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**New Wine in Old Skins? Regulating
“New” Migration within the Traditional
Framework – The Example of Sans-Papiers
in Switzerland**

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According to the Swiss dualist immigration policy only highly-qualified nationals from third countries can work in Switzerland. However, some economic sectors depend heavily on low-skilled workers that cannot be recruited legally. Caught between restrictive legislative approaches, the needs of the economy and international human rights obligations States have developed various approaches to solve the untenable legal situation of Sans-Papiers for example. The project aims at developing a coherent theory on how Switzerland should approach Sans-Papiers.

In order to regulate labor migration flows most Western States have enacted in recent years restrictive immigration schemes. However, as migration is increasingly motivated and regulated by the market and the needs of the economy, the discrepancy between the regulatory framework and the reality of migration is growing: many States, including Switzerland, albeit excluding low-skilled workers from admission are facing a reality in which various economic sectors are in need of these workers. Caught between economic interests, restrictive immigration policies and the human rights of the respective workers and their families, countries resort to varied solutions from exploiting discretionary powers at the legislative, administrative and judicial level to developing best practices on how to address the needs of vulnerable groups of migrants. The project aims at exploring and identifying margins for maneuver, the ensuing practice of migration authorities and best practices in selected countries and at investigating the possibilities for similar approaches in respect of Sans-Papiers in Switzerland.

How States Cope with Economically Necessary but Politically Unwanted Labor Migration (Lucia Della Torre)

“Irregular migrants, to the extent that they have (informal) jobs, fill a labor market need. Indeed, irregular migrants respond to high demand, in particular, in often low added value sectors (such as domestic care and construction).” This quote from a recent European Report exploring new avenues for legislation for labor migration to the European Union evidences that increasingly economically necessary migration is not congruent with politically wanted and legally possible migration, leaving the respective workers and their families in a precarious situation. States all over the world have attempted various ways to accommodate the needs of the economy while at the same time guaranteeing the rights of the workers and managing migrations movements. Where regulatory options have failed, often administrative or judicial answers were given, mainly by using discretionary powers.

This sub-project aims at researching and analyzing mechanisms that, at different levels (legislative, executive, judicial), could make the Swiss system more flexible, while fully respecting the need for control and management of migration flows. The goal is to suggest solutions that,

without falling into populist and unworkable appeals, can both expand the possibilities for legal access to the Swiss labor market, and allow the regularization of those that are already present, irregularly, within the territory. These solutions should make it possible to achieve greater efficiency in the allocation of the labor resources that Switzerland needs, while at the same time improving the position of the Sans-Papiers, empowering their access to some basic rights such as education or work.

Children's Best Interests Determination in Swiss Migration Law (Jyothi Kanics)

According to the guiding principles of the *Convention on the Rights of the Child (CRC)*, States should allow each child to express his or her views and to take their views into account when considering the best interests of the child without discrimination and with a view to ensuring the child's right to life, survival and development. In recent years, the European Union and European governments have taken measures to embed the principle of the best interests of the child in migration law and policy. Consequently, when deciding on a *durable solution* for a migrant child, States should carry out a *Best Interests Determination (BID)*. UNHCR and UNICEF define a *durable solution* to be "a sustainable solution that ensures that an unaccompanied or separated child is able to develop into adulthood, in an environment which will meet his or her needs and fulfil his or her rights as defined by the CRC and will not put the child at risk of persecution or serious harm". While some States are grappling with the challenge whether and how to determine the best interests of children, particularly those children who have received a negative decision on their asylum claim or who are living with their families in an irregular situation, other States are making progress putting principles into practice.

This sub-project will outline elements of good practice in respecting children's rights in migration law and policy. The key features, safeguards and criteria for a BID will be presented as well as emerging good practice. It will focus on the possibilities for the future development of the Swiss legal and policy framework in order to provide a BID for different categories of at-risk migrant children including Sans-Papiers.

Methodology

Methodically, both projects will make use of the standard legal research techniques which are the presentation and analysis of the Swiss, European and international legal sources, of the case-law of Swiss courts and international human rights bodies and comparative legal approach. It will take into consideration relevant social science research as well as cooperate with researchers of other scientific disciplines.

Publications and Presentations

- Kanics, Jyothi. "From Protecting Children on the Move to Safeguarding their Rights." Presented at the *Council of Baltic Sea States, PROTECT Children on the Move Expert Meeting*, Stockholm, 11 March 2015.
- Kanics, Jyothi. "Review of OSCE Commitments concerning Trafficked Children." Plenary presentation at the *OSCE Human Dimension Implementation Meeting*, Warsaw, 28 September 2015.
- Kanics, Jyothi. "EU Project on Best Interests and Durable Solutions." Speaker at the *Future Planning: Durable Solutions for Separated Children in Europe Conference*, Dublin, 13 November 2015.
- Kanics, Jyothi. "Children and Young People on the Move: Towards a more precise definition of their best interests." Keynote speaker at the *EU MinAs Project Conference*, Portoroz, 19–20 November 2015.

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