

**ORGANISING AGAINST ABUSE AND EXCLUSION:
THE ASSOCIATIONAL RIGHTS OF UNDOCUMENTED WORKERS**

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In April 2013, farm supervisors shot a group of migrant workers in the strawberry fields of Manolada, Greece, when they demanded six months of unpaid wages. Out of the 30 people shot, some were seriously injured.¹ In March 2013, a group of undocumented construction workers in Louisiana, USA, gathered to meet their employer and claim unpaid wages, following a bitter dispute. Instead, they were met by armed police and immigration officers, with their guns pointed.² In both examples, that the workers spoke out did not lead to the enforcement of their basic labour rights, but to their abuse, their arrest and deportation. These two examples are by no means isolated, there is no doubt. There is similarly no doubt that the great majority of undocumented workers carry on in silence, because of the fear of abuse by the employer, arrest and deportation by state authorities.³

Should the labour rights of undocumented workers be protected? This chapter addresses this question by looking at a fundamental labour right, the right to organise. This is a right of unique importance for the vulnerable group of undocumented workers for it gives them a voice at work, which they would otherwise not have, as the examples of the introductory paragraph indicate. The first part of the chapter discusses the value of organizing. Forming associations has inherent value: some people organize for the reason that they value associational activity with others whose views they share. It also has

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¹ Amnesty International, 'Greece: Despair Pervades Camps as 33 Migrant Workers Shot in Manolada', 22 April 2013, available at <http://www.amnesty.org/en/news/greece-despair-pervades-camps-after-33-migrant-workers-shot-manolada-2013-04-22>

² P Harris, 'Undocumented Workers' Grim Reality: Speak Out on Abuse and Risk Deportation', *The Guardian*, 28 March 2013.

³ The EU Fundamental Rights Agency 2011 Report 'Migrants in an Irregular Situation Employed in Domestic Work: Fundamental Rights Challenges for the European Union and its Member States', for instance, frequently makes reference to the abuse that domestic workers suffer.

instrumental value: workers primarily associate in order to gain access to certain goods, namely workplace rights, such as fair wages, safe working conditions and related interests. Even though some trade unions may be viewed as expressive associations that endorse a particular ideology, in general they are primarily instrumental associations that strive for better access to workplace rights. Unions also have a public purpose, namely the promotion of liberty and equality. For the undocumented, who are most of the times socially excluded, the instrumental value of associational activity is even greater than for other workers, as the second part of the chapter shows. It not only helps them access important workplace goods; it also promotes their social integration.

However, undocumented workers face at least two types of hurdles in their associational activity, which are presented in the third section of the chapter: first, in some countries, the state bans their unionization and the employers have the power to dismiss them if they associate. Second, on other occasions, the unions themselves exclude them from membership. Are these obstacles compatible with human rights law? The fourth part of this chapter discusses the right to organize as a human right. Having found that it is a right of fundamental importance, protected in several civil, political, and socio-economic rights treaties, it turns to the treatment of undocumented migrants. It finds that undocumented workers in Europe are excluded from all social rights protection under the European Social Charter. For this reason, the final part of the chapter addresses the question whether undocumented migrants have a right to form and join trade unions and other workers' associations in light of the case law of the European Court on Human Rights. It concludes that banning undocumented workers from forming or joining associations (including trade unions) is incompatible with fundamental liberal values of the European Convention on Human Rights. It also argues that the Court should be slow in permitting the exclusion of undocumented workers from membership by trade unions themselves.

I. THE VALUE OF WORKERS' ASSOCIATIONS

It is important to discuss the value of workers' associations more generally, before turning to the particularities of undocumented workers' organisations. The value of workers' associations can first be examined against the background of the value of associational activity, which then has to be placed in the particular context of collective

labour relations. Being member of an association may be inherently valuable. Individuals sometimes associate because they value being members of a community with others whose interests they share. Many associations are expressive, and this is the reason why individuals join them. Expressive associations are those that have as their primary purpose the promotion of a particular ideology, a particular conception of the good life or the good society.⁴ Individuals become members of organisations that support an ideology or system of beliefs, such as a religion, or have some other shared interest, such as arts or sports, simply because they are religious, art lovers or sports enthusiasts. Many trade unions can be classified as expressive associations (not neutral). They often embrace ideologies of a part of the political spectrum (left-wing politics most of the time), and some workers join them because they share their political views.

At other times people join organisations because of their instrumental role in securing access to important goods. Professional associations are one such example: lawyers or doctors may need to become members of a professional association, in order to be able to exercise the profession. Most of the time, people join trade unions or other workers' associations because of their instrumental role. Trade unions are, in fact, *primarily instrumental* associations, because their primary purpose is to secure to their members access to goods, such as fair wages and decent working conditions – goods that are essential irrespective of the members' conception of the good life.⁵ Because of the inequality of bargaining power between the employer and the worker,⁶ people can bargain with the employer meaningfully and gain access to these strategic goods, only when they act collectively. Trade unions serve a number of different functions, which evolve over time.⁷ Yet in general, the inequality of bargaining power is viewed as the normative foundation of labour law that justifies the legal protection of trade union rights: the idea that '[f]ighting individually, workers lose; fighting together, workers can win'.⁸

The purpose of trade unions and other workers' associations can also be described as *public*. Trade unions do not promote a specific conception of the good life, but have (or

⁴ Stuart White, 'Trade Unionism in a Liberal State', in Amy Gutmann (ed), *Freedom of Association* (Princeton University Press 1998) 330, 334.

⁵ *ibid*, 334-335.

⁶ P Davies and M Freedland, *Kahn-Freund's Labour and the Law* (Stevens, 1983) 18.

⁷ KD Ewing, 'The Function of Trade Unions' (2005) 34 *Industrial Law Journal* 1.

⁸ Jay Youngdahl, 'Solidarity First: Labor Rights Are Not the Same as Human Rights' (2009) 18 *New Labor Forum* 31 at 32.

should have) as their primary purpose the promotion of liberty, and equal and basic opportunities for all. The public purpose of trade unions differentiates them from other associations with purely private purposes, and has implications for the relations of a trade union with a liberal state.⁹ It may mean that the state should have the power to intervene in the internal affairs of a union to ensure that it is run in a fair way.¹⁰

Another aspect of the instrumental value of trade unions, also important for present purposes but less frequently discussed, is that participation in unions may serve as a school for democratic participation more generally.¹¹ Industrial citizenship can promote democratic citizenship. Trade unions are an organized form of civil society, and as the European Court of Human Rights (ECtHR) put it in the *United Macedonian Organisation Ilinden v Bulgaria*,¹² '[i]t is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively'.¹³

II. UNDOCUMENTED MIGRANTS AND WORKERS' ASSOCIATIONS

Undocumented migrants are those that enter in a country without legal authorization, or those who enter with legal authorization, like a visa or work permit, which they overstay. It is hard to have precise numbers of undocumented migrant workers in Europe. According to some estimates, in 2008 between 1.9 million and 3.8 million undocumented migrants resided in the EU, while in the US, which has a smaller overall population, there was a larger population of undocumented migrants of about 11.2 million people.¹⁴ Many of the undocumented migrants are either jobseekers or workers, because work is a key reason why people migrate. They often concentrate in specific work sectors. Undocumented migrants are usually employed in the informal labour market, in

⁹ Amy Gutmann, 'Freedom of Association: An Introductory Essay', in Amy Gutmann (ed), *Freedom of Association* (Princeton University Press 1998) 1, 13.

¹⁰ White, above n 4, 347-350.

¹¹ Carole Pateman, *Participation and Democratic Theory* (CUP 1970) chapter IV; Robert Dahl, 'Political Institutions and Democracy' (2005) 120 *Political Science Quarterly* 187 at 197; Michael Walzer, 'On Involuntary Association' in Amy Gutmann (ed), *Freedom of Association*, 64 at 68; Karl Klare, 'Workplace Democracy and Market Reconstruction: An Agenda for Legal Reform' (1988-1989) 38 *Catholic University Law Review* 1, 8; Karl Klare, 'The Labor-Management Cooperation Debate: A Workplace Democracy Perspective' (1988) 23 *Harvard Civil Rights - Civil Liberties Law Review* 39; Jennifer Gordon, 'Transnational Labor Citizenship' (2007) 80 *Southern California Law Review* 503, 526 ff.

¹² *United Macedonian Organisation Ilinden and Others v Bulgaria*, App No 59491/00, Judgment of 19 January 2006.

¹³ *ibid*, para. 58.

¹⁴ C Morehouse and M Blomfield, 'Irregular Migration in Europe', Migration Policy Institute, 2011, p 6.

precarious sectors and sectors with low union density, such as domestic labour, sex, agriculture, construction and manufacturing.¹⁵

Employers often prefer to employ undocumented workers rather than documented migrants or the country's own nationals exactly because of their vulnerability, which makes them prone to exploitation. Anderson and Ruhs have argued that employers perceive undocumented workers as workers with a better 'work ethic' than others, willing to accept worse working conditions than lawful residents or the country's own nationals.¹⁶ The employer, as they explain, does not need to actually know the exact immigration status of the worker: it is the perception of this immigration status (together with the existence of this status) that makes these workers vulnerable, and makes the employers keen to employ them.¹⁷ Immigration laws, 'far from protecting workers' rights, contribute to creating groups of workers who are more attractive to employers'.¹⁸

Because of their precarious legal status, undocumented migrant workers are particularly prone to exploitation. When employed, they suffer from several types of exploitative treatment: they sometimes have their pay withheld or are paid unfairly, they are employed in very poor working conditions, with insufficient health and safety standards, and are also dismissed if, for example, they attempt to unionise.¹⁹ This group of workers has limited or no knowledge of their labour rights, and may often face language barriers, which makes access to information more difficult. Sometimes, and particularly if they speak out about their exploitation, they also fall victims of physical abuse.²⁰ Yet most of the time they choose to remain hidden from the authorities, even when they are victims of exploitation or abuse, because of the fear of deportation.

Undocumented workers can form different types of associations. In the US, for instance, the immigrant labour movement consists of three types of organisations: first, trade unions; second, worker centres, which are NGOs specialising in labour rights; and third,

¹⁵ Bridget Anderson, *Us and Them? The Dangerous Politics of Immigration Control* (OUP 2013) 79 ff.

¹⁶ B Anderson and M Ruhs, 'Migrant Workers: Who Needs Them?' in B Anderson and M Ruhs (eds), *Who Needs Migrant Workers* (OUP 2010) 15, 30-31.

¹⁷ *ibid*, 31.

¹⁸ Anderson, as above n 15, 71.

¹⁹ All these types of exploitation are well-documented. See, for instance, M LeVoy and N Verbruggen, *Ten Ways to Protect Undocumented Migrant Workers*, PICUM, 2005, p 9. Hereinafter cited as PICUM Report.

²⁰ See the examples discussed in the introduction of this chapter.

the immigrant rights movement.²¹ Similar initiatives exist in Europe.²² Different though these initiatives are, the associations have interrelated goals and often co-operate in order to advance these goals.²³ That various migrant, labour and human rights organisations co-operate is an important fact for those that examine the links between the labour and human rights movements.²⁴ It shows how the human rights movement can serve instrumentally to promote the interests of workers.²⁵

It was said earlier that union membership has both intrinsic and instrumental value. For the undocumented, the instrumental value of association is greater than for other workers, a point that has been highlighted in academic literature, reports of NGOs and trade unions. Illegal immigration is unlikely to diminish.²⁶ Undocumented workers are part of almost every society; yet at the same time they are socially excluded:²⁷ even though they are workers, and hence participate in society through their labour, they are barred from access to most other rights of societal membership.²⁸

Organizing can promote the social inclusion of undocumented workers. Associational activity helps address their isolation, because by organizing, migrants realize that the exploitative situation that they experience is shared by others.²⁹ They also gain confidence by learning that they have certain rights by law, and are informed about what steps they can take to address violations of these rights.³⁰ Members of migrants' or workers' organisations provide practical support to each other, which is crucial for the

²¹ Ruth Milkman, 'Immigrant Workers, Precarious Work, and the US Labor Movement' (2011) 8 *Globalizations* 361. See also Jennifer Gordon, *Suburban Sweatshops – The Fight for Immigrant Rights* (Harvard University Press 2005).

²² For examples, see PICUM Report, chapters 4 and 5.

²³ See, for instance, Milkman, above n 21.

²⁴ VA Leary, 'The Paradox of Workers' Rights as Human Rights', in L Compa and S Diamond (eds) *Human Rights, Labour Rights and International Trade* (University of Pennsylvania Press 2003) 22; Guy Mundlak, 'Human Rights and Labor Rights: Why Don't the Two Tracks Meet?' (2013) *Comparative Labor Law and Policy Journal* 217.

²⁵ Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2013) 3 *European Labour Law Journal* 151 at 160.

²⁶ PICUM Report, p 10.

²⁷ For a definition of social exclusion, see Hugh Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66 *Modern Law Review* 16 at 22.

²⁸ On the role of rights for societal membership, see TH Marshall, 'Citizenship and Social Class' in R Goodin and P Pettit (eds), *Contemporary Political Philosophy – An Anthology* (Blackwell 1997) 291. The essay was originally published in 1949.

²⁹ PICUM Report, p 34.

³⁰ PICUM Report, p 35; John Wrench, 'Trade Union Responses to Immigrants and Ethnic Inequality in Denmark and the UK: The Context of Consensus and Conflict' (2004) 10 *European Journal of Industrial Relations* 7.

undocumented who may not have access to other networks of support.³¹ Further, sometimes organisations for migrant workers help them build leadership skills,³² and also encourage civic participation more generally.³³ Organising undocumented migrants can even lead to acquisition of citizenship as formal legal status, as an example of migrant domestic workers in London has shown.³⁴ Finally, by joining a union, workers without legal documentation obtain a membership card, which serves as evidence of residence in a country.³⁵ Forming or participating in trade unions and other associations promoting workers' rights serves an important instrumental function, and can ultimately lead to the social integration of the undocumented that are citizens at the margins, in the sense that they are employed and participate in the labour market, but have extremely limited labour rights.³⁶

III. OBSTACLES

Despite the great instrumental importance of organizing, the undocumented often face hurdles, unknown to other groups of workers. In some jurisdictions, national law prohibits undocumented migrants from joining trade unions. In a Report of the EU Fundamental Rights Agency on 'Fundamental Rights of Migrants in an Irregular Situation in the European Union',³⁷ for example, it was said that in some member states of the EU (Cyprus, Latvia and Lithuania) undocumented migrants do not have a right to form or join a trade union. In Spain, undocumented migrants were similarly excluded from union membership by law until a 2007 decision of the Spanish Constitutional Court that ruled the prohibition unconstitutional.³⁸

At the same time, in some legal orders, there are examples of trade unions that exclude undocumented workers from membership, because of protectionism.³⁹ In their view, the

³¹ See the website of the self-help group Justice for Domestic Workers, for instance: <http://www.j4dw.org>

³² PICUM Report, p 38.

³³ PICUM Report, p 40.

³⁴ See the example discussed by Bridget Anderson, 'Mobilizing Migrants, Making Citizens: Migrant Domestic Workers as Political Agents' (2010) 33 *Ethnic and Racial Studies* 60.

³⁵ PICUM Report, p 44.

³⁶ Virginia Mantouvalou, 'Workers Without Rights as Citizens at the Margins' (2013) *Critical Review of International Social and Political Philosophy*.

³⁷ European Union Agency for Fundamental Rights, 'Fundamental Rights of Migrants in an Irregular Situation in the European Union', 2011, p 55. Hereinafter cited as FRA 2011 Report.

³⁸ *ibid.*

³⁹ For discussion of the relationship between trade unions and the undocumented in the US, for example, see Gordon, above n 11, 528 ff.

interests of their own members are in conflict with the interests of migrant workers, whose participation in the labour market may lead to increased competition, and hence lowering of wages and other labour standards. Looking at the example of Britain, for instance, it has been argued that unions were in the past either actively hostile or insufficiently supportive of migrant workers and members of ethnic minorities.⁴⁰ The position of UK trade unions changed more recently. Unite the Union, for example, has taken a strategic decision to encourage participation of undocumented workers. Yet in the literature, union activity on migrants is still viewed as ‘piecemeal’, while unions are ‘actively opposed’ to the formation of organisations, such as the US worker centres.⁴¹ The examples of Cyprus, where trade unions do not admit migrants, and Austria, where unions have what is described as an ‘ambivalent practice’, serve to illustrate the problem further.⁴² As undocumented migrants are excluded from union membership, examples of transnational unions on migrant workers rights are limited in number and in success.⁴³ Undocumented migrants have therefore no voice at work in several European legal orders. Their inability to unionise contributes to their continuous exclusion.

The exclusion of undocumented workers either by state or trade union policy damages the ability of migrant workers to improve their working conditions and to integrate in society. Is this compatible with international human rights and international labour law?

IV. COLLECTIVE LABOUR RIGHTS AS HUMAN RIGHTS

There is much academic debate on labour rights as human rights.⁴⁴ I have argued elsewhere that there are three approaches to this question: first, a positivistic approach, which examines whether workers’ rights are human rights in international or

⁴⁰ John Wrench, ‘British Unions and Racism: Organisational Dilemmas in an Unsympathetic Climate’, in R Penninx and J Roosblad (eds), *Trade Unions, Immigration, and Immigrants in Europe 1960-1993* (Berghahn Books 2000) 133.

⁴¹ H Connolly, M Martinez Lucio, S Marino, ‘Trade Unions and Migration in the UK: Equality and Migrant Worker Engagement without Collective Rights’, Manchester, 2012, p 14.

⁴² FRA 2011 Report, pp 55-56.

⁴³ I Greer, Z Ciupijus and N Lillie, ‘The European Migrant Workers Union and the Barriers to Transnational Industrial Citizenship’ (2013) 19 *European Journal of Industrial Relations* 5.

⁴⁴ See, for instance, the debate Jay Youngdahl, ‘Solidarity First: Labor Rights Are Not the Same as Human Rights’, (2009) 18 *New Labor Forum* 31 and Lance Compa, ‘Solidarity and Human Rights’, (2009) 18 *New Labor Forum* 38. See also C Fenwick, T Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing 2010); Hugh Collins, ‘Theories of Rights as Justifications for Labour Law’ in G Davidov and B Langille (eds), *The Idea of Labour Law* (OUP 2011) 137; Kevin Kolben, ‘Labor Rights as Human Rights?’ (2010) 50 *Virginia Journal of International Law* 449; Guy Mundlak, ‘Industrial Citizenship, Social Citizenship, Corporate Citizenship: I Just Want My Wages’ (2008) 8 *Theoretical Enquiries in Law* 531.

constitutional law, second, an instrumental approach, which assesses whether human rights can in practice promote the interests of workers; and third, a normative approach, which assesses the conceptual links between labour and human rights, and their justification.⁴⁵ Having discussed the justification of trade union rights in the sections above, this part of the chapter will turn to the first one of these approaches: namely whether undocumented migrants have trade union rights as a matter of positive international law. If it is established that they do have such rights, the implication will be that national law and union policy that excludes undocumented workers from membership may need to change.

The interest of workers to form associations is recognized as a labour right of fundamental importance in international human rights and international labour law. The right to organize, including a right to form and join a trade union, is guaranteed in all major human rights treaties. It is protected in article 23 of the Universal Declaration of Human Rights, article 22 of the International Covenant on Civil and Political Rights and article 8 of the International Covenant on Economic, Social and Cultural Rights. Freedom of association is also a core value of the International Labour Organisation (ILO), and is included in its 1919 Constitution and the 1949 Declaration of Philadelphia. Convention 87 on Freedom of Association and Protection of the Right to Organise of 1948 and Convention 98 on the Right to Organise and Collective Bargaining of 1949 are two of the eight core Conventions of the ILO.

The above documents protect the rights of everyone, though some of the treaties explicitly permit certain restrictions for specific groups, such as the police or the armed forces.⁴⁶ They do not distinguish between nationals and non-nationals, authorized and unauthorized migrants. Convention No 87 of the ILO, for instance, states that workers and employers ‘without distinction whatsoever’ have the right to form and join organisations. Many of these treaties also prohibit discrimination either on all grounds, or discrimination on certain grounds, which sometimes include discrimination on the basis of nationality.⁴⁷ The UN Convention on the Protection of the Rights of All Migrant

⁴⁵ Virginia Mantouvalou, ‘Are Labour Rights Human Rights?’ (2012) 3 *European Labour Law Journal* 151.

⁴⁶ See the discussion in Gillian Morris, ‘Freedom of Association and the Interests of the State’, in KD Ewing, CA Gearty and B Hepple (eds) *Human Rights and Labour Law* (Mansell 1994) 29.

⁴⁷ For an overview of international and regional documents, see Bernard Ryan and Virginia Mantouvalou, ‘The Social and Labour Rights of Migrants in International Law’ in R Rubio-Marin (ed), *Migration and Human Rights* (OUP 2013).

Workers and Members of their Families⁴⁸ makes special reference to undocumented migrant workers and their vulnerability in its Preamble, and guarantees a right to organize for all migrant workers.⁴⁹

The right to organise is also recognized as a fundamental right in the 1998 ILO Declaration of Fundamental Principles and Rights at Work, and has been the subject of three Global Reports according to the follow up mechanism of the Declaration. The 2000 Report entitled ‘Your Voice at Work’⁵⁰ identified migrant workers as a group of workers that are often denied the right to organize in many legal orders. The 2004 Report ‘Organising for Social Justice’⁵¹ contains a special section on migrant workers, highlighting the challenges that they face. It pays attention to undocumented workers particularly, emphasizing their vulnerability, as well as the fact that unions in many legal orders do not accept them as members.⁵²

Shifting the focus from the international legal order to Europe, the right to organize is guaranteed in article 11 of the European Convention on Human Rights (ECHR), as well as in the counterpart to the Convention in the area of social rights, the European Social Charter (ESC), which protects the right to organize (article 5) and the right to bargain collectively (article 6). However, the Charter excludes undocumented migrants from its scope. The Appendix to the ESC under the title *Scope of the Social Charter in Terms of Persons Protected* states as follows:

‘persons covered by Articles 1 to 17 include foreigners only insofar as they are nationals of other Contracting Parties lawfully resident or working regularly within the territory of the Contracting Party concerned, subject to the understanding that these Articles are to be interpreted in the light of the provisions of Articles 18 and 19’.

⁴⁸ Adopted by General Assembly resolution 45/158 of 18 December 1990.

⁴⁹ Article 26.

⁵⁰ ILO Report of the Director General, ‘Your Voice at Work’, International Labour Office, 2000, available at http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=1921.

⁵¹ ILO Report of the Director General, “Organising for Social Justice”, International Labour Office, 92nd session, 2004, available at http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=2502.

⁵² *ibid*, para 159.

This means that people who reside lawfully in a country, but do not come from one of the Contracting States, are not protected under the ESC, with the exception of article 19 that protects migrant workers.⁵³ Undocumented migrants that are employed in the country are excluded altogether. Work-related rights depend upon the status of immigrants as lawful residents, which means that persons residing and working illegally in the territory of Contracting States will not enjoy any protection of their social rights.⁵⁴

That undocumented migrants were excluded from the scope of the ESC does not mean that the Council of Europe as an organisation does not recognise the challenges that this group of individuals face. In 2006, for instance, the Council of Europe's Parliamentary Assembly adopted a Resolution entitled 'Human Rights of Irregular Migrants'⁵⁵ that stated that there were at the time between 3 and 5 million irregular migrants in Europe, living and working in deplorable conditions. The Assembly urged Member States to protect at least a 'core minimum' of rights of irregular migrants. The labour and social rights identified included fair wages and working conditions, compensation for accidents, access to justice and trade union rights for all those that work.⁵⁶

⁵³ Article 19 provides as follows: 'With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Contracting Party, the Contracting Parties undertake: 1. to maintain or to satisfy themselves that there are maintained adequate and free services to assist such workers, particularly in obtaining accurate information, and to take all appropriate steps, so far as national laws and regulations permit, against misleading propaganda relating to emigration and immigration; 2. to adopt appropriate measures within their own jurisdiction to facilitate the departure, journey and reception of such workers and their families, and to provide, within their own jurisdiction, appropriate services for health, medical attention and good hygienic conditions during the journey; 3. to promote co-operation, as appropriate, between social services, public and private, in emigration and immigration countries; 4. to secure for such workers lawfully within their territories, insofar as such matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment not less favourable than that of their own nationals in respect of the following matters: remuneration and other employment and working conditions; membership of trade unions and enjoyment of the benefits of collective bargaining; accommodation; 5. to secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals with regard to employment taxes, dues or contributions payable in respect of employed persons; 6. to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory; 7. to secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals in respect of legal proceedings relating to matters referred to in this article; 8. to secure that such workers lawfully residing within their territories are not expelled unless they endanger national security or offend against public interest or morality; 9. to permit, within legal limits, the transfer of such parts of the earnings and savings of such workers as they may desire; 10. to extend the protection and assistance provided for in this article to self-employed migrants insofar as such measures apply.'

⁵⁴ On non work-related rights, see *International Federation of Human Rights Leagues (FIDH) v France*, Complaint No 14/2003, Decision of 8 September 2004 and *Defence for Children International (DCI) v Netherlands*, Complaint No 47/2008, Decision of 20 October 2009.

⁵⁵ Council of Europe, Parliamentary Assembly Resolution 1509 (2006).

⁵⁶ *ibid*, para 13.

At the same time as the ESC excludes undocumented migrants, very few Council of Europe Member States (and no EU Member State) have ratified the UN Convention on the Protection of the Rights of Migrant Workers and Members of their Families. Similarly, very few European States have ratified the European Convention on the Legal Status of Migrant Workers.⁵⁷ For this reason, the protection of migrant workers has been described as ‘a clear weakness of the European protection system’.⁵⁸

V. DO UNDOCUMENTED WORKERS HAVE A RIGHT TO ORGANISE UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS?

Can Article 11 of the ECHR serve instrumentally to address the problem of the exclusion of undocumented migrants from collective labour rights?

As a starting point, it should be said that the rights of the Convention are protected for everyone within the contracting states’ jurisdiction.⁵⁹ They are not conditional upon immigration status. The interpretation of the term ‘jurisdiction’ has given rise to controversy in the case law and academic literature, but it covers at least everyone within the state’s territory, as well as areas outside a state’s territory, over which the state exercises effective control.⁶⁰ Article 16 of the Convention permits restrictions on the political activity of aliens, but the provision has very rarely been examined and is viewed as outdated. The Parliamentary Assembly of the Council of Europe has called for its removal.⁶¹ It has also been observed that other international human rights instruments, like the ICCPR, the American Convention on Human Rights and the African Charter of Human and Peoples’ Rights all have provisions on freedom of expression and association, and none of these documents contain something equivalent to article 16.⁶²

Immigration was not a primary consideration for the drafters of the ECHR in the aftermath of the Second World War: their key concern was how to protect the traditional

⁵⁷ CETS No 093, entered into force in 1 May 1983. It has been ratified by 11 states.

⁵⁸ UN Human Rights Office of the High Commissioner Report, ‘Rights of Migrant Workers in Europe’, 2011, p 15.

⁵⁹ Article 1 of the ECHR.

⁶⁰ *Loizidou v Turkey* (Preliminary Objections), App No 15318/89, Decision of 23 March 1995.

⁶¹ Council of Europe, Parliamentary Assembly, Recommendation 799(1997) on the Political Rights of Aliens. See Helene Lambert, *The Position of Aliens in Relation to the European Convention on Human Rights* (2nd edition, Council of Europe Publishing 2001) 17.

⁶² Nuala Mole, *Asylum and the European Convention on Human Rights* (4th edition, Council of Europe Publishing 2007) 114.

civil and political rights of the peoples of Europe against totalitarian regimes. Being applicable to the 47 Member States of the Council of Europe, the Convention does not protect freedom of movement.⁶³ The case law of the Court incorporates the principle that states have the power to control who enters their territory, that they can plan and implement their own immigration policy.⁶⁴ This principle is generally accepted in international law and in academic literature.⁶⁵

The ECtHR has not examined trade union rights of the undocumented, but the rights of migrants have been explored in important case law.⁶⁶ For example, people that enter a country unlawfully, in order to seek asylum, are protected under the Convention.⁶⁷ Documented migrants may even establish a right to work under the ECHR, which does not explicitly contain such a provision.⁶⁸ Turning to the right to organise of undocumented workers, the main focus should be on article 11 on the right to organise, which reads as follows:

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

The provision protects a right to unionise, but does not explicitly include a right to collective bargaining or a right to strike. However, over the years the Court has developed case law, which shows that article 11 of the ECHR can serve instrumentally to protect workers' interests, by incorporating a right to collective bargaining and a right to strike.⁶⁹

⁶³ Protocol 4, article 2 protects freedom of movement within a country's territory of those who are lawfully therein.

⁶⁴ *N v United Kingdom*, App No 26565/05, Grand Chamber Judgment of 27 May 2008, para 30.

⁶⁵ For an interesting collection of essays, see WF Schwartz (ed), *Justice in Immigration* (CUP 1995).

⁶⁶ For an overview of the case law, see Yiannis Ktistakis, *Protecting Migrants under the European Convention on Human Rights and the European Social Charter* (Council of Europe Publishing 2013).

⁶⁷ See *MSS v Belgium and Greece*, App No 30696/09, Grand Chamber Judgment of 21 January 2011.

⁶⁸ *Bigaeva v Greece*, App No 26713/05, Judgment of 28 May 2009.

⁶⁹ See Virginia Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' (2013) 13 *Human Rights Law Review*; KD Ewing and J Hendy, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39 *Industrial Law Journal* 2.

The second paragraph of article 11 permits limitations to the right, and the Court has examined whether specific groups of workers that are explicitly mentioned in the provision can lawfully be excluded from union membership. The leading case on the issue is *Demir and Baykara v Turkey*,⁷⁰ where the Court ruled that members of the administration of the state cannot be excluded from article 11 altogether. A test of proportionality has to be applied, if the state sets limitations to trade union rights – a standard which Turkey failed to meet in this case.

Can undocumented workers, who are not mentioned in the provision, be excluded from trade union or other associational rights? Before addressing this, the sections that follow will refer to case law under other ECHR provisions, which provides some important insights: first, the jurisprudence views migration status as special status that creates vulnerability and may hence deserve special protection, and second, it scrutinizes carefully the position of state authorities that discriminate against migrants.

1. Undocumented Migrant Workers Are Vulnerable to Coercion

Jurisprudence under article 4 of the Convention does not exclude undocumented workers, but shows that their status makes them prone to labour exploitation. The provision states as follows, insofar as relevant: ‘1. No one shall be held in slavery or servitude. 2. No one shall be required to perform forced or compulsory labour.’ Article 4 contains an absolute prohibition that does not permit qualifications for any reasons.

In a landmark judgment on migrant domestic labour, *Siliadin v France*,⁷¹ the Court examined a situation of labour exploitation, and developed principles that are already very influential in law at national and international level. Siliadin was a Togolese national who was brought to France to work and be educated, but was instead kept at home as a domestic worker. She had to clean the house and the employer’s office, to look after three children; she slept on the floor in their room; she rarely had a day off; she was almost never paid. When she escaped from her employers, she was faced with the fact that French law did not criminalise this behaviour. Before the Strasbourg Court, she

⁷⁰ *Demir and Baykara v Turkey*, App No 34503/97, Grand Chamber Judgment of 12 November 2008.

⁷¹ *Siliadin v France*, App No 73316/01, Judgment of 26 July 2005. For analysis see Virginia Mantouvalou, ‘Servitude and Forced Labour in the 21st Century: The Human Rights of Domestic Workers’ (2006) 35 *Industrial Law Journal* 395.

claimed that lack of legislation criminalising the employers' conduct violated article 4. In dealing with this situation, the Court classified it as 'servitude'. It said that 'what is prohibited is a "particularly serious form of denial of freedom" [...] It includes, "in addition to the obligation to perform certain services for others ... the obligation for the 'serf' to live on another person's property and the impossibility of altering his condition".'⁷² Siliadin's immigration status carried significant weight in the classification of her situation as servitude. As the Court emphasised, she 'was entirely at [the employers'] mercy, since her papers had been confiscated and she had been promised that her immigration status would be regularised, which had never occurred.'⁷³

That the Court placed special emphasis on the immigration status of Siliadin shows that it is open to claims of psychological coercion, which undocumented migrant workers often face because of the fear of deportation. Such coercion can be exerted on someone who has no legal right to reside in a country, and can for this very reason be a victim of exploitation. The *Siliadin* case, which imposed a duty to criminalise such treatment, was followed by the case *CN v United Kingdom*⁷⁴ that extended the positive state obligations under article 4 to include an obligation to investigate effectively the working conditions of undocumented migrant workers, who may be victims of trafficking. The Court recognised in this judgment that an undocumented migrant worker can be victim of 'overt and more subtle forms of coercion', stated that there are 'many subtle ways an individual can fall under the control of another',⁷⁵ and also that the authorities did not pay sufficient attention to the fact that the employers had taken the applicant's passport. Finally, on a related matter, looking at a case of sex trafficking,⁷⁶ which involved a woman that worked under a very restrictive visa regime that tied her to her employer, the Court found it problematic for the reason that it rendered individuals vulnerable to traffickers.

The *Siliadin* and *CN* cases, which both ruled that there had been a violation of article 4 of the Convention, show that the Court does not exclude undocumented migrants from the

⁷² *Siliadin*, para 123.

⁷³ *Siliadin*, para 126.

⁷⁴ *CN v United Kingdom*, App No 4239/08, Judgment of 13 November 2012.

⁷⁵ *ibid*, para 80.

⁷⁶ *Rantsev v Cyprus and Russia*, App No 25965/04, Grand Chamber Judgment of 7 January 2010. Discussed in Jean Alain, 'The European Court of Human Rights and Trafficking as Slavery' (2010) 10 *Human Rights Law Review* 546.

scope of the ECHR.⁷⁷ To the contrary, it accepts that irregular migration status generates vulnerability and can lead to the exercise of coercion by the employer over the worker. Moreover, very restrictive immigration rules may lead to precariousness,⁷⁸ by creating strong ties between a particular employer and an immigrant, and breach the Convention. In response to the overall question of this section, namely whether the Convention protects the rights to associate of the undocumented, it can be said that article 4 case law indicates that undocumented migrants are more prone to labour exploitation and abuse than other workers. This reality makes their need to organise more urgent, and the instrumental value of workers' associations weightier than for any other category of workers. More will be said on this later on.

2. Limitations on the Basis of Immigration Status Must be Strictly Proportionate to the Aim Pursued

Yet article 11 of the Convention is not an absolute right, unlike article 4. It is a qualified right, which permits certain limitations. Would the outright exclusion of undocumented migrants from associational activity be compatible with it? A line of cases on welfare support for non-nationals shows that nationality is not easily accepted as a ground of different treatment. Even certain social rights, when read into the Convention, cannot legitimately be limited to state nationals only. The Court has ruled that both contributory and non-contributory benefits have to be available to regular migrants equally to a state's nationals.

Article 14 of the ECHR prohibits discrimination in the enjoyment of Convention rights. It is not a free-standing provision that can be invoked on its own. Applicants have to demonstrate that the conduct in question 'falls within the ambit' of some other Convention right.⁷⁹ *Gaygusuz v Austria* concerned social security benefits.⁸⁰ The applicant was a Turkish national lawfully resident and working in Austria, who had paid contributions to an unemployment insurance fund in the same way as Austrian nationals. The authorities refused to pay an advance on his pension as an emergency payment

⁷⁷ On article 3 of the ECHR, which prohibits torture, inhuman and degrading treatment, see *Hirsi Jamaa v Italy*, App No 27765/09, Grand Chamber Judgment of 23 February 2012.

⁷⁸ Bridget Anderson, 'Migrations, Immigration Controls and the Fashioning of Precarious Workers' (2010) 24 *Work, Employment and Society* 300.

⁷⁹ See, for instance, *Thlimmenos v Greece*, App No 34369/97, Grand Chamber Judgment of 6 April 2000.

⁸⁰ *Gaygusuz v Austria*, App No 17371/90, Judgment of 16 September 1996.

under Austrian legislation for the sole reason that he did not have Austrian nationality. He claimed that this treatment was discriminatory, and hence contrary to article 14 of the Convention in conjunction with article 1 of Protocol 1, which states that '[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions'.

Reading social rights into the right to property, the ECtHR held that the benefit that Gaygusuz claimed could be classified as 'possessions', so that his situation was within the ambit of article 1 of Additional Protocol 1. Turning to article 14, the Court considered whether the difference of treatment between the applicant, on the one hand, and Austrian nationals, on the other, was justified. It ruled that it was not based on an 'objective and reasonable justification'. The Court referred to the possibility of recognising state authorities some discretion in the area of the social rights of migrants, by mentioning its margin of appreciation doctrine, but stressed that 'very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention'.⁸¹ There was therefore a violation of the prohibition of discrimination in conjunction with the right to property. A similar finding was also made in a case where the authorities refused a non-contributory disability benefit to the applicant that was a documented migrant.⁸² The same principle was endorsed in cases on maternity and child benefits of foreign nationals with limited residence rights⁸³ or those that have the status of a refugee⁸⁴ under article 8 (the right to private life) in conjunction with article 14.

The article 14 jurisprudence shows that at least regular migrants, even those with limited residence rights, cannot be treated differently for the sole reason of their nationality or residence status. The justification for different treatment of similar situations has to be strong. It has to satisfy a strict test of proportionality, which state authorities failed to pass.

⁸¹ *ibid*, para 42.

⁸² *Koua Poirrez v France*, App No 40892/98, Judgment of 30 September 2003.

⁸³ *Niedzwiecki v Germany*, App No 58453/00, Judgment of 25 October 2005.

⁸⁴ *Fansie v Greece*, App No 40080/07, Judgment of 28 October 2010.

3. Associational Activity of the Undocumented

What has been established this far is that, first, undocumented migrants are protected under absolute provisions of the Convention. Their immigration status is viewed as a factor that generates vulnerability and makes them prone to exploitation. Second, migrants with different types of residence permits (some of which are more and other less permanent) cannot be treated differently when it comes to qualified provisions, unless there is a strong justification. In light of these principles, how would the Court approach a ban on the associational activity (trade unions or workers' centres) of undocumented workers?

It was earlier said that even when looking at categories of workers that are explicitly mentioned in the second paragraph of article 11 as groups whose trade union rights may be limited (members of the armed forces, police and the administration of the state), the Court applies a test of proportionality. In *Demir and Baykara*, the Court stated that the restrictions imposed on them should be interpreted strictly and 'must not impair the very essence of the right'.⁸⁵ Even though undocumented workers are not explicitly mentioned in article 11, state authorities might argue that the prohibition of their associational activity can promote the aim of combatting illegal immigration. The Court has accepted that this is a legitimate aim for state authorities to pursue.⁸⁶ Yet limitations of Convention rights for reasons of immigration policy will be hard to justify morally and legally for those that are already within the jurisdiction of a member state.⁸⁷ It might also be said here that if Strasbourg protects the labour rights of irregular migrants, there will be floodgates of immigrants that will seek to enter Europe.⁸⁸ Such consequentialist considerations are not unknown in the reasoning of the ECtHR, but they have very rarely been accepted by the Court, and have given rise to dissenting opinions, and criticisms.⁸⁹ So even though control of irregular migration is a legitimate state function, it will not easily be used as a justification for restrictions of the rights of undocumented

⁸⁵ *Demir and Baykara*, above n 68, para 97.

⁸⁶ *Souza Ribeiro v France*, App No 22689/07, Grand Chamber Judgment of 13 December 2012, para 97.

⁸⁷ See *Hirsi Jamaa*, above n 76.

⁸⁸ Discussed in Joseph Carens, 'The Rights of Irregular Migrants' (2008) 22 *Ethics and International Affairs* 163 at 167.

⁸⁹ *N v UK*, above n 64. For discussion and criticism, see Virginia Mantouvalou, 'N v UK: No Duty to Rescue the Nearby Needy?' (2009) 72 *Modern Law Review* 815.

migrants, beyond the exercise of the state power of detention and deportation, in conditions that again, of course, have to comply with ECHR standards.⁹⁰

It should be added here that very often when the Court examines labour rights under the Convention, it takes note of the position of other international bodies that have addressed similar issues.⁹¹ For this reason, mention should be made here of the approach of the ILO to the question of trade union rights of undocumented workers. The ILO examined the issue in a case involving Spain. In response to a complaint brought by the General Union of Workers of Spain (UGT), the ILO Committee on Freedom of Association said that the rights to organize and strike, freedom of assembly and association, the right to demonstrate and collective bargaining of Conventions 87 and 98 are applicable to all workers, without distinction whatsoever, and that undocumented workers cannot be excluded from this protection.⁹²

On this matter it is also important to highlight the landmark advisory opinion of the Inter-American Court of Human Rights on the rights of undocumented migrants.⁹³ This opinion was adopted in response to a question brought by the Government of Mexico, as to whether it was lawful to exclude undocumented migrants from access to labour rights. While that question did not refer to a particular state, it was understood to relate to the decision of the US Supreme Court in *Hoffman Plastic Compounds v NLRB*,⁹⁴ in which undocumented migrant workers were denied back pay for lost wages, after their dismissal for attempts to organise a trade union. The IACtHR ruled that the exclusion of undocumented migrants from labour rights breached international principles of equality before the law and non-discrimination, which it recognised as norms of *jus cogens*. The Court accepted that it would be compatible with human rights law to deny employment to undocumented migrants, but emphasised that it would not be lawful to deny labour rights once someone is already employed. In its words:

‘Labor rights necessarily arise from the circumstance of being a worker, understood in the broadest sense. A person who is to be engaged, is engaged or

⁹⁰ See *MSS v Belgium and Greece*, above n 67.

⁹¹ See, for instance, *Demir and Baykara*, above n 68, para 98 ff. Mantouvalou, above n 69; Ewing and Hendy, above n 69.

⁹² ILO Committee of Experts, Report No 327, Case No 2121.

⁹³ *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, 17 September 2003, Inter-AmCtHR (Ser A) No 18 (2003).

⁹⁴ 535 US 137 (2002).

has been engaged in a remunerated activity, immediately becomes a worker and, consequently, acquires the rights inherent in that condition [...] [T]he migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment.⁹⁵

The advisory opinion of the Inter-American Court suggests that while the state has no duty to provide employment to undocumented migrants, once they are employed, they are protected equally with other workers.⁹⁶ This complaint was also examined by the ILO Committee on Freedom of Association, which concluded that *Hoffman* was incompatible with ILO standards.⁹⁷

Both the Inter-American Court of Human Rights and the ILO find that the exclusion of undocumented migrants from trade union membership is contrary to the protection of trade union rights and in breach of the prohibition of discrimination. The approach of these bodies may play an important role in the interpretation of the ECHR, for the Court often takes note of relevant international materials when examining the rights of the Convention, adopting an ‘integrated approach to interpretation’.⁹⁸

In light of the above, the correct interpretation of article 11 is an inclusive one, which protects the right to organise of undocumented migrants. The state cannot prohibit their associational activity, and employers cannot lawfully dismiss them for the sole reason that they form and join a trade union or other workers’ association.

4. Trade Union Autonomy and the Exclusion of the Undocumented

It was earlier said that in some countries, trade unions exclude undocumented workers from membership, because they view the interests of their members as incompatible with the interests of undocumented migrant workers. Is this policy of exclusion compatible with the ECHR? In general, the Court has accepted that the right to associate under

⁹⁵ Paras 133-134.

⁹⁶ For a case note, see SH Cleveland, ‘Legal Status and Rights of Undocumented Workers’ (2005) 99 *American Journal of International Law* 460.

⁹⁷ Case No 2227 (United States), Report No 332, November 2003.

⁹⁸ See Mantouvalou, above n 69.

article 11 of the ECHR encompasses both positive and negative components.⁹⁹ Both individuals and unions have a right not to associate. Compelled association has often been ruled to be incompatible with article 11.¹⁰⁰ The importance of union autonomy, namely the power of unions to set the rules by which they will be governed, is recognized by the Court, and explicitly mentioned in ILO Convention 87, article 2, as well as other international documents.

In the case law of the ECtHR the principle of union autonomy was in recent years upheld in the case *ASLEF v UK*.¹⁰¹ ASLEF, the applicant union, is a socialist labour association that expelled a train driver and member of a political party of the far-right, the British National Party (BNP), when union officers were informed of his membership of the BNP and some of his activities, such as handing out anti-Islamic leaflets and engaging in serious harassment of anti-Nazi demonstrators. The Court stated that a union should have a right to choose with whom it will associate in a way similar to individual employees. This is because '[w]here associations are formed by people, who, espousing particular values or ideals, intend to pursue common goals, it would run counter to the very effectiveness of the freedom at stake if they had no control over their membership'.¹⁰² The exclusion from membership here was legitimate. It was due to the worker's political affiliation to the BNP, the views and activities of which were fundamentally incompatible with those of the trade union. The union was rightly viewed as an expressive association, which endorses a particular ideology, and the views of the BNP were said to run counter to this ideology.

The Court did not only recognise the expressive commitments of trade unions, though. This is important because the primary purpose of trade unions is instrumental, as was said earlier on, not expressive. The ECtHR said that 'membership of a trade union is often regarded, in particular due to the trade union movement's historical background, as a fundamental safeguard for workers against employers' abuse and it has some sympathy

⁹⁹ See *Young, James and Webster v UK*, App Nos 7601/76, 7806/77, Judgment of 13 August 1981, and more recently *Sorensen and Rasmussen v Denmark*, App Nos 52562/99 and 52620/99, Judgment of 11 January 2006.

¹⁰⁰ See Virginia Mantouvalou, 'Is there a Human Right Not to Be a Trade Union Member?' in C Fenwick, T Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing, 2010) 439. See also the discussion in Tonia Novitz, 'Negative Freedom of Association: *Gustafsson v Sweden*' (1997) 26 *Industrial Law Journal* 79.

¹⁰¹ *Associated Society of Locomotive Engineers & Firemen (ASLEF) v United Kingdom*, App No 11002/05, Judgment of 27 February 2007.

¹⁰² *ibid*, para 39.

with the notion that any worker should be able to join a trade union'.¹⁰³ In addition, the Court accepted that unions have a public purpose, namely the promotion of equality for all workers, which may justify state interference in their internal affairs. In the *ASLEF* case it found that expulsion would not be detrimental to the worker. The BNP member who was expelled from the union would not suffer a significant disadvantage (or indeed any disadvantage at all) following his exclusion.

However, union autonomy should not be viewed as absolute. In the case of undocumented workers, the primarily instrumental value of associations and their public purpose, namely the promotion of basic opportunities for all, which was discussed earlier in this chapter, is such that their systemic exclusion from union membership would be detrimental to them. Unlike the exclusion of the member of a far-right political party by a left-wing trade union, the exclusion of undocumented workers is likely to be based not on a deep conflict in expressive commitments,¹⁰⁴ such as the one that we saw in *ASLEF*, but on prejudice and a narrow definition of the national labour market, that a liberal human rights court should be slow to accept. The underlying concern, above all, is that the exclusion of undocumented workers from union membership would deprive undocumented workers from an institutionalized voice at work and the basic opportunity to be socially included, leading to well-documented situations of exploitation and abuse that are incompatible with the basic values of the ECHR. The exclusion of undocumented workers from trade unions would probably strike at the very essence of the right to associate and breach article 11 of the Convention.

VI. CONCLUSION

Associational activity has great value for all workers, which is both intrinsic in the sense that people value being part of associations as such, and instrumental in the sense that people value workers' associations because they help them gain access to important strategic goods. Trade unions are primarily instrumental associations, and in the case of undocumented workers, their instrumental role is particularly important. Organising not only gives them a voice at work. It can also lead to their inclusion both in the workplace and in society at large. It is therefore particularly worrying that state authorities do not

¹⁰³ *ibid*, para 50.

¹⁰⁴ See also the discussion in White, above n 4, 349-350.

always recognise that undocumented workers have a right to organize, and that unions themselves sometimes exclude them from membership.

The right to organise is a fundamental labour and human right, which is protected in international human rights law and international labour law, as this chapter showed. Most legal documents do not distinguish between nationals and non-nationals, documented and undocumented foreign nationals. In fact, many of them prohibit discrimination on the basis of nationality, and monitoring bodies have come to recognize that irregular migrants are a particularly vulnerable group of workers. Yet in Europe, the protection of the social and labour rights of the undocumented under the ESC is wanting. For this reason, the final part of the chapter turned to the ECHR that protects the right to form and join a trade union. The case law of the ECtHR offers important insights that help address the question of this piece. It recognizes that undocumented migrants are particularly vulnerable to labour exploitation, that difference of treatment on the basis of immigration status has to be very strictly justified, and that exclusion of categories of workers from collective labour rights is to be very narrowly interpreted. The Court accepts the important instrumental role of unions for the promotion of a voice at work. That a most vulnerable group of workers would have no voice at work, if they had no right to unionise, is a consideration that should play a very weighty role in any balancing exercise that the Court employs in its reasoning. This is because above all, as the Inter-American Court of Human Rights has emphasized, workers' rights are universal, in the sense that everyone is entitled to them as soon as they become workers, and only by virtue of their status as workers, irrespective of immigration status. That someone is an undocumented worker should constitute a reason for special protection, rather than exclusion from the scope of the ECHR.