ACCESS DENIED

Towards a new social protection approach for excluded migrants

Concept version no.1

Gijsbert Vonk

Sarah Van Walsum

Die kind wat ’n man geword het trek deur de ganse Afrika
Die kind wat ’n reus geword het reis door die he reld
Sonder ’n pas

(Ingrid Jonker)

INTRODUCTION

1. Background of the study

This essay is written as a concluding report for the "Cross Border Welfare State" research programme. This privately funded, five year programme ran between 2006 and 2010 and accommodated four PhD posts and a number of smaller, auxiliary research initiatives. The programme focussed on the social security position of non EU migrants. Its central aim was to gain a better understanding of how law and policies in the area of immigration, social security and civic integration interact.

The relation between immigration, social security and civic integration is complex. Over the last decades millions of immigrants have established themselves in European countries. It is expected that immigration pressure will remain high due to factor such as poverty in the developing world and the increasing demands for labour in our ageing societies. The prospect of more immigrants coming to our countries gives rise to fears and concerns. Some are worried that it will not be possible to maintain a high level of social protection offered by the present welfare system. Others claim that immigration will negatively affect the cultural identity of the host countries. Apprehensions such as these give rise to political pressure to restrict access to social security for immigrants and to compel the immigrant population to participate in civic integration programmes. In their turn social security and civic integration are used by governments as instruments to help realise restrictive immigration policies; by making it more difficult for immigrants to access the social security system and by increasing the civic integration requirements, an attempt is made to make the country less attractive for some immigrant groups

Social security is also connected with the subject of integration of immigrants. Many (former) immigrant populations suffer from a weaker socio-economic position, in terms of low levels of education, higher unemployment rates, low incomes, language barriers, etc. The integration of disadvantaged immigrant groups has become a major political objective of many Western governments. Also here social security plays a role, be it in a somewhat contradictory way. On the one hand income maintenance prevents a further deterioration of the socio-economic position of migrants, on the other hand long term benefit dependency may hamper integration in their countries of residence.

The pressures exercised by immigration and integration policies also affect the social security position of migrants who decide to leave their countries of residence. Modern immigration and integration policies often presuppose that migrants should become full members of their new countries of residence. However, many migrants themselves are more

inclined to maintain strong links with their countries of origin as well. In this way many migrants develop a dual identity, actually moving between their new countries of residence and their countries of origin. The question rises whether the social security system should accommodate such transnational alignments, for example by concluding generous bilateral social security agreements with the countries of origin concerned, or whether permanent residence in the home countries should be discouraged by strictly applying the principle of territoriality (non portability of benefits).

Against the backdrop of these partly concurrent and partly opposing pressures arising from different policies domains, the national and European legislator must make choices when crafting the concrete legal position of migrants in social security. It is not an easy task considering the highly politicised nature of the debate on immigration and the welfare state. The objective of the Cross Border Welfare State programme has been to provide objective information which helps governments to make these choices, primarily by :

a. Providing insight as to how the social security position of migrants varies according to immigration status and the type of social security schemes involved.
b. Investigating the minimum requirements that apply with regard to the social security position of migrants arising from international protective standards
c. Creating insight between policy correlations between immigration, social security and integration

2. Object, purpose and structure of the report

Object and central question

The purpose of the present essay is to report on the outcomes of research projects carried out within the framework of the Cross Border Welfare Programme . Thereby we will focus on the greater picture that emerges from our study on the relation between integration, social security and civic integration. There is one theme that runs like red strand to all the studies carried out. This is the mechanism of inclusion and exclusion of migrants in social security. In other words, how is the line between inclusion and exclusion drawn for different groups of migrants; how does this line meander in time and why; and how do the exclusions manifest themselves in the concrete legal position of migrants? This study deals with this theme.

Mapping the line between in- and exclusion is not the final objective of the present exercise. We want to carry the argument a little further by looking at the further consequences of the exclusion of migrants from social security. The central question

addressed is a paradoxical one. Knowing that the exclusion of certain immigrants from social security is legitimate from the point of view of national policies and interests or even from the point of view of the logics of the social security system itself, what alternative strategies can be developed in order to address their social protection without undermining these policies, interests and logics?

There are different groups of excluded migrants to be taken into consideration, for example third world temporary migrants who cannot invoke the protection of any bilateral treaties, asylum seekers and irregular immigrants. Particularly, the position of the latter group is problematic. These persons are not welcome and have no, or at least a strongly diminished legal position in social security. But nonetheless they are here in considerable numbers, often in adverse circumstances, and presenting our societies with a an array of practical, governmental and ethical dilemmas.

Purpose

The purpose of this report is to develop alternative approaches to social protection for migrants who are excluded from the regular social security system, in particular irregular immigrants. A number of options for the social protection of migrants will be explored, ranging from codifying minimum care obligations arising from human rights standards to providing temporary income support and credits to migrants who co-operate with the return to their countries of origin. The willingness to address such alternative approaches is what we refer to as "a new social protection approach to formally excluded migrants".

Structure

The report is structured in 'dialectical fashion', which is big way of saying that it falls apart in three sections which can be presented as a thesis, an antithesis and a synthesis. Part A is the thesis dealing with the exclusion of migrants from the formal, public social security schemes. It discusses how the exclusion of certain groups is an inherent part of any social security scheme, how this exclusion is further strengthened by the prevalence of immigration policies over social security and what limits international law, in particular international human rights, impose on the possibility to exclude persons from social security rights. Part A is based upon a analysis of legal policy. It builds on Gijsbert Vonk's earlier study, "social security, migration and the law"[1] and takes on board the new research findings of the Cross Border Welfare Programme, especially Klaus Kapuy 's study on the social security position of irregular immigrants[2], Lieneke Slingenberg's on the reception of asylum seekers[3], Eva

[1] Vonk
[2] Klaus Kapuy
[3] Lieneke Slingenberg

Hilbrink's study of income requirements in immigration law and the publications[4] on civic integration by Jeanine Klaver and Arend Odé[5] and by Karin de Vries[6].

Part B is presented as an antithesis. It deals with the social security position of immigrants outside the formal state framework. The reader is forewarned that the term social security used in this second part is not the same as in part A. It does not relate to public benefit schemes for the classical social risks of sickness, unemployment, invalidity, old age, children, death, etc. (formal social security) but to a range of informal collective strategies and initiatives developed by immigrants and their dependants to make sure that they can cope in times of need (informal social security). As will be shown, these alternative forms of social security challenge the formal concept of social security. They do so because in the first place they are not part of public arrangements in the host country but based on civil society initiative. In the second place, they are not locked up in the nation state as formal social security schemes usually are but transnational by nature. Part B is based upon an empirical study, conducted in 2008 and 2009 by Sarah van Walsum, among migrant domestic workers residing in the Netherlands and their family members residing in Ghana and the Philippines.[7] Furthermore, it draws its sources from a cross-border welfare study conducted in preparation of this essay by the Stichting Bevordering Maatschappelijke Participatie (BMP: Foundation to Support Civil Participation) into transnational social security arrangements for irregular migrant workers[8], as well as from the broader literature both on the position of irregular migrants and on transnational social security arrangements.

Part C connects the two spheres of formal and informal social security for migrant workers and constitutes the synthesis. It is entitled "towards a new social protection approach for formally excluded migrants" The question dealt with is: what are the responsibilities of the (international) government towards excluded migrants? These responsibilities are categorized along the lines of the internationally recognized human rights distinction of state responsibilities between the duty to respect, to fulfil and to provide. Part C accumulates in a list of alternative forms of protection which are not necessarily at odds with formal government policies, such as the provision of minimum care for vulnerable persons, respecting private and informal social security arrangements , giving extra-territorial protection to immigrants and emigrants and providing financial support to voluntary returnees. Because such forms of protection are not all considered part of the regular social security system, or indeed of the concept of *the right to social security,* in part C we will employ the wider and more general term "social protection".

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[4] Eva Hilbrink
[5] Klaver and Odé
[6] Karin de Vries
[7] Van Walsum
[8] BMP

3. Some limitations and definitions

The Netherlands as a fixed point of reference

When commenting upon the position of migrants in social security, we will refer to the situation is different countries, but most of all to the one which exists in the Netherlands. This does not mean to say that it is a book about the Netherlands only. Most of the cross-border welfare projects also conducted research into other countries, but apart from the study by Klaus Kapuy on the situation of irregular migrants in Canada, Belgium and the Netherlands, this has not led to systematic comparative legal analysis. The Netherlands however figured constantly in all the reports, which allows us to adopt this country as a fixed point of reference. As such, this is not a bad choice as the Netherlands has made a series of quite articulate choices in formulating the legal position of migrants in social security. In this way the Dutch have created an interesting laboratory for themselves to test new policies. However this also means that the reader must be careful not to extrapolate the Dutch experience too easily to other countries. Very often this is not possible.

Defining irregular immigrants

Defining the irregular immigrant is an art in itself.[9] Between a legal white status and the irregular black status there are many shades of pale. This study employs a deliberately broad definition as all non citizen migrants staying in a county with the required authorisation. This definition includes migrants who have not been given a positive decision as to their right to stay or reside by the authorities of the host state. This means that not only groups without any status (e.g unreported immigrants) and those who must leave immediately (e.g. on grounds of an expulsion order), but also other categories such a immigrants who are awaiting the outcome of a request for a residence permit or overstayers, are included in the definition. Asylum seekers, defined as persons applying for protection in another country until a final decision on that application has been made, are however treated as a separate category. This is done by reason of the fact that in view of the principle of non-refoulement, states have a stronger responsibility towards the social protection of asylum seekers than irregular immigrants.[10]

Defining social protection and social inclusion

As for the term social protection: this refers to all public efforts intended to protect the livelihoods of persons, including various forms income support, emergency relief, micro credits, housing, etc. The term social security is narrower and refers to the formal public social security within the meaning of the risks covered by ILO-Convention No. 102, containing minimum standards of social security. The term includes all contributory and non

[9] Cf. Elspeth Guild, "Who is an Irregular Migrant" in: *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Martinus Nijhoff Publishers, 2004, 3-17.

[10] Slingenberg, 10

contributory schemes covering the risks of medical care, sickness, unemployment, old age, industrial accidents and occupation disease, family burden, maternity, invalidity and death.[11] Also the general condition of "need" or " poverty" is included in the concept of social security, thus covering not only social insurance schemes but also social assistance.

Defining civic integration

The term civic integration is intended to refer to legal framework applying in a country aimed at the participation of immigrants in the society by proficiency of the language and general knowledge of the host country, including its cultural values. This definition has emerged from the evolution of various integration policies towards ethnic minorities into the present integration schemes applying in countries across Europe. [12]

> Klaver and Odé point out that many European countries have responded in the same way to the problem of lack of integration of immigrant populations. Firstly, civic integration policies are generally directed to well-defined target groups, consisting of people who originate from the less developed world. Moreover, only those who intend to stay on a permanent basis are expected to participate in these policies, which means that people who migrate within the frameworks of family formation and reunification constitute the principal target groups of these policies. Next, language proficiency is increasingly seen as key to successful integration, and all civic integration programmes therefore focus on linguistic competence. While some variation exists between countries as to the language level which is aspired, civic integration courses generally aim at providing immigrants with a basic language level which should be sufficient as a first step to a self-supportive life in their new country of settlement. Most countries also include social orientation in their civic integration programs as a means to become better acquainted with the ins and outs of society. Often this element is restricted to practical knowledge on everyday life in the host country, but in some countries these orientation courses have a broader claim and also include some basic understanding of the national history, culture, and some general values. Lastly, civic integration trajectories are no longer offered voluntarily but are increasingly deployed as a necessary condition to obtain further privileges in the host state . More specifically, there is a growing tendency to link these civic integration requirements to a secure residence status and the possibilities for nationality acquisition. Moreover, financial sanctions – in the form of fines or reduced access to social welfare services –are often imposed whenever the current integration requirements are not met. In all, states want to increase their grip over the integration process newly arriving residents, particularly with regard to potentially vulnerable immigrant categories. Therefore, a legal framework has been introduced operating on the basis of positive and negative incentives, meaning that those who comply with the requirements have access to various kinds of privileges available in the society of settlement. Conversely, non compliance with civic integration requirements may become a reason for exclusion from various social and legal advantages.
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> *J.F.I. Klaver and A.W.M. Odé, Civic Integration and Modern Citizenship, 2009, p. 3-5.*

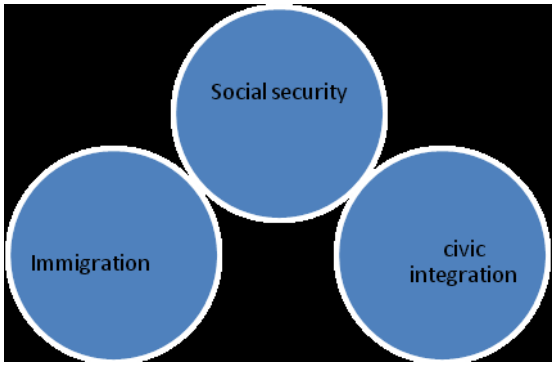
[11] On this definition of social security cf Pieters, 2006.
[12] Klaver en Odé, 3-5

PART A: THE EXCLUSION OF MIGRANTS FROM FORMAL SOCIAL SECURITY

4. General lay out

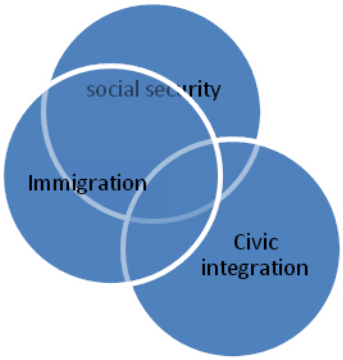
As mentioned, the way the question of how the different policy domains of immigration, social security and civic integration eventually affect the legal position of migrants in social security is a complex one. In order to deal with this question in a relatively brief and hopefully systematic fashion, we have resorted to an analytical trick.

First of all in paragraph 5, we will describe the logics of in- and exclusion in social security from the point of view of original position. In this position immigration law, social security law and civic integration are treated as independent policy domains, each characterised by the own logics, principles and rules. As will be seen, historically, to some extent, the development of the position of migrants can indeed be explained with reference to "endogenous" social security logics.



In paragraph 6 the original position will be contrasted by the "dynamics of in- and exclusion in social security". Here we will take into account the relations between the three policy domains. As we will demonstrate, social security is increasingly made subordinate to considerations of immigration policy. This most of all manifests itself in the legal residence test which excludes immigrants with insufficient and weak residence status from entitlement to benefits. The dominance of immigration policies is also starting to reveal itself in relation to civic integration, where mandatory integration tests are no longer only designed to help immigrants participate in society but also to raise barriers against immigration. Also we will demonstrate that in their turn civic integration policies may overshadow social security, both directly (withholding benefits from those who do not pass

the civic integration test), but also indirectly (retrenching social security to the national borders). These different trends cause the line between in –and exclusion in social security to meander in new directions.



We continue our analysis in paragraph 7 in paragraph in which we will describe how the exclusion of irregular immigrants from social protection is increasingly challenged on grounds of human rights arguments. Finally, in paragraph 8 we will present some overall conclusions.

This contrast between the original position and the dynamics of the position of migrants in social security runs parallel to the distinction made by Linda Bosniak in her book *The Citizen and the Alien* (2004) between the 'sphere separation model' and the 'sphere convergence model'. These models which derive their inspiration from Walzer philosophical work *Spheres of Justice* (1993), portray two different approaches of defining material rights for immigrants, such as the right to education and the participate in the system of social security. In the 'sphere separation model' the need of state to control immigration must be kept separate from the sphere of the regulation of material rights of its members. Immigration powers should may only be used as regards decision on entrance and expulsion made at the border, but should not trickle trough in the question of whether a resident is entitled to material rights such as affiliation to the social security system. In the second model referred to as the 'sphere convergence model', considerations of immigration control and immigration status continue to play a role in defining the material rights of immigrants in the host state. This model creates various circles of membership, with national enjoying full rights in the middle, and various categories of immigrants in the outer layers, enjoying less favourable positions. In the 'sphere convergence model' social rights may legitimately operate as a tool for immigration control.

The distinction the two models has been successfully applied by Lieneke Slingenberg in her study on the reception of asylum seekers under international law. The author convincingly demonstrates that under international law immigration control and social security are partly separate but also partly overlapping spheres, as if both models are applied simultaneously. As regards social security rights, states are not allowed to exclude all aliens on the basis of their sovereign immigration power. By identifying the relevant qualifying conditions for entitlement to the equal treatment with nationals, international law has established how far the sovereign immigration power may reach before it must give away to equality. Since most asylum seekers are not able to meet the relevant requirements set as a condition for equal treatment, the majority of them will not be entitled to equal treatment in the field of social security. As regards this category of immigrants, the state's immigration power may have a normative bearing on their social security rights.

Lieneke Slingenberg, Between Sovereignty and Equality, the Reception of Asylum Seekers under International law, 2011, 388-390

5. The logics en in- en exclusion in the original position

5.1 The social security perspective

Social security is based upon the notion of solidarity. Solidarity is expressed within certain groups. Therefore each social security scheme automatically draws a line between those who are in and those who are out. Other than sometimes suggested[13], these lines are not necessarily drawn between immigrant and non-immigrant population, or more crudely between those with nationality of the host state and those with foreign nationality. If we take the post war concept of the right to social security as a starting point, every person has this right as a member of society has this right[14] and there is no ground for not considering non-citizens as members of the society, as an immigrant might well establish close ties with the his host state. After second world war these ties have gradually gained recognition, a development which is captured by sociologists with the term "post-national citizenship".[15]

Social insurance

Indeed, if we look at the development of early *social insurance* schemes the immigration status of the insured person has never been a factor of direct importance. The personal scope of application of most early social insurance schemes in Europe has always been grafted upon the existence of a contract of service with the employer. In most of the social insurance schemes of the European states nationality was not an issue, at least where coverage was concerned. Apart from exceptions arising from new policies in some countries (see below paragraph 6) this situation has never really changed. The absence of the nationality condition implies that immigrants are affiliated to social insurance as long as they have a relevant employment relationship. [16]

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[13] See for example De Beer in Grenzeloze Solidariteit
[14] Art. 9 Universal declaration
[15] Guiraudon
[16] ILO; Kapuy

The situation does not need to be fundamentally different for *residence based social insurance* schemes, in the sense that immigrants are *prima facie* excluded from these schemes. Whether or not they are depends upon the way the residence test is applied. If we take the Dutch situation as an example, the following picture emerges. The Dutch residence based national insurance schemes cover the risks of old age, death, children and exceptional medical expenses. Under these schemes all residents are insured. Residents are defined in the law as persons who live in the Netherlands and whose residence status is assessed according to circumstances as prescribed by the law. This concept is further elaborated in case law, showing that a person must have long-lasting personal ties with the Netherlands; the focus of a person's social life must be in the Netherlands. Incidentally, this requirement of intensive ties with the country of residence is not unusual in European social security law. For instance, there is the UK term *ordinary* and in some cases *habitual residence*[17], and the German term *gewöhnlicher Aufenthalt*.[18]

Do immigrants come under this 'fortified residence notion'? In the early '70s, the Central Court of Appeal still believed that this was not the case[19] The Court judged that, "a foreign *gastarbeider* (literally: guest worker) whose family remains in his country of origin, who regularly visits this family when on leave and who also maintains normal contacts with this family, continues to be a resident of that country." The use of the term guest worker in this consideration illustrates the expectation held at the time that the migration that was taking place for labour purposes would turn out to be a temporary phenomenon. It was assumed that guest workers would eventually return to their country of origin. It was further concluded on the basis of this expectation that coverage under Dutch national insurance was out of the question. By the late 1970s, a shift is discernible in case law. In a judgment of 1977, the Court ruled that "it is going too far to assume that a foreign worker whose family stays behind in the country of origin and who maintains regular contact with the family can never be a resident of the Netherlands as well".[20] Here, we see that it was no longer inconceivable that a migrant worker could build up such intensive ties with the Netherlands that residence could be applicable. The term *gastarbeider* (guest worker) was dropped, and replaced by the term *buitenlandse arbeider* (foreign worker). In the mid-80s, the Court went a step further. In a judgment of 1985[21], it appears that maintaining economic ties with the Netherlands constitutes an important reason to assume residence: "The employment history of the person concerned leads to the conclusion that ties have gradually come about between that person and the Netherlands as a result of which he and his family have become entirely or almost entirely dependent on his possibilities for earning income in the Netherlands." Regarding terminology, the migrant worker is now referred to neutrally as "the person concerned". Finally, it was recognized in case law that economic ties are not the

[17] Ogus and Barendt and guide
[18] Paragraph 30 of the general part of the *Sozialgesetzbuch*.
[19] Central Court of Appeal, 11 Nov. 1971, *RSV* 1972/48.
[20] Central Court of Appeal 4 July 1979, *RSV* 1979/230.
[21] Central Court of Appeal 19 Dec. 1985, *RSV* 1986/166.

only factor to be taken into account. Residence depends upon the intensity of economic, social and legal ties that person may have with the Netherlands. It is the mix of these factors that depends the outcome of the test.[22]

The development described above shows that the interpretation of the term residence has adapted to the reality of migration and the way in which this reality has been perceived in society. Rather than a subjective perception of the phenomenon of migration, the objective circumstances of a migrant in the Netherlands now constitute the deciding factor. Incidentally, the concept of residence underwent a similar shift in meaning under the influence of migration with respect to the phenomenon of the dual place of residence. Initially, case law was based on the assumption that a person could only be a resident of one country at a time, i.e. either the Netherlands or another country. This idea, however, was at odds with the situation of older migrants who had become eligible for pensions/benefits and had not entirely severed their ties with their country of origin. Some of these people have kept the Netherlands as their country of residence while spending several months each year in their country of origin. It was situations like these that led the Central Court of Appeal to accept in 1994 that such cases are cases of dual residence.[23] Therefore, maintaining ties with the country of origin does not preclude residence in the Netherlands.

From the above it follows that social insurance has gone a long way in accepting immigrants within its scope of protection. This is most clearly visible in work based insurance schemes, which include all workers, but it also shows in residence based insurance schemes. The Dutch experience illustrates that such residence schemes are not necessarily biased against migrants, in the sense that they impose a *prima facie* to the participation if migrants. This observation actually coincides with the situation in other countries which have residence based schemes, such as the Nordic countries, although this does not rule out that some of these countries apply minimum periods of insurance. [24]

International coordination law

The fact that immigrants are not necessarily excluded from the social insurance of their host states on formal legal grounds, does not mean to say that they do not face any obstacles in social security. As a result of the specific legal conditions that apply in national legislation, migrants can be faced with other disadvantages in claiming benefit rights. For example, if migrants work predominantly in precarious labour relations, they may be excluded from

[22] Supreme Court 13 March 2011, USZ 2011/61
[23] Central Court of Appeal 15 June 1994, *AB* 1995,76.
[24] Many international co-ordination instruments on social security stipulate that minimum periods of residence may apply in residence based insurance schemes as a condition for full equal treatment, but when it comes to insurance conditions the same instruments periods prescribe that periods residence completed in another contracting state, must be treated as periods completed in the host state. Cf. for example, art. 8(2) and art. 28 of the European Convention on social security (1972). For an overview of the relevant provisions in international coordination law, see Lieneke Slingenberg (2012), 160-162.

work based insurance schemes by reason the absence of a formal contract of service. Other legal obstacles apply specifically in a cross border context. The fact that migrants have broken insurance records may lead to reduced pension rights or, where minimum insurance requirements are not met, to no rights at all. Territorial restrictions for the payment of benefits can stand in the way of the payment of benefits abroad, while sometimes entitlement to benefits for non-nationals is made subject to the condition of reciprocity with the country of origin. Such problems can to some extent be alleviated by national legislative efforts, but in the end the realization of true solutions requires the linking together of national social security schemes on the basis of international agreements.

International agreements on the coordination of social insurance schemes are almost as old as social insurance itself. The first social insurance agreement was concluded in 1904 between France and Italy and since than a network of bilateral and multilateral treaties has come into being, covering all branches of social insurance and including a number of techniques which are specially designed to protect the rights of migrant workers. This network of social security treaties extends throughout the entire world. The treaties provide *inter alia* for equality of treatment on grounds of nationality, the exportability of pension rights and the accumulation of insurance periods that have been built up in different countries.

The growth of the body of international coordination law has kept pace with the extension of the scope of protection of the social security systems in general. As the system has gradually opened its gates to all sorts of other vulnerable groups, who were previously unprotected, so it has expanded to include the various categories of migrants who, for one reason or another are unable to reap the full benefits of the existing schemes. For migrants the right to social security could not solely be achieved by unilateral legislative measures; the international coordination of national social security schemes was also necessary. The very existence of the network of international co-ordination treaties emphasizes the universal character of the right to social security. Perhaps the conclusion of a number of worldwide conventions within the framework of the ILO for the protection of migrant workers in social security[25] alongside all sorts of other conventions that set minimum standards for social security, would confirm this line of reasoning. Within the EU the function of the bilateral and subsequent multilateral agreements, have been taken over by a single Regulation, presently known as Regulation 883/2004 coordinating the social security systems of all the 27 member states.[26]

[25] For example ILO Conventions no. 19 of 1925 (equal treatment in accident insurance), no. 48 of 1935 (maintenance of acquired rights), no. 118 of 1962 (equal treatment of foreign nationals in social security) and no. 157 of 1983 (maintenance of social security rights).

[26] EC Regulation no. 883/2004 of the European Parliament and of the Council on the coordination of social security systems. This regulation is coupled by Regulation no. 987/2009 which includes administrative procedures necessary for applying the mother regulation.

Social assistance

Access to social assistance for migrants was always more problematic than access to social insurance. The fact that the origins of social assistance schemes are based upon the notion of a unilateral charitable obligation, rather than a reciprocal insurance relation between the insured person and the social insurance institutions is largely responsible for this. Traditionally social assistance schemes are organized on a strictly local basis. Thus the early poor laws in Europe often excluded persons who were born outside the local community responsible for providing poor relief. In the second half of the 19th century strict local requirements were abolished, although this did not end but merely shifted the problem of offering assistance to 'strangers'. Similar restrictions that previously existed for persons who were born outside the local communities, were now made applicable to nationals of other states. The nationality requirement was introduced. The prevailing opinion in Europe was that not the host-state but the state of origin was responsible for offering support to the needy .

Since the Second World War the nationality condition has been replaced by the notion of territoriality. This process has taken place gradually through legislative changes and the jurisprudence of the courts. The process of the erosion of the nationality condition in social security law is actually still taking place. The much-discussed *Gaygusuz*-judgement of the European Court of Human Rights of 16 September 1996 is an illustration of this.[27] In this judgment the Court ruled for the first time that unequal treatment in social security (*in casu* unemployment assistance for the long term unemployed) solely on nationality grounds constitutes a violation of Article 14 of the European Convention on human rights, unless it is justified by very weighty reasons.

The replacement of the nationality condition by the territoriality condition is in line with the principle that modern states should take responsibility for the social welfare of all citizens.[28] Interestingly in social assistance this notion of territoriality does not necessarily imply a residence test such as the one applying in the Dutch national insurance schemes, described above. Thus, for example, for a long time in Belgium, Britain, Germany, and the Netherlands only simple presence in the country was required. On the other hand in social assistance the principle of territoriality has never been fully accepted. In almost all European countries the nationality condition and the territoriality conditions are intertwined by establishing links between the right to social assistance and the legality of residence. Here we find a curious form of interaction between immigration law and social welfare law. Entitlement to social assistance depends on the legality of residence, while in its turn the legality of residence may depend upon the foreigner claiming social assistance. Only for those with permanent residence status may such conditions be alleviated. Furthermore,

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[27] ECrtHR, (Gaygusuz/Austria), *RJ&D* 1996-IV, no. 14, 1129-1157.

[28] Cf. G.J. Vonk, (2000), *Social security and property: Gaygusuz and after.* In: Jan Peter Loof, Hendrik Ploeger, Arine van der Steur eds., The right to property, The influence of Article 1 Protocol no. 1 ECHR on several fields of domestic law. Maastricht, 145-155.

exceptions may made for irregular migrants who are in an emergency situation, in which it is possible for the local authorities to offer relief on a temporary basis.[29] Such exceptions follow from the nature of social assistance as a final safety net within the social security system.

International agreements and social assistance

The special position of immigrants in social assistance as opposed to social insurance is reflected in the state of international law. Social assistance is generally excluded from the scope of application of international coordination agreements . It is dealt with in different agreements which are coincidentally not primarily social security instruments but rather instruments of international migration law.[30]

In fact, historically these instruments are older than social security co-ordination agreements. They are rooted in the exchange agreements that were concluded in the second half of the 19th century between some European states to regulate the position of paupers who were in the hands of the poor law authorities. [31] The prevailing opinion in Europe was that not the host-state but the state of origin was responsible for offering support to the needy. For that reason reciprocal agreements were concluded with the aim of bringing poor law recipients back to their countries of origin. Thereby the host states would promise to continue to provide relief to immigrants from the other country until they were safely placed in the hands of the domestic authorities.[32] Subsequently such arrangements became part of wider settlement agreements, such as the Dutch-German settlement agreement of 1904. In fact, the European Convention on social and medical assistance of 1953 can also be seen as a successor to this type of arrangements. This convention allows for payment of social and medical assistance to foreigners, until the moment that the legality of their residence is terminated.

Nowadays, all major international migration conventions contain at least a provision on equality of treatment for migrants in the field of social security and social assistance for migrant workers: the UN Conventions on refugees and stateless persons, ILO-Convention No. 97 on Migration for Employment, the European Convention on the Legal Status of

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[29] Until the koppelingswet made an end to this in 2000, but interestingly in the meantime case law of the Central Court of Appeal has forged new exceptions for emergency cases under adjacent schemes, such as COA and WMO.

[30] The exclusion of social assistance from international co-ordination instruments is problematic for minimum substance benefits with a mixed nature, which bear characteristics of both social insurance (linked to the classical social insurance risks) and social assistance (means test, financed by general taxation). In EU coordination law, these benefits are branded as special non-contributive benefits which fall under a special regime which is based upon territoriality (non portability) of the benefits. See art. 3(3) and art. 70 Regulation 883/2004.

[31] The oldest agreements of this types is a treaty concluded between Bavaria and Saxony, dating back to 1833!

[32] For a short description of this history, cf. G.J. Vonk, *De coördinatie van bestaansminimumuitkeringen in de Europese Gemeenschap*, Deventer, 1991, pp. 3-5.

Migrant Workers and, of course, the modern 1990 International Convention on the Protection of Rights of all Migrant Workers Rights. These conventions may be very relevant as their personal and material scope of application is wider than the traditional social security coordination instruments, which exclude social assistance, housing and other types of welfare services for those who are not economically active. As a matter of fact exactly the same situation has always applied in the European Community where migration regulation no. 1612/68 - in particular art. 7(2) Regulation no. 1612/68[33], prescribing equality of treatment in the area of social and fiscal advantages - played a major role next to social security regulation no. 1408/71 (which excluded social assistance from its material scope of application). [34] Nowadays, in the case law of the EU Court of Justice this role of art. 7(2) Regulation no. 1612/68 has been taken over by the very notion of European citizenship itself. [35]

5.2 The perspective of immigration law

The above examples of international regulation of social assistance already makes clear that also in the original position immigration law does not turn a blind eye to the status of immigrants in social security. But there is more to it than that. It is a traditional starting point in international law that states are free to regulate the entry and residence of foreigners according to their own best interests. Interestingly a common technique adopted in all immigration systems, both on a national and on an EU level is the imposed income requirements as a condition for obtaining a visa or residence status. Such requirements serve as a minimum subsistence test. They imply that the immigrant must show that he is capable of earning an income above a certain threshold in order to have the right to residence. In case of temporary residence the lack of a sufficient income may serve as a ground for withdrawing or not prolonging the right to stay. [36] For permanent residence status, the minimum subsistence test in often only imposed as condition of obtaining such status.

The minimum subsistence test distinguishes the weak from those who are strong enough to look after themselves and contribute to the society of the host state. In this it also acts as a gate keeper preventing access to the welfare state. By ensuring that immigrants can support themselves on a durable basis, they are prevented from becoming participants in the social security system, not in terms of taxes and contributions of course,

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[33] Presently art 7(2) Regulation 492/2011.
[34] Art. 4(4) Regulation no. 1408/71. The exclusion is maintained in present Regulation no. 883/2004 in art. 3(5).
[35] Cf. Anne Pieter van der Mei, 'European Union citizenship, freedom of movement and social assistance benefits' in: *Social Security in Transition*, Jos Berghman et al (eds.), Kluwer Law International, 2002, 93-107. See also Kay Hailbronner, Kay. 'Union citizenship and social rights', in: Jean-Yves Carlier and Elspeth Guild (eds.), *The Future of Free Movement of Persons in the EU.* Bruylant, Brussels, 2006, 65–78; as matter of fact the provisions of art. 7(2) Regulation no. 1612/68 still survives in the form of art. 7(2) of Regulation no. 492/2011 on the freedom of movement for workers within the Union (codification).
[36] Hilbrink

but rather as beneficiaries of publicly funded social assistance benefits. Indeed, in some immigration laws both national and in the EU this condition that a person may not become a burden on public funds or on the social assistance system is explicitly formulated as part of the relevant income requirements. [37]

Traditionally, the income requirement particularly played a role to regulate the immigration of family members, the underlying presumption being that the male immigrant breadwinner must demonstrate that he cannot only look after himself but also after his wife and children who want to join him in the country of immigration. But also after the demise of the male cost winner model, income requirements continue to operate as an instrument for family reunification policies. [38]

5.3 The perspective of civic integration

In the original position, civic integration is born as a policy in its own right. In the Netherlands, for example, the notion that immigrants should be supported in language education and social orientation initially did not have anything to do with making the country more (or less) attractive to immigrants or with preventing social security dependency. The notion was originally rooted in the conviction that ethnic minorities with disadvantages should be helped in taking part in the Dutch society, on the same footing as other groups. [39] However, as we will see in the next paragraph such consideration, might at some stage be overshadowed by other rationalities. For example the Dutch civic integration test has now partly developed into an instrument of immigration policy, which siphons off those who are considered unable to offer any valuable contribution to the host society, while failure to obtain civic integration targets will have adverse consequences for entitlement to social assistance benefits.

6 The dynamics of in- and exclusion of migrants in social security

5.1 Sphere convergence: general remarks

The line between the in- and exclusion of migrants in social security is not a static one, it changes over time. In order to understand these changes we must look at underlying forces

[37] In British Immigration act, section x. For an example of EU law cf art. 6 (x) of EU directive 2004/38.
[38] Van Walsum

that affect the social security position of migrants. One of these forces is the tendency of governments to allow arguments of immigration policy to enter the domain of social security and civic integration. Clearly allows for more dynamics, as changes in the immigration policy will affect social security positions as well, making social security law even more subject to political change than it already is without the interference of immigration policy.

In our observation, the prevalence of immigration policies over social security is not necessarily a new phenomenon, nor does it have to be to the disadvantage of the social security position of the migrant workers. It depends upon the nature of the policies pursued. Thus, in one of our earlier publications entitled "migration, social security and the law" [40], we concluded that it was not the existence of migration itself, but rather the desirability of the migration that affects the legal position of migrants in social security.

When the immigration climate is favourable and officially encouraged, the natural tendency of the law is to further strengthen the protection of migrant workers in social security on the whole. The clearest example of this can be found in the European Union where the freedom of movement of persons is enshrined in the EC-treaty. The freedom of movement of persons is coupled by powerful Regulations which protect the social security rights of migrants, presently know as 883/2004 and 987/2004. The EU Court of Justice critically scrutinizes the application of these regulations against the background of the treaty objective of the freedom of movement of persons. The system of co-ordination of social security has become an integral part of the legal order of the Union and offers strong guarantees against all sorts of disadvantages, which may arise from migration between the Member States.

However, when the immigration policies are ambiguous, for example when the labour market situation is such that there is a demand for workers from third countries while the official immigration strategy is a restrictive one, the state of social security law becomes more differentiated. In such a climate, governments sometimes conduct policies to allow labour immigration on a temporary basis and sometimes this is coupled with measures or implicit constructions that deny full or equal access to the social security system. Because such measures may run contrary to legal guarantees that are built into the social security system for migrants, they are vulnerable to corrections by the courts. The situation of ambiguous immigration policies consequently increases the tensions between the legislature and the judiciary, which often occur in the area of granting social rights to migrants.

Finally, when the immigration policies are unambiguously restrictive the state of the law no longer comes to the rescue of immigrants. On the contrary, The law rather legitimizes the lack of social security protection for specific groups. This is reflected in provisions that exclude for example illegal immigrants and asylum seekers from the social security system. For such categories of immigrants the law rather operates as an instrument of exclusion.

Gijsbert Vonk, "Migration, Social Security and the Law, Some European Dilemmas", European Journal of Social Security, 2002, 315.

[40] Vonk, 2001

Below we build on this analysis by focusing in particular on the exclusionary effects of sphere convergence, taking into account the following relations:

- Immigration policy and social security (6.2)
- Immigration policy and civic integration (6.3)
- Civic integration policies and social security (6.4)

6.2 Immigration policy and social security: the legal residence test

In law the preference of migration law over social security status, takes the shape of the legal residence test. This test is prolific both in national law as in international law. The exclusion of illegal immigrants goes the furthest in the Netherlands, where as a consequence of the so-called "linkage act" of 1998 this category is now fully excluded from all public services, including social insurance benefits (but excluding legal aid, education under the age of 16 and medical aid in emergency situations). Other countries, such as Austria, Denmark and the UK are moving quickly to follow this example, if not so radical, then at least on a more incremental basis. [41] As a matter of fact also outside Europe attempts are being made to introduce the test, most notably in the US where since the second half of the last decade the previous Bush and present Obama administration have been struggling to introduce the No Social Security for Illegal Immigrants Act[42], but so far without success. Again there are countries which seem to be not particularly interested in the whole matter and which leave the test to play its 'original role' in social assistance.[43] In such countries contributory insurance schemes do not necessarily exclude foreigners on grounds of their immigration status as employers are normally under an obligation to make social insurance contributions, even if they employ irregular workers. This holds true in particular for benefits in respect of industrial accidents and occupation diseases the origins of which are vested in the civil law liability of the employer, but less so for unemployment insurance benefits which operate on the basis of an obligation of making oneself available for the labour market, which is -at least officially- not possible in case of illegal residence.[44]

The legal residence test has both an inclusive and exclusive effect. On the one hand it may serve as an alternative for the even stricter nationality criterion and thereby buttress the equal treatment of migrants in social security once the test is passed.[45] On the other hand,

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[41] For example, new legal residence tests have also been introduced in Austria, Denmark, and in the UK (2004).
[42] The latest version of the proposal dates from March 2011.
[43] Cf.
[44] Cf. Paul Schoukens and Danny Pieters, Exploratory report on the Access to Social Protection for Illegal Labour Immigrants, 2004; Klaus Kapuy, 650-651
[45] In the Netherlands, but not in Denmark where the legal residence test was accompanied by the introduction of minimum periods of

the conditions under which guarantees are granted may equally operate against groups who do not pass the test, the irregular immigrants and asylum seekers.

Irregular migrants enjoy no equality of treatment whatsoever and very often have to cope without hardly any support whatsoever. With regard to social assistance, some countries only grant minimal aid, in kind and on a discretionary basis. Medical support is often limited to emergency situations only. Other countries, even deny any form of emergency relieve under their social assistance schemes. In practice, this state of affairs often means that local communities or charitable institutions take over the role providing some form of care and protection.

The same holds true for asylum seekers, who are also excluded from regular support schemes on grounds of their weak immigration status.[46] Initially, in many countries, asylum seekers were still covered by the national social assistance schemes, but gradually separate schemes have been set up, which provide alternative and often very minimal forms of care: benefits in kind, vouchers, pocket money, or in some cases no care at all. The exclusion from social security if often coupled with all sorts of other restrictions with regard to the choice of housing and work. Only some countries impose a time limit upon exclusionary measures; in Germany for example, the period is three years. In other countries such limits simply do not exist. Restrictive measures for asylum seekers have been purposefully introduced in order to avoid integration into the society. Furthermore in the eyes of the governments these measures make the respective countries less attractive for the asylum seekers wishing to apply for refugee status.

The deterioration of reception conditions in Europe has been stopped by Directive 2003/9/EC. Interestingly, also this directive is not devoid of pressures exercised by immigration policies. According to the preamble it serves a double function, not only to secure asylum seekers a decent standard of living, but also to ensure comparable living conditions in the member states, in order to avoid secondary movements influenced by varying reception conditions. It has been suggested that the latter motive, has been the decisive one for the adoption of the directive.[47]

Remarkably, the legal residence test which characterizes access to social protection for non citizen migrants in national law, is fully reflected in the protective clauses on equal treatment in international migration law. Thus, looking at the instruments referred to in paragraph 5.1 the following picture emerges. The European Convention on Social and Medical Assistance only provides equality of treatment to immigrants who are "lawfully

[46] For a general overview, see Roland Bank, (2000), *Europeanising the reception of asylum seekers: the opposite of welfare state policies*. In: Micheal Bommes and Andrew Geddes, Immigration and welfare, challenging the broders of the welfare state, London/New York, 148-169. For the situation in the Netherlands, see Lienke Slingenberg (2012), Chapter 2.

[47] Slingenberg with reference to Peek.

present ". Articles 20 to 24 of the UN-Convention on the Status of Refugees dealing with welfare rights are restricted to those who are "lawfully staying". Art. 1 of the European Convention on the Legal Status of Migrant Workers restricts the application of the Convention to "nationals of a Contracting Party who have been authorised to reside in the territory of another Contracting Party in order to take up paid employment". Something similar applies for ILO Convention No. 92 (art. 11). Only the 1990 UN International Convention on the Protection of Rights of all Migrant Workers Rights, seems to take a softer stance towards irregular immigrants, at least providing a right to medical assistance in emergency situations (art. 28), but typically this Convention has still not been ratified by a single Western or Arab state.

The legitimizing effect of the law with regard to the exclusion of asylum seekers and illegal immigrants is further enhanced by the efforts of European governments to actively promote the adoption of restrictive clauses in international legal instruments which are relevant for the social security protection of migrants. Thus, the new Euro-Mediterranean Association Agreement EC-Morocco signed in 1996 now reserves the equality of treatment in the field of social security for persons working and residing legally in the territories of the host countries.[48] A similar restriction has been formulated in the recently adopted Charter of Fundamental rights of the European Union in art. 34(2) dealing with the right to social security for migrants who move within the territory of Europe.[49] Such clauses are fully logical and legitimate from the perspective of immigration policies, in particular the effective enforcement of immigration rules. At the same time they do little to improve the fate of illegal immigrants, but rather support the policies of exclusion.

6.3 Immigration policies and civic integration: the consequence of failure to meet civic integration obligations

As was suggested earlier civic integration schemes may originate from a positive concern for the wellbeing of disadvantaged groups of newcomers and ethnic minorities, but may soon become overshadowed by other less charitable motives. The turning point for such shift of rationality for particular groups of immigrants occurs when civic integration programmes are made mandatory, as is the case in countries such as Austria, Denmark and the Netherlands. The question then arises what sanctions should be imposed upon persons who do not participate in civic integration programmes or who fail civic integration tests. The

[48] Art. 66 of the Agreement reads: "The provisions of this Chapter shall not apply to nationals of the parties residing or working illegally in the territory of their host countries". See OJ EC 2000, L 70/16.
[49] Art. 34(2) of the Charter: "Everyone residing and moving legally within the European Union is entitled to social security benefit, and social advantages in accordance with Community law and practices".

new Dutch Integration Act which was introduced in 2007 includes a battery of sanctions. Failure to comply with the obligations can result in fines of up to € 1000 and can be repeated when certain deadlines are not met. In addition a link is made between the passing of the exam and the possibility of obtaining permanent resident status; immigrants will be denied this status if they fail their civic integration exam. Furthermore the acquisition of Dutch citizenship depends on passing this exam.

Also the Act on Integration Abroad which requires prospective immigrants to pass a civic integration test before being granted a visa, creates a clear link between civic integration and immigration. This acts act mainly targets family migrants from non-Western countries, in practice mainly from Morocco and Turkey. For them without passing the necessary test, it will not even be possible to obtain temporary residence rights.

When judging these mandatory constructions it is clear that civic integration and immigration law have become intermingled. The implicit justification for this has been analysed by various commentators, one of them being Ben Vermeulen who published an essay in 2010 entitled "On freedom, equality and citizenship. Changing fundamentals of Dutch minority policy and law (immigration, integration education and religion)".[50] . Vermeulen observes that in the Netherlands permanent residence and formal citizenship are no longer considered to be instruments of integration, much rather a sort of final reward for the efforts of the immigrant to fully adjust himself to the Dutch society. Linking civic integration to residence status, supports this process. This in its turn, Vermeulen asserts, coincides with the emergence of a new citizenship concept which expects the immigrant to establish unique ties with the Netherlands and unilaterally adjust to the moral and cultural values attributed to the Dutch, or in a wider sense, Western society.

The Dutch experience shows that immigration policy and civic integration can get mixed up even further than presented in the above picture. This can be illustrated by the most recent events surrounding the Act on Integration Abroad, introduced in 2006 in order to compel prospective immigrants from non-Western states to first take an integration exam before making a visa application . After the introduction of this Act the number of requests for admission in the Netherlands decreased strongly, from 20,000 in 2005 to 9,000 in 2010. In 2009 a Parliamentary Committee appointed to evaluate the act still concluded that the introduction of the civic integration exam abroad had no strong and unacceptable effect on potential immigrants. Nonetheless, encouraged by the apparent effects of Act on Integration Abroad, the latest centre right minority Government, supported by the anti-immigration and anti- Islamist party of Geert Wilders raised the level of the examination and introduced a further immigration test. The Act on Immigration Abroad has been analysed by Karin de Vries in her dissertation entitled "Integration at the Border".[51] According to Karin De Vries it is still too early to conclude that this act has had the effect of excluding particular

[50] Vermeulen in M.-C. Foblets, c.s. (2010)

groups of persons. That may be so, but for the less informed onlooker, the recent history of this act gives rise to the certain suspicion that the original integration function of the Act on Integration Abroad coincides rather comfortably with the selective immigration ambitions of the successive Dutch governments.

In her dissertation Karin de Vries argues that integration requirements imposed by the Dutch Act on Integration abroad are not merely a barrier to the entry of foreigners, but also an instrument to support or promote the integration process in the host state. The acceptability of such requirements therefore has to be determined trough balancing of interests, including the interest of successful integration (as part of the public interest of the host state), as well as the effects of non-admission (on individual immigrants and host state residents and/or the public interest of the host state). The Vries argues that the outcome of this balancing act, and hence of the acceptability of integration requirements as an instrument of exclusion, depends to a large extent on the purpose for which admission is sought and on international law requirements. Very often these two factors run parallel. For example when family reunification is concerned account has to be taken of the EU family reunification directive and the case law of the ECtHR concerning Article 8 ECHR. The conclusion here is that the level of integration requirements may not be raised so high as to exclude persons with little education or learning capacities from joining their family members in the host state. De Vries also expresses doubts as to whether the Dutch Act on Immigration Abroad might give rise to indirect discrimination on grounds of ethnic origin, as the act mostly applies the relatives of Turkish en Moroccan migrant communities in the Netherland, while subjects of Western states, such as Americans and Australians are expressly excluded.

Karin de Vries, Integration at the border. The Dutch Act on Integration Abroad in relation to International Immigration Law, Vrije Universiteit, 2012.

6.4 Civic integration policies and social security: retrenchment to the national border

Civic Integration in its turn also has a bearing on the social security position of immigrants. Thus for example, in the Netherlands social assistance beneficiaries are likely to get a reduction of benefit (a so called administrative measure) when they fail to meet their civic integration obligations. This is on top of the fine that the person may receive on the basis of the Integration Act itself. The latest governments has tabled a bill to make it mandatory for all municipalities to impose benefit cuts on beneficiaries who fail to meet their civic integration targets.

Obviously in this way civic integration policies directly enters the domain of social security. But there is also a more indirect link. In the previous paragraph we related that the new Dutch civic integration policies are rooted in a new concept of citizenship. This concept is not only suspicious of multiculturalism (in the sense the immigrant must accept the Dutch

way of life as his own) but is also opposed to transnational alignments (in the sense that the immigrant is supposed to develop unique ties with the Netherlands). This same notion of citizenship underlying new civic integration policies has, in our eyes also led to changes in social security rights for migrants, particularly where these rights can be invoked in an extra-territorial context.

The Netherlands social security system always used to have an open relation with the outside world: long term benefits were freely exportable throughout the globe, recipients of benefits abroad enjoyed continued affiliation; the general social insurance schemes, based upon residence, allowed for unrestricted voluntary insurance for people moving abroad, child benefits were payable for children residing outside the country, and the Netherland adhered to a wide network of often generously decorated bilateral social security agreements. However, in the second half of the nineties, a number of legislative changes were introduced which resulted in an abrupt end to this open character: continued insurance for pensioners abroad was abolished and a total ban on the export of benefits was introduced (save international obligations). Furthermore, voluntary insurance for the general insurance schemes was limited to a period of ten years.[52] These measures were taken independently from each other for various reasons. But taken together, the effects of the measures point in the same direction, namely a retrenchment of the system to the national borders, affecting especially those who entertain transnational ties.

Interestingly, the new entrenchment policies do not work in the same way for all immigrants. From the point of view of national law no distinctions are made between the national origin of the immigrants involved, but such distinctions arise as a curious byproduct of the interaction of national law and international law. If the quality of national treatment is favourable, i.e. when national social security law allows equal access to benefits schemes and refrains from territorial restrictions, the effects of the absence of international social security treaties for migrants may be limited. But when the quality of national conditions for migrants is poor, then the contrast between those who are protected by international agreements and those who are not becomes more articulate. While the new legislation is often partly or even fully mitigated by EC law and provisions of bilateral social security agreements, it applies in full force to migrants from countries with which the Netherlands has not entered into any social security obligations. And intentionally or otherwise, these happen to be the countries in the third world and the East which produce the immigration pressures which the Dutch government tries to curb. Actually with regard to the export ban introduced in 2000, the legislation actually anticipated the interplay between national law and international obligations. The idea was not to restrict the payment of benefits abroad as such, but to make the export of benefits dependent upon the existence of international obligations. It was thought that in this way other states will be more prepared to participate in verification measures which are imposed by Dutch social security institutions. In the meanwhile in April 2011, the Dutch government announced that it wants to introduce

[52] Cf. G.J. Vonk (1999), Eigen land eerst, fort Europa of mondiale plichten, *Sociaal Maandblad Arbeid*, 393.

benefits payable abroad on the basis of international obligations. The idea is that the level of some types of benefits should be adjusted to the standard of living in the export country involved. Talks must be initiated with the bilateral treaty partners in order realize these latest ambitions

Perhaps it goes too far to consider the Dutch social security retrenchment as a consequence of civic integration policies, but the two policies can be considered as birds of a feather, both born out of the rise of the concept of unique citizenship and the unwillingness to facilitate transnational alignments, especially not by means of extra-territorial social security rights.

7. The impact of human rights on the exclusion of non-legal residents from basic social rights

The new patterns of in- and exclusion detected in the previous paragraph, clearly have negative consequences for certain groups of immigrants. In particular, the legal residence test in both national social security and international migration law, leaves irregular immigrants exposed to mishaps, risks and dangers of daily life. Hunger, destitution, homelessness, degradation, exploitation, fear, loss of dignity, in short: the whole array of Dickensian horrors expelled from our societies by the emergence of the welfare state, continues to threaten the lives of this group.

The Dickensian parallel becomes even stronger when we take into account that another phenomenon which is recently gaining significance in many western states. This is the criminalisation of irregular immigrants. Many immigrants who enter the country in a way which is not allowed are treated as criminals and are literally rounded up in prisons. Also third persons, such as doctors, teachers and landlords may enter the domain of criminal law when they become too closely engaged in helping irregular immigrants. In the laws of some countries this is not allowed. The repressive policies also affects asylum seekers, either because their entry has been refused or because they are kept en semi-prison conditions in separate asylum centre in order to lodge their asylum claim.[53]

The criminalisation trend ensues from the preoccupation of governments to control immigration by enforcing rules and maintaining a grip on the movements and whereabouts of the people. Actually, these motives also apply to the reception of asylum seekers. By placing them in centrally organised locations, government is better capable of exercising influence over the behaviour of asylum seekers. It is not an accident that in Netherlands the

[53] Slingenberg, 34-36.

ministerial responsibility for the reception of asylum seekers has shifted from social affairs, to immigration affairs and recently to the home office.[54] The reception of asylum seekers has become a inland security issue.

This issue of criminalisation of immigrants has been dealt with extensively in 2009 in a report prepared by Elpeth Guild for the Commission for Human Rights of the Council of Europe. Where foreigners who are subject to immigration control, cross external borders into European states otherwise than in accordance with the national law on border crossing, in many states an administrative sanction applies. For instance, this has long been the case in the UK where so-called 'illegal entry' has included not only clandestine entry onto the territory avoiding any immigration control but also entry obtained by deceiving an immigration officer who, if in full knowledge of the facts, would not have permitted the individual entry onto the territory. However, irregular entry is also a criminal offence punishable by a fine and/or up to six month imprisonment and expulsion. In Germany, irregular entry (and residence) is an offence under the criminal law. The sanction for the least severe form is imprisonment up to one year or a fine in addition to expulsion. Similar criminal law sanctions are provided for irregular entry in Greek immigration law. In 2008 Italian law was changed to make the irregular status of aliens who commit a criminal offence.

According to Guild these examples are not the only ones that contribute to the criminalisation of immigrants. She concludes that are striking aspects of the EU's criminalisation of foreigners. First there is the pervasive way in which the measures (a) separate foreigners from citizens through an elision of administrative and criminal law language and (b) subject the foreigner to measures which cannot be applied to citizens, such as detention without charge, trial or conviction. Secondly, there is the criminalisation of persons, whether citizens or foreigners who engage with foreigners. The message which is sent is that contact with foreigners can be risky as it may result in criminal charges. This is particularly true for transport companies (which have difficulty avoiding carrying foreigners) and employers (who may be better able to avoid employing foreigners at all). Other people, going about their daily life, also become targets of this criminalisation such as landlords, doctors, friends etc. Contact with foreigners increasingly becomes associated with criminal law. The result may include rising levels of discrimination against persons suspected of being foreigners (often on the basis of race, ethnic origin or religion), xenophobia and/or hate crime.

Espeth Guild, Criminalisation of Migration in Europa: Human Rights Implications, Issue Paper Commissioner for Human Rights, 2009, 11-12

The exclusion from social protection and the criminalisation of irregular immigrants constitutes a challenge for human rights, which take human dignity as their very starting point . To what extent do human rights affect the exclusion of irregular immigrants from social protection? In fact the answer to this question is a contentious one. There are some,

[54] Slingenberg, 43

for example Cholewinsky[55] and Mikkola[56], who argue that international human rights contain an obligation for the state to provide social assistance to enable a migrant worker to live in dignity. Others maintain that such a general obligation under international law does not exist[57], or that it is at least problematic.[58] For example in his recent extensive research on the position of irregular migrant workers in social security, Klaus Kapuy came to the conclusion that explicitly binding international legal obligations to protect irregular immigrants are far and few between, and not so much stemming from international human rights, but much rather from very specific EU-instruments, such as the EC Return Directive 2008/115 and the EC Directive 2004/81 on victims of human trafficking, which contain obligations to provide emergency medical treatment. [59] The author does not rejoice in this conclusion, he simply deduces it from the state of positive law.

In the meanwhile, we would like to add to this debate that even while the case at the core of the exclusion of irregular immigrants from social protection is left untouched by international human rights, there seems to be an increasing number of incidents nibbling at the fringes of this core, thereby sometimes taking out quite large chunks.

In the first place, with regard to asylum seekers it is important that protective standards these days not only ensue from EC Directive 2003/9/EC. On 21 January 2011 , in the case of M.S.S. against Belgium and Greece, the European Court of human rights proclaimed the treatment of asylum seekers in Greece (or rather the lack of any treatment) constitutes a violation of Art. 3 of the ECHR.[60] In particular, it follows from this case that if a state does intentionally not provide asylum seekers with the benefits laid down in the EC directive or in their domestic law, they can be held responsible for asylum seekers' living conditions. Similarly, six years earlier in 2005, in the *Limbuela case,* the British House of Lords came to the conclusion that it is illegal for the state to refuse any assistance and housing to asylum seekers, while at the same time prohibiting them to work. [61] The very fact that the host states have some responsibility for the stay of asylum seekers apparently is enough to justify a minimum care obligation.

In the second place, when it comes to the levels of support to be provided to asylum seekers, the ECtHR case law that applies to detainees becomes relevant. This follows from the general supposition of the Court that persons in custody are in a vulnerable position and

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[55] Ryszard Cholewinsky, *Irregular migrants: Access to minimum social rights,* Council of Europe, Strasbourg, 2005, p. 46.
[56] M. Mikkola, 'Social human rights of migrants under the European Social Charter', *European Journal of Social Security*, 2008, 25-59.
[57] Cf. Danny Pieters and Paul Schoukens, *Explanatory report on the access to social protection for illegal labour migrants,* Council of Europe, Strasbourg, 2004.
[58] G. Noll, Why Human Rights fail to Protect Undocumented Migrants, 2010, available at http://ssrn.com/abstract=1553750
[59] Klaus Kapuy, The social security position of irregular migrant workers, *New insights from national social security law and international law*, Antwerpen, Intersentia, 2011.
[60] Application no. 30696/09
[61] Secretary of State for the Home Department versus Wayoka Limbuela, c.s.[2004] EWCA Civ 540

that therefore, the authorities are under a duty to protect them. Asylum seekers are - increasingly so- placed in the hands of the state, therefore this logic should also apply to them. Case law with regard to the treatment of detainees is strict. Relevant factors now to be taken into account are: the existence of sufficient and adequate living space, sanitary products (even toilet paper), adequate food, clean bed linen, medical care and necessary medical aids, such as glasses or dentures, the presence of radio and TV and the temperature of the cell. Lieneke Slingenberg rightly points out that it goes too far project all the relevant requirement with regards to these factors on asylum seekers. Nevertheless with regard to this group there is a minimum care obligation arising from the ECHR and that is whether the person concerned is able to cater for his most basic needs and whether there is any prospect of improvement of the situation within a reasonable time.[62]

Thirdly, a minimum care obligation also seems to develop for vulnerable categories of persons who are illegally residing in their host countries, notably children of irregular immigrants and pregnant women. Thus, for example last year in a complaint lodged by Defence for Children, the European Committee of Social Rights ruled that it was contrary to the European Charter for the Netherlands to refuse support to young children whose parents reside illegally in the country. [63] Part the reasoning of the Committee was based upon the International Convention of the protection of the rights of children. It has been argued that the decision of the European Committee of Social Rights is not so important, because legally non binding. But the same no longer holds true for subsequent Netherlands court cases, directly or indirectly influenced by the decision of the European Committee of Social Rights. For example in 2010, the Court of Appeal in the Hague pronounced that the state commits tort when it sends an Angolan mother with four very young children out on the streets without any support, simply because it is inhumane to do so.[64] This decision is legally binding. Also case law in Belgium, and who knows how many countries more, recognizes a duty to provide social assistance in respect of children of illegal parents, be it at a reduced rate. [65]

Finally, national and international case law allows for exceptions to the exclusion of illegal foreigners in cases of medical emergencies. There is an increasing number of national and ECtHR decisions, which express duty to provide some form of relief in such situations. [66] Very often such decisions are human rights inspired and taken on grounds of the merits. All the reported cases are a testimony of the growing impatience of human rights authorities with rigid uncompromising exclusions of rights for irregular immigrant. The underlying current on which this case law is based, rather streams towards a some form of recognition of minimum social care responsibility for irregular immigrants than away from it.

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[62] Slingenberg, 363.
[63] Social Rights Committee 20 October 2009, Defence for children versus the Netherlands, Complaint 47/2008.
[64] Court of Appeal The Hague 27 July 2010, *LJN* BN2164.
[65] Kapuy (2011), 3-1-304.
[66] Slingenberg, Katrougalos (2011)

8. **Final observations**

What conclusions can be drawn from part A of this study. The overall picture is that the dynamics of in- and exclusion is that access to social security is rendered more difficult while the scope of application is more closely linked to the national border (retrenchment to the national borders). These trends are allowed to take place without too much opposition from international law. Only in emergency cases or in relation to vulnerable groups international human rights raise some minimal barriers. Perhaps this outcome is in itself is not so surprising, what is more relevant is that changes in the social security position of migrants are so strongly and inevitably linked to the exogenous policy areas of immigration and civic integration, or even higher notions of citizenship that affect the three spheres simultaneously. It is as if the struggle for the survival of the national state has become fully exposed in social security. How should we judge this hegemony of immigration policies on social security?

This point has been addressed by Klaus Kapuy in his research dealing with the social security position of irregular immigrants . What makes this research interesting is that Kapuy actually proves that there is such a thing as an original social security position. He finds this position by comparing the social security position of irregular immigrants with those of persons who engage in undeclared work. The outcome of the latter positions reflects the inner logics of social security in a much purer way.

> "What do we mean by social security considerations and social security logic? We mean the objectives, the basic principles and the concrete design of a given social security scheme. However, it is not necessary to identify all these characteristics of a given scheme precisely, in order to tell what the scheme's logic is like. Instead, we can look a the legal position of national workers, especially those engaging in undeclared work. In the treatment of national workers, the objectives, basic principles and design of social security law finds expression. The treatment of nationals whose work is not declared, in addition, shows us the impact of non-affiliation and of non-payment of contributions on entitlement to benefits. This is important, since irregular migrant workers for the most part work in the black economy. They and their employers usually want to avoid contact with public authorities (...). Therefore, if we want to determine the social security situation of irregular migrant workers according to the logic of social security, we can take nationals who engage in undeclared work as a point of reference. However, in the exceptional cases where the work of irregular migrant workers is correctly declared, it seems only logical that our point of reference should then be nationals whose work is declared, and not national whose work is undeclared."
>
> *Klaus Kapuy, The social security position of irregular migrant workers. New insights from national social security law and international law, Antwerpen, Intersentia, 2011, 638*

According to Kapuy it is logic of social security and not considerations of immigration policy that should determine the social security position of immigrants. This will not necessarily result in more generous attitudes towards immigrants, but merely to more equitable results in individual cases. For example, if we would apply the residence test to irregular immigrants most of them would not pass by reason of their uncertain ties with their country of living. The situation will only become different when an irregular immigrant has stayed in his host country for a longer time, perhaps with the knowledge of the immigration authorities, and has been allowed to build up social and economic ties there. Then the outcome of the residence test in that individual case might be a different one. Also in his view social security rights which are vested in civil law (labour law) obligations of the employer, such as benefits for industrial accidents and continued wage payments in case of sickness, should not necessarily be affected by immigration status. Interestingly, in the Netherlands labour rights are indeed left untouched by the "linkage principle".

It is not difficult to be sympathetic towards Kapuy's point of view. It expresses the strongest of preference for sphere separation. But suppose this option would not be realistic because states give more priority to realising migration policy objectives than to creating a body of uncontaminated social security law, what then should be the plight of immigrants? This is the challenge we will take up Part C of this study, dealing with alternative approaches to social protection for excluded immigrants.

PART B: THE POSTION OF MIGRANTS IN INFORMAL SOCIAL SECURITY

9. Preliminary remarks

'Formal' and 'informal' social security

This part of our report is, in a number of ways, the 'negative image' of the first. In the first part, the main focus was on formal state regulated institutions that provide social security within migrants' countries of residence. However in this part our point of departure will be the existential needs of migrants residing in the Netherlands, the interactions they engage in to meet those needs, and the web of social relations and normative structures that inform those interactions. This approach is often referred to in the literature as an 'informal' approach to social security . The term 'informal' is somewhat misleading, since it implies a dichotomous relationship to the above described institutional approach, which would then be referred to as 'formal'. However, formal social security institutions are not necessarily absent from this so-called 'informal' analysis, nor do the social phenomena that it describes stand separate from state institutions. On the contrary, state institutions may well be involved. Nonetheless, since the term 'informal social security' has by now become quite current, we too shall adhere to it.

Insights from the informal perspective

For our purposes, an informal approach to social security offers a number of new insights. First, the focus on the migrant as a social actor involved in a complex of social relations relevant to social security brings to the fore that migrants are not only potential receivers of social protection, but that they can function as providers of social security as well, both in their nations of origin and in their nations of residence. This even applies to undocumented migrants who, as is the case in the Netherlands, are not in a position to pay income taxes or social security contributions. Undocumented migrant domestic workers, for example, enable Dutch women who would otherwise be spending time performing unremunerated work in the home, to engage in paid labour – often on a professional level – and generate income taxes and social protection premiums. Indirectly then, these migrants contribute to the formal Dutch system of social security, while at the same time replacing the informal social security their employers have previously provided in the context of their family obligations: home maintenance, child care and (possibly) elderly care. At the same time

these migrant domestic workers, like other migrants worldwide, contribute to the large volume of remittances being sent back to their countries of origin. To a significant degree, these remittances help finance education and health care, services that states have retracted from in many migrants' countries of origin under the pressure of the social adjustment programmes imposed by the IMF in the 1980's and 1990's (Fergusen; other literature?).

A second insight follows from the fact that informal social security arrangements lack the national bias which is characteristic for the formal social security system In part A of the study we have shown how national social security systems are interlinked by an international system of co-ordination shaped by bi- and multilateral agreements, albeit to varying degrees. Nonetheless despite the existence of this international system, formal social security schemes remain nationally shaped and oriented. By focussing on the needs of migrants, rather than on national institutions that might or might not address those needs, we are able to map out a broader range of social relations that migrants engage in to meet their needs. Some of these may be centred in their countries of origin, others in their countries of residence and others still may link to multiple localities. As will be shown, informal social security arrangements have a highly transnational character.

Thirdly, the informal approach moreover makes it possible so show how social structures and institutions in one national setting may interact with and intertwine with those in another. As we shall illustrate, irregular migrants in the Netherlands have been able, to a degree at least, to secure their needs despite their increased exclusion from national state regulated forms of social security, thanks to the web of social relations with which they engage in a transnational context. In the institutional approach outlined in part I of this essay, social protection is conceptualised as a process that is distinct from that of social integration. As explained in that part, the latter has come to figure as a prerequisite for the former, through the mediating role of migration law. By placing needs at the centre of analysis, rather than the specialised national institutions that may or may not address them, we are able to highlight how migrants become integrated into their societies of residence by virtue of the arrangements they make to meet their social protection needs. The fact that migrants are excluded from formal social security does not mean they do not take part in other reciprocal relations of mutual support within that same society. The contrary is the case. However as we shall also argue, informally regulated systems of mutual support and solidarity are not infinitely resilient. In this respect they are no different from the formally regulated ones. Nor are they isolated from the exclusionary implications of the converging spheres as described in the first part of our essay. As we shall argue, undocumented migrants risk becoming doubly marginalised: through their increased exclusion from the forms of social protection provided by specialised national institutions, and by the increased disqualification of various transnational social structures on which they depend to secure their present and future needs. As we shall discuss further on the dominance of immigration

policies over social security also affects informal social security arrangements and this has exclusionary effects.

To summarise, in focussing on migrants and the social relations they are involved in, the informal approach brings into view both how migrants mobilise these relations to meet their own needs and how these relations commit migrants to meet the needs of others. It enables us to link the spheres of social security in migrants' countries of residence with those in their countries of origin and allows us to expand our normative analysis of the distribution of social risks beyond the national framework. It pushes us to acknowledge and address the fact that if certain human needs that arise within a national society are excluded from the sphere of institutionalised national responsibility they will none the less have to be resolved by someone, somewhere. It is not enough to examine to what degree national social security schemes should take direct responsibility for meeting these needs. We also need to address the question to what degree the formal national regulatory sphere should actively facilitate other social protection arrangements or, at least, limit restrictions on their functioning.

Composition of Part B

In the next paragraph 10 we shall first briefly discuss three examples of how migrants in the Netherlands have mobilised social relations, in a transnational context, to meet their needs for social security. As we shall argue, their arrangements to meet their own needs closely entwine with their arrangements to meet the needs of others. Given the reciprocal nature of social security arrangements, describing migrants as (potential) receivers of social protection, inevitably also involves describing them as providers of social security.

In this description will make use of a empirical study that was conducted in 2008 and 2009 among migrant domestic workers residing in the Netherlands and some of their family members residing in Ghana, in the first case, and the Philippines, in the second.[67] In our analysis, we shall relate the results from this study to those of another study conducted in preparation of this essay by the Stichting Bevordering Maatschappelijke Participatie (BMP: Foundation to Support Civil Participation) : "Over de grens. Een onderzoek naar migranten zonder papieren en transnationale vormen van sociale zekerheid" (Crossing the Border. Irregular migrants and transnational social security arrangements. Further: BMP report), as well as to the broader literature both on the position of irregular migrants and on transnational social security arrangements.

[67] For this research, Sarah van Walsum collected data through semi-structured interviews with fifteen Ghanaian and seventeen Filipino domestic workers in Amsterdam. Subsequently she spent three weeks in respectively Ghana and the Philippines. During each of these periods she stayed with and/or interviewed family members of five informants from respectively the Ghanaian and the Filipino segments of the Amsterdam sample. This research was funded by the Dutch Research Council (NWO) as part of the collaborative ESF/EUROCORES project: Migration and Networks of Care in Europe.

Following our description of this empirical material, paragraph 11 is then reserved for a more general discussion of how the various (transnational) social relations (both formal and informal) that are relevant to the social security of irregular migrants intersect with each other. In doing so, we shall be revisiting the notion of converging spheres of social security, migration and integration introduced in the previous chapter.

Finally in paragraph 12 we will draw some conclusions.

Irregular immigrants and regular immigrants

Although our main focus is on irregularly resident migrant workers, we have also included regularly resident migrants in our empirical descriptions and analysis. By doing so, we can explore how differences in status may impact on social security arrangements within specific social structures. As we shall argue, the issue is not only whether a particular state takes part in the social security arrangements of a specific group of persons living and working within its territory, but also how it does this, and, more specifically, how its involvement intersects with that of other (transnational) social structures that are also implicated in those arrangements. As we shall make clear, the transnational social security arrangements that are taking shape, involve interwoven networks and institutions in which state actors and concerns of national welfare do play a role, but in various ways and to differing degrees.

10. Transnational social security arrangements: three examples

In this paragraph, we shall examine how and to what degree transnationally oriented migrants from Ghana and the Philippines are managing issues of social security, in spite of being (partially) excluded from formally regulated provisions in the Netherlands. The three aspects of social protection that we will report on relate to are: coverage of health risks and other calamities affecting migrants' kin in their countries of origin, transnational arrangements for housing and (paid) care, and migrants' financial provisions for retirement in their countries of origin. The first example explores the (possible) cumulative gains that can accrue from including transnational oriented migrants in formal social security schemes. The second explores how regimes of care in migrants' countries of origin and residence have become entwined with each other, and the normative issues that this raises. The third explores how the convergence of restrictive migration policies with other regimes of exclusion can undermine transnational strategies to secure social protection.

10.1 Transnational effects of including migrants into national health care benefits

Until recently, the hospitals in Ghana worked on a "cash and carry" system. Patients who were unable to pay, did not receive any care. In the event of an emergency, the pressure on migrants living abroad to provide their family members in Ghana with the necessary funds to access health care could be considerable.[68] Starting in the early 1990's, communal health insurance schemes started to develop in various districts in Ghana. In 2007, these local initiatives were taken over by the Ghanaian government and successfully applied nationwide.[69]

While at first sight these developments are only relevant to the social protection of persons in Ghana, and not in the Netherlands, they never the less have had important implications for the material security of Ghanaian migrants residing in the Netherlands. These are now better able to manage their savings for their own present and future needs. They no longer have to cover all the medical costs of chronically ill relatives, or plunder their savings and/or borrow funds on short notice to cover the costs of a medical emergency in Ghana.

The successful implementation of a national health insurance scheme in Ghana was not self-evident. Anthropologists have often made the point that paying premiums for insurance is not something people in rural African societies are inclined to do.[70] Lothar Smith however has reported on extended families that have set up calamity funds, primarily meant to cover funeral costs in Ghana. What is interesting to us, is the initiating role that migrant family members living in more affluent nations have played in setting up these schemes. Quoting from one of his informants Smith explains:

> In origin the calamity fund was organized in recognition of the fact that those abroad were too often called upon for any problem, with those in Ghana demanding their financial support when those who are abroad might actually be out of a job or in other financial difficulties. Therefore, to add to their financial support of such events like funerals, the calamity fund was created. We have agreed within the family that those in the village pay 2,000 Cedi in the case of women, or 5,000 Cedi for men, per month [i.e. 20 and 50 Eurocent]. Family members in Kumasi have to pay higher contributions, and those in Accra pay even more. Finally those who are abroad will pay the highest monthly contribution…(Smith 2007 p. 194)

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[68] Lothar Smith. *Tied to migrants. Transnational influences on the economy of Accra, Ghana*. Leiden: Africa Studies Centre, 2007, p. 181

[69] Research on the history of this national health Insurance scheme has been done by Professor Irene Agyepong of Legon University, Accra Ghana.

[70] See for instance Mirjam Kabki. *Transnationalism, local development and social security. The functioning of support networks in rural Ghana.* Leiden: African Studies Centre 2007, p. 22, Platteau 1991 (zie stuk F&K)

Our data indicates moreover that Ghanaians are not averse to paying for health insurance once they have settled in the Netherlands. On the contrary. Informants who were documented and statutorily obliged to pay never complained about that fact, and one woman who was undocumented and therefore excluded from regular insurance, had taken out tourist insurance so that she would at least be covered in the event of an accident. Smith even reports of a man who, after having returned to Ghana, continued to pay premiums in the Netherlands to cover the insurance of his wife and child who had stayed behind in the Netherlands, and for himself as well.[71]

One of the people who were instrumental in establishing the collective health insurance programmes of the 1990's was Ineke Bosman, a Dutch doctor who had been practicing in the Brong Ahafo region since the 1970's. During an interview she reported that she had initially experienced difficulty convincing people in her district to spend their precious cedis on insurance premiums, even though they were well aware of the disadvantages of the "cash and carry" system, and eager for a better alternative. In the end the more affluent members of extended families, who would normally be appealed to in emergency situations, played a crucial role in convincing these villagers to give the system a chance. Although Dr. Bosman could not confirm that family members living abroad had been among those exerting such pressure, the parallels between her account and that of Smith concerning the funeral funds is striking.

It seems likely to us that migrants living abroad will indeed have been included in family discussions on health insurance such as those described by Dr. Bosman. It also seems likely that they will have brought into these family discussions their own experiences with already established health insurance schemes in their countries of residence. Legally resident migrant family members in particular will have been in a position to encourage participation in a Ghana based insurance system, since they will have been insured themselves, and hence familiar with the workings of such a system.

This example shows how the social protection offered to migrants who have been included in the institutional arrangements offered by the Dutch state, can reach beyond the borders of the Dutch nation. The indirect positive effects on the social protection of dependent kin in migrants' countries of origin, can in turn help augment the social protection of the migrants in the Netherlands. Such forms of cumulative gain are not normally included in the calculus of the costs and benefits of specific social protection regimes, made from an institutional perspective.

[71] P 181. Since registration in the Dutch municipal registrars is a prerequisite for regular health insurance in the Netherlands, I assume this man was still legally resident in the Netherlands.

10.2 transnational arrangements for housing and (paid) care

In this next section on transnational social security arrangements, we shall again consider how social protection regimes in migrants' countries of origin and their countries of residence can intersect, but now looking at the implications of such intersection for migrants who have been excluded from institutional forms of social protection in their countries of residence. The focus here is specifically on migrant domestic workers and their engagement in the construction of homes in their countries of origin, in the maintenance of homes in their countries of residence, and in arrangements of care in both localities

Paradoxically, measures designed to exclude irregular migrants from various facets of Dutch society have in fact driven many of them into the heartland of that society, its citizens' private homes. As restrictions on the employment of irregular migrants in other sectors came to be more vigorously enforced, more and more irregular migrants – both men and women – have come to respond to the increasing demand for paid help in the home, where such controls are rare due to privacy considerations. In this context of intimacy, some may succeed in deriving a degree of social protection from their relationship with their employers. Our data shows how some Filipino domestic workers in particular, who counted a relatively large number of professionals among their employers, were able to access medical care via their employers' networks. All domestic workers moreover reported relying on their employers' networks for finding new opportunities for employment.

As Dutch immigration policies become more restrictive, irregular domestic workers may come to rely on their employers for shelter as well. One woman reported that she knew of several Filipinas who worked as live-in domestics in an affluent suburb outside of Amsterdam, where the houses are roomier than in the Dutch city centres, and are more conducive to such arrangements. Formerly, according to her, these women would have been eager to leave such a live-in arrangement because of the limits to privacy and personal freedom that it implied. They would have moved into the city, found a place to stay, and looked for work on a live-out basis. The women she spoke to more recently however seemed reluctant to leave their employers' homes because of the increased risks involved in illegally sub-letting an apartment in the city – one of the few housing arrangements available to irregular migrants. In an effort to gain more control over the low-cost housing sector, Dutch housing associations had become more active in tracking down people who sublet illegally.[72] Rumours circulated of Filipinos being caught during such controls, handed over to the immigration authorities and deported. In this context of increased controls, providing domestic services on a live-in basis had become more attractive despite the limits on privacy and the increased dependency on the employer.

In migrants' countries of origin, too, issues of shelter and care are often intertwined. Lothar Smith in his PhD dissertation already quoted above reports how Ghanaian migrants

[72] See, for example, "Corporatie (i.e. a housing corporation) boekt zege op onderverhuurder," NRC Handelsblad (dutch daily newspaper) (19 July 2008).I'm sorry – I only have date of publication; not page number.

in the Netherlands have constructed dwellings in their hometowns to express their success as migrants and their commitment to the extended family there, but also to secure shelter for themselves in their own old age, in a place where they expect to be looked after and kept company by their kin.[73]

Our own data confirms Smith's findings concerning the Ghanaian case. [74] Interestingly, the link that he describes between investment in real estate and in future care also emerges in our data concerning Filipino migrants. Thus one woman told how she had been able to purchase a lot in a suburb of Manila and build a house there within six years after having come to the Netherlands as an aupair. Once the house was completed, she had her mother move into it, thus ensuring the house would be looked after in her absence, while saving herself the costs of having to pay her mother's rent in Manila.

What had initially been intended as an individual investment, was however put under pressure by family commitments. Concerned on the one hand that her mother, who had developed diabetes, would need care and help in the home, this woman subsequently invited her unemployed younger brother, his wife and their two children to join her mother in the house. By having her brother move into her house, my informant could release him and his family from the squalor of the overcrowded home that they had been sharing with the wife's family, while ensuring her own mother of the help and care that she increasingly needed. Hence, while she had initially invested in a home of her own, this woman ended up accommodating her family members' needs.

Arguably, in doing so, she was also investing in her own future, since her brother's children might feel indebted to her, and inclined to support her and care for her in her old age. Not everyone who goes abroad can count on such support upon returning however. Our data also yields examples of migrants who have spent their entire adult lives abroad working in private homes, who subsequently returned to care for their aging parents, but had no relatives they could count on to look after them in return. One Filipino woman who was in her early fifties had spent most of her adult life working in Malaysia, Singapore and Hong Kong as a domestic worker. Although always legally resident, she had never been entitled to settle permanently in any of those countries. She had never married and had no children of her own. She had returned to the Philippines to look after her aging mother. She

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[73] Lothar Smith. 'A home in the city: Transnational investments in urban housing.' Paper presented at *XVI ISA World conference of Sociology, Research Committee on Sociology of Migration*, Durban, South Africa, 23-30 July 2006, p. 22/23; Alberto Mazzali, Arthur Muliro, Angela Zarro and Marco Zupi, 2006. *It's our problem too: Views on African Migration and Development. Major outcomes of an International Workshop, a Multidisciplinary Delphi Consultation and Interviews* (research paper). Rome: Centro Studi di Politica Internazionale (CeSPI), p. 42/43.

[74] See further: Sarah Van Walsum. 'Migration and the regulation of care. Notes from a transnational field of enquiry.' Paper presented at the conference: *Making Connections: Migration, Gender and Care Labour in Transnational Context*, 14-15 April 2011, University of Oxford.

had three sisters, but all of these were married and settled abroad with families of their own. This woman worried about her own future after her mother should pass away.

10.3 financial provisions for retirement in the country of origin.

As the populations of the more affluent nations age, their societies are becoming more dependent of the care labour and household services being provided for by young adult migrants coming from Eastern Europe, sub-Saharan Africa, South America and South East Asia. To the extent that these migrants are rendered unable, through live-in work arrangements and/or restrictive migration policies, to engage in close physical contact with their kin, establishing and/or maintaining a family remains problematic for them. Making suitable arrangements for support, care and company for these and other migrant workers in their old age is arguably one of the most urgent challenges at present in the sphere of social protection and migration (Williams).

For migrants who are excluded from formal arrangements of social protection in their country of residence, and who are unable or unwilling to rely solely on the future support of family in their country of origin, commercial insurance or other financial products can form a solution. Under the auspices of the Filipino Ministry of Labour and organisations such as UNICEF and Oxfam-Novib, some Filipino NGO's have set up projects that link (undocumented) migrants in Europe to rural financial institutions in the Philippines.[75] These institutions finance development projects that are screened for their business potential by micro finance experts, and are covered, to a degree at least, by an insurance funded by COS, a Dutch NGO active in the field of third world development.[76]

Although they are not formally involved in this project, interviews with Filipino state actors (including the Filipino consulate in the Netherlands) revealed that they follow it with interest and sympathy through informal networks. The financial position of returning migrants is a topic of concern for the Filipino Ministry of Labour, the worry being that some may return worse off than they left. While regular migrants can be approached through consular officials abroad, and encouraged to continue contributing to national social insurance schemes, irregular migrants are harder to track down and include in such schemes. Transnationally co-ordinated investment projects like the one described here form an alternative strategy for ensuring some financial security for these migrants upon their return to the Philippines.

Irregular migrants taking part in this project are however hampered in their participation by the fact that, as irregular migrants, they are excluded by Dutch law from

[75] www.ercof.org
[76] See also: Anonuevo, Dizon-Anonuevo, Gonzales et al, 2008...

regular banking transactions. In fact, in order to send their money abroad, they either have to access the bank account of a legally resident countryman or woman, take part in a collective bank account run by a legally resident member of some form of association,[77] or rely on family in the Philippines to transfer remittances to their account there. Hence their ability to secure funds for their personal future needs remains dependent on the loyalty and honesty of their kin and/or members of other social networks. State controls of transnational banking, which are closely linked with state controls of migration, hence aggravate the exclusion of irregular migrants from state regulated forms of social protection, by complicating the realisation of alternative arrangements through transnational financial transactions.

11. general discussion of the outcome of the case studies

Interaction between formal and informal social security arrangements

As these three examples show, irregular migrants , who often work in industries and services that are central to the welfare of the citizens of their host countries, also play a key role in initiating and maintaining transnational strategies for achieving social protection in their countries of origin. It is important to realise that, while state actors may not play a central role in these arrangements, they will not be entirely absent from them either. The micro-finance scheme in the Philippines is being supported informally by highly placed state actors there, but is also being frustrated to a degree through Dutch state policies that exclude irregular migrants from bank transactions. The collective health insurance schemes in Ghana have by now been taken over by the Ghanaian state – their initial success may well have been supported by the fact that regularly resident Ghanaian migrants living in the advanced welfare states of the EU had become familiarised with the obligatory health insurance schemes there. States that rely – officially or unofficially – on the labour of migrant domestic workers to resolve care issues in their own societies, can compromise those migrants' own future care needs by restricting their options to engage in family life. The examples show that even when social protection arrangements are not state driven, the context of state regulation remains relevant. It affects the degree to which migrants, who have been excluded from state regulated national forms of social protection, can initiate, develop and profit from alternative transnational forms of social protection, such as those described here.

[77] See BMP report for a description of such a collective banking arrangement.

Modern communication technology

Increasingly, modern communications technology is facilitating long distance communication and, in doing so, has an impact on the field of transnational social relations. Since many irregular migrants are unable to travel, due to visa restraints and/or the high costs of intercontinental travel, they rely on long distance communication to maintain their networks, supervise the care of their dependents, convey their emotional involvement, control the distribution and spending of their remittances and manage any property or business interests they might have there. Digital payment systems that work via mobile phones may, moreover, make it easier for irregular migrants to circumvent restrictions on their use of banking institutions (Van Walsum 2010). But if modern communication technology has done much to facilitate international communication, enforced distance can none the less weaken claims to future support and care. It makes it impossible, for example, to attend important ritual celebrations such as funerals, where mutual ties of commitment and solidarity are enacted and confirmed. Similarly, marital bonds must be maintained without physical contact, resulting in forced infertility or – if a child is born from an adulterous relationship – possibly divorce. Certainly in societies where people rely on their children for care and support in their old age, such complications have implications for social security of the couple involved.

Varying structures of informal support

As the examples above make clear, irregular migrants, although excluded from formal social protection in the societies they reside in, continue to form part of a whole array of social relations. Some of these are closely connected to their position as workers, and include employers, associations of particular categories of migrant workers (such as migrant domestic workers) and trade unions. Others involve more long term reciprocal relations, such as those between kin, or between members of a particular faith association. A comparison of the Filipino and the Ghanaian case suggests that different categories of irregular migrants may rely on different constellations of support networks, with different implications for their social protection arrangements.

The Filipino case was largely structured through the transnational labour market in domestic work. Most had come to the Netherlands through an au pair agency, or through a travel agent acting as a broker for migrant workers, or through family already active on the market in household services and willing and able to recruit colleagues from the Philippines, with or without the assistance of one of their employers. Once in the Netherlands, these Filipino domestic workers relied to a large degree on colleagues and, as discussed above, employers to meet their needs for shelter, jobs and medical assistance. On the other hand, having identified themselves with their field of work, they were also active at organising

themselves as domestic workers, initially via self-organisations and subsequently as part of the Dutch trade union movement.[78]

While the Filipino's were almost all tied into more or less institutionalised networks of domestic workers, the Ghanaians were not. The networks that they were linked into consisted mainly of extended families, faith groups, home town associations or Ghanaian self organisations, and these were the networks they primarily depended on for access to shelter, employment and medical care. While many of these Ghanaian networks most likely included a substantial number of domestic workers, this was incidental, and not the key focus of shared identity that drove them to seek each other out. These observed differences reflect findings presented in the general literature on Filipino domestic workers (whether documented or undocumented) working worldwide on the one hand,[79] and on irregular migrants who migrate in the wake of established and legally resident countrymen on the other.[80].

Of course, this distinction between the employment focussed networks of the Filipino's and the family, church and hometown related networks of the Ghanaians should not be exaggerated. Some Ghanaians had been recruited as workers, albeit through their extended family, and some Filipino's had been brought over to work as a domestic worker by a family member already settled in the Netherlands and working in the business. And while Ghanaians did not initially organise themselves as domestic workers, they did connect with other domestic workers within their family, faith group and hometown networks to exchange information on wages, possible employers and so on. In the process, some did eventually join in the organising initiatives of the Filipino domestic workers or set up their own domestic workers' association, linked to the Dutch trade union. Moreover, those Filipino's who did have family members living in the Netherlands, were often able to appeal to these for support, while some of my Ghanaian informants also had close ties with employers, who also contributed in some way to their social protection. In both cases, the possibilities offered through social or employment networks might be supplemented on the one hand by commercial alternatives offered by brokers, often via the internet, and on the other hand by Dutch religious institutions and NGO's - some of which might be (partially)

[78] Sylvia Günther. Struggling for Recognitions. The unionization of (un)documented migrant domestic workers in the Netherlands. Master's thesis, University of Amsterdam, 2011.
[79] See for example: Rhacel Parreñas. Servants of Globalization. Women, migration and domestic work. Stanford: Stanford University Press, 2001.
[80] See for example: Francine Bashi. Survival of the Knitted. Immigrant Social Networks in a Stratified World. Stanford: Stanford University Press, 2007. See also Staring's work on the role legally settled Turkish migrants play in providing irregular migrants from Turkey with housing and jobs. A small-scale empirical study shows how ethnic Turks from Bulgaria have also been able to rely on these same networks of settled Turkish migrants (BMP). See finally sources quoted in the BMP report on Ghanaians in the Netherlands: Mazzucato and Broere.

financed or at least condoned by local authorities (cf Engbersen et al 2002; Van der Leun 2003).[81]

Through ties with the households they work for, affiliation to legally settled countrymen or involvement with Dutch religious organisations, NGO's or trade unions, irregular migrants not only manage to develop and expand on arrangements for social protection, they often also gain access to instruction in the Dutch language, in the workings of Dutch bureaucracy, and in the possibilities and impossibilities offered by Dutch law – integration in the formal sense of the word. There is a double irony at work here if we consider that their exclusion from the formal channels of social protection has come to be justified, in part at least, on the grounds of their assumed lack of integration.

Varying dynamics of dependency

Employers' generosity has its shadow side. A worker whose employer has provided for health care, shelter or other basic needs, will feel indebted and dependent as a result. As Sabrina Marchetti has argued convincingly in her master's thesis on the position of Filipino domestic workers in Amsterdam and in Rome, the dependency vis à vis the employer that results from an undocumented status keeps the workers involved caught up in a dialectic of favours/gifts and expressions of gratitude, making it difficult for them to extricate themselves from a certain degree of servility.[82]

In the Netherlands irregular migrants are not excluded from the protections provided by labour law, even if their employment is unauthorised. These protections include claims relevant to their social protection, such as the right to minimum wage and the right to paid sick leave. Since 2006 migrant domestic workers, including those with irregular status, have been welcome to join the Dutch trade union movement. Through the trade union, they are educated in their rights vis à vis their employers, and can feel strengthened in their negotiations with their employers. However, as various forms of exclusion from formal social protection accumulate, migrant domestic workers with irregular status can be forced to depend more on their employers, for income but also for access to medical care and shelter, and so risk becoming more vulnerable in their negotiating position. One of the Filipino women we interviewed was an active member of a self-organisation of domestic workers and of the Dutch trade union. She worried about Filipino domestic workers who had elected to continue working on a live-in basis with a single employer, for fear of the risks of apprehension and deportation that working for multiple employers on a live-out basis

[81] Staring has described the emergence of financial services and labour and housing brokerage within the Turkish community in the Netherlands. Some of my Ghanaian and Filipino informants reported finding jobs or homes via Turkish brokers.
[82] *Ibid*.at 77-84.

implied.[83] Whenever she approached such workers to encourage them to organise, they generally refused, saying their employers would not approve.

The extent to which irregular migrants can gain access to social networks in their countries of residence, and the degree to which they can rely on receiving support from those social networks, is not self evident and depends on many variables related, among other things, to shared histories and the extent to which support is deemed to be justified and deserved (Böcker, Van Walsum 2000). This also follows from a study conducted in the US and the UK, of West Indian transnational networks shows family ties do not automatically result in concrete acts of support by the American sociologist Vilna Bashi (Bashi, 2007). In Bashi's analysis, those settled migrants who provide support to newcomers form a specific group, with specific characteristics. They are socially engaged persons, often actively involved in both their country of origin and their country of residence. They are successful in their work, and/or have a broad and diverse network that makes it possible for them to act as brokers on the employment, housing and/or marriage markets. Because these settled migrants owe their success as brokers to their good reputation, they must be careful in how they select those they help out. Bashi's study shows how religious organisations can play an important role in helping them to select candidates of good repute, who can be relied on to perform well.

The case study on Turkish Bulgarians, included in the BMP report, fits well with Bashi's analysis. This study was conducted among Turkish Bulgarians, most of whom had been approached via a Turkish woman who had helped them, via her networks, in finding housing, odd jobs and support in paying medical bills. Similarly, the case included in the BMP report on the Latitude Care Network, a religious organisation that provides support to Ugandan refugees, also profiles the role of a single individual who has been successful in building a network that includes key contacts both in her country of origin and her country of residence, and in mobilizing this network to the benefit of (irregular) migrants, among other things by providing micro credit facilities both to refused asylum seekers in London and to development projects in Uganda.

BMP, Over de grens. Een onderzoek naar migranten zonder papieren en transnationale vormen van sociale zekerheid, Amsterdam, 2011.

Like employment relations, relations based on reciprocity too can involve a high degree of dependency, with the accompanying risk of abuse, although this is generally tempered by social control (Staring 2001; BMP report). The retraction of formal state

[83] Besides the risks involved in having to sublet lodgings illegally, there is also the risk of being apprehended while travelling to and from work. In February 2010, thirty undocumented domestic workers workers were apprehended and placed in alien detention following a joint control action carried out by the bus company transporting them from their place of residence to the suburb where their employers lived, and local police charged with migration control..krantenberichten

regulated alternatives can aggravate irregular migrants' dependency on family or other support networks, increasing the risk of abuse. It can also place their transnational networks under pressure by forcing irregular migrants to bank on a level of support from legally settled migrants that the latter may not consider fair or proper. Legally settled migrants may avoid newcomers so as not to have to face their possible condition of need, and irregular newcomers may feel forced to dissemble so as not to place the legally settled members of their extended family, faith group or other social networks in a position of embarrassment. Where experienced needs exceed shared notions of fitting commitments, a painful silence can fall filled with unexpressed sentiments of accusation, misunderstanding and impotence. (Van Walsum 2000). Under extreme pressure, informal structures of solidarity can collapse. (Finch; Von Benda Beckmann & Von Benda Beckmann).

The collapse of an irregular migrant's social support structure not only affects that migrant, but also those settled migrants or citizens with whom he or she is closely linked. When an irregular migrant with Dutch children is unable to provide them with sufficient shelter, food and clothing, this can result in a loss of custody and placement of the children in institutional care or foster homes, thus profoundly affecting the family life of Dutch citizens.

When social networks such as those based on kinship, faith or place of origin are unwilling or unable to support them in their needs, irregular migrants may turn to local authorities, forcing these to confront the normative issue to what degree they may deny these people their basic needs, on the sole ground that they lack the formal right to reside (Van der Leur 2003). In Part A of this report, we have reviewed some of the case law that has resulted from this confrontation, and that suggests that there is a limit – however minimal - to the extent to which states can exclude irregular migrants from formal channels of social protection.

12. Conclusions

In this second part of our report, we have shifted the perspective from that of the state as provider of social security, to migrants themselves and their involvement in a broad array of social relations in which they both rely on others to provide them with care, support or shelter – now or in the future – and are instrumental in providing for the basic needs of others, both in their country of origin and in their country of residence. Particularly the involvement of irregular migrants in the provision of services that formerly would have belonged to the circuit of informal social security arrangements provided by citizens among themselves, reveals the limits of a nationalist framework. As Fiona Williams put it in a report

that she wrote in 2009 for the United Nations Research Institute for Social Development on the recognition and redistribution of care, "[m]igration has stretched people's care commitments across the globe and as such challenges the national basis of eligibility to benefits and pensions." [84]

This perspective on social protection also allowed us to show how, besides state regulated provisions, social networks grounded in kinship or faith, a shared place of origin, or common locality of current residence, employment relations and financial products can all play a role in securing basic needs. Forma social security schemes form part of the story, and exclusion from these need not mean exclusion from all other sources of social security.

At the same time however, formally social security does not stand in complete isolation from informally regulated ones. In part A of this report, we discussed the growing convergence between the fields of social security, migration control and integration policy. In this second part, the implications of another form of convergence come to the surface, namely that between migration control and the criminalization of irregular migrants, already addressed in Part A. It is this form of convergence in particular that places the informal, informal social security under pressure.

The exclusion of irregular migrants from regular banking transactions is one example, as discussed above. The limits to freedom of movement that result from stricter visa requirements from another. In the Netherlands, most migrants from outside of the EU, North America, Japan, New Zealand, Australia and some Latin American countries, are subject to visa requirements. Should they return to their country of origin after a period of irregular stay, they will have to wait at least five years before being able to acquire a new visa. Once present in the Netherlands, they will therefore not be readily inclined to leave. As discussed above, this has repercussions for their ability to maintain their transnational social ties. The criminalisation of those who provide irregular migrants with shelter or employment also reflect this form of sphere convergence. While generally justified as measures meant to combat exploitation and abuse, the experiences of migrant domestic workers described above suggest that in practice such measures may very well facilitate abusive power relations, rather than discouraging them.

In the next and final part of this essay, we shall work out the contours for an alternative approach that balances the principle of limited national solidarity with universal protections against the most extreme forms of vulnerability.

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[84] Williams, Fiona. 2009. *Claiming and Framing in the Making of Care Policies: The Recognition and edistribution of Care.*(report) New York: United Nations Research Institute for Social Development.

PART C: TOWARDS A NEW SOCIAL PROTECTION APPROACH FOR FORMALLY EXCLUDED MIGRANTS

13. The need for an alternative approach?

As was observed in Part A of this study, the current trends in migration and social security can be captured by two words: *exclusion* (from the formal system, in particular for asylum seekers and irregular immigrants) and *retrenchment* (to the national borders). The background of these trends can be found in the wish to strictly enforce immigration policies and in the implicit rejection of transnational alignments. These are legitimate, and to a large degree understandable interests. The effects on social security positions in terms of exclusion and retrenchment are moreover logical and coherent. If governments want to improve the effectiveness of immigration policies and encourage the integration of newcomers, they would hardly be helped by giving more rights to irregular immigrants and offering migrants a favourable basket of extra-territorial benefit rights, allowing them to entertain relations with other states as well.

Yet, it would be short sighted only to look the legitimacy of the exclusion arguments and to turn a blind eye to the negative consequences of present day policies. Whatever the legislator does to outlaw the irregular immigrant, this does not mean to say that he does not exist. In fact, the estimated number of irregular immigrants in Europe, ranges between 1.8 and 3.3 million persons; in the Netherlands the group is estimated to be between 60 and 130,000.[85] Due to their lack of legal status both in terms of immigration law and social security, irregular immigrants are easily subject to economic exploitation and degrading treatment. Furthermore, the absence of any protection for irregular immigrants can lead to tension between local and central government, the former having to bear the brunt of the formal exclusion from social security established by the latter. Also, the situation with regard to the exclusion of irregular immigrants is often not as clear cut as it seems, as public authorities tend to condone or even finance non-governmental organisations in their effort to help irregular immigrants, which leads to unclear and seemingly contradictory government practices. Finally, as courts are frequently called upon to remedy the sharp edges of exclusionary measures in individual cases, the harsh policies force a wedge between legislature and the judiciary, which results in unclear legal positions and tensions in the legal order.

The more uncompromising the policies of exclusion are, the more such disadvantages come to the fore. The Dutch policy reflex are illustrative for this: when new legislative

[85] Hamburg Institute of International Economics. Database on Irregular Migration, Working Paper No.4/2009.

measures and stricter forms control appear not to be fully in stamping out the last irregular immigrant, even more stringent measures are introduced. In this way the policies develop and distinct repressive flavour. It shows itself in the rigidity of prohibitions (e.g. no social assistance, not even in emergency cases), in the imposition of harsh sanctions on immigrants who fail to meet their obligations (e.g. no social assistance when a migrant fails to get the right civic integration papers in time), in the incapacity to take into account individual circumstances (e.g. no affiliation to residence based social insurance even if a irregular immigrant is fully integrated) and more broadly speaking in the criminalisation immigrants.

The repressiveness of the recent policy trend creates its demons in the form of unwanted side effects: marginalisation, exposure and individual human beings, social tensions, human trafficking, prostitution and underground activities. Combating irregular migration is like fighting the monster of *Hydra.* Every time you chop off its head, two new ones reappear.

14. Building blocks for an alternative approach

In this last part of our report we raise the question of whether there are any alternative solutions to the issue of social protection of excluded immigrants which would yield better results and which are not necessarily contrary to the interests of the states. Is it possible to turn the repressive policy cycle into a more positive approach? Before we propose a number of concrete steps in this direction, let us first determine the building blocks upon which such alternative policies can realistically be based.

As we argued earlier, from the point of view of the interests of the states the exclusion of irregular immigrants from social security is logical and legitimate. In our proposals we take this as starting point. Therefore, we will refrain from suggesting that irregular immigrants should be (once more) included in the system on the basis of certain rules and principles, at least not beyond what is required from the point of view of respect of basic human rights. [86] We rather want to take the exclusion as a starting point in order see how we can build a social protection construction around it.

Our now approach is based upon three main building blocks. Firstly, respect for basic human rights; secondly, extra territorial responsibilities for immigrants and emigrants; and thirdly, international co-operation in case of return.

a. Respecting basic human rights

[86] Infra, Paragraph 8.

The general assumption here is that state cannot escape the consequences of the obligations from basic human rights, even though these are contrary to their legitimate immigration interests. In line with the internationally recognized categorisation of human rights duties, i.e. between the duty to respect, to protect and to fulfil, states have different obligations in this field. Not only may it be necessary to provide aid in order to relieve urgent individual circumstances (duty to fulfil), they also should refrain from creating obstacles which stand in the way of non state regulated forms of protection, arising from private insurance, employers obligations under labour law and charitable initiatives (duty to respect). Furthermore, the realisation of these private and informal forms of protection should also be facilitated, for example by allowing migrants to make use of the banking system of giving them access to courts. (duty to protect).

b. Extra-territorial responsibility for immigrants and emigrants

It would be a mistake to think that only the receiving states should play a role in the social protection of migrants. In particular when states have an interest in emigration of their citizens abroad, because they depend on remittances they send back to them, there states maintain a responsibility for their emigrants abroad. Some countries have established some interesting precedents for this, for example in Albania where it is possible for emigrants to remain affiliated to the social insurance system on a voluntary basis, or the Philippines and Sri Lank which have established funds for workers overseas. Irregular immigrants may benefit strongly from such arrangements, as they are mostly excluded from protection in their countries of residence or work. Extra-territorial responsibilities may infer that states allow for the export of benefits to other countries. As we will argue, the export of benefits is in no way contrary to the policies of exclusion of irregular immigrants.

c. International co-operation in case of return

Irregular immigrants can be expelled. They can also return on a voluntary basis. The proper return of migrants, be it forcefully or voluntarily, requires international co-operation. The protection of the returnees is part of the package for which states assume responsibility, albeit in a implicit and indirect way. Within the framework of repatriation programmes complex structures have come into being which make it possible for irregular migrants and refused asylum seekers to go back to their home countries or third countries while receiving forms of financial aid. The International Organisation for Migration is involved, as well as the European Commission and national ministries. In turn, these authorities work together with local NGOs that channel the aid to the migrants who co-operate with their expulsion. This aid mostly consists of lump sum payments. Such payments are made available to enable the returning migrants to re-integrate more easily in their countries of origin. These types of aid can be considered to be a new pillar of social protection which evolves out of the complex

relation between the irregular migrant, the host state, the state of origin and international organisations. The question is how the (international) government can help to improve this pillar.

Below we will elaborate further on these three building blocks

16. Respecting basic human rights

15.1 Providing support in individual cases of exceptional vulnerability and need

As discussed in paragraph 8 of this report, the question of whether international human rights include a positive obligation to provide assistance to irregular immigrants is highly contentious one. Some assume such responsibility on theoretical or on normative grounds, others cannot discover such general positive obligation in positive international human rights, in terms of truly binding obligations for the state. Our own observation was that the underlying current on which recent case law is based, rather streams towards a some form of recognition of minimum social care responsibility for irregular immigrants than away from it. This minimum care responsibility however does not express itself in some general right to social and medical assistance, but merely to the recognition of a duty to provide medical support, shelter, or aid in individual situations of exceptional vulnerability and need, for example when young children are involved or in cases of medical emergency. In our eyes, states should except such duty based upon its discretionary powers.

Is it feasible that the international community will take on board the growing body of national and international human rights case law dealing with vulnerable irregular immigrants and accept such duty in an international legal document? States would probably hate it. Yet we would challenge any person to refute that under the present state of the law of all European states, the duty does already exists , if not on the basis of primary legislation, than at least on the basic of local laws e and in case law. It takes more research to provide evidence for this, but we are convinced, that once carried out governments will be provided with ample evidence that an international minimum care obligation is nothing more than a reflection of their national state practice.

15.2 Respecting and protecting informal and private social security arrangements

Non interference in private and informal social security

In 2008 the Committee of Economic, Social and Cultural Rights (CESCR), adopted General Comment no. 19, dealing with the right to social security as contained in Article 9 of the International Covenant of Economic, Social and Cultural Rights (ICESCR) [87] . The document employs the standard trichotomy of duties: to respect, to protect and to fulfil. For our subject this approach yields illuminating insights, as te first two obligations requires the state to respect private and informal social security and to protect the integrity of such arrangements. Due to the exclusion from the formal system, irregular immigrants are fully dependent informal and private forms social protection. The manifestations of these forms of protection have been extensively described in Part B of this report. They range from charitable support, self help networks, mutual and private health care insurance, and protection offered by employers within the contact of contractual labour law. We have seen how government policies negatively impact upon these forms of protection outside the social security system. For example, bank facilities are rendered impossible and providing care, shelter or housing to irregular immigrants is increasingly branded as a criminal offence. In our view, such crossover of government policies in the private domain, comes in conflict with essential freedom rights which exist in our societies. For this reason we assume that the logics of exclusion may not stretch beyond the public social security system. Private and charitable initiatives must be respected and even be protected. This places limits on the exclusionary measures that can be imposed in the name of migration control. Irregular migrants must be secured access to general facilities needed to effectuate their self help, in particular the banking system, communication services and public transport facilities.

Extension of the non-interference principle to employment based rights

While the argument of non-interference can be easily accepted in relation to family networks of irregular immigrants or faith associations, it is perhaps less so vis a vis the duties of the employer under labour law, since these are often closely connected to social security and moreover imposed by a regulatory framework included in the law. Yet the position of the irregular immigrant under labour law is fundamentally different from the one in public social security schemes. It is not for no reason that in international law, it is generally assumed that, contrary to social security benefits, employment based rights should be granted regardless of legal status. (Cholewinsky 2005, 27-31.) Especially least within the context of ILO-instruments this point seem to have gained general acceptance. [88] The public/private divide offers a stronger argument for sphere separation than the differences between immigration law and social security. European instruments on

[87] The document can be accessed on the internet at http://www.unhcr.org/refworld/type,GENERAL,CESCR,,47b17b5b39c,0.html

[88] *Report of the Committee on Migrant Workers, Conclusions on a fair deal for migrant workers in a global economy* (An ILO plan of action for migrant workers), International Labour Conference, 92nd Session, 2004 paragraph 27.

employment rights, in particular those of the Council of Europe are less clear cut about this, but this does not mean to say that the legal position should be fundamentally different. Indeed we rather support the recent conclusions of the European Union Agency for Fundamental Rights in a report on irregular domestic workers, where it states the following.

> While access to the labour market can be restricted to nationals and/or lawfully abiding or residing foreigners, once a person is working, there are a set of human rights and basic labour rights which must be respected, even if the work relationship is not in conformity with the law. This includes, for example, rights with respect to fair working conditions, unjustified dismissal, or freedom of association and access to justice for violations of these rights.[89]

Some of these rights have actually been amplified by EU Directives. Article 6 of the Employers Sanctions Directive no. 2009/52/EC for example stresses the employer's responsibility to pay any outstanding remuneration and requires Member States to provide for mechanisms to ensure that irregular migrants may either introduce a claim against their employer or may call on a competent authority of the Member state concerned to start procedures to recover outstanding remuneration.

The enjoyment of employment based rights also requires effective remedies. Thus, irregular migrant workers must at least be free to join trade unions and take part in their activities. Also they should at least be able to move over the streets and with public transport without having to fear apprehension, detention and deportation. Effective mechanisms should moreover allow migrant workers to lodge complaints against abusive employers, again without having to run the risk of being made subject to restrictive measures of migration control. Moreover, given the role that trade unions, equality bodies and NGOs play in making justice mechanisms more accessible to irregular migrants, they should be given support to undertake legal proceedings on behalf of migrants. In other words the effective protection of migrants' fundamental rights implies facilitating, and not undermining, those social relations that provide alternative forms of social protection to those offered by national state regulated institutions.

Lastly, a word about the border the line between private employers obligations and public social security schemes. Some social security scheme are rooted in mutual solidarity between workers, others are rooted in charity. For schemes for industrial accidents and occupational diseases a different rationale applies. These schemes arose directly out of civil law liability of the employer. With regard insurance for industrial accidents and occupational diseases the exclusion of irregular immigrants is less logical, and indeed often not applied (Schoukens and Pieters, 2004). There is, in other words, not only a social need

[89] *Migrants in an irregular situation employed in domestic work: Fundamental rights challenges for the European Union and its Member States,* European Union Agency for Fundamental Rights, Luxemburg, 2011, Page 11.

(Cholewinsky, 2005) but also a systematic reason to apply the labour law logics and these schemes and not exclude immigrants on ground of their status.

16. Extra-territorial responsibility for emigrant and immigrant countries

Social security has gone a long way in accepting migrants within its scope of protection. However this acceptance reaches its limits in the legal residence test. While the right to benefits is reserved for legally residing immigrants, the legality of residence in its turn depends on the condition that the immigrants do not rely on public funds. In the latter condition we find a reminiscence of the 19th century postulate that it is not the host state but the country of origin which is responsible for the social welfare of its citizens.

In fact, many social security systems have traditionally extend their operation to its own citizens living and working abroad. Thus, social assistance schemes sometimes apply to national citizens in other countries, in case they do not get any assistance in their country of residence.[90] Also some social insurance schemes allow for optional continued insurance for persons who move abroad. Such facilities gain extra importance when emigrants live and work in other countries in irregular conditions. This is the case for example for the Albanian social insurance system which has possibility for emigrants to remain affiliated to the system on a voluntary basis. In this way, an potential social protection facility is created for the hundred of thousand Albanians working abroad in undeclared work and/or without authorisation of the immigration authorities.[91]

Sometimes extraterritorial responsibility manifests itself in more complex forms. An example is the Philippine government initiative to support workers overseas. [92] Rising problems associated with working abroad have made migrant protection and representation an important priority for the Philippine government. One of the Philippine institutions providing migrant protection is OWWA, an institutionalized welfare fund that seeks to protect Filipino migrant workers abroad. OWWA is funded by a mandatory membership fee of the emigrants and by government grants. It offers support services for participation in pre-departure orientation seminars, public assistance programs for people in need, on-site services at embassies and consulates, and an OWWA identification system. (Ruiz, 2008) Apparently inspired by the success of the Philippine fund also Sri Lanka has come up with an initiative to help its workers abroad. The Sri Lanka Overseas Workers Welfare fund covers

[90] This is the case in Germany (art. 119 Bundessozialhilfegesetz) and was until recently the case in the Netherlands.
[91] Potential, because so far the voluntary scheme has not been over successful in attracting in participants. In 2009 the number had risen to 23.900 persons. Cf. Managing of voluntary insurance, the case of the Social Insurance Institute in Albania, ISSA, Good practices in social security, 2010.
[92] Infra, paragraph 10.

payments to migrants and their families in the case of death, disability or a need to cover travel expenses (ILO, 2008).

These examples show how origin countries can take increased responsibility for their migrants' social protection, even in the absence of receiving country commitments (Van Ginneken, 2010). In our view this responsibility must be actively encouraged by the international government as part of a strategy for the alternative social security protection for irregular migrants.

As a matter of fact also the export of benefits, in particular long term benefits, should be encouraged by the international government, as is indeed the case (ILO, 2005) World Bank, 2010). This is not a emigrant countries responsibility but once again a responsibility for receiving states. Exporting benefits is perfectly in line with the logics of immigration law, as this facilities the return of the immigrants to their countries of origin. Indeed, it is for this reason that the Dutch Linking Act of 1998, allows for benefits the revive when an irregular emigrant moves abroad.

17. International co-operation in case of return

As we observed a plethora of services and facilities have come into being to financially support irregular migrants who return to their home countries. Such forms of support include the costs of transport, and sometimes also micro credits for setting up an occupational activity in country of origin. The services are channelled through international organisations such as IOM, government agencies and NGO's. Also the sources of finance of such schemes are very diverse. The reasons for financial return support are diverse. It promotes voluntary turn but also helps the individual concerned setting up a new life in a new country. In the latter sense, they contribute to the social protection of irregular migrants.

In our view the financial return facilities should be actively encouraged, extended and been given standard recognition in the return packages that countries immigrant and emigrant countries negotiate with each other. In this way the return of irregular immigrants will not only a matter for readmission policies but also part of development strategy and of social policy. Particularly in the EU these domains appear not to be connected. The EU concludes readmission agreements with third countries to make sure that these countries allow their nationals back on territories, with raising bureaucratic or legal obstacles. These agreements constitute the framework for forced expulsions. The aid or returnees is however an issue within the EU Regional Protection Programmes. These two forms of co-operation could be merged into one by creating standard return agreements which favour voluntary return and which not only tackle bureaucratic or legal obstacles for this return, but also the

question of social protection and re-integration of irregular immigrants. Actually, a preference for voluntary return has actually also been expressed by the European Commission in the evaluation of the EU readmission agreements (COM(2011) 76 def.). Such new generation of return agreements should preferably contain a social paragraph, in which the EU member states undertake to respect basic human rights for irregular immigrants as long as they remain within their jurisdiction, while third countries pledge to take over the responsibility for social protection and assume responsibility for the re-integration in the home countries as from the moment of readmission. The responsibility of home countries for the re-integration of irregular immigrants does not necessarily imply that these countries should be solely responsible for the financing of the re-integration programmes; also donor money can (and shall realistically) be a source of financing. In fact concrete pledges for this can be made part of the return agreement. As a matter of fact, social paragraphs as part of return agreements are not a new phenomenon. As recorded in paragraph 5.1, they were already adopted in nineteen century settlement agreements concluded between European countries.

SUMMARY AND FINAL CONCLUSIONS

18. Summary

This report deals with the relation between immigration law, social security and civic integration. Its purpose is to develop alternative approaches to social protection for migrants who are excluded from the formal social security system, in particular irregular immigrants.

Part A dealt the dynamics of in- and exclusion in the formal social system. The overall picture is that access to social security is rendered more difficult for asylum seekers and for irregular immigrants while the scope of application of the social security system is more closely linked to the national border (retrenchment to the national borders). These trends, which were attributed to restrictive immigration policies and the implicit rejection of transnational citizenship, are allowed to take place without too much opposition from international law. Only in emergency cases or in relation to vulnerable groups international human rights raise some minimal barriers.

Part B dealt with the position of migrants in informal social security. Here it was discussed how besides formal social security, social networks grounded in kinship or faith, a shared place of origin, or common locality of current residence, employment relations and financial products can all play a role in securing basic needs. However it was observed that also these alternative forms of social protection are under pressure as a result restrictive immigration practices and the further criminalization of irregular immigrants. An example is that irregular immigrants cannot make use of the regular banking system anymore.

In part C we discussed three different alternative approaches to social protection of irregular migrants. The first one was built upon respect for basic human rights. We proposed that states should accept minimum care obligations in case of vulnerability and need on the basis of its discretionary powers. Furthermore, private and informal social security arrangements (including employment based rights) should be better respected and protected.

The second approach called for international government to press for more extraterritorial responsibility for immigrants and emigrants. Countries can create funds to protect their own overseas workers. And the receiving states should allow for the export of long term benefits. Irregular migrant workers can benefit greatly from such initiatives.

The third approach cumulated in a call for a new generation of EU return agreements, which should not only regulate the obstacles for readmission, but which should also include a social paragraph, dealing with the division of responsibility for the social protection of irregular immigrants between the host state and the country of origin and with the funding of financial support for the returnees.

19. Access denied: the road ahead

The question of social protection for irregular migrants is highly contentious. So far both EU member states and the receiving states formulate this group as being outside their "sphere of solidarity". Promoting alternative strategies as the ones proposed above, requires a dialogue with stakeholders on all levels. These stakeholders are EU member states and returning states, represented on a national and local level, the judiciary, civil society groups, unions and employer organisations and not to forget the returnees themselves. This project is based upon the conviction that progress towards a new generation of social policy oriented return agreements can only be made when these various stake holder groups are confronted with each other's needs and concerns.

It is hoped that our Access Denied Conference in Amsterdam on the 13th and 14th of March can make a small contribution towards this goal. During the conference we will launch a proposal for the development of an International Declaration on the Social Protection of Irregular Immigrants:

- to be supported by leading academics, non-governmental organisations, trade unions, employer organisations and local governments; and
- to be presented to a number of national governments and international organisations, in particular the EU, the Council of Europe, the ILO, IMO and ISSA in 2014.

The contents of the declaration could be based upon the three building blocks contained in the conclusions, each of which would constitute a separate research project under the banner of the present initiative. The first project deals with the codification of basic human rights. It is based on a study of the case law and opinions of national and international courts and supervisory bodies with regard to the position of irregular immigrants. As said, this case law may recognize minimum care obligations in the case of emergencies and for vulnerable groups. The research aims at *codifying* modern case law in this field. New standards could stipulate that states should at least accept that forms of aid must be available, not as a right but on grounds of discretionary powers of the central or local authorities. The use of these powers can be qualified in general terms with reference to for example medical aid, housing,

shelter en food. Codifying modern case law on the protection of irregular immigrants requires careful international and comparative legal research.

The declaration should also include certain duties to respect civil law and private initiatives in the area of social protection of irregular immigrants. For example, states should refrain from creating obstacles for irregular migrants to set up mutual or private medical insurance schemes, they should not prohibit charitable organisations to come to the rescue of people in need, should not make it impossible for local authorities to work together with such charities, should make sure that irregular migrants can make use of the banking system and transport facilities, etc. In order for these standards to be developed, it is necessary to carry out empirical research into the most frequently occurring forms of civil law and private initiatives and governments rules and practices which may inhibit such initiatives.

Finally the declaration should call upon the international government to encourage extra-territorial responsibility for immigrants and emigrants and the adoption of social clauses in a new generation of return agreements. In order for these proposals to be effect, co-operation need to be established with European and international organisations such as the EU, the Council of Europe, ILO, IOM and ISSA so that more research will be done into good practices of extra-territorial social security regimes and financial return facilities.