting a report – it will take a substantial amount of time to compile a report so NGOs should be aware of when states reports are due, issues that have been, or still are, under review and previous state reports and subsequent conclusions.⁷²

Participating in Other Treaty Body Activities

It is important for an NGO wishing to engage with treaty body mechanisms to remain engaged with the treaty bodies in between the submission of state reports, as these usually only occur every four or five years for each country. The treaty bodies hold treaty-specific discussion days and workshops throughout the year, where NGOs can often participate. The submission of information and

informal consultation of NGOs is also permitted at the Annual Meeting of Chairpersons of Human Rights Treaty Bodies and Inter-Committee Meeting. This meeting is a forum for treaty bodies to discuss issues, their recent work and the effectiveness of the treaty body system, so endeavouring to highlight certain issues here could prove to have significant effect.⁷³ NGOs are encouraged to submit information and evidence in written form ahead of thematic discussions.

Promoting Ratification to the Treaties

This is particularly relevant for the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (CMW) as very few UN member states are parties to this treaty, and no EU member states have yet ratified it. Advocacy and increasing political pressure from civil society can help to increase the internationally accepted levels of human rights protection.

TAKE ACTION



- It is important for NGOs to know when their country is due to be reviewed by relevant treaty bodies; the reporting schedule can be found [here](#).
- To check which treaties your country has ratified click [here](#).
- More information on all aspects of the UN treaties and treaty bodies, and how NGOs can engage with them, can be found in the UN's [Handbook for Civil Society](#), in Part IV.

⁷¹ A state must usually submit its first report within a year of ratifying, and then once every four or five years after that, depending on the treaty.

⁷² Third party website which provides an easy-to-navigate reporting schedule for each treaty body can be found [here](#).

⁷³ Find out more about the Annual Meeting of Chairpersons of Human Rights Treaty Bodies and Inter-Committee Meeting can be found [here](#).

expert insight



An NGO's Experience with International Advocacy and Shadow Reporting

HANNY BEN ISRAEL, Kav LaOved



Hanny Ben Israel is an attorney at Kav LaOved, a leading Israeli human rights NGO dedicated to protecting and promoting the rights of the most disadvantaged groups of workers in Israel – primarily migrant workers, Palestinian workers and low-wage Israeli workers. Hanny's work at Kav LaOved focuses on reforming government policy in the field of labour migration to Israel and involves Supreme Court litigation and advocacy with law and policy makers, as well as with international actors.



As the oldest and largest civil society organization in Israel dedicated to protecting and promoting the rights of disadvantaged workers, Kav LaOved face various dilemmas and challenges in trying to promote respect for human rights through international advocacy.

Challenge 1

The first challenge for Kav LaOved is that NGO engagement at the UN level is rather contentious; it is a very sensitive and extremely polarised issue in Israel. NGOs which collaborate or otherwise engage in international processes are often labelled as traitors and as enemies of the state.

This increased political sensitivity does not deter us from international advocacy but it does mean that we make decisions strategically in terms and where and with whom we advocate. We tend to refrain from using UN processes that are heavily politicised, such as the *Human Rights Council's Universal Periodic Review*, and focus more on expert-led standard setting bodies, such as the *UN Treaty Bodies* and the *International Labour Organisation*.

Challenge 2

The second dilemma is cost in relation to possible benefit. Cost is significant to most NGOs and international processes are expensive. They often require a huge amount of time and resources and the benefits can sometimes feel obscure and vague. It is frustrating to come from a meaningful national context to an environment that can appear very sterile and detached from the realities taking place on the ground. Dialogue is often wrapped in reserved and soft language, despite concerning grave human rights violations.

Challenge 3

A further challenge we encounter frequently is that the international basis of human rights is not as solid with regards to undocumented migrants. Despite the universal nature of human rights, questions rise as to the necessary state application of human rights obligations with regards to non-citizens. Further frustration is added as many international decisions and comments are not legally enforceable. Advocacy is made even more problematic by the lack of



ratifications of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (CMW).

Nonetheless, despite these challenges, international advocacy is an important tool for NGOs to commit to and make more use of.

State compliance with UN decisions despite unenforceability

Firstly, although UN decisions are unenforceable by nature, states often do comply. Whether it is out of concern for public image or genuine concern for human rights, states do care about international criticism. This can be a vehicle by which action can be taken.

For example, in 2010 Kav LaOved lobbied the Committee on the Elimination of All Forms of Discrimination against Women specifically with regards to migrant women.⁷⁴ One of the recommendations arising from the Committee's examination of Kav LaOved's submission was that the Israeli government revoke a policy under which documented migrant workers would lose their status if they gave birth.⁷⁵ Israel had been a party to CEDAW for 20 years and those were the first recommendations CEDAW had made to Israel concerning the rights of migrant women. Three months after the recommendations were published, the Israeli Supreme Court adjudicated in favour of the recommendation. It found that existing policy was in violation of migrant women's basic rights, including the right to parenthood, and cited the CEDAW committee recommendations to reinforce its reasoning. This is a very illustrative example on how international criticism can push things forward within national contexts.

Increasing the visibility of issues concerning migrants

The second reason to support engagement in international advocacy is the need for increased visibility of issues and concerns of migrants in the international arena. The paradigm that immigration policy is a national question governed solely by inner considerations of sovereignty and border control is still too frequently encountered. It is also often seen from the very narrow lens of economic benefits or disadvantages of labour migration, and not from a human rights perspective. As migrants' rights advocates, we share a responsibility to promote discourse in the international arena around the rights of migrants.

Practical Tips

Finally, here are some practical tips for engaging in international reviewing processes, based on Kav LaOved's work:

1. For treaty bodies' periodic reviews, it is important to engage in the process early – by submitting a report and proposing questions for the 'issues and questions' phase.⁷⁶
2. Before the session, submit a shadow report, but also be there in person for the constructive dialogue and lobby committee members directly. There are large amounts of written material, so being available to talk to committee members directly about your report and relevant issues is vital. Knowing which committee member is 'responsible' for relevant articles in the convention and lobbying them directly is also helpful.
3. Draft proposed questions for the constructive dialogue and give them to committee members, since if an issue is not brought up orally in the constructive dialogue, the committee may not write about it in the concluding recommendations.
4. Draft proposed concluding recommendations for your issues and lobby committee members to endorse them.

⁷⁴ Kav LaOved's 'Shadow Report on the Situation of Female Migrant Workers in Israel', submitted to CEDAW, can be found [here](#).

⁷⁵ A policy designed to prevent migrants from settling in the country. In order to retain documentation women who gave birth would have to send the baby away from Israel, normally to relatives in their countries of origin, within 3 months. Full document of CEDAW recommendations regarding migrant workers can be found [here](#), from page 10 under the heading 'Female Migrant Workers'

⁷⁶ Issues and questions phase: Before the review of a country begins, there will be a preliminary session in which the committee decides on a list of issues and questions for the country under review to address in its report. Committees allow NGOs to send materials for this preliminary session.

Charter Based Mechanisms

Charter based mechanisms refer to procedures under the *Human Rights Council*, formerly the Commission on Human Rights. There are two main mechanisms: the *Universal Periodic Review*, a new mechanism under the Human Rights Council, and the *Special Procedures*, an older set of procedures inherited from the Commission on Human Rights.

Charter Based Mechanisms

- ✓ NGOs can submit written statements, observations and recommendations for country reviews under the UPR
- ✓ NGOs can raise areas of concern by submitting information to the Special Procedures
- ✗ mechanisms not appropriate for legal redress; aimed toward country or thematic issues

Universal Periodic Review

The *Universal Periodic Review* (UPR) assesses to what extent each of the 193 member states of the UN has respected their agreements and commitments to human rights. It also highlights any gaps a state may have in its protection of human rights; the state concerned then has the obligation to improve their compliance with their human rights obligations before the next review. Each state is reviewed every four years. It has a broader application as it assesses states in relation to implementation of human rights according to: (i) *The Charter of the United Nations* (ii) *The Universal Declaration of Human Rights* (iii) *Human rights treaties as ratified by the states concerned* (iv) *Voluntary pledges and commitments made by the state* and (v) *International humanitarian law* in case of armed conflict.

Reviews take place through interactive discussion, conducted by the UPR Working Group⁷⁷, between the member state being reviewed and the other UN member states. The reviews are based on three documents:

1. **A national report.** Information provided by the state under review.
2. **A summary of reports** by independent human rights experts and groups.⁷⁸ This includes bodies within the Special Procedures, such as Special Rapporteurs, human rights treaty bodies and other UN mechanisms.
3. **A summary of information from other stakeholders.**⁷⁹ This includes non-governmental organisations and national human rights institutions.

NGOs can submit information for discussion, and are also permitted to attend the review. They may not partake in interactive discussion but have the opportunity to make comments before the outcome of the review is adopted.

TAKE ACTION



- NGOs should be aware of when the relevant country is due for review under the Universal Periodic Review; a **calendar of second reviews** for each state under the UPR and more information on how to participate can be found [here](#).
- A comprehensive guide of how stakeholders should compile a report for the UPR, key issues to consider and contact information can be found from paragraph 10 – 22 and in the annexed box at the end of the OHCHR guidelines [here](#).
- Further information and guidelines for relevant stakeholders' written submissions to the UPR can be found [here](#).

⁷⁷ The Universal Periodic Review Working Group consists of 47 members of the Human Rights Council.

⁷⁸ Summary prepared by the Office of the High Commissioner for Human Rights (OHCHR)

⁷⁹ Summary prepared by the Office of the High Commissioner for Human Rights (OHCHR)

Special Procedures

Special Procedures is the general name given to mechanisms established to address both specific country concerns and international thematic issues. Special Procedures are either an independent expert, known as a *Special Rapporteur*, or a *working group* normally consisting of five member states. Special procedure mandates require the mandate holder to examine, monitor, advise and publicly report on either the relevant country or theme. Most Special Procedures receive information on specific allegations of human rights violations and send urgent appeals or letters of allegation to governments asking for clarification. In 2011, a total of 605 communications were sent by UN Special Procedures to governments in 131 countries.⁸⁰

NGOs can engage with Special Procedures by submitting information on human rights violations that have already occurred, are on-going, or that have a high risk of occurring. The information can be regarding an individual case, an on-going trend in human rights violations, cases affecting a particular group or drafted or existing legislation not in accordance with international human rights standards.⁸¹ It may be useful for NGOs to be aware of when different Special Rapporteurs carry out their country visits, to be able to assist them in their research and to raise specific issues. If you wish to assist or provide information to the Special Rapporteur, instructions of how to do so and contact information can be found [here](#).

The Special Procedures of the Human Rights Council are led by independent human rights experts with specific mandates to report and advise on human rights from either a thematic or country-specific perspective⁸². The UN have provided user-friendly questionnaire sheets in English, French and Spanish that may help with submitting information, including a submission form for the 'Special Rapporteur on the Human Rights of Migrants'.⁸³

TAKE ACTION



- Instructions and guidelines for submitting information to Special Procedures can be found [here](#).
- Model questionnaires of how to submit information to the Special Procedures can be found [here](#) in English, French and Spanish.
- More information on the Special Rapporteur on the human rights of migrants can be found [here](#).

The following special rapporteurs and other bodies of independent human rights experts might be relevant to engage with in order to raise the concerns of undocumented migrants:

UN Working Groups:

- [Working group on arbitrary detention](#);
- [Working Group on the issue of discrimination against women in law and in practice](#)

UN Special Rapporteurs:

- Human rights of migrants;
- Right of everyone to the enjoyment of the highest attainable standard of physical and mental health;
- Contemporary forms of racism, social discrimination, xenophobia and related intolerance;
- Violence against women, its causes and consequences;
- Torture and other cruel, inhuman or degrading treatment or punishment;
- Adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context;
- Extreme poverty and human rights;
- Trafficking in persons, especially in women and children;
- Right to education;
- Situation of human rights defenders.

Information does not necessarily have to be submitted through a submission form but it may be useful for NGOs as a starting point. Keeping up to date with the activities of the Special Procedures will be beneficial; for example when a Special Rapporteur is conducting state visits relevant NGOs can assist the Rapporteur in conducting meetings and collecting information and evidence. Such visits are also a time in which NGOs will have the opportunity to highlight relevant issues on a significant, international platform.

⁸⁰ A full overview of Special Procedures can be found [here](#).

⁸¹ More on submitting information to Special Procedures can be found [here](#).

⁸² As of 1 January 2013 there are 36 [thematic](#) and 12 [country](#) mandates. A full list of UN Special Rapporteurs with a thematic mandate can be found [here](#); UN Special Rapporteurs with a specific [Country mandate](#).

⁸³ Questionnaires, including the migrant specific questionnaire, are available [here](#). More information can be found on this Special Rapporteur can be found [here](#) and contact information can be found [here](#).



Other Procedures

The Commission on the Status of Women

The complaints procedure under the Commission on the Status of Women is meant to identify global, rather than country specific, patterns and trends regarding women's rights. Complaints submitted to the Commission are sent, anonymously if required, to relevant countries for comment and then all communications are reviewed by working groups which compile reports on the issues that arise. More information can be found [here](#), from page 18 onwards.

Special Representatives of the Secretary-General

UN Special Representatives are thematic experts appointed by the Secretary-General. As part of their mandate, Special Representatives can carry out country visits to investigate allegations of human rights violations or act as negotiators on behalf of the United Nations. A full list of UN Special Representatives of the Secretary-General can be found [here](#). Among the relevant Special Representatives concerning migrants are the Special Representative of the Secretary-General for Migration and the Special Representative for the Secretary General on Violence Against Children.

Support

When engaging with UN mechanisms it is important for NGOs to make use of the *vast network of support* and forge useful alliances. These alliances may add influence to relevant issues, contribute strategic advice or offer expertise to facilitate any actions undertaken. It may be useful to work alongside:

- Regional or international NGOs that share concerns on the issue; they may also have a useful contact network that can be accessed
- Grassroots organisations as well as solidarity and advocacy networks
- Undocumented migrants themselves; they may provide valuable input, testimonies, evidence and support for on-going advocacy
- Researchers and academics
- Experts in the field
- Legal professionals
- Political parties and members of national parliament
- Local authorities
- Trade unions
- Faith based communities
- Mainstream and social media
- International actors and agencies (for example UNHCR, Human Rights Watch or Amnesty International).

Conclusion

Legal mechanisms on the national, European and international levels offer important opportunities to enforce undocumented migrants' rights. Successful utilisation of existing legal mechanisms to challenge laws, policies and practices which violate undocumented migrants' rights depend on the awareness of undocumented migrants and their advocates of the available legal avenues and on overcoming practical and legal barriers to accessing justice.

In order to achieve success in ensuring full respect of the human rights of undocumented migrants, a wide range of different strategies must be employed, often simultaneously. Through varied inputs and contributions, this report has underlined that grassroots mobilisation, migrant empowerment, research and evidence collection, alliance building, political lobbying, strategic advocacy and communications are all crucial in complementing and reinforcing any legal strategies that are undertaken, and should be used by a wide range of actors to promote a much broader acceptance as well as realisation of undocumented migrants' human rights.



Members of PICUM at PICUM International Workshop, "Using Legal Strategies to Enforce Undocumented Migrants' Human Rights", 15 June 2012.



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