



# MIGRANT **WORKERS'** **RIGHTS** IN EUROPE



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The sole responsibility for the content of the study remains with the author.

## Abbreviations

ACIDI	High Commission for Immigration and Intercultural Dialogue (Portugal)
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
Cesu	Chèque-emploi service universel (France)
CMW	Committee on the Protection of the Rights of All Migrant Workers and Members of their Families
CNCDH	National Consultative Commission for Human Rights (France)
COE	Council of Europe
CPED	International Convention for the Protection of All Persons from Enforced Disappearance
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
ECLSMW	European Convention on the Legal Status of Migrant Workers
ECtHR	European Court of Human Rights
EEA	European Economic Area
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
FAS	Foras Áiseanna Saothair (Training and Employment Authority - Ireland)
FRONTEX	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
GFMD	Global Forum on Migration and Development
HIV/AIDS	Human immunodeficiency virus/Acquired immunodeficiency syndrome
HRC	Habitual Residence Condition (Ireland)
HRC	Human Rights Council
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ILO	International Labour Organization

IOM	International Organization for Migration
MEP	Member of the European Parliament
MESCA	Mediterranean and Scandinavian countries
MF	Members of their Families
MOU	Memorandum of Understanding
MP	Member of Parliament
MW	Migrant Workers
NHS	National Health Service (Portugal)
NIP	National Integration Plan (Germany)
OHCHR	Office of the High Commissioner for Human Rights
PECI	Plan Estratégico de Ciudadanía e Integración (Spain)
PSOE	Partido Socialista Obrero Español (Spain)
SWA	Supplementary Welfare Assistance (Ireland)
TB	Treaty (Monitoring) Body
UDHR	Universal Declaration of Human Rights
UDI	Norwegian Directorate of Immigration
UK	United Kingdom
UKBA	United Kingdom Border Agency
UN	United Nations
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHCR	United Nations High Commissioner for Refugees
UPR	Universal Periodic Review

## Executive summary

This study was commissioned by the Regional Office of the High Commissioner for Human Rights in Brussels in order to identify and analyse the challenges and opportunities for ratification by European countries of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW). The study covers developments at the European Union (EU) level, in EU Member States and Norway, and is limited to migrant workers from third countries (i.e. countries outside the EU). The results of the study were shared during an Experts Seminar held at the European Parliament which was organized by the Regional Office for Europe in cooperation with the International Organization for Migration (IOM) and the International Labour Office in Brussels marking the 20th Anniversary of the adoption by the United Nations General Assembly of the ICRMW. The discussions during the Experts Seminar also served to inform the finalization of this study.

The ICRMW is a core international human rights instrument that sets fundamental human rights to all migrant workers and their families, whether they are in a regular or irregular situation, and additional rights to regular migrant workers and their families. To date, 44 States have ratified the Convention. In Europe, it has been ratified by four States and signed by two, none of them EU Member States. Yet there is a gap in the protection afforded to migrant workers at national and EU levels.

European States explained their views on the ratification of the ICRMW in recent international processes such as the Universal Periodic Review (UPR). The study found that the obstacles cited, whereas legal, administrative or financial, are not insurmountable and that ratification is merely a question of political will at the national level. The study showed that the “right to family reunification” in the ICRMW is not as absolute as often believed. The ICRMW does not create new rights for migrant workers, nor does it limit the sovereign right of States to decide upon entry into their territory. The rights of irregular migrant workers specifically covered by the ICRMW are also protected by other international human rights instruments and are recognized by most EU Member States’ national legislations. Equally, the shared competence of the European Union in the field of migration does not prevent individual Member States endorsing human rights instruments or adopting more favourable measures.

The increasing role of the EU in the area of migration can indeed be an asset, rather than an obstacle as it is often perceived. In fact, the study reveals that there is a need for discussion and debate about ratification of the Convention at the EU level in order to address the political reluctance among European countries to ratify the ICRMW. EU Institutions have on several occasions supported the ICRMW ; in particular, the European Parliament has consistently called on Member States to ratify it. The entry into force of the Lisbon Treaty and the adoption of the Stockholm Programme (2010-2014) are also providing room for a reinforced EU role for the EU in the debate about ratification.

In addition, emerging EU policies and legislation on migration provide for more recognition – and protection - of migrant workers’ and their families’ rights. Several recent developments at the EU level, when compared to the protection offered by the ICRMW, reveal very minor substantive differences (EU Charter of Fundamental Rights ; Blue Card Directive ; and the proposal for a single application procedure and common set of rights Directive) or common goals (EU Global Approach to Migration and EU Integration policy). Similarly, developments in the last ten years in national legislation, measures and practices of European States in the field of migration show that, while limiting access to some rights (i.e. family reunification, though always recognized to some migrant workers, under certain conditions), the majority of recent legislation also extends access to other rights (i.e. right to education and urgent medical care for irregular migrant workers and their families). The analysis of a selection of legislation and practices in a number of EU Member States and Norway leads to the conclusion that there are significant fluctuations in the way migrant workers rights are protected throughout Europe. Some countries have recently opted for a more positive, labour demand-based approach to migration (Sweden, Norway), or have managed to maintain or to recover an extended protection basis for migrant workers (Spain, Ireland, Italy, Portugal), including for irregular migrant workers (Portugal, Spain), while others opted for restricting their approach to migration policies, while taking innovative steps that take into consideration migrant workers’ rights (Czech Republic). The



trend to favour high-skilled migration that was identified in a number of countries (Czech Republic, Ireland, UK) is, however, currently being revisited due to the effects of the economic crisis. Finally, the study also identified regularization programmes or mechanisms in several countries under review (including Belgium, Ireland, Poland, Portugal and Spain) as well as other means to end the irregular nature of migrant workers' stay in the country (Czech Republic, France, Spain).

## Introduction

### *Facts and figures about migration in Europe*

Europe is a destination for many migrants. It is estimated that Europe currently hosts 70 million international migrants, representing 9.5 per cent of Europe's population.<sup>1</sup> Immigration to Europe represents 32.6 per cent of the total migratory flows in the world.<sup>2</sup> The European Union (EU) currently hosts around 31.8 million migrants, representing 6.4 per cent of the total EU population.<sup>3</sup> The number of third country nationals in the EU represents 4 per cent of the total EU population.<sup>4</sup> Among them, 37 per cent come from other European countries, 25 per cent from Africa, 20 per cent from Asia, 17 per cent from the Americas and 1 per cent from Oceania.<sup>5</sup>

### *Migrants' rights in Europe*

All Member States of the EU have ratified most of the nine core international human rights treaties. Some have already ratified the latest adopted human rights instruments, namely the International Convention on the Rights of Persons with Disabilities (CRPD) and the International Convention for the Protection of All Persons from Enforced Disappearance (CPED).<sup>6</sup> Under core international treaties, States have the obligations to protect effectively the human rights of everyone, including migrant workers and their families, including when they are in an irregular situation. This study illustrates that protection of regular and irregular migrant workers is provided to some extent in most national legislations of EU Member States. However, many concerns still exist regarding the enjoyment of human rights by migrant workers in Europe pointing to the need for an adequate framework to protect their rights in an effective manner. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) provides this comprehensive framework responding to the specific protection needs of migrant workers, including when they are in an irregular situation. In Europe, only few states have ratified the ICRMW.

Several of the States Parties to the ICRMW are EU candidate countries ; however none are Member States of the EU.

### *Aims of the study*

This study analyses developments in Europe over the last 10 years that are relevant for the promotion and protection of the rights of migrant workers as per the provisions of the ICRMW. It aims at identifying and analysing the challenges and opportunities for ratification by EU Member States and other European States of this international human rights instrument, thus ensuring the path towards universal ratification of all core international human rights instruments in Europe. The study presents some elements for discussion on the relevance of the latest developments in the legislation and policies of the EU and EU Member States as steps forward in closing the gap between the protection offered by the ICRMW and the true state of affairs. Clarifications on the content and scope of provisions of the ICRMW in areas of particular concern can be of help in guiding informed discussions towards its ratification.

### *Scope of the study*

The study covers EU Member States and Norway, and provides in-depth analysis of national legislation and practices in a number of selected countries. By looking principally at the EU Member States, it is possible to draw lines between the discourse and the actions at both national and regional level. As will be seen, this appears to be particularly relevant concerning migration issues. Norway was included among the selected countries in order to take into consideration its proximity and agreements with the EU, which were found to be of relevance for this exercise.

Terms used to refer to persons who cross international borders are diverse and cover an array of situations and categories. Refugees are not considered in this study, as they fall under a different protection system.

Article 2 of the ICRMW defines a migrant worker as “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national”. However, the study only looks at migrant workers as far as they are third-country nationals, often referred to as “immigrants” in the EU context to differentiate them from EU citizens exercising their right to free movement within the EU and who are obviously in a different legal position.<sup>7</sup>

In order to grasp the latest developments in the migration field, both at the EU level and at the national level, we have limited the analysis to the most recent policies and legislations. On some occasions we look at legislations older than 10 years, to highlight changes since then. Issues covered are those related to the content of the ICRMW as detailed in Part I of the study.

### *Methodology and structure*

The study was carried out as a desk study, building on information and data from existing research and documentation. The first part of the study presents the ICRMW and the European context in which we are analysing prospects for ratification. EU legislations and policies are described, as well as opinions of EU Member States and EU institutions on the ratification of the ICRMW. A section exposes what ratification of the ICRMW entails. This first part then recapitulates the most pungent obstacles to the ratification of the ICRMW put forward by European States until now. The methodology adopted to analyse these arguments consists in unpacking some provisions of the ICRMW in order to detail any misconceptions about the ICRMW. This first part also contributes to identifying the areas where more work is needed to bring EU Member States closer to a ratification standpoint.

The second part of the study identifies and describes legal standards, policies and practices adopted at the country and EU levels that contribute to the protection of the rights of migrant workers and members of their families. They are analysed in light of international human rights standards and more particularly the ICRMW. This part contributes to demystifying the ICRMW and to re-establishing the concrete links that exist between its content and EU and national migration legislations and measures.

The results of the study in draft form were presented at an Experts Seminar organized by the Regional Office for Europe (ROE) in collaboration with the International Organization for Migration (IOM), the International Labour Office (ILO) and December 18 at the European Parliament in Brussels on 8 December 2010, to mark the 20th Anniversary of the adoption by the United Nations General Assembly of the ICRMW. The Experts Seminar aimed at taking stock of the main developments and trends in the promotion and protection of the rights of migrant workers and members of their families in the region and to raise awareness about the provisions in the Convention and how they can be used as a reference and be linked to existing (positive) policies and actions that are being developed in some countries of the region, including in some EU Member States. During the Experts Seminar, which was opened by Edward McMillan-Scott, Vice President of the European Parliament, and Abdelhamid El Jamri, Chairperson of the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Members of the European Parliament from various political groups including Alejandro Cercas (Spain), H el ene Flautre (France), Nadia Hirsch (Germany) and Rui Tavares (Portugal) ; representatives from civil society organizations ; United Nations agencies ; regional organizations ; and the European Commission shared views and provided comments on the various issues addressed in the study. The seminar was closed by Juan Fernando L opez Aguilar, MEP, Chairperson of the Committee on Civil Liberties, Justice and Home Affairs.

## Part I: The situation of the ICRMW in Europe

### 1. THE ICRMW IN THE LANDSCAPE OF MIGRATION POLICIES IN EUROPE

#### 1.1 PRESENTATION OF THE ICRMW

The ICRMW is one of the nine core international human rights treaties. It was adopted by the United Nations (UN) General Assembly on 18 December 1990 and entered into force on 1 July 2003 after ratification by 20 States. Like all core international human rights treaties, the ICRMW builds upon the fundamental rights recognized in the Universal Declaration of Human Rights (UDHR) and develops a set of principles that are of particular importance to the situation of migrant workers and their families. Importantly, the ICRMW includes fundamental rights for all migrant workers and their families, independently of their status (regular or irregular) in their country of transit and employment.

The ICRMW, as an international treaty, was drafted and adopted by States Parties to the UN. The drafting process took place in the 1980s<sup>8</sup> and saw divergent interests of States emerge. European states played an active part in the drafting process, particularly the Mediterranean and Scandinavian countries (MESCA), a group made up of Finland, Greece, Italy, Norway, Portugal, Spain and Sweden.<sup>9</sup> The MESCA Group worked actively on a proposal that gave its final structure to the ICRMW.<sup>10</sup> According to Graziano Battistella, “the text of the Convention is fundamentally a European text, although modified by the long negotiation process.”<sup>11</sup> Other European countries also took part, including Germany<sup>12</sup> Belgium, France or the United Kingdom.

The ICRMW was adopted unanimously on 18 December 1990 by the UN General Assembly. After 20 states had ratified it, the Convention entered into force on 1<sup>st</sup> July 2003. Initially, it was believed that it would be widely ratified, including by European States.<sup>13</sup> However, not only did European States not ratify it, but other more supportive States did not do so until the late 1990s. This explains the 13 years between adoption and entry into force, which is the longest delay of all core international human rights instruments,<sup>14</sup> and is the illustration of the intricate links between States’ policies on migration and market forces.<sup>15</sup> However, it is often forgotten that it also took ten years for the International Covenants on Civil and Political Rights, and Economic, Social and Cultural Rights to come into force.

To date, 44 States have ratified the ICRMW, mostly countries from the South,<sup>16</sup> where the Convention is seen as a valid, binding human rights instrument. It is integrated into the international human rights framework as a core instrument and is being given increased attention by most, if not all, UN agencies and programmes; in particular OHCHR, ILO, UNESCO and UNDP. It has been promoted on many occasions at national, regional and international levels in the last five years, as the main reference in terms of protection of migrant workers’ rights. The circumstances surrounding its drafting process should not be held against its validity, nor should the ICRMW be considered as a “second-rate” treaty due to lack of ratification by Western countries.

Human rights law evolves, as does any other legal area at the national level. International human rights treaties set important basic principles in specific areas and act as standards of reference for States Parties, setting out their obligations throughout the years, independently of political change. They also play an important role in guiding States in establishing policies, legislating and implementing effectively their legislations in the fields covered by the treaties. This is reinforced by the Treaty Bodies (TB) mandated by the treaties to supervise implementation at the national level and that provide interpretation of the scope of the provisions in the treaties (General Comments).

The ICRMW is no exception. It assembles and defines, for the first time, all migrant workers’ rights in a comprehensive set of articles, with the aim of addressing the specific vulnerabilities of migrant workers and members of their families. In addition, its application is supervised by the Committee on Migrant Workers (CMW) that has developed working methods<sup>17</sup> and expert understanding of the provisions of the ICRMW over the last six years. For example, the CMW has recognized the following good practices

in the way States Parties implement provisions of the ICRMW: the creation of a State Ministry in charge of providing information to nationals who may be intending to emigrate ; efforts to regulate private recruitment agencies and to close down those which do not comply with national legislation ; adoption of bilateral agreements between countries of employment and countries of origin in compliance with international human rights and labour standards ; establishment of special groups to protect and counsel migrants in transit through the State's territory ; the implementation of a regularization programme with the aim of documenting irregular migrant workers ; and efforts by countries of origin to extend voting rights to citizens residing abroad.<sup>18</sup>

The ICRMW has the same universal dimension as do the other core international human rights treaties. This means that it aspires to be universally applicable, therefore universally ratified. When ratified, the ICRMW applies to all migrant workers and members of their families, without distinction,<sup>19</sup> under the jurisdiction of a State Party.

The ICRMW does not create “new rights” for migrant workers and their families. It features rights that have been recognized to all under other core human rights treaties, in particular the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights.<sup>20</sup> The ICRMW does however address specific protection needs of migrant workers and members of their families through the formulation of previously recognized rights, and through additional guarantees that are necessary due to the particular vulnerability of migrant workers. This is also the case of other group-specific core human rights treaties such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention of the Rights of the Child (CRC) and the new Convention on the Rights of Persons with Disabilities (CRPD).

The ICRMW contains 93 Articles, divided into nine parts:

- Part I contains the scope of the ICRMW and definitions. Article 2.1 defines a “migrant worker” as “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national”. Article 4 defines “members of their families” as “persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned”.
- Part II includes one Article on non-discrimination with respect to rights, in line with previous UN international human rights Conventions. It notably includes the following grounds for non-discrimination: “national, ethnic or social origin”, “nationality”, “economic position”, “marital status” and “other status”. Nationality and economic position are new grounds in comparison with previous core UN human rights treaties.<sup>21</sup>
- Part III lists the human rights of all migrant workers and members of their families, i.e. rights recognized to migrant workers and members of their families in a regular or irregular situation in their country of origin, transit and employment. As will be seen below, this Part is at the heart of the debate on ratification in Europe. Part III mainly restates and underscores “the application to migrant workers and members of their families of corresponding rights spelled out in the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights and other core human rights treaties”.<sup>22</sup> Article 34 notes that migrant workers and members of their families have an “obligation to comply with the laws and regulations of any State of transit and the State of employment”, in particular “the obligation to respect the cultural identity of the inhabitants of such States”.
- Part IV lists the human rights specifically recognized to regular migrant workers and members of their families, who are entitled to all rights under Part III and fuller and additional rights under Part IV. The distinction between regular and irregular migrant workers was a choice made at the time of drafting.<sup>23</sup> While recognizing fundamental rights to undocumented migrant workers, the ICRMW elaborates additional rights to documented migrant workers thus favouring and encouraging regular migration. This is also seen as an incentive for migrant workers and employers to respect laws and regulations of States of transit and employment.<sup>24</sup> The reference to “additional rights”, however, has often been misunderstood and misrepresented as “new rights”, which is incorrect.

- Part V features provisions applicable to particular categories of migrant workers and members of their families, entitled to rights under Parts III and IV. These categories are “frontier workers”, “seasonal workers”, “itinerant workers”, “project-tied workers”, “specified-employment workers” and “self-employed workers”.
- Part VI deals with the “promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families”. Articles 64 to 71 include general recommendations to States Parties, both as countries of origin and countries of transit and employment. For example, States are encouraged to consult and cooperate on a number of issues (orderly return, resettlement and durable reintegration of migrants, (Article 67) ; and preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation, (Article 68), specifically relevant regarding an international phenomenon such as migration. This Part has often been disregarded by European states, although it clearly contains important information regarding policies dealing with international migration. It is also the operating element of one of the main goals of the ICRMW, the elimination of irregular movements, as stated in its Preamble. Finally, Articles in Part VI are highly relevant to the ongoing inter-state debate at the international level on migration and development.<sup>25</sup> The added value of the ICRMW on these issues is illustrated in the work of the Committee on Migrant Workers (CMW).<sup>26</sup>
- Part VII on the application of the Convention details the monitoring system common to each core international human rights Convention, establishing a body of independent experts, the CMW, mandated to supervise the application of the Convention by States Parties.<sup>27</sup> It is interesting to note that Article 74 gives a particular role to the International Labour Office (Secretariat of the International Labour Organization - ILO), in line with the Preamble, which recalls the mandate of the ILO in relation to the protection of migrant workers’ rights.
- Part VIII on general provisions contains an important statement in Article 79: “Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families. Concerning other matters related to their legal situation and treatment as migrant workers and members of their families, States Parties shall be subject to the limitations set forth in the present Convention.” The sovereign right of States to decide upon who is allowed to enter their territory is clearly affirmed in the first sentence.<sup>28</sup>
- Part IX features “final provisions” that concern technical aspects of the ratification of the Convention.<sup>29</sup> Article 91 allows States to make reservations to the Convention at the time of signature, ratification or accession. However, as for all other core international human rights treaties, such reservations cannot be “incompatible with the object and purpose of the present Convention”. Nor may a State ratifying or acceding to the Convention “exclude the application of any Part of it, or, without prejudice to Article 3, exclude any particular category of migrant workers from its application” (Article 88).

The ICRMW covers all aspects of migration of workers, from pre-departure information to monitoring recruitment agencies, to conditions of work and stay in the employment country, to conditions of return and portable rights.<sup>30</sup> Hence, it applies – and this is often forgotten in the debate in Europe – to States Parties as countries of origin, transit and employment. Among the 44 States Parties to the ICRMW to date, most are simultaneously countries of origin, countries of transit and countries of employment of migrant workers and their families. This situation applies to many European countries. Most of them have important sections of their population living abroad, mostly in other EU or European Economic Area (EEA) countries, but also in third countries.<sup>31</sup> Therefore some obligations specific to countries of origin, such as the availability and effectiveness of consular services, the obligation to provide information before departure, or facilitating the right to vote, would also be relevant to many European countries.

In addition, aspects covered by the ICRMW, such as regulating recruitment agencies or the death of migrant workers, contain obligations for both origin and employment countries of migrants. Articles 31, 32, 33 and 47 are clear examples of the combined obligations of States of origin and States of employment for the protection of migrant workers’ rights. The ICRMW also expressly encourages States Parties to cooperate on a number of issues, namely combating trafficking (Preamble, Recital 12), the



orderly return of migrants (Article 67), or the education of migrant children and their integration at school (Article 45). In this regard, the ICRMW supports the international nature of migration and foresees the necessity for complementary actions by States to deal with cross-border movements.

## 1.2 DEVELOPMENTS IN EU MIGRATION LEGISLATION AND POLICY

The ICRMW in its Preamble recognizes the efforts made by certain States on a regional or bilateral basis towards the protection of the rights of migrant workers and members of their families, as well as the importance and usefulness of bilateral and multilateral agreements in this field. Developments at the EU level are therefore of critical importance to this study. All research on the prospects for ratification by European States devotes much time to examining the migration policies and legislations of the EU, including the role the EU could play in promoting ratification, in particular following the increasing responsibilities of the EU for migration policies.<sup>32</sup>

Over the last two decades, the EU has emerged as a new and increasingly important player in the area of migration policies, complementing the policies of the Member States. Following the Treaty of Maastricht, the EU developed increasing cooperation in some areas which are related to migration, such as border control (under the so-called Third Pillar, i.e., the inter-governmental dimension). This emphasis reflected the general orientation of the EU Member States in that period which were mainly focused on reducing irregular migration. Consequently, the policy area of migration has remained located within the Justice, Liberty and Security Directorate General (from 2010 Home Affairs Directorate General) of the European Commission and dealt with by the Justice and Home Affairs Council to this day.

The explicit mandate of the EU in the field of migration – as a shared responsibility with Member States – was inaugurated in 1997 in the Treaty of Amsterdam.<sup>33</sup> It was further developed in a number of documents and programmes adopted by the European Commission and Council. Generally, the EU has worked on the establishment of common policies in the field of migration and asylum by promoting cooperation, coordination, and in some areas, limited harmonization between existing Member State policies. Thus, migration has been included in the different programmes adopted by the EU. Overall, the Member States have shown significant resistance to proposals by the European Commission – particularly when they are aimed at harmonizing the level of rights of migrants – and unanimity in Council, which was required for the adoption of new EU legislation in this area until the Lisbon Treaty, was exceedingly difficult to achieve.

In 1999, the Tampere Programme (1999-2004) called for the development of a common European immigration policy based on core elements: partnership with countries of origin ; common European asylum system ; fair treatment of third-country nationals ; and management of migration flows. During the Tampere Programme, the EU adopted four Directives: on family reunification,<sup>34</sup> on long-term resident status,<sup>35</sup> on students<sup>36</sup> and on researchers.<sup>37</sup> The EU also initiated the development of a common integration policy, in particular using the European Commission communication on “A Common Agenda for Integration - Framework for the Integration of Third-Country Nationals in the European Union”<sup>38</sup> in September 2005. Additionally, on 28 February 2002, the Council adopted a comprehensive Action Plan to combat illegal immigration and trafficking of human beings in the EU.

Finally, during the Tampere Programme, the European Commission published a proposal for a Directive on the “conditions of entry and residence” of third-country nationals.<sup>39</sup> Unfortunately, EU Member States have not been able to agree on a common denominator for a single entry permit and a common set of rights for migrants, and the Directive Proposal was withdrawn. This failure to agree on a rights-based framework for labour migration in the EU is a demonstration of the approach that has dominated the development of EU migration legislation. Firstly, EU institutions have promoted rights-based legislation in the field of migration that Member States refused to adopt ; secondly, Member States have favoured a security- and economy-based approach to migration that has systematically sidelined the rights-based approach.

The Hague Programme (2005-2010) adopted by the European Council in November 2004 followed the Tampere Programme with the aim of creating “a space of freedom, safety and justice”. In particular, under The Hague Programme, the EU initiated a process on legal migration, launching a Green Paper on an “EU approach to managing economic migration” in 2005. The Green Paper process led to the adoption

in December 2005 of a Policy Plan on legal migration<sup>40</sup> comprising proposals for a General Framework Directive and four Directives on the entry and residence conditions for salaried workers (highly-skilled workers, seasonal workers, intra-corporate transferees (ICTs) and remunerated trainees). This Plan was a tentative replacement of the withdrawn Directive on the “conditions of entry and residence” of third-country nationals.

In parallel, the Hague Programme saw a shift towards more practical forms of European cooperation on asylum and migration.<sup>41</sup> Less legislation was passed - it only adopted the Blue Card Directive on 25 May 2009<sup>42</sup> - and existing Directives were evaluated.<sup>43</sup> However, in December 2008, implementing the 2002 Return Action Programme, the Council adopted the Return Directive<sup>44</sup> that has been criticized by a number of civil society actors, UN agencies and experts, and non-EU countries for substantially affecting international protection afforded to refugees.<sup>45</sup> It is worth noting, in this regard, that some of the provisions of the Return Directive that were most criticized did not figure in the initial proposal of the Commission, but were introduced by Member States. The Hague Programme also saw the emergence of the Migration and Development nexus, in particular with the Commission’s communication on “Migration and Development: some concrete orientations”.<sup>46</sup> The process on the integration of third-country nationals was also furthered.<sup>47</sup>

The Stockholm Programme (2010-2014) was adopted by the European Council in December 2009. Even though it is in line with the two preceding Programmes, it introduces a number of relevant innovations with regard to migration policies at the EU level. The first is the transfer of asylum and migration community competence under the First Pillar, thus moving from a unanimity requirement to one involving qualified majority voting in Council combined with co-decision by the European Parliament in terms of adoption of legislation. In theory, diverging national policies are now less likely to slow down or prevent agreement on measures at the European level. However, it remains to be seen whether there will be the political will to use the qualified majority principle in cases where major EU countries will be opposed to the Commission’s proposals.<sup>48</sup> The call for ratification of the ICRMW by EU Member States made by the European Parliament<sup>49</sup> on a number of occasions has gained more relevance now that the Parliament has more power. Indeed, the support that the Parliament has shown consistently to the ICRMW, coupled with the support of a number of Members of the European Parliament (MEP) for the ICRMW,<sup>50</sup> is a crucial element of the discussion on ratification of the ICRMW in the EU.

The Stockholm Programme also endorses a more inclusive and comprehensive approach to migration issues. The Global Approach to Migration launched in 2005<sup>51</sup> was subsequently improved through various Commission communications.<sup>52</sup> It relies more on the External Relations of the EU, hence on cooperation with third countries. It focuses on the management of legal migration, the prevention and reduction of illegal migration, and the relation between migration and development. Although other processes initiated under previous Programmes are still running, this latest shift towards a more restrictive approach to migration tones the former down.

Finally, more political initiatives have also been undertaken recently, demonstrating that migration is an important issue for EU Member States, and that States do not always converge in their approaches to migration policy. The European Pact on Asylum and Immigration, adopted in October 2008 under the French Presidency, is a striking example of political utilization of the migration item. It does not contribute to the existing Acquis<sup>53</sup> and ongoing processes of the EU, but rather brings confusion on the direction they should take. It reverses the trend towards harmonization of migration policies and promotes exclusive competences of the EU Member States. Although adopted by the 27 Heads of State and Government, the Pact is not an EU instrument. But it is undeniable that it influences greatly the EU migration policy, as the latest development of the Global Approach to migration demonstrates.

Most EU legislative acts and proposals deal with migrants in a largely instrumental manner, paying little attention to a rights-based perspective. However, the Directive on long-term resident status<sup>54</sup> lays down an ambitious set of rights of long-term resident third-country nationals, granting them in most areas equal treatment with EU citizens, and the Proposal for a General Framework Directive<sup>55</sup> includes a common set of rights for certain legally staying third-country nationals, assimilating them to a large extent to those provided for long-term residents. Thus, the proposal goes quite far in guaranteeing – at least to fully regular migrant workers – many of the rights which are included in the ICRMW.<sup>56</sup> The Explanatory Memorandum of this proposal recognizes that “currently there is a “rights gap” regarding third-country workers as opposed to own nationals”. The main objectives of the Proposal fall within the



ambitions of the EU, i.e., rights are recognized because they are necessary for the development of the European economy and for social cohesion, and not because migrant workers are entitled to them under human rights law. Introduced by the Commission in 2007,<sup>57</sup> the proposal was rejected by the European Parliament in December 2010 after a long process of negotiations. The rejection of the Directive was prompted by MEPs who regarded its text (particularly in the light of subsequent amendments) as too restrictive in terms of the personal and material scope of rights. The proposal is likely to be renegotiated in 2011, but the outcome is as yet unclear.

### 1.3 THE RATIFICATION OF THE ICRMW AND EUROPE

In Europe, the ICRMW was received ambiguously at first, some South European States prepared to ratify, others radically opposed. For instance, Italy, Spain and Portugal had not yet emerged as immigration countries when the Convention was ratified and adopted ; they had a much more positive approach, which was later replaced by consensual neutrality. On the contrary, Germany had made clear from the beginning that it would not ratify the ICRMW. EU states have now reached a sort of de facto consensus whereby no Member State would dare ratify the ICRMW without ratification being agreed at the regional level. In parallel, the EU migration policy has developed into a core field of EU legislation that applies to all Member States. This has been used by many EU Member States as an explanation for not ratifying.

Efforts to promote the ICRMW in Europe have been gathering pace in recent years, as it is commonly accepted that even a single ratification in the EU would represent a breakthrough not just on a regional level, but would also trigger interest throughout the world.<sup>58</sup> In fact, the lack of ratification by EU Member States is seriously undermining the credibility of their external policy efforts to promote the improvement of human rights situations in other parts of the world by encouraging or exhorting non-European States to ratify other international human rights instruments.<sup>59</sup> Moreover, the non-ratification of the ICRMW remains the most glaring omission on the part of the EU Member States, given that all EU Member States have ratified most of the international and regional human rights treaties and make efforts to respect them. The fact that EU Member States fail to maintain this level of commitment when it comes to the rights of third-country nationals gives rise to critical appraisal of the consistency of their (and the EU's) internal and external human rights policies. Recently, Ban Ki-Moon, Secretary-General of the United Nations, told the Council of Europe of his disappointment about Europe's lack of ratification and the implications that this has for migrants' rights:

“Here in Europe, ratification of the Convention on the Rights of Migrant Workers and their Families has been disappointing. Twenty years after it was adopted, none of Europe's largest and most wealthy powers have signed or ratified it. In some of the world's most advanced democracies ... among nations that take just pride in their long history of social progressiveness ... migrants are being denied basic human rights.”<sup>60</sup>

As shown in the Table in Annex II, the reluctance of EU Member States to ratify the ICRMW also concerns other international Conventions that specifically protect the rights of migrant workers, such as ILO Conventions Nos. 97 (The Migration for Employment Convention (Revised), 1949) and 143 (The Migrant Workers (Supplementary Provisions) Convention, 1975). This also applies to the regional level: all EU States have ratified the European Convention on Human Rights (ECHR),<sup>61</sup> but only six (France, Italy, the Netherlands, Portugal, Spain and Sweden) have ratified the European Convention on the Legal Status of Migrant Workers (ECLSMW).<sup>62</sup> In addition, similarities also emerge as to the reasons put forward by EU states for not ratifying the ILO Conventions and the ICRMW.<sup>63</sup> The field of migrants' rights is therefore a clear weakness of the European protection system. Understanding this specificity and the reasons that explain it is a core element of the process towards more recognition.

However, ratifications of ILO and Council of Europe (COE)<sup>64</sup> standards protecting the rights of migrants also show some commitment to the rights of migrant workers, at least by some EU Member States. Eleven EU Member States have ratified one or both of the two above mentioned ILO Conventions.<sup>65</sup> Moreover, instruments protecting migrants' rights have been ratified by more members of the COE ; the previous number rises to 21 when considering COE Members. Even more importantly, Albania, Azerbaijan, Turkey and Bosnia and Herzegovina have ratified the ICRMW, while Serbia and Montenegro have signed it. The ongoing process of accession of these States, in particular Turkey, to the EU casts

new light on the status of the ICRMW in the EU. Signature or ratification of the ICRMW by candidate countries to the EU can indeed contribute a different approach to the discussions on ratification of this instrument by EU Member States.

The ICRMW found support within the institutions of the EU as early as 1994. The European Commission initially supported the ratification of the ICRMW by EU Member States in an official Communication,<sup>66</sup> but then fell short of calling for ratification. It can only be speculated whether the disappearance of the issue from the Commission's subsequent Communications reflected a realistic political appraisal of the resistance of key Member States to the issue or a genuine change of view in the Commission itself.

The European Parliament has been more consistent in its approach, repeatedly calling on all Member States of the EU to ratify the ICRMW. For instance, on 6 July 2006, the Parliament urged "all Member States to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and fully honour their international commitments with regard to the protection of migrant workers and their families".<sup>67</sup> On 24 October 2006, the Parliament called "on Member States, on the basis of their national legislation and international conventions, to guarantee respect for the fundamental rights of immigrant women, whether or not their status is regular, particularly protection from enslavement and violence, access to emergency medical care, legal aid, education for children and migrant workers, equal treatment with regard to working conditions and the right to join trade unions (UN Convention for the Protection of the Rights of All Migrant Workers and Members of Their Families - 1990)" and called "on Member States, in compliance with their national legislation and international conventions (UN Convention for Protection of the Rights of All Migrant Workers and Members of Their Families - 1990), to ensure access to education for the children of immigrant women whose status is irregular".

On 9 January 2009, the Parliament called "on the Member States to ratify the United Nations Convention on the Rights of Migrant Workers, and draws their attention to the fact that most people who work without being in possession of the appropriate immigration documents are doing work which is legal and essential to Europe's economies, such as fruit picking, construction or maintenance work, and care of the sick, the elderly and children".<sup>68</sup> It additionally called "on the EU institutions and Member States to stop using the term "illegal immigrants", which has very negative connotations, and instead to refer to "irregular/undocumented workers/migrants".<sup>69</sup> It is interesting to note that in 2009, the European Parliament pointed to the fact that irregular migrant workers are in fact contributing to European economies. . Given that migration policy has now moved to a legal regime of co-decision by the European Parliament, the views of that institution might carry more weight in the future.

In the context of the recent vote of the European Parliament on the Proposal for a Single Permit and Common Set of Rights Directive (General Framework Directive)<sup>70</sup> that took place in December 2010, an Amendment (N° 16) was proposed that, if adopted, would have led to the inclusion in the Preamble of the Directive of a call to all EU Member States to ratify the ICRMW. This amendment, although backed by three major political groupings, lacked sufficient support to be adopted in the plenary. Due to the rejection of the draft Directive itself by Parliament, it is unclear (at the time of this study's conclusion) whether reference to the ICRMW will be raised in the next stages of the legislative process.

During the consultation process following the EU Green Paper on Economic Migration, several opinions in favour of ratification of the ICRMW emerged. In their contributions, the European Economic and Social Committee and the Committee of the Regions called on Member States to ratify the ICRMW, as did various representatives of civil society.<sup>71</sup>

Calls for ratification have also been made by the Parliamentary Assembly of the Council of Europe. The European Court of Human Rights, which has competence to judge all of the Council of Europe's Member States, and frequently refers to international human rights treaties as a basis for its judgements, has not yet begun basing its judgements on the provisions to the ICRMW.

EU Member States have, on many occasions, expressed their opinion on the ICRMW. The range of opinions varies, but the message appears to be fairly consistent, namely a refusal to sign and ratify. It is interesting to analyse the reasons invoked.<sup>72</sup> This is detailed in the next Chapter.<sup>73</sup> Such opinions have been made public either by means of Parliamentary questions,<sup>74</sup> answers to Recommendations made by National Human Rights Institutions<sup>75</sup> or as replies to surveys carried out by civil society actors<sup>76</sup> or international agencies.<sup>77</sup>

To date, EU Member States have not changed their position on the ratification of the ICRMW. They have received a number of recommendations to accede to the ICRMW from Treaty Bodies,<sup>78</sup> Special Procedures mandate holders<sup>79</sup> and from Human Rights Council Members in the context of the Universal Periodic Review (UPR).<sup>80</sup> Some have rejected UPR recommendations to ratify the ICRMW, thus reaffirming their reluctance to ratify, sometimes citing the reasons for such an opinion. Others have not yet rejected the recommendations, thus indicating a neutral position that might evolve. Finally, Finland and Slovakia seem to have taken another option by accepting the recommendation to consider ratifying the ICRMW made by Members of the Human Rights Council in June 2008 and May 2009, respectively.<sup>81</sup>

## 1.4 WHAT DOES RATIFYING THE ICRMW MEAN?

Ratifying means:

- Recognizing the importance of the rights set forth in the ICRMW and adhering to values that include the universality of the rights of migrant workers and members of their family. States recognize that, as human beings, all migrant workers are entitled to the most fundamental human rights.
- Recognizing the vulnerability of migrant workers and members of their families to specific human rights abuses and being willing to adopt measures to protect them.
- Accepting the provisions of the ICRMW as binding at the national level and towards other States Parties. This means that State Parties have to adapt their national legislation to be in conformity with the ICRMW. In some cases, States can also make reservations to the provisions of the ICRMW that they cannot commit to, as long as these are not against the object and purpose of the ICRMW.
- Accepting the applicability of the ICRMW to all migrant workers and members of their families that it covers, and the definition that the Convention gives to the different beneficiaries: “migrant worker”, “members of their families”, “frontier worker”, “seasonal workers”, “seafarer”, “worker on an offshore installation”, “itinerant worker”, “project-tied worker”, “specified-employment worker” and “self-employed worker”.
- Accepting the mandate of the Committee on Migrant Workers, committing to submit periodic reports and accepting dialogue with the Committee on the most effective way to implement the ICRMW. States also have to consider the recommendations of the Committee after a review of their report as being of particular importance as to what measures to take to best respect their obligations under the ICRMW. This presupposes that States are willing to improve their legislation and practice in the field of migrant workers’ rights.

## 2. RATIFICATION OF THE ICRMW BY EUROPEAN STATES: ISSUES AT STAKE

In 2007, UNESCO published a study on the obstacles to ratification of the ICRMW by European States,<sup>82</sup> as part of a series on obstacles to ratification.<sup>83</sup> The study was based on seven country reports (France, Germany, Italy, Norway, Poland, Spain and the United Kingdom) and aimed at identifying the main common and country-specific obstacles to the ratification of the Convention, in order to draw up a series of recommendations to overcome them. This study was the first document to discuss the ratification of the ICRMW in Europe in a detailed, complete and action-oriented manner. It presented the findings of the country reports according to the nature of the obstacles identified and listed legal, financial/administrative and political obstacles.

The UNESCO study showed that legal obstacles invoked by States as reasons not to ratify derived from incompatibilities between the current national legislations or overarching principles, and the content of the ICRMW. The study also concluded that, although these concerns over the content should be taken into consideration, the obstacles did not prevent ratification as they could easily be overcome, either by

modifying national legislation, or by making reservations to the ICRMW while ratifying. Administrative and financial issues did not emerge as major obstacles. The political obstacles identified in the study are clearly the core elements of the debate about the ratification of the ICRMW by European States. But all major legal, financial and administrative obstacles to ratification provide an understanding of the positions of EU Member States on the ICRMW.

Since 2007, most of these arguments have been restated on several occasions. This section describes the obstacles that states have consistently put forward to justify not ratifying the ICRMW and/or that seem to be core elements in the debate about ratification. It closely follows the classification contained in the UNESCO study.

## 2.1 LEGAL ISSUES

Three issues seem to be commonly cited as causing particular problems to States in the prospects for ratification. These are: the sovereignty of States to decide who enters their territory, the rights recognized to irregular migrant workers, and the “right” to family reunification.

### 2.1.1 States’ sovereignty

Preserving the sovereignty of States on their territory remains a crucial aspect of State prerogatives. Hence, the right of States to decide who can and cannot enter and remain on their territory is of utmost importance. At the level of the EU, this sovereign right of States is protected by Article 79(5) of the Lisbon Treaty that explicitly states that EU Member States retain the sole right to determine “volumes of admission” for work purposes.<sup>84</sup>

It seems that the sovereign right of States to decide upon who enters their national territory would be limited by international law in two areas, namely the admission of their own citizens, and the admission of refugees under the international asylum protection framework.<sup>85</sup> In that respect, Article 8.2 of the ICRMW protects the right of migrant workers and members of their families to re-enter and remain in their State of origin, i.e. “the State of which the person concerned is a national” (Article 6 ). In addition, the right to leave and return to one’s own country is protected by Articles 13.2 of the UDHR and Articles 12.2 and 12.4 of the ICCPR ;<sup>86</sup> in these provisions, “his own country” is broader than the concept of “country of nationality” and the right to return to one’s own country encompasses the right of “long-term resident migrants” to return to their host country.<sup>87</sup>

The fear that the ICRMW would breach the sovereign right of States to decide upon entry in and stay of third-country nationals on their territory has been frequently listed as a major issue for European States.<sup>88</sup> According to this argument, the ICRMW, by recognizing certain rights to migrant workers and their families, would limit the freedom of States to decide on visa, residence and work permit criteria. In fact, the contrary is included in the ICRMW in Article 79 that reads: “Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families. Concerning other matters related to their legal situation and treatment as migrant workers and members of their families, States Parties shall be subject to the limitations set forth in the present Convention.”

The Convention cannot be interpreted as limiting the right of States to decide upon admission of third-country nationals on their territory. The sovereignty of States with regard to admission, entry, stay and leave of migrant workers is mainstreamed throughout the ICRMW. The following limitations to rights arising out of the ICRMW refer, directly or indirectly, to the sovereignty of States Parties, and concern admission, entry, stay and/or leave:

- “any restrictions except those that are provided by law, are necessary to protect national security, public order (ordre public), public health or morals” (Article 8 on the right to leave any country and Article 39 on the right to liberty of movement) ;
- “whenever the terms of their stay, as authorized by the State of employment, meet the appropriate requirements” (Article 43.2 on equality of treatment with nationals) ;

- “Subject to article 70 of the present Convention, a State of employment may make the establishment of such facilities subject to the requirements generally applied in that State concerning their installation” (Article 43.3 on access to the employer’s housing or social schemes) ;
- “measures that they deem appropriate” (Article 44 on family reunification) ;
- “except where the authorization of residence is expressly dependent upon the specific remunerated activity for which they were admitted” and “subject to such conditions and limitations as are specified in the authorization to work” (Article 51 on migrant workers not permitted to choose freely their activity) ;
- “except for reasons defined in the national legislation of that State” (Article 56.1 on protection from expulsion of regular migrant workers) ;
- “without prejudice to article 79” (Article 64 on the promotion of sound, equitable and humane conditions) ; and
- “in accordance with applicable national legislation and bilateral or multilateral agreements” (Article 69 on regularizations).

In addition, Article 35 “protects” the right of States to decide on regularizations ; Article 34 “protects” the laws and regulations of the States Parties, and the cultural identity of their inhabitants ; Article 22 “protects” the right of States to decide to return irregular migrants on an individual basis.

### 2.1.2 Regular versus irregular migrants

The ICRMW protects both regular and irregular migrant workers and their families. Part III of the Convention (Articles 8 to 35) applies to all migrant workers, whereas Part IV (Articles 36 to 56) provides additional rights to regular migrant workers and their families. The rationale for this distinction is to be found in the will of the drafters to give incentives for the recruitment of regular migrants in order to combat irregular migration and employment of irregular migrants.<sup>89</sup>

States have traditionally distinguished between regular and irregular migrant workers. Lately, attitudes towards irregular migrant workers have worsened, thus influencing the debate about ratification. As a result, rights recognized to irregular migrant workers have been more recently cited by States as an obstacle to ratify the ICRMW.<sup>90</sup> Two main aspects regarding irregular migrant workers in the ICRMW can be identified in the State’s reluctance to ratify the ICRMW. These are the fact that the ICRMW recognizes rights to irregular migrant workers, and the argument that the ICRMW does not help prevent irregular migration.

#### 2.1.2.1 Granting rights to irregular migrant workers?

Annex I compiles all recommendations made to European States by members of the Human Rights Council (HRC) during UPR since 2008.<sup>91</sup> It shows that all European States that have been reviewed in the UPR received one or several recommendations to ratify the ICRMW.<sup>92</sup> In all the answers given by European States which sought to justify not ratifying the ICRMW, mention was made of the fact that the ICRMW protects the rights of irregular migrant workers or does not distinguish between regular and irregular migrant workers. This is found, for instance, in the answer that The Netherlands gave to the members of the HRC in April 2008 during the first session of the UPR: “The Kingdom of the Netherlands has not signed this convention because it is opposed in principle to rights that could be derived from it by aliens without legal residence rights. The Kingdom of the Netherlands therefore cannot support this recommendation.” It is interesting to note that during the same session, The Netherlands accepted the recommendations to ratify three other Conventions or Protocols.<sup>93</sup>

In previous attempts to assess the obstacles to ratification, States had expressed two main concerns regarding rights of irregular migrant workers: that the Convention covered more than the necessary basic rights of irregular migrant workers ; and that granting rights to irregular migrant workers, including access to social benefit, would act as a pull factor and lead to more irregular movements.<sup>94</sup> On closer inspection,



this argument seems rather unconvincing. Firstly, all European States concerned have ratified other core international human rights treaties that protect migrant workers' rights even when they are undocumented. In particular, European States have all ratified the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) ; and they have all ratified the European Convention on Human Rights (ECHR). States are bound by the international obligation to respect irregular migrant workers' rights under these treaties. A comparative table clearly shows that most Articles of the ICRMW applying to irregular migrant workers and their families have corresponding provisions in other core international human rights treaties that EU Member States have ratified.<sup>95</sup> In addition, the right not to lose residence or work permit for not fulfilling a contractual obligation, protected under Article 20.2 of the ICRMW, is contained in Article 8.1 of ILO Convention N° 143 (Revised) ; Article 2 of ILO Convention N° 97 (Revised) protects the right to information contained in Article 33 of the ICRMW. Only the right to transfer savings and earnings,<sup>96</sup> the right to consular protection and assistance,<sup>97</sup> and the right not to have identification documents confiscated or destroyed, which are recognized to irregular migrant workers under expressly formulated provisions, do not have explicit corresponding rights in other international human rights instruments ; this does not mean however, that other treaties may not be interpreted as protecting these rights. In fact, all of these three specific rights spelt out in the ICRMW could be seen as declensions of more general human rights.

All European States have comprehensive legislation and mechanisms to protect, including in practice, the right to life, right to integrity of the person, prohibition against torture, prohibition of slavery and forced labour, and right to liberty and security ; these also apply to irregular migrant workers and their families.<sup>98</sup> In addition, most European States do "grant" rights to irregular migrant workers that are more contentious from the perspective of States. As the analysis of national legislation and practices in Part II shows, rights that are protected under most national law include the right to health (at least emergency health care), the right to education, and the right to be regularized under certain conditions.

Access to and effective implementation of these rights can often be questioned when it comes to migrant workers in an irregular status. However, these rights are "recognized" in national law. It seems therefore illogical to refuse to sign the ICRMW on the grounds that it recognizes rights to irregular migrant workers in general, without being more specific as to the rights that actually cause problems with regard to national legislation. Even though international human rights obligations extend to the actual and effective enjoyment of the rights internationally recognized, as far as ratification is concerned, the gap between this and the rights recognized in principle should not prevent ratification. In fact, in most cases, ratification is a step towards bridging such a gap.

Beyond this, the very nature of human rights is that they are universal ; they apply to all human beings. The *raison d'être* of the ICRMW is to stress that, whatever their status, migrant workers and members of their families are entitled, as human beings, to basic human rights. The scope of the ICRMW covering all migrant workers and members of their family (limited to Part III) is in fact a reason to ratify the ICRMW: it is the first international instrument that protects the basic human rights of all migrant workers.

The term "irregular migrant workers" covers a variety of situations. The irregularity of migrant workers can have different sources: working without work and/or residence permits ; non-registration at social insurance institutions ; non-registration at tax institutions, violation of workers' rights, insufficient registration of the employment contract, irregular extension of a regular work permit, "pseudo-self-employed", violation of trade regulations, "pseudo-companies", and organization in membership associations.<sup>99</sup> Consequently, there are different degrees of irregularity, as there is a difference between breaches of employment and labour regulations and breaches of regulations on residence and visa procedures, the former being considered as "semi-compliance".<sup>100</sup> It is also important that many irregular migrant workers are those who have entered regularly in the country, but subsequently lost their legal status. In the case of Italy, for instance, it is estimated that only 25 per cent of irregular migrants present in the country entered irregularly, whereas 75 per cent entered regularly but became undocumented after losing regular status.<sup>101</sup> Indeed, many irregular migrants who lose their legal status have in fact sought to maintain it, but they were not able to pass various hurdles created by excessively onerous or rigid demands of State bureaucracies. From a migration policy point of view, this is counter-productive, especially in light of collective regularization programmes or individual regularizations that have taken place in most European States in the last decade, as shown in Part II.

Additional arguments linked to the economic contribution of irregular migrant workers to the host society are usually put forward to support the recognition of rights to irregular migrant workers. However, the debate is not so much whether irregular migrant workers are making a contribution to European economies – which they are<sup>102</sup> – but rather that they are human beings entitled to protection. The ICRMW does not go beyond that recognition. In fact limitations are often placed on the rights recognized to irregular migrant workers in the ICRMW:

- “may therefore be subject to restrictions” provided by law and necessary (Article 13 on freedom of opinion) ;
- “in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties” (Article 27 on social security rights) ; and
- “in accordance with the applicable legislation of the State concerned” (Article 32 on the transfer of earnings).

Finally, the very fact that Part III of the ICRMW applies to irregular migrant workers and their families should be seen as a tool to improve legislation and practices that protect irregular migrant workers’ rights. The review of national legislation and practices by the CMW encourages and triggers the exchange of good practices on access to fundamental human rights of irregular migrant workers and their families. For instance in the case of access to health care that is recognized, at least in principle, in most European countries, analysis shows that in many cases, access is limited or difficult in practice.<sup>103</sup> Therefore, a review of the law and practice by the CMW could contribute to identifying difficulties and suggesting means to improve practice. The CMW in reviewing States Parties reports can identify best practices and recommend them when they are applicable in other countries. Even though this is true for all provisions contained in the ICRMW, it is particularly relevant for the fundamental rights of irregular migrant workers, because the ICRMW is the only international human rights instrument that specifically and expressly protects these rights, and formulates them in a way that aims at addressing specific vulnerabilities of irregular migrants.

### 2.1.2.2 Fighting irregular migration

Among obstacles to ratification, concomitant to the rights recognized to irregular migrant workers and their families is the argument that the ICRMW does not contribute to reducing, or even encourages irregular migration. In the argumentation of European States referring to irregular migrants, it can be observed that granting rights to irregular migrant workers is often assimilated to encouraging migration, in particular irregular movements. This is a perception that is neither founded on the spirit and content of the ICRMW, which stipulates the contrary, nor on research<sup>104</sup> that shows that irregular movements are not influenced by the degree of protection in countries of destination.

Though it is acknowledged that more research should be carried out on this very specific issue,<sup>105</sup> it is difficult to subscribe to the belief that the recognition of irregular migrants’ rights in countries of destination could be an incentive to migrate. What might be true, however, is that recognition of rights might be an incentive to choose one particular country of destination over another. At the level of the EU, it therefore appears logical to standardize protection afforded to irregular migrant workers. Standardization can only be possible if European States politically and collectively recognize as a principle that irregular migrants are entitled to fundamental human rights. This could be achieved by adopting a Directive on the rights irregular migrant workers and their families are entitled to.

It should be noted that the debate on the rights of irregular migrant workers in Europe is distorted by the tolerance, and in some cases, support, that States may give, intentionally or not, to irregular work of migrants on their territory.<sup>106</sup> It is now widely acknowledged that migration, including low-skilled migration, contributes to the economies of European States. The benefits of irregular migration to economies and societies are increasingly documented. The principled position of States against irregular migration often contrasts with their non-action about irregular employment of migrant workers.<sup>107</sup> States find themselves in a “schizophrenic” position in which they seek to end irregular migration while resorting to it for low skilled-jobs.<sup>108</sup>

Contrary to common opinion about the ICRMW, one of the important concerns at the time of drafting, reflected in an elaborate and comprehensive set of articles, is the reduction of “illegal” migration.

The Preamble makes it clear by referring to “recognizing the importance and extent of the migration phenomenon, which involves millions of people and affects a large number of States in the international community” and adds “[awareness] of the impact of the flows of migrant workers on States and people concerned”. The Preamble goes on with an argumentation in four Recitals concluding as follows: “Bearing in mind that the human problems involved in migration are even more serious in the case of irregular migration and convinced therefore that appropriate action should be encouraged in order to prevent and eliminate clandestine movements and trafficking in migrant workers, while at the same time assuring the protection of their fundamental human rights.”

The Preamble proposes three - cumulative - elements that can contribute to reducing irregular movements of migrants:

- 1: Recognize their basic human rights to avoid unfair competition that irregular work facilitates.
- 2: Recognize “more” rights to regular migrant workers in order to encourage regular employment of migrants.
- 3: Sanction employers that resort to irregular migrant labour.

This in part explains why rights of all migrant workers and their families are recognized in Part III of the ICRMW. Article 68 affirms that: “States Parties, including States of transit, shall collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation”. In addition to this “clear and principled human rights approach to the problem of irregular migration”<sup>109</sup>, the ICRMW contains several elements specifically designed to combat irregular migration:

- 1: Cooperation among States (Articles 64, 65, 67, 68).
- 2: The promotion of sound, equitable and humane conditions of migration (Article 64).
- 3: Evaluation of labour needs and consequences of migration (Article 64).
- 4: Elaboration and implementation of clear policies for entry and stay in the country (Article 65).
- 5: Properly inform employers and migrant workers (Article 65).
- 6: Combat misleading information (Article 68.1.)
- 7: Repress and sanction smugglers and traffickers (Article 68.1).
- 8: Monitor recruitment of migrant workers by private agencies (Article 66).
- 9: Sanction employers of irregular migrants (Article 2).
- 10: Address irregular status of migrants (Article 69).
- 11: Regularization (Article 69).
- 12: Orderly return of migrants (Article 67.1).

EU Member States have well understood that in order to “combat” irregular migration the help of countries of origin and transit (cooperation among States) is necessary.<sup>110</sup> They have signed a number of bilateral agreements, either individually or via the EU agencies. The programme of work of the European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX)<sup>111</sup> illustrates clearly the demand by the EU and EU Member States for coordinated action with third countries. International cooperation to control border crossing into the EU and limit irregular movements of persons is a developing tool of the EU. It could be reinforced by integrating elements mentioned above that the ICRMW elaborates to combat irregular migration.



In the context of the debate linking migration and development, the role of recognizing human rights of irregular migrants has been put forward and disseminated.<sup>112</sup> In particular, the relevance of the ICRMW to articulate measures, policies and actions remains central.<sup>113</sup> The divide between internationally discussed and agreed principles – recognition of irregular migrants’ rights to fight irregular movements and to support development – and discourse and policies at the national level is an issue to be considered. It appears to be mainly a question of the will of decision makers, as most fundamental rights of irregular migrant workers are in principle recognized in European States’ legislation.

The utility of the ICRMW in matters relating to combating irregular movements of persons and the guarantee that ratification does not go against the will of many States to controlling migration movements and reducing irregular movements is clear. The ICRMW is first and foremost a human rights instrument, which was drafted and adopted universally to protect migrant workers and members of their families. States’ attempts to protect irregular migrants are too often overshadowed by their actions to manage migration. This may be a crucial element regarding ratification of the ICRMW: it is too often considered in the context of migration management and not in its own right. What Cholewinski and MacDonald rightly recall, is that EU and EU Member States migration policies do not share the same philosophy as the ICRMW.<sup>114</sup> The former have been driven by the concern for regulation of migration flows, whereas the ICRMW is based on a human rights approach. They appear mainly complementary rather than anything else, especially in the domains where they share concerns. The fight against irregular migration is definitely one of those.

### 2.1.3 The “right” to family reunification

The ICRMW does not protect the right to family reunification. Article 44 protects the right of the unity of the family of migrant workers who are documented or in a regular situation. It encourages States Parties to “take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers” with members of their families. The wording of that Article cannot be understood as a right to family reunification. In particular, read together with Article 79 that guarantees the right of States to decide upon who enters their territory, it is clear that the ICRMW, while encouraging family reunification, leaves a reasonable margin to States to decide whether and how to protect the unity of the family. Here again, reluctance of States regarding family reunification is based on misconceptions of the ICRMW.

So far, the Committee on Migrant Workers monitoring the implementation of the ICRMW by States Parties has not had the opportunity to develop its interpretation of Article 44. Only in the concluding observations formulated after the examination of the report from Algeria, did it refer to this Article: “The Committee is concerned that the regulations governing family reunification for migrant workers, under Act N°. 81-10, apply only to the spouse.” It therefore recommended that “the State Party ensures that the rules governing family reunification are in line with articles 4 and 44 of the Convention”.<sup>115</sup>

Other Treaty Bodies have made recommendations to States Parties to the other international human rights treaties relating to the unity of the family. They have not interpreted these Conventions as providing a right to reunification of families, but rather based their recommendations on non-discriminatory and gender-equality grounds.<sup>116</sup>

The selective analysis of national legislation in European States regarding migrant workers’ rights in Part II of this study shows that in most countries, regulations exist that allow family reunification for certain categories of migrant workers and under certain conditions. Both the limitation to certain categories of migrant workers and the conditions to allow family reunification fall within the scope of Article 44 of the ICRMW, as only “an explicit and blanket ban on all family reunification” could be in breach of this article.<sup>117</sup>

## 2.2 ADMINISTRATIVE AND FINANCIAL ISSUES

### 2.2.1 The costs of ratification

In the arguments of States against ratifying the ICRMW, administrative and financial issues are the least difficult to overcome.<sup>118</sup> General financial concerns are often invoked by “new” EU Member States that were traditionally countries of origin and therefore have not yet put in place a framework to deal with migration issues in their entirety.<sup>119</sup> While it is true that the ICRMW covers a varied range of aspects of national policies, from justice to education, to border control and consular services, such a

framework dealing with migration issues is necessary for any EU Member State. European migration policy also covers a great number of issues that necessitate putting in place a framework according to European law. In fact, from an organizational point of view, it would be more cost-effective to implement these EU legislations taking into account provisions of the ICRMW. Further, it has to be recalled that the CMW while reviewing States Parties' reports, takes a comprehensive approach with regards to implementation of ICRMW provisions. For instance, it takes into consideration "factors and difficulties impeding implementation of the Convention", such as "the very significant increase in migration flow" (Mexico),<sup>120</sup> "the geography of the thousands of islands [that make] it challenging to effectively monitor the movement of people and control borders to prevent irregular migration and to safeguard the rights of all migrant workers" (Philippines),<sup>121</sup> "controlling the extensive borders [the State Party] shares with seven neighbouring countries"<sup>122</sup> (Mali), "that the State Party is currently in a process of profound institutional and legal changes, in particular in the process of adopting a new constitution"<sup>123</sup> (Bolivia) or "the political and administrative structure [of the State Party], which grants extensive autonomy to the two Entities established under the Dayton Peace Agreement of 1995 (...) [that] may create constraints in planning, developing and implementing comprehensive and coordinated laws and policies for the implementation of the Convention at all levels"<sup>124</sup> (Bosnia and Herzegovina).

Another financial argument was put forward by France and concerns the transfer of remittances by migrant workers, according to which implementation of Article 47 of the ICRMW would drastically cut the taxes deducted from money transferred by migrant workers. Article 47 encourages States Parties to "take appropriate measures to facilitate such transfers", which seems to indicate that States should reduce the amount of taxes that are received by banks and the State on the flows of remittances sent by migrants to their countries of origin. The French National Commission on Human Rights (CNDH) advised France to make a reservation to Article 47 in order to overcome this obstacle to ratification.<sup>125</sup> This argument is therefore not insurmountable. It should also be noticed that Article 47 contains an indication as to how transfers should be facilitated that leaves some margin of action to States Parties: "Such transfers shall be made in conformity with procedures established by applicable legislation of the State concerned and in conformity with applicable international instruments."

Another aspect of administrative and financial issues concerns the existing gap between rights as they are recognized in the law and their effective implementation in practice. Filling the gap in some countries represents a major undertaking and consequent budget, as the cases of Italy and Greece illustrate. The geographical situation of some European States has to be taken into consideration, as they are "gateways" to Europe and therefore have to face serious border control issues. Recently, the situation in Greece was commented on by the UN Special Rapporteur on Torture, Manfred Nowak, in these terms: "Greece should not carry the burden of receiving the vast majority of all irregular migrants entering the EU in 2010. This is a truly European problem which needs a joint European solution, and not only a reinforcement of the European borders with FRONTEX."<sup>126</sup> Here again, the standardization at the European level in filling the gap between rights in theory and rights in practice would allow for regional financial burden-sharing.

Ratifying an international human rights treaty usually entails costs and countries are well aware of this. For example, accommodating the needs of persons with disabilities in the workplace, equipping streets, public buildings, etc., to facilitate their access represents costs<sup>127</sup> which did not stop – and rightly so – all EU Member States as well as the EU as a whole from signing the new Convention on the Rights of Persons with Disabilities that was adopted on 20 December 2006.<sup>128</sup>

Finally, in the face of the argument about financial costs of ratification, one is tempted to highlight the financial benefits of migration for European countries. There is no possible future for European economies without labour migration. Financially, regularly employed migrant workers contribute to the tax systems and therefore to the social welfare systems of countries in which they work.<sup>129</sup> In any case, a cost-benefit analysis of the implementation of migrant workers' rights does not support the financial argument.<sup>130</sup>

The question of costs also covers the budgetary choices that are made in the field of migration. Budgets to stop and prevent irregular migration at the borders of the EU indicate that EU Member States have decided that, although extremely expensive, increased and reinforced border control measures and development of forced voluntary returns are necessary.<sup>131</sup> By comparison, the integration of migrant workers that includes and necessitates recognition and implementation of rights gets much less funding, although integration is equally important for European States' objectives of security, and for chosen and efficient labour migration.<sup>132</sup>

## 2.3 POLITICAL OBSTACLES

Political obstacles to ratification are generally influenced by policy trends, public opinions, and peer pressure. Political obstacles to ratification are additionally guided by elements specifically linked to migration: i.e. the management approach to migration that has been opted for by European States since 1992, the sensitivity of States when it comes to the respect of their territory and national identity, traditional prevalence of the protection of States' citizens rather than foreigners, the selective media coverage of today's migration phenomenon, and more recently, the economic crisis and its impact on European States' economies.

European States recurrently put forward a number of obstacles to the ratification of the ICRMW that are political, in the sense that they are a question of decision-makers' choice. Questions are raised about the necessity of the ICRMW in the light of States' international obligations and national legislations ; the EU mandate on asylum and migration is often cited as preventing Member States from individually ratifying the ICRMW. Finally, it appears that the lack of political will of decision-makers accounts for a great deal in the negative perception of the ICRMW.

### 2.3.1 Is the ICRMW superfluous in Europe?

Opinions of European States about the ICRMW have consistently questioned its usefulness. States base their argument on their adherence to other binding international human rights instruments that protect migrant workers' rights, and to their own national legislation and practice that they sometimes say go beyond the protection afforded by the ICRMW.

All EU Member States have ratified the core international human rights treaties with the exception of the ICRMW.<sup>133</sup> Most of the rights these treaties protect apply to everyone, including migrants, whether in a regular or irregular situation. Fundamental rights recognized specifically to irregular migrant workers and their families in the ICRMW are already covered, though not specifically, in the other core international treaties by which European States are bound. This is how the argument of European States is elaborated, arguing that the ICRMW is therefore needless. However, several studies<sup>134</sup> have shown that, in practice, there is a difference between the coverage of migrants' rights by other core international human rights treaties and their Treaty (Monitoring) Bodies (TBs), and the protection that the ICRMW potentially entails. Often, conclusions of other TBs lack relevance or applicability ; the issues they cover that are relevant for migrant workers' rights are not systematic and vary greatly from a country to another, and from one TB to another, therefore creating gaps in the monitoring of States' records.<sup>135</sup> The ICRMW contributes to closing the gap between rights as they are on paper and as they are enjoyed in practice.<sup>136</sup>

In particular, an evident added-value of ratifying the ICRMW is the expert analysis of States Parties' achievements that is carried out by the CMW on a regular basis. The CMW contributes to addressing States Parties' difficulties in implementing the ICRMW by identifying gaps in protection of migrant workers and by recommending means to bridge those gaps, thus improving aspects of the States Parties' migration policies and legislations. Through the identification of best practices among States Parties, the CMW allows for the sharing of information and best practices. States, including European States, are explicitly encouraging and supporting such approaches to migration policy making, as both the programme of the Global Forum on Migration and Development (GFMD) and their participation in this international forum demonstrate. The GFMD primarily aims at enabling "policy makers and experts to debate and exchange ideas, best practices and experiences that support governments in designing effective and coherent migration and development policies".<sup>137</sup> The overall subject of the last GFMD in Mexico, November 2010, was "Partnerships for migration and human development: shared prosperity – shared responsibility". The discussions indeed focused on partnerships – cooperation and collaboration – while also including the human rights protection approach to migration.<sup>138</sup>

National legislations and practices of European States do grant some level of protection to migrant workers and their families, including those in an irregular situation, as shown in Part II of this study. However, what is also clear is that most recent legislations and practices of States tend to limit access to some rights,<sup>139</sup> while at the same time extending access to others.<sup>140</sup> Such fluctuations of national law and policy are, in fact, characteristic for the area of migration. This is not surprising, but it might be at the expense of the enjoyment of human rights. This is why human rights instruments that include monitoring

mechanisms have been adopted by States at the international level as safeguards permanently binding the States Parties. Specific instruments have also been adopted to protect more vulnerable persons: women, children, migrant workers and their families, and persons with disabilities, whose rights are already covered in general terms under previous human rights treaties. The same logic has driven the drafting and implementation of the ICRMW. The need for a specific and innovative instrument is reaffirmed by the “institutional and endemic problems” migrant workers continue to face, despite the fact that other human rights instruments apply to them.<sup>141</sup>

In response to the argument of European States that ratification of the ICRMW is superfluous, one is tempted to ask whether migrant workers are superfluous in Europe. The relation between the contributions of migrant workers in the countries where they work and the enjoyment of their rights in practice are intrinsically linked. The contributions migrants make to the economies and societies in the countries where they work and live can only be obtained when migrant workers’ rights are effectively and specifically protected.<sup>142</sup> Ratification of the ICRMW would thus represent one step towards greater recognition and respect of migrants as contributors to European economies.

### 2.3.2 The European argument

The argument that an EU Member State cannot unilaterally ratify the ICRMW has been recurrently put forward by EU Member States. Very recently, European Member States have reiterated their reluctance to ratify the Convention,<sup>143</sup> arguing that “the signature and ratification could only be planned jointly with the other EU partners as many provisions of the Convention fall within the European Union domain”<sup>144</sup> or that “France cannot act individually on this matter because migration and asylum policies come within the Community competence, which implies a coordination amongst all Member States”.<sup>145</sup>

#### 2.3.2.1 European migration policy and ICRMW

There is no available comprehensive study of the eventual incompatibilities between the EU migration Acquis and the content of the ICRMW.<sup>146</sup> It is therefore difficult to assess whether ratifying the ICRMW would contradict any of the multiple EU policies and laws on migration. Furthermore, a study should also look at the EU approach to migration and assess when and how it affects the rights of migrant workers, not so much in the law, but in their enjoyment in practice. Such a study could help to indicate possible inconsistencies, but even this could not support the European argument as an obstacle to the ratification of the ICRMW.

As already noted, migration is a growing competence of the EU.<sup>147</sup> However, asylum and migration are not exclusive competences of the EU, but are shared between the EU and Member States. Under the shared competences, instituted by the Lisbon Treaty that entered into force on 1 December 2009, asylum and migration are subject to the rule that Member States cannot exercise competence in areas where the Union has done so.<sup>148</sup> An important exception to this rule is that Member States can always transfer EU legislation into their national legislation in a way that is more favourable to its beneficiaries.<sup>149</sup> As seen, EU Institutions have in fact called on EU Member States to ratify the ICRMW.

EU legislation is - at least indirectly - linked to core international and regional human rights treaties that all EU Member States have ratified. For instance, all EU Member States are bound by the International Bill of Human Rights, which combines the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The ICRMW is actually rooted in these instruments and builds upon them to specifically protect migrant workers and their families.<sup>150</sup> In addition, the EU Acquis include obligatory ratification of a number of human rights conventions, namely the ECHR and its Protocols Nos 4 and 6 ; the International Convention on the Elimination of All Forms of Racial Discrimination ; and the Convention on the Rights of the Child . Moreover, the EU is currently considering signing, as an institution with a legal personality, the ECHR.<sup>151</sup> Thus, the legal influence of these later Conventions on EU legislation and measures are a step further. Their relevance to the debate about ratification of the ICRMW is that they cover rights of irregular migrant workers and members of their families, including in an irregular situation.<sup>152</sup>

The EU now has its own human rights reference text: the Charter of Fundamental Rights of the European Union became binding on EU States with the entry into force of the Lisbon Treaty.<sup>153</sup> As



shown in Part II,<sup>154</sup> there are no critical incompatibilities between the ICRMW and the EU Charter. On the contrary, this in fact means that, now that EU legislation cannot afford migrants' rights protection below the protection they are explicitly entitled to under the Charter - which in many ways corresponds to the protection granted by the ICRMW, including to irregular migrant workers - the eventual inconsistencies between the ICRMW and the EU Acquis should be resolved, with a few exceptions. These exceptions can be addressed either by making a reservation upon the ratification of the ICRMW, or by modifying corresponding national legislation.

All EU Member States are Member States of the United Nations ; Article 52 of the Charter of the United Nations stipulates that "nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations".

### 2.3.2.2 The European migration policy as an exonerating argument

The European argument, as it is presented by Member States rests on the claim that, even though it might legally be possible for individual States to ratify, it can only be done in coordination with other EU Member States. The argument suggests that ratification could be undertaken only by the EU as a whole (or at least by a significant group of EU Member States).<sup>155</sup> While it is true that national migration policies are increasingly influenced by community approaches to migration, this argument cannot, in itself, prevent a sovereign State from acceding to an international treaty.<sup>156</sup> Human rights are also part of the mandate of the EU, but this does not prevent any Member State from adhering to international human rights conventions without the consent of regional counterparts.

The reasons why the European argument continues to fuel EU Member States' discourse about the ICRMW remains to be considered. Peer pressure should not be underestimated in this regard.<sup>157</sup> In a somewhat hostile environment towards the ICRMW, becoming the first Member State to ratify the ICRMW would not go unnoticed. The chances are that it would be highly criticized by other Member States, on a number of grounds recurrently put forward by States, not least of which is the "wrong" signal that ratification would send to aspiring migrants. It is undeniable that ratifying the ICRMW would send a strong political message. But this latter argument maintains the confusion between the level of protection a country affords to migrant workers and the number of irregular migrants it counts on its territory. However, there is no evident or proven causal effect between the two.<sup>158</sup>

The perception of migrants by public opinion and the media, in comparison with other vulnerable groups protected under specific core international human rights treaties (such as women and children), plays a decisive role in the reluctance of States to ratify the ICRMW. As demonstrated by several authors,<sup>159</sup> the cultural and philosophical representations of migration in Europe do not contribute to spreading a positive image of "the migrant". This is somewhat surprising, given that Europe was an important source of emigration up to the mid 20<sup>th</sup> century.

The level of misconceptions about the Convention, its content and its meaning can again be identified as grounding the European argument. It is as if European States had demonized the ICRMW to the point where they have lost track of what it is, namely an international human rights treaty.

The European argument is one of the major obstacles today for ratification of the ICRMW. It in fact reveals that individual States' reluctance to ratify it is merely a question of political will.

### 2.3.3 The will of decision-makers

In a context in which the applicability of human rights to migrants is challenged by "newly articulated ideologies and political arguments,"<sup>160</sup> the political will to ratify the ICRMW usually reflects a more general recognition of the importance of migrant workers' rights. In the Member States of the EU, the explicit opposition to the ICRMW can, in fact, be explained solely by a lack of political will.

However, in a number of EU Member States, at least some political parties have expressed their intention to take steps towards the ratification of the ICRMW.<sup>161</sup> In some instances ratification has

been included in the electoral programme. The cases of Spain, France, the UK, and to a lesser extent Italy, illustrate that raising awareness about the ICRMW and its content at national level, and particularly in the political sphere, is an important factor for endorsement by political parties and Members of Parliament.<sup>162</sup> However, in the cases of France and the UK, where national ratification campaigns have been organized and resulted in the inclusion of the ratification of the ICRMW in the programme of some political parties, and in questions put to Parliament, this has not been sufficient to create a wider acceptance of the Convention. Ratification campaigns remain a necessary tool in national contexts where there is an evident lack of knowledge about the ICRMW, in particular among politicians. This is what drives the current campaign targeting EU Member States that was launched in July 2010.<sup>163</sup>

Usually, political parties committed to the ICRMW were not in power when they seemed positively inclined towards ratification. Once in power, none has taken action to ratify the ICRMW, in some cases making clear that politically, ratification was no longer an option.<sup>164</sup> This was particularly the case in Spain. Representatives of the Spanish Socialist Party (PSOE) urged the Government of Spain to ratify the ICRMW in November 2003. A few months later, the PSOE came to power - and it has not taken any action since to sign or ratify the ICRMW. However, the commitment of the PSOE to the ICRMW was reaffirmed in 2008 as ratification of the ICRMW was included in the manifesto for the 2008 general election.<sup>165</sup> The PSOE does envisage ratification, but only if it takes place in the context of a European consensus. Indeed, it expressed its reluctance to unilaterally accede to the ICRMW on the occasion of the question put to the Government by Members of Parliament in 2010.<sup>166</sup> This case illustrates that the ICRMW can be perceived as a “vote-loser” issue, even though it has been endorsed in principle by a potential majority party or even a party in power.<sup>167</sup> Above all, what the Spanish case makes clear is the strength and resilience of the “European alibi”.

This is why the above mentioned ratification campaign specifically addresses the EU level, involving more than 50 Members of the European Parliament, from 21 EU Member States.<sup>168</sup> Raising the level of campaigning and targeting political spheres at the EU level might actually provide more visibility and increased impact than multiple national campaigns. This is particularly true given the fact that EU Member States consistently refuse to address the issue of the ratification of the ICRMW unilaterally, and demand that it be addressed at the regional level. There is therefore a clear space – and need – for discussion on this topic at the European level, within the EU Institutions.

The EU dimension of the debate surrounding the ratification of the ICRMW should not, however, overshadow the primary responsibility for the protection of the rights of all migrant workers and their families that lies with the Governments and Parliaments of individual EU Member States. The question of accountability of these States with regards to the human rights of migrants cannot be transferred to the EU level or hidden behind supposedly competent EU Institutions. In the international context, the blatant lack of political will of European States to recognize the importance of the human rights of migrants has created a double standard ; while they demand that other States respect their international human rights obligations, they refuse to be bound by international human rights obligations regarding migrant workers. The systematic reminder of this double standard in the recommendations made to EU Member States within the process of the UPR is a welcome step.

## Part II: Relevance of the provisions of the ICRMW in the migration policies and legislation in the European Union and European States

The lack of progress towards ratification of the ICRMW by EU Member States and other European countries contrasts with the growing acceptance by some of these countries of the need to guarantee protection of fundamental rights of migrant workers and their family members in the territory under their jurisdiction. In most EU Member States and at the EU level, legislation, measures and policies in fact address key issues of the current debate about migration policy in the EU and accommodate key provisions included in the ICRMW. The following section therefore proposes to study several aspects of EU and national migration policies, their impact on the rights of migrant workers and their families, and where they stand in comparison with the ICRMW.

### 1. DEVELOPMENTS IN EU MIGRATION POLICY

EU Member States have given the EU a mandate in the migration field. This directly influences the development of national legislation in Europe, including for non-EU Member States. A comprehensive analysis of the developments of the legislation and policy at the EU level would require an in-depth study of the EU acquis. The following section focuses on some particularly relevant items of the EU migration policy and legislation, in order to grasp the relation that exists between those and the ICRMW. The aim is to demonstrate that, far from what could be imagined, EU migration policy and the ICRMW have much in common.

#### THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

The Charter of Fundamental Rights of the European Union (EU Charter)<sup>169</sup> was adopted, with few amendments,<sup>170</sup> by the European Parliament, the Council of the European Union and the Commission of the European Communities in December 2007. It became binding in December 2009 when the Lisbon Treaty came into force.<sup>171</sup> As per its Article 51, the Charter is binding on European Member States “only when they are implementing Union law”. The nature of the EU Charter and the lack of a specific mechanism to monitor its implementation in Member States’ law and practices are counter-balanced by Article 52.3, which binds the interpretation of the EU Charter to the relevant case law of the European Court of Human Rights ECtHR. Hence, the ECtHR having developed case law regarding the rights of migrant workers, that law will be beneficial to the specific interpretation of laws within the EU. A case in point is the extensive case law developed by the ECtHR regarding detention of irregular migrant workers<sup>172</sup> that can be put into perspective with the transposition at national level of the EU Return Directive.<sup>173</sup>

The comparison of the EU Charter with the provisions in the ICRMW reveals that they share a very large common set of rights, some applying only to regular migrant workers and some to all migrant workers, including those in an irregular situation. Their commonalities cover fundamental human rights, applying to “everyone”.

Fundamental human rights applying to everyone, regular and irregular migrant workers and members of their families, are contained in the EU Charter and the ICRMW:

- Right to life (Article 2 of the EU Charter ; Article 9 of the ICRMW) applies to everyone.
- Right to integrity of the person (Article 3 of the EU Charter and Article 16.2 of the ICRMW) applies to everyone.
- Prohibition against torture (Article 4 of the EU Charter and Article 10 of the ICRMW) applies to everyone.

- Prohibition of Slavery and forced labour (Article 5 of the EU Charter and Article 11 of the ICRMW) applies to everyone. Article 5.3 of the EU Charter prohibits trafficking in human beings, while reference to preventing and eliminating trafficking in human beings is contained in the Preamble of the ICRMW.
- Right to liberty and security (Article 6 of the EU Charter and Article 16.1 of the ICRMW) applies to everyone.
- Freedom of thought, conscience and religion (Article 10 of the EU Charter and Article 12.1 of the ICRMW) applies to everyone.
- Freedom of expression (Article 11 of the EU Charter and Articles 13.1 and 13.2 of the ICRMW) applies to everyone.
- Right to education (Article 14 of the EU Charter and Article 30 of the ICRMW) applies to everyone.
- Respect for private and family life (Article 7 of the EU Charter and Article 14 of the ICRMW) applies to everyone.
- Right to property (Article 17 of the EU Charter and Article 15 of the ICRMW) applies to everyone.

Other rights common to both texts include:

- Protection against collective expulsion (Article 19.1 of the EU Charter and Article 22.1 of the ICRMW) applies to everyone.
- Cultural, religious and linguistic diversity (Article 22 of the EU Charter and Article 31 of the ICRMW).
- It can easily be considered that Article 27 of the EU Charter on workers' rights to information and consultation within the undertaking has its equivalent in Article 65.1 d) of the ICRMW on the provision of information and assistance to migrant workers.
- Protection in the event of unjustified dismissal in Article 30 of the EU Charter covers "every worker", hence applying equally to regular and irregular migrant workers. The same protection exists in the ICRMW, explicitly under Article 54 for regular migrant workers and implicitly for all migrant workers in Article 25.1 a).<sup>174</sup>
- The right to fair and just working conditions (Article 31 of the EU Charter and Article 25.1 a) of the ICRMW) applies to every worker, hence to regular as well as irregular migrant workers. However, they are not formulated in the same way. The ICRMW protects equality with foreign nationals regarding conditions of work. Article 31.1 of the EU Charter states that "every worker has the right to working conditions which respect his or her health, safety and dignity". The reference to "fitness, safety, health and principles of human dignity" is found in Article 70 of the ICRMW, though specifically applying only to regular migrant workers.
- Protection of family (Article 33.1 of the EU Charter and Article 44.1 of the ICRMW). Article 44.1 of the ICRMW additionally covers protection of the unity of the family.
- Freedom of movement and of residence is recognized to "nationals of third countries legally resident in the territory of a Member State" in Article 45.2 of the EU Charter. Equally, Article 39 of the ICRMW covers the right of regular migrant workers and members of their families to free movement and free residence.
- Right to an effective remedy and to a fair trial (Article 47 of the EU Charter and Articles 83 and 18.3 of the ICRMW) applies to everyone.
- Presumption of innocence and right of defence (Article 48 of the EU Charter and Articles 18.2 and 18.3 of the ICRMW) applies to everyone.



- Principle of legality and proportionality of criminal offense and penalties (Article 49 of the EU Charter and Article 19 of the ICRMW) applies to everyone.

In addition, some differences can be found in the following Articles:

- Right to marry and to found a family is protected under Article 9 of the EU Charter and does not exist as such in the ICRMW. Article 44 of the ICRMW covers the protection of the unity of the family.
- Freedom of assembly and association in Article 12 of the EU Charter covers the right of everyone to join and to form Trade Unions. In the ICRMW, the right to join a trade union contained in Article 26 concerns all migrant workers, whereas the right to form trade unions in Article 40 concerns only regular migrant workers.
- The freedom to choose an occupation recognized to “everyone” in Article 15 of the EU Charter could be interpreted as applying to irregular migrant workers. The right to choose their remunerated activity is limited to regular migrant workers in Article 52 of the ICRMW that additionally contains limitations described in Article 52.2.
- Article 18 of the EU Charter protects the right to asylum, which the ICRMW does not, as it falls outside its scope. This is clearly stated in Article 3 of the ICRMW.
- The right to equality before the law contained in Art. 20 of the EU Charter that applies to everyone does not have an equivalent in the ICRMW. The ICRMW is based on the concept of “equality of treatment with nationals”, contained in Articles 25, 28, 30, 43, 45, 54, 55 and 70. It is mainly limited to employment and work conditions ; and social benefits. However, Article 18 of the ICRMW protects the right of all migrant workers and their families to “equality with nationals of the States concerned before the courts and tribunals”.
- The grounds for the principle of non-discrimination vary between the EU Charter (Article 21.1) and the ICRMW (Article 7): “sex, race, colour, ethnic or social origin, language, religion or belief/ conviction, political or any other opinion, property, birth and age” are common grounds. Both texts also contain nationality as a ground for non-discrimination, although applied differently: the ICRMW protects all migrant workers from discrimination on the basis of nationality, although allowing non-citizens to be treated differently from citizens in some cases and under certain conditions ; the EU Charter guarantees non-discrimination on the grounds of nationality (Article 21.2), but only between citizens of the individual EU Member States as Article 21.2 is limited to the “scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties”. Article 21.2 of the Charter therefore does not protect migrant workers from discrimination based on nationality as does the ICRMW. In addition, the EU Charter contains the following grounds: “genetic features, membership of a national minority, disability and sexual orientation”, which reflect more recent concerns in terms of discrimination. The ICRMW contains additional grounds as well, “national origin, economic position, marital status and other status”, reflecting the orientation of the Convention to protect the rights of migrants and workers. Both texts retain, however, the possibility to distinguish between nationals and foreign citizens in some cases and under certain conditions.
- While Article 23 of the EU Charter protects the equality between men and women, the ICRMW does not contain such a general provision, even though migrant women are protected by the ICRMW through its inclusive language.<sup>175</sup> The EU Charter goes further than the ICRMW as it explicitly guarantees equality between men and women. The same applies to the right of the child (Article 24 of the EU Charter), of the elderly (Article 25 of the EU Charter) and of persons with disabilities (Article 26 of the EU Charter). Once again, for the latter two, this is a result of more recent concerns, as shown in the adoption of the Convention on the Rights of Persons with Disabilities on 13 December 2006.
- The right to social security is recognized to everyone under Article 27 of the ICRMW, while only “everyone residing and moving legally within the European Union is entitled to social security benefit” under Article 34.2 of the EU Charter. However, Article 27 of the ICRMW contains

limitations with regard to “requirements provided for by the applicable legislation of that state and the applicable bilateral and multilateral treaties”. Article 27.2 of the ICRMW reinforces the idea that, in fact, the right to social security may not be recognized by national legislation ; when they cannot benefit from social security, migrant workers should be reimbursed their contributions.

- Right to health: Article 35 of the EU Charter grants everyone the right to preventive health care and to medical treatment. As for the ICRMW, Article 28 covers the right of every migrant worker and members of their family to urgent medical care. The gap between these two articles is significant concerning irregular migrant workers. Regular migrant workers’ and members of their families’ right to health is completed by Articles 43.1 (e) and 45.1 (c) of the ICRMW.
- The right to vote of “every citizen of the union” is protected under the general “right to vote and to stand as a candidate at municipal elections” under Article 40 of the EU Charter and thus does not apply to third-country migrant workers, whether in a regular or irregular situation. On the contrary, Article 42 of the ICRMW does cover political rights - at the level of local community, hence at municipal elections (Article 42.2) – of all regular migrant workers “if the State, in the exercise of its sovereignty, grants them such rights”. In addition, Article 41 of the ICRMW protects the right of regular migrant workers to vote and to be elected in elections taking place in their country of origin.
- Article 23 of the ICRMW covering the right of all migrant workers and members of their families to have recourse to the consular authorities of their country of origin was thought to be a very specific right included in an international human rights treaty on the grounds that it was very relevant for migrant workers. It was usually cited as an example of “specific rights” recognized in the ICRMW. Interestingly, Article 46 of the EU Charter also provides for diplomatic and consular protection to every citizen of the EU. Its scope is therefore limited to migrant workers who are EU citizens, while Article 23 of the ICRMW applies to all migrant workers and their families.

It appears that there are very few substantive differences between the newly binding EU Charter and the ICRMW. The entry into force of the EU Charter cannot be put forward as an additional obstacle to ratification. On the contrary, the very existence of the EU Charter and its broad scope, including regarding irregular migrant workers, is a step towards more recognition by EU Member States of the rights of all migrant workers.

Finally, it should be noted that the Commission has adopted a strategy<sup>176</sup> to ensure that the EU Charter is effectively implemented. This strategy will include systematic evaluation of new EU legislation on the basis of the fundamental rights contained in the EU Charter ; ensuring through available mechanisms that EU Member States respect the EU Charter ; publication of annual reports on the application of the Charter ; and informing citizens of their rights and ways to implement them. It will be interesting to see the development of this strategy, especially as it can provide indications regarding EU legislation and practice and how it affects or effectively protects migrant workers’ rights. Even more relevant here is the fact that, as we have seen, the EU Charter contains fundamental rights that apply to irregular migrant workers. It can be hoped that the Commission’s strategy will allow for more visibility of the rights of irregular migrant workers in the EU.

The implementation of the EU Charter in practice could positively affect the effective enjoyment of fundamental rights by migrant workers ; as the Commission explains it, EU legislation that is in violation of fundamental rights guaranteed by the Charter could be annulled by the Court of Justice of the European Union.<sup>177</sup>

## 1.2 THE CASE OF THE “HIGH-SKILLED WORKERS” OR BLUE CARD DIRECTIVE IN THE FRAMEWORK OF THE POLICY PLAN FOR LEGAL MIGRATION

In its Policy Plan for Legal Migration, which was presented on 21 December 2005, the Commission made five legislative proposals concerning different categories of third-country nationals. The “high-skilled workers” Directive is the first of these proposals. The Policy Plan with its sector-by-sector approach was in fact presented following the rejection (by the Member States in Council) of a proposal for a more ambitious General Framework Directive on the general conditions for migration into the EU for all third-country nationals.<sup>178</sup>

The EU Directive on a Blue Card scheme<sup>179</sup> was adopted on 9 May 2009 by the EU Council. It allows highly skilled third-country nationals with a job offer to work in an EU country for up to four years. After 18 months, the migrant worker can move to another EU country. High-skilled migrant workers can bring their families ; the migrant worker's spouse is granted a work permit.

The Blue Card Directive should be integrated into national legislation by 19 June 2011. The UK, Ireland and Denmark, who are not bound by EU Acquis, decided to opt out of the Directive.

The conditions in applying for a Blue Card, as indicated in the Directive, are the following:<sup>180</sup>

- possess a college diploma or have completed five years of occupational training ;
- enjoy a job contract or a job offer ;
- gross income has to be at least 50 per cent above the national average (1.2 times in sectors with a labour shortage, such as engineering or health care) ;
- possess a valid travel document and, if necessary, a visa.

The objective of the Directive is formulated as follows: “addressing labour shortages by fostering the admission and mobility — for the purposes of highly qualified employment — of third-country nationals for stays of more than three months, in order to make the Community more attractive to such workers from around the world and sustain its competitiveness and economic growth.”<sup>181</sup>

Even though it represents a compromise based on the lowest common denominator, the Blue Card Directive does guarantee a set of rights which must be seen as an enviable level of protection from the perspective of many other categories of migrant workers. It creates an immigration status that is valid across Europe with no temporal limitations, is granted through a straightforward application procedure and provides the same social and labour rights as the citizens of the receiving country and generous terms for family reunification.<sup>182</sup> Chapter 4 of the Directive contains six articles on the rights granted to high-skilled third-country workers. In particular, under Article 14, EU Blue Card holders will enjoy equal treatment with nationals of the Member State issuing the Blue Card, as regards:

- working conditions, including pay and dismissal ;
- freedom of association and freedom to join a trade union ;
- education, training and recognition of qualifications ;
- a number of provisions in national law regarding social security and pensions ;
- access to goods and services, including procedures for obtaining housing, information and counseling services ; and
- free access to the entire territory of the Member State concerned within the limits provided for by national law. This includes the right to leave and re-enter the country of employment without interrupting legal status (Preamble, Recital 21).

Equality of treatment in these areas corresponds to the provisions of Articles 25, 26, 27, 38, 39, 43 and 47 of the ICRMW. In addition, Article 15 of the Blue Card Directive covers the applicability of Directive 2003/86/EC on the right to family reunification to high-skilled migrants. This covers a “right to family reunification” for the spouse and unmarried, minor children and adopted children ; and the rights recognized to them. It limits the applicability of the Family Reunification Directive on a number of provisions, resulting in more favourable measures for high-skilled migrants than those provided for in the Family Reunification Directive. This is particularly the case of the right to work granted immediately to high-skilled migrants' family members, whereas Article 14.2 of the Family Reunification Directive sets a delay of up to one year. These measures are particularly relevant under Articles 44, 45 and 53 of the ICRMW.

More favourable measures are also provided for in the Blue Card Directive in Article 16 on the applicability of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents. Specifically, high-skilled migrant workers are authorized to change their country of employment after 18 months and, under certain conditions, can cumulate these periods of work and residence in different countries in order to fulfill the requirements of Article 4(1) of the Long-term Resident Directive to be granted long-term resident status. Provisions covering the maximum allowed length of absence from EU Member States are also more favourable.

Article 12 of the Blue Card Directive limits access to the right to choose work and change employer for high-skilled migrant workers. They are recognized as having equality with nationals to access other high-skilled labour fields only after two years of work under the Blue Card scheme. Before the same two-year delay, Blue Card holders may change employers only after approval by the authorities.

Article 13 of the Blue Card Directive covers the protection of unemployed Blue Card holders, with a limit to three consecutive months and one occurrence during the Blue Card validity. During this period, the unemployed high-skilled migrant does not lose her/his status under the Blue Card ; this is in conformity with Article 49.2 of the ICRMW. However, the period of three months seems too short, under Article 49.3 of the ICRMW, as it does not correspond to the period during which the unemployed migrant would have access to unemployment benefit. High-skilled migrant workers who are unemployed for more than three months become irregular if they remain in the EU Member State of employment, whether they are entitled to social benefit or not during this period, and regardless of whether their children are attending school. This seems somewhat ineffective with respect to the EU priority concern to combat irregular migration and some provisions in EU Member States that actually take into consideration these elements to “regularize” or maintain workers under a regular status.

The Directive (in the final version, as opposed to the Commission’s initial proposal) grants fairly limited rights in terms of freedom of movement within the EU27. Critics of the final version argued that the Directive failed to address properly the shortage of skilled labour in the EU,<sup>183</sup> but as the issue of free circulation between regional groups of States is not dealt with by the ICRMW, the issue of internal freedom of movement is considered to be beyond the scope of this study.

Finally, it should be kept in mind that the Directive has to be transposed into national legislation to be effective in Member States. Therefore, given the margin for transposition that is inherent to all EU directives, the result might vary from one country to another. The Blue Card Directive clearly gives space for EU Member States to adopt more generous rules than those set forth in the Directive. Article 4 covers “more favourable measures” and lists a number of references that cannot be limited by the transposition of the Directive ; these include international agreements such as human rights treaties. Importantly, Recital 26 of the Preamble reads as follows: “This Directive respects the fundamental rights and observes the principles recognised in particular in Article 6 of the Treaty on European Union<sup>184</sup> and reflected in the Charter of Fundamental Rights of the European Union.”

### 1.3 THE EU INTEGRATION POLICY

Integration is defined as “a two-way dynamic process of mutual adjustment on the part of all immigrants and residents in Member States”<sup>185</sup> and “integration implies respect for the basic values of the European Union.”<sup>186</sup> The notion of “integration” refers to the need to include migrant workers and their families into the host societies in order to facilitate social cohesion. It is interesting to look at the EU Integration Policy when discussing ratification of the ICRMW in Europe because integration is not possible without the recognition and effective implementation of migrant workers’ rights. As the European Commission stated, “the promotion of fundamental rights, non-discrimination and equal opportunities for all are key integration issues.”<sup>187</sup>

The integration of third-country nationals is primarily relevant at the national and local levels. However, integration of third-country nationals in each EU Member State concerns other Member States as “they are vulnerable to integration deficit of the others.”<sup>188</sup> Integration of migrants is, therefore, increasingly regarded as an important issue across Europe and is also increasingly referred to in EU policy documents on migration, even though the responsibility for integration policies remains at the level of EU Member States. In this policy area, the European Commission cannot propose legislation ; it can only coordinate

and stimulate the exchange of good practices, as it has done since 2004 on the basis of the 11 Common Basic Principles on Integration.

The EU has developed guidelines and mechanisms to coordinate Member States' action at the EU level, hence offering an added value to national integration policies. The following elements can be mentioned:

- The adoption of the 11 Common Basic Principles for Integration in 2004 is the cornerstone of integration policy at the EU level. It gives Member States a framework of guidelines to develop their national policies.
- The publication of the Handbook on Integration that aims at providing policy-makers and practitioners with practical tools to improve integration policies (three editions).
- The Migrant Integration Policy Index (MIPEX) is a survey of European integration policies that ranks countries depending on the effectiveness of their integration policies. The survey includes laws and practices on family reunification, residence rights, labour market access, political participation, access to nationality and anti-discrimination. The project strongly supports the ties that exist between the level of protection afforded to migrants' rights and the level of their integration. According to the MIPEX, "Integration in both social and civic terms rests on the concept of equal opportunities for all. In socio-economic terms, migrants must have equal opportunities to lead just as dignified, independent and active lives as the rest of the population. In civic terms, all residents can commit themselves to mutual rights and responsibilities on the basis of equality"<sup>189</sup>. MIPEX is co-financed by the European Commission.
- In direct relation to this definition is the General Framework for Equal Treatment Directive<sup>190</sup> that anchors the principle of equal treatment into European law. It is relevant for migrant workers as it applies to employment and occupation. However, it does not contain grounds for the definition of discrimination based on nationality, which limits its application regarding migrant workers to common grounds (religion or belief, disability, age or sexual orientation).
- The European Integration Fund was established by the European Commission in 2008. By granting financial resources to projects at national or local levels that aim at enhancing and developing third-country nationals' integration, the Fund promotes policies for migrants in a range of sectors (access to public services, education, professional training, etc.). It additionally coordinates priority areas of action throughout EU Member States.
- The designated National Contact Points on integration of the 27 EU Member States meet frequently to discuss the implementation of integration policies and projects.<sup>191</sup>
- The European Integration Forum and the Integration Portal, both launched in April 2009, are designed to involve civil society actors and other stakeholders in the EU's work.<sup>192</sup>
- Equality Summits have been organized jointly by the European Commission and the Presidency of the EU since 2007. They gather a variety of stakeholders, including EU delegates, representatives of EU Member States' Governments, experts and civil society. Each Summit deals with one aspect of the discrimination that takes place in society and discusses means to tackle it. The fourth Summit took place in Brussels in November 2010 and focused on "Equality and diversity in employment".

The EU additionally contributes to favouring integration in national societies by developing policies and legislation on topics that are relevant for integration of third-country nationals, such as non-discrimination, the status of certain categories of migrant workers, family reunification, conditions of employment, and access to public benefits. Moreover, successful integration of migrant workers is also one of the elements of an effective and coherent labour migration.

However, other EU policy areas may also interfere with the Policy's effectiveness.<sup>193</sup> The contribution that the EU Integration Policy could make to the national migration and integration policies of EU Member States is limited to a great extent by concerns regarding irregular migration and the monitoring of EU borders. As a result, serious integration tools are being developed at the European level only for certain



categories of migrant workers: those who do not contravene more pressing security and utilitarian concerns. These are, so far, the high-skilled migrants and the long-term third-country residents ; high-skilled migrants are considered relatively unproblematic from the viewpoint of integration policy,<sup>194</sup> and the integration of persons who are settling in the country and who are ultimately entitled to citizenship might seem more obvious than that of seasonal or short-term migrants. The two EU Directives contain provisions that protect these migrant workers' civil, political, but also social, cultural and economic rights.

The “single application procedure and common set of rights” Directive,<sup>195</sup> also called General Framework Directive, ought to be a crucial reference in terms of integration of migrant workers generally. Chapter III of the Directive Proposal covers a “right to equal treatment” that is the heart of the rights protection contained in this text.<sup>196</sup> The scope of the principle of equal treatment with nationals of the Proposal echoes the same principle in the ICRMW (Article. 55). Both texts protect equal treatment in the areas of working conditions (Article 54), including in the case of dismissal ; freedom of association and to join trade unions (Article 40) ; education and vocational training (Article 43 ) ; recognition of diplomas ; social security, at least partially (Article 27) ; portability of pension rights and tax benefits (Articles 47 and 48) ; and access to goods and services. Article 12.2 of the Directive Proposal allows States to restrict the equal treatment principle, under certain conditions, as does the ICRMW in some cases under the different Articles cited. In addition, Article 11 of the Directive Proposal allows freedom of movement and to leave and re-enter the country of employment, also contained in Articles 38 and 39 of the ICRMW ; and protects the right to information, contained in Article 37 of the ICRMW.

To date, however, this Directive has not been adopted by the Council ; the Parliament in fact rejected the Proposal in plenary in December 2010, which may lead to continued discussions in 2011, including on the rights recognized to third-country nationals.<sup>197</sup>

## 1.4 COOPERATION WITH THIRD COUNTRIES

The EU Global Approach to Migration is the overarching strategic framework for the external dimensions of the EU's common migration policy.<sup>198</sup> It was adopted in 2005, under the UK Presidency of the EU, with the aim of intensifying relations between the EU and border countries mainly over two issues: limiting irregular immigration and increasing “chosen” immigration into EU territory through increased third-country responsibilities ; and developing the migration and development policy of the EU to consolidate EU immigration priorities.<sup>199</sup> It focused initially on Africa and the Mediterranean region. Since 2007, the Global Approach has also been applied in cooperation with the EU's neighbouring countries in the east and southeast.

Concretely, the Global Approach to Migration translates into bilateral agreements signed with third countries and into the Circular Migration and Mobility Partnerships. The latter have so far been signed as pilot tools with Moldova and Cape Verde. It is believed that circular migration, brain gain and remittances are providing the tools for the regulation of migration in the common interest of the EU and third countries.<sup>200</sup> Bilateral Agreements are more complex and concern a greater number of countries and issues. Even though they are often signed in exchange of readmission agreements for migrant workers in an irregular situation, bilateral agreements have several advantages: first, they allow for greater State involvement in the migration process ; they can be tailored to specific labour demand and supply of the two countries involved ; and they can provide effective mechanisms for protecting migrants.<sup>201</sup> The “effectiveness of agreements will depend on the weight assigned to each goal”,<sup>202</sup> as often goals for these agreements conflict.

Integrated cooperation with third countries is key to the EU Global Approach. Cooperation among States is also one of the major aspects of sound, equitable, humane and lawful conditions for international migration, as drafted in the ICRMW. Article 64 encourages States Parties concerned to “as appropriate consult and cooperate”. In particular Article 64.2 encompasses all aspects of the cooperation foreseen by the EU:

“In this respect, due regard shall be paid not only to labour needs and resources, but also to the social, economic, cultural and other needs of migrant workers and members of their families involved, as well as to the consequences of such migration for the communities concerned.”

Regarding countries of employment, Article 64.2 acknowledges the need to take labour shortages into consideration when developing migration policies ; it also implicitly points out the need for integration policies, in order to adjust “consequences ... to the communities concerned”. Regarding countries of origin, this Article highlights the need to pay attention to brain drain – how labour resources may be affected by migration – and to the development potential that international migration may bring to “the communities concerned”. Finally, and certainly most importantly, Article 64.2 gives a central place – formally and substantially – to the rights of migrant workers and members of their families. This last element may be the least developed in the EU Global Approach, even though bilateral agreements increasingly highlight the “social, economic and cultural needs” of migrant workers.

Finally, a commonality between the ICRMW and the EU Global Approach to Migration is their promotion of cooperation among States to limit irregular movements of persons. This is stated in Article 68 of the ICRMW: “States Parties, including States of transit, shall collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation.” Reducing irregular migration is anchored in the constitutive document for the EU Global Approach to Migration: Priority actions focusing on Africa and the Mediterranean: “Action must be taken to reduce illegal migration flows and the loss of lives, ensure safe return of illegal migrants (...)”.<sup>203</sup>

## 2. SELECTION OF DEVELOPMENTS IN NATIONAL LEGISLATIONS ON MIGRATION IN EUROPEAN COUNTRIES

In this section, a selection of policies and practices of some European states – mostly EU Member States and Norway - in the field of migration are described and analysed. The analysis aims at identifying good practices with regard to migrants’ rights, on the basis of international obligations of States, but also on the basis of the ICRMW if it were ratified by those States. The objective is to show the existing bridges between national legislations and practices in a number of European States on one hand and the content of the ICRMW on the other. The selection of practices is not exhaustive and is a first step of a more ambitious project. Specific relevant issues have been prioritized – such as family reunification, regularization and rights of irregular migrant workers – and documented as much as possible. However, the idea was also to illustrate the content of the ICRMW through the description of legislation and practice at the national level in order to contribute to the demystification of the ICRMW.

### 2.1 BELGIUM

Third-country nationals represented 2.9 per cent of the total Belgian population in 2008.<sup>204</sup>

#### 2.1.1 Examples of rights recognized to irregular migrant workers and their families

Belgium has Constitutional and legislative protection for the right to education of migrant children in an irregular situation. Article 24 of the Belgian Constitution protects the right to education. The responsibility for the implementation of this principle falls under the governments of the different linguistic communities (French and Flemish). In the region of Wallonia, Article 40 of the Decree of 30 June 1998, as amended under the Decree of 27 March 2002, establishes that “Children staying illegally on French-speaking territory are, as long as they stay with their parent or guardian, admitted into educational establishments”. Similarly, in Flanders, a circular letter of the Flemish Minister of Education gives the right to these children to attend school.<sup>205</sup>

Article 30 of the ICRMW guarantees the right of “every child of a migrant worker” to the “basic right of access to education on the basis of equality of treatment with nationals of the state concerned”. It further states that the irregularity of a child’s status cannot legitimize refusing or limiting access to public education. Even though the right to education of migrant children in an irregular situation is contained in national legislation, in practice, a number of obstacles prevent these migrant children from enjoying this right in some cases.<sup>206</sup> The fear of being denounced is one of the reasons. In Belgium, school teachers are explicitly not required to report migrant children in an irregular situation and their parents to the authorities.<sup>207</sup> The Flemish circular letter on education of these migrant children guarantees that there will not be arrests of irregular migrant family members within the vicinity of the school.<sup>208</sup>

Another obstacle to the enjoyment of the right to education can be due to the lack of information on part of the child's parents. Under Belgian law, parents are obliged to register their children in school. In practice, it is more difficult for irregular migrant families to be aware of and to actually respect this obligation. It is also more difficult to identify irregular migrant children not attending school. However, Belgian civil society has developed creative programmes to counter this situation.<sup>209</sup>

Finally, according to the holistic approach to the right to education contained in the ICESCR<sup>210</sup> and developed by the CESCR,<sup>211</sup> the right to education of all migrant children should include specific courses to tackle their particular situation.<sup>212</sup> In Belgium, language support activities exist: a 2001 decree in Wallonia created specific learning provisions for children who had lived less than a year in Belgium in order to facilitate their integration into the mainstream education system. In Flanders, equivalent "Gateway classes" exist since 2002.

Access to health care for irregular migrant workers<sup>213</sup> and their families in Belgium is protected in the legislation. The Royal Decree of 12 December 1996 on Urgent Medical Aid, revised in 2003, states that foreigners who stay illegally in the Kingdom are entitled to what is called "urgent medical aid" granted by the public centres of social action. In addition, the Law of 8 July 1964, last modified in 2009, protects free access to urgent medical aid, though the notion is understood more restrictively in the Law than in the Decree. In fact, the notion of "urgent medical help" contained in the 1996 Royal Decree is very large and encompasses "a wide variety of care provisions, such as medical examinations, operations, childbirth, physiotherapy, medications, tests and exams, etc."<sup>214</sup> Care provided to irregular migrant workers is supposed to be free, as the Centre for Social Welfare has the obligation to pay the costs of "urgent medical aid" and is later reimbursed by the Belgian Ministry of Health.<sup>215</sup>

Finally, unaccompanied migrant children, whether in a regular or irregular situation, are covered by public health insurance: they have free access to a broad range of treatment in private and public institutions.<sup>216</sup>

### 2.1.2 Integration

In Flanders, a complete policy on integration has been developed. An "integration path" is provided by "integration officers" to all regular migrant workers, asylum seekers and refugees. The programme is funded by the Flemish Government and offers three types of assistance: a Dutch language course ; a course on social orientation that covers the Belgian (Flemish) society, the State's structure, education and health system ; and a personal professional and educational orientation that includes socio-cultural integration or studies (such as the recognition of foreign diplomas) and assistance to find employment.<sup>217</sup>

### 2.1.3 Regularization<sup>218</sup>

To end the irregular stay of migrant workers in the country, Belgium favours, like most other EU countries, voluntary return and alternatively forced return. Regularization is considered as an exceptional measure taken on a case-by-case basis. Regularizations organized since 2000 took place on a case-by-case basis, but in the framework of regularization campaigns launched by the Belgian Government. These campaigns were later positively evaluated and are considered to have generally met their main objectives: to address backlogs in the asylum system and address specific humanitarian cases.<sup>219</sup>

Under Articles 9bis and 9ter (formerly article 9.3) of the 1980 Aliens Law, there is a general possibility to apply for regularization in Belgium, even though they were not initially drafted in this spirit. The conditions under these Articles are the following:

- An unreasonable long asylum procedure
- Medical reasons
- Other humanitarian situations, including
  - parents of children with Belgian nationality ;
  - financially dependent aged parents supported by one of their legally resident children ;



- persons who were brought up in Belgium and returned against their will ; certain categories of handicapped persons ; and
- persons living in a long-standing relationship with a Belgian citizen or a legally resident alien if the family unit would cease to exist if the person concerned returned to his/her country of origin.

The possibilities these articles offer are considered as a regularization mechanism, but there has been criticism for a lack of clarity and duration. This partly led the Government to publish an Instruction for a regularization campaign in 2009.

In July 2009, the Belgian Government announced a new regularization programme to take place at the end of the year. It followed a series of actions by civil society and migrants groups in the country.<sup>220</sup> In July 2009, new instructions were formally given to the Foreign Office concerning regularization of irregular migrant workers. These instructions set criteria and a three-month period to regularize a number of irregular migrants (from 15 September to 15 December). Regularization could be obtained on three grounds:

- Duration of regularization procedure under Article 9 of the Aliens Law: more than four years for families with children and five years for single applicants.<sup>221</sup>
- Length of stay in Belgium: regularization could be granted for irregular migrants who had lived for at least five years in Belgium, who had been residing legally or had tried to regularize their situation ; and who could prove their integration in Belgian society. Priority was given to migrants who had children attending school, who knew the Belgian languages, or on the basis of their ability in language classes.<sup>222</sup>
- Regularization through work: irregular migrants who could prove having worked for two and a half years in Belgium were also entitled to apply.<sup>223</sup>

It is estimated that between 2000 and 2007, some 77, 500 persons were regularized. The latest campaign was generally limited to 25, 000 and the exact number of regularized persons is still unknown.

#### 2.1.4 Cooperation with third countries

Belgium does not have partnership agreements with another country. However, it recognizes the trend to developed migration partnerships in the recent years.<sup>224</sup> These agreements mainly cover the legal migration framework. Both countries gain from establishing such agreements. In the case of the Labour Mobility Partnership signed between Belgium and India, the labour markets of both countries should be analysed in order to evaluate the capacity for labour mobility in certain work categories, and the consequences of labour migration on the country of origin.

## 2.2 CZECH REPUBLIC

In 2008, third-country nationals represented 2.1 per cent of the total Czech population.<sup>225</sup>

### 2.2.1 Examples of rights recognized to irregular migrant workers

Access to health care is possible for irregular migrant workers only in the case of urgent medical treatment, according to the Act on Care for the Peoples' Health, § 55, article 2 c). Irregular migrant workers do not have access to public insurance, and therefore have to contract private health insurance in order to benefit from health care coverage, which is often too expensive for them. Depending on whether they have contracted a private insurance and the coverage the latter provides, irregular migrant workers must themselves cover the cost of medical treatment. This includes urgent medical care if they do not have private health insurance.<sup>226</sup>

Education is accessible for children of irregular migrant workers, although it seems that this is only possible for elementary schools. In addition, the legality of the residence of the parents is often verified at the time of registration at the school, which clearly constitutes a limit to the access to education.

### 2.2.2 Highly skilled migration

In 2003, the Czech Republic launched a pilot project for highly skilled migration based on a points-based system, called “the Selection of Qualified Foreign Workers”. Highly skilled migrant workers and their families could obtain a permanent residence permit after two years and six months.<sup>227</sup>

In 2007, the Government initiated its own version of a Green Card for third-country nationals, launched in January 2009 under the amended Labour Law.<sup>228</sup> This law sets a list of countries from which applicants must originate in order to be granted a Green Card. This pre-approved nationality condition seems incompatible with international human rights standards and in particular the non-discriminatory ground of nationality contained in Article 7 of the ICRMW. The Czech authorities made clear that nationals from countries not listed in the Green Card programme could also apply to work in the Czech Republic through a regular work permit.

Originally, the Green Card scheme was intended to facilitate legal migration of skilled third -country nationals to the Czech Republic by simplifying the conditions for employment. It put in place an online register of vacancies and the Green Card combined with a residence permit and a work permit. It seems, however, that launched during the economic crisis, this scheme was not as successful as expected ; in February 2010, only 69 Green Cards had been granted.<sup>229</sup>

### 2.2.3 Facilitating the voluntary return of migrant workers

Until 2008, the Czech Republic had a migration policy encouraging non-EU citizens to migrate for work to the country. But when the first consequences of the economic crisis started to reach the Czech labour market, the Government opted for a drastic turnaround.

The Project of Voluntary Returns was launched on 26 February 2009 to encourage regular migrant workers in the Czech Republic who had lost their job before the termination of their contract<sup>230</sup> to voluntarily return to their home countries. The Interior Ministry offered the volunteer returnees an allowance of €500 per regular migrant and €250 per child under 15, and the cost of the ticket to travel home for the jobless migrant worker and his/her family. It also provided for emergency accommodation for the transitional period before departure. The conditions for registering with this project were the following:

- Residing legally in the country.
- Being a third-country national.
- Holding a valid residence permit or an exit order issued after a residence permit had expired.
- Not being subject to deportation.

By the end of 2009, more than 2,000 migrant workers benefitted from this project. As for those who did not register, it is unclear what their situation became, but it is estimated that most of them chose to stay in the country, most likely in an irregular situation.<sup>231</sup>

This measure clearly echoes Article 68 of the ICRMW that encourages States Parties to prevent irregular migration. By returning regular migrant workers before they lose their residence permit and become irregular, the Czech Republic anticipates an increase in irregular migrant workers in the country and offers a preventive solution. However, regarding Article 67.2 on the return of regular migrant workers and their families, there is no indication in the Czech Voluntary Return Project about the resettlement and social integration of voluntarily returned migrant workers and their families in the country of origin.

The Voluntary Return Project that was approved by the Czech Government in May 2009<sup>232</sup> furthers the aim of the first project and applies to irregular migrant workers. This second phase started in September 2009. Irregular migrants could register with the project in order to obtain their ticket home, the cost of which was covered by the Czech Interior Ministry. But under this new phase, irregular migrants were not given allowances and were in addition banned from re-entering the Czech Republic for a certain length of time.<sup>233</sup> This second phase was launched to respond to the situation of regular migrant workers who had lost their job and whose resident permit had expired before they could apply for the first Voluntary

Return Project. The Czech Republic decided to open the possibility for voluntary return to all irregular migrants in the country.<sup>234</sup>

An interesting aspect of the second-phase project is that irregular migrant workers registering will be banned from the Czech Republic from a certain amount of time depending on the length of time they stayed irregularly in the country, but not as long as normally prescribed by law. However, irregular migrant workers who can pay for their own ticket will see the length of the ban reduced (by two-thirds or half). This is a curious link made between the financial resources of migrants and their right to (re) enter the Czech Republic. In addition, irregular migrants registering with the project and unable to pay their own plane ticket were subject to standard deportation procedures. Finally, even though this project intends to reduce the number of irregular migrants in the country and tackle their vulnerability, the Czech Republic has clearly stated that no regularization of irregular migrant workers could be envisaged.<sup>235</sup> Article 69 of the ICRMW encourages States Parties to “take appropriate measures to ensure that such a situation [irregular situation] does not persist”, in particular but not limited to regularization (Article 69.2). Important regularization campaigns have been carried out in the Czech Republic by civil society organizations.<sup>236</sup>

Interestingly, in both projects, the Czech Republic sought the assistance of the IOM<sup>237</sup> and civil society actors.

#### 2.2.4 Protection of migrant workers in the economic crisis

According to Czech legislation, a migrant worker holding a residence permit for work purposes becomes irregular and must leave the country if she/he loses her/his job. In the context of the economic crisis, the Czech Republic has softened this rule, allowing a migrant worker who becomes unemployed before the expiry of their residence permit through no fault of their own a 60-day protection period in order to give them time to find another job.<sup>238</sup> In addition, the Government has extended the prolongation time of a work permit from one year to two years. As the renewal of a work permit can be a complicated process in the Czech Republic, due to the number of documents to be presented,<sup>239</sup> this measure protects regular migrant workers from the risk of becoming irregular every year due to lack of documents.

#### 2.2.5 Family reunification

The Czech Alien Act<sup>240</sup> provides for the possibility for third-country nationals holding a long-term or permanent residence permit and having stayed at least 15 months in the Czech Republic to be reunited with their families. This possibility concerns spouses, minor children or dependent adult children, minors placed in the care of the sponsor, solidarity parents (older than 65 or who cannot care for themselves regardless of age). Family members get a residence permit of one or two years, depending on whether the sponsor holds a long-term or a permanent residence permit. Family members' residence permits can be renewed every five years. Family members are entitled to work, either as employees (but only if they get a work permit), or as self-employed.

### 2.3 FRANCE

On 31 May 2007, the French Government created a Ministry specialized in migration issues<sup>241</sup> in the context of a reform of the national migration policy. The Migration Minister is charged with the elaboration and implementation of migration and asylum policies ; the implementation of integration policies ; and the promotion of co-development policies with countries of origin.<sup>242</sup> This modification was supported by the need to organize and improve the implementation of migration and integration policies and to unify the different national actors in this field.

The French National Consultative Commission for Human Rights (CNCDH) gave an advisory judgement for the ratification by France of the ICRMW.<sup>243</sup> The CNCDH particularly emphasized the symbolic dimension of the ratification of the ICRMW by France, and the significance of this, in particular in the context of the EU and the elaboration of the European social model.

In 2008, third-country nationals represented 3.8 per cent of the total French population.<sup>244</sup>

### 2.3.1 Examples of rights recognized to irregular migrant workers and their families

Access to health for irregular migrants used to be guaranteed under the Universal Health Coverage Act (CMU). This right to statutory health coverage applied to the whole population, on the basis of residence, regardless of their status. In 2010, however, entitlements of irregular migrants were removed from the CMU ;<sup>245</sup> irregular migrant workers and members of their families now have access to free basic health care through the State Health Aid (AME) if they have lived in France for three consecutive months and upon compliance with certain conditions. For irregular migrant workers and their families who do not meet these conditions, the State created a special fund in 2004 (fonds de soins d'urgence) to cover expenses incurred by hospitals.<sup>246</sup> This fund – as indicated in the name - covers only emergency medical care to concerned irregular families, defined as “urgent care provided for by a hospital and of which the absence would endanger the patient’s life or could lead to severe and lasting impairment of the health condition”.

The latter regulation allows irregular migrant workers and their families to access urgent medical care, as prescribed in Article 28 of the ICRMW, but there is a delay of three months before irregular migrant workers, including children, can access the broader healthcare system (AME). The French example of access to health was however mentioned in the recent OHCHR Study on the rights of children in the context of migration, based on the wide range of medical care - both curative and preventive - that is covered by the AME.<sup>247</sup>

In addition, the Law of 11 May 1998<sup>248</sup> created regularization on the basis of medical treatment: irregular migrant workers suffering from serious medical pathologies are guaranteed a residence permit if they cannot access effective medical care in their country of origin. However, this “right to stay” as originally conceived seems to have been limited in practice.<sup>249</sup>

Right to education of children of irregular migrants is implicitly protected in French national legislation.<sup>250</sup> However, in practice, access of irregular migrants’ children to education is a problematic issue in France. The practice of arresting irregular migrant parents bringing their children to school has been highly criticized and triggered vivid reactions. Recently, the Committee on the Rights of the Child expressed its concerns regarding the use of the National Observatory for Children at Risk (Observatoire National de l’Enfance en Danger, ONED) to detect migrant children in an irregular situation, which may limit their access to schools.<sup>251</sup>

### 2.3.2 The Cesu: an incentive to “declare” migrant domestic workers

The French “chèque-emploi service universel” (Cesu) scheme entered into force in January 2006. It is designed to make it easier for private individuals to hire domestic help. It is a tool to stimulate demand for and organize the supply of domestic service employment. It creates financial incentives for employers to declare domestic workers to social insurance and tax authorities. It covers a range of services in the home (cleaning, ironing, preparation of meals, care of a sick or infirm person (not including medical care), small gardening jobs or jobs around the house, computer and internet assistance, help with administrative formalities, private lessons and part-time house watching, maintenance or repairs) ; outside the home for tasks related to services provided in the home (shopping, preparation and delivery of meals, cleaning and delivery of laundry, transporting persons who have difficulty with mobility, accompanying elderly and infirm persons or children outside of the home (on walks or on public transport, in everyday activities)) and for dependent elderly persons or persons with disabilities (dog walking and pet care (not including veterinary care or grooming) and at-home hairdressing and manicure services).

The first aim of the scheme might not be the protection of migrant domestic workers but rather the commodification of domestic labour. However, the scheme applies to migrant workers and the occupations listed above are often undertaken by migrant workers, sometimes in an irregular situation. Often, these are women.<sup>252</sup> As it covers domestic workers working irregularly, it therefore applies to irregular migrant workers under certain conditions.

The simplicity, rapidity and discretion of the procedure favour the use of the scheme even for irregularly staying migrant domestic workers.<sup>253</sup> The financial implications - a deduction of 50 per cent of the yearly salary paid to the domestic worker from yearly taxes of the employer (for a maximum of €12,000 a

year) and exemptions from the employer's contributions - makes the scheme a real incentive to declare domestic workers previously irregularly employed. It does not, however, have any consequences as such with regard to the irregularity of the stay of a migrant worker. An administrative procedure must be started to allow regularization of a domestic migrant worker without residence or a work permit.

Using the Cesu means that both employer and employee are acting legally. They are automatically insured in the event of an accident in the home. A work contract between employer and employee is not necessary for a work period of less than eight hours a week, although it is recommended. The Cesu takes the place of a work contract in this case. The employee becomes eligible for social security benefits that apply to any employed person ; she/he can prove social security contributions (which allows for supplementary pension and unemployment insurance) ; and has access to vocational training.

If the employee is an irregular migrant worker, using the Cesu has additional advantages: the migrant worker can prove the length of stay, or at least length of work, in the country of employment ; the Cesu application forms contain a contract model and sometimes the Cesu is the de facto contract, which means that the domestic migrant worker enters into a more balanced work relationship.

This practice is relevant under Articles 27 and 54 of the ICRMW on access to social security benefits for irregular migrant workers and regular migrant workers respectively ; and Article 25 on conditions of work and terms of employment.

### 2.3.3 Bilateral agreements to protect social security rights of migrant workers

France has signed social security agreements with more than 30 countries. These agreements ensure the portability of contributions made by migrant workers who have worked regularly in France to the national social security system. The agreements generally cover old age, survivor, disability and work accident pensions. However, they do not cover complementary pensions, unemployment and non-contributory allowances.

Article 27.1 specifically refers to bilateral treaties as a source of legislation to determine access to social security benefits for migrant workers and additionally stipulates that States Parties concerned "can at any time establish the necessary arrangements to determine the modalities of application of this norm". Article 27, however, applies to all migrant workers, in a regular and irregular situation, whereas bilateral agreements traditionally cover regular migrant workers' social security rights.

More specifically, Article 47 covers the right of regular migrant workers "to transfer their earnings and savings, in particular those funds necessary for the support of their families (...)". Contrary to other Articles in this Part of the ICRMW, this Article specifically applies to the State of employment and the State of origin. It clearly covers the portability of these rights to the country of origin upon return.

France's Social Security Agency describes the advantages of establishing bilateral social security agreements as follows. They:<sup>254</sup>

- Facilitate free movement.
- Facilitate resorting to foreign labour.
- Facilitate maintaining foreign workers' families in the country of origin, and facilitate return of foreign workers.
- Procure competitive advantages or limit advantages granted to the other signatory country.

Bilateral social security agreements fully respond to the imperatives contained in Article 64 of the ICRMW: "States Parties concerned shall as appropriate consult and cooperate with a view to promoting sound, equitable and humane conditions in connection with international migration of workers and members of their families". Further, Alinea 2 of Article 64 stresses the importance of "social, economic, cultural and other needs of migrant workers and members of their families" and encourages States Parties to pay attention to these.



### 2.3.4 New immigration law

The “Besson Law”<sup>255</sup> was adopted by the French National Assembly on 12 October 2010.<sup>256</sup> It will now be examined by the Senate before it becomes a law.

The objectives of the Besson Law concern the transposition of three European Directives (Blue Card Directive<sup>257</sup> on promotion of labour migration ; Return Directive<sup>258</sup> on the fight against irregular migration ; and Sanctions Directive<sup>259</sup> on complete elimination of employers of irregular migrant workers), the reinforcement of the integration policy (following a seminar on national identity) and the fight against irregular migration.

This Law brings some improvements to the legislation, such as regarding the sanctions against employers of irregular migrant workers (Articles 57 to 67). The sanctions are extended to actors other than the direct employer of irregular migrant workers, i.e. the master builder or the property developer, who are aware of the irregularity of the workers employed. The rights of irregular migrant workers to be paid their salary after their work terminates are reinforced (Articles 58 and 59 f ) and also cover the period after the return to the migrant’s home country. Overall, the balance between the rights of irregular migrant workers and their employer has been adjusted (Article 68.2 of the ICRMW).

The transposition of the European Blue Card for high-skilled workers, as provided for in the Law, also represents a positive addition to French legislation, especially regarding the right to family reunification (Articles 13 & 15 of the Law). Families of high-skilled workers would benefit from a much easier and faster procedure for immigration. They would not have to apply to the “family reunification” procedure but would be considered as “accompanying family” and would obtain residence and work permits without integration measures such as the Welcome and Integration Contract (Contrat d’accueil et d’intégration). In addition, the provisions of the law allow the high-skilled worker to enjoy fully his/her right to the unemployment benefit (the residence and work permit are extended until the end of the unemployment rights).

Other provisions of the law, on the contrary, have a restrictive effect on the rights of migrant workers. This is the case, for instance, with the transposition of the EU Return Directive (Articles 22 to 56 of the Law), the adoption of which by the EU Council on 18 December 2008 triggered vivid reactions in Europe.<sup>260</sup> The transposition of the Return Directive in French legislation would increase the maximum length of the administrative detention from 32 to 45 days (Articles 40 and 41 of the Law). It would also extend the period during which an irregular migrant worker is detained without a decision of a judge (Article 37). The transposition of the Return Directive contains a series of provisions that are highly criticized by a number of associations.<sup>261</sup> In some cases, the Besson Law makes provision for stricter measures than laid down in the EU Directive by, for instance, generalizing what is set forth in the Directive as an exception. This is particularly the case of the measures relating to the conditions to entering France, removal measures, including administrative detention measures, and the ban on re-entering French territory for up to five years for non-compliance with a voluntary return order.<sup>262</sup>

## 2.4 GERMANY

In 2008, 5.8 per cent of the German population were third-country nationals.<sup>263</sup>

### 2.4.1 Examples of rights recognized to irregular migrant workers and their families

The right to education is implicitly guaranteed under German law. But the Residence Act<sup>264</sup> requires schools to report irregular status to foreign-resident authorities, or any other information requested by these authorities. This creates a limitation to the right of undocumented children to effectively access education.<sup>265</sup>

Access to health care: The Asylum Seekers Benefits Law of 5 August 1997 applies to irregular migrant workers<sup>266</sup> and to “husbands, spouses or children under age associated to the persons according to [Section 1] N°. 1 to N°. 5, although not themselves fulfilling the requirements defined in these numbers”.<sup>267</sup> This means that free health care is guaranteed to irregular migrant workers and members of their families in case of “serious illness or acute pain and everything necessary for recovery, improvement or

relief of illnesses and their consequences, post natal care, vaccinations, preventive medical tests and anonymous counseling and screening of infectious and sexually transmitted diseases".<sup>268</sup> In addition, access to urgent medical care is guaranteed through the obligation for medical staff to provide medical treatment.<sup>269</sup> Finally, pregnant women and children in an irregular situation benefit from a higher level of access to health care.<sup>270</sup>

#### 2.4.2 Highly skilled migration<sup>271</sup>

A new German Labour Migration Control Act entered into force in 2009, with the aim of encouraging immigration of highly qualified workers from new EU Member States and third countries. This measure is supposed to tackle the labour shortage of high-skilled workers, and "to bring the best brains into the German labour market." To do so, the law gives these qualified migrants the right to seek permanent residence in Germany on the conditions that they are offered a job from a German employer with a minimum annual salary. In addition, selected skilled migrant workers are allowed to bring their families, which was not possible under the previous German Green card scheme from 2000 to 2003.

#### 2.4.3 Integration summits and policies

A new Immigration Act entered into force in 2005 and contained measures to promote the integration of regular migrants in Germany.<sup>272</sup> In 2006, Germany initiated a process to address a range of integration policy issues. In June 2006, the Government held the first Integration Summit that led to the adoption of a National Integration Plan (NIP) in 2007. "For the first time, all levels of government – federal, state and local – were to engage in a dialogue with the most important civil society actors, including representatives of various immigrant organizations, from the churches, business and industry, culture, academia and the media to agree on a joint plan for a long-term integration policy."<sup>273</sup> Six working groups compiled the 200-page report, which included 400 commitments to make it easier for foreigners to integrate in Germany and which were measures to be taken by government, business and social representatives.

These measures concerned improved integration courses ; the promotion of the German language from the outset ; ensuring quality education and training and improving job prospects ; improving the situation of women and girls and achieving equal opportunities ; providing local support for integration ; combining culture and integration ; promoting integration through sport ; representing diversity positively in the media ; strengthening integration through civic engagement and equal participation ; and promoting a cosmopolitan scientific community.

The NIP was presented at the Summit held in June 2007 where it was adopted. However, the 2007 edition of the Summit was overshadowed by a boycott by immigrant associations'.<sup>274</sup> The third Summit took place in November 2008, but much more discreetly. It focused on the implementation of the NIP, after the publication in October 2008 of the first progress report of the Federal Government.<sup>275</sup>

The Summits aimed at helping the Government to develop a comprehensive policy for immigrants and their families. The cornerstone of the NIP was the provision of integration courses for adult migrants, primarily focused on language learning.<sup>276</sup> The Government also allocated a budget to support the NIP. An interesting aspect of the Summits was that they gathered various stakeholders in the field of integration: civil society, immigrant groups and community, and government representatives. They also integrated immigrants in the debate, "to talk with them and not about them",<sup>277</sup> which is relevant under Article 42 of the ICRMW. They intended to create a network of players concerned with integration of foreigners: "so far more than 5,000 have become involved, supporting children and young people from immigrant families in their education and vocational training."<sup>278</sup> In addition, the German Government further put in place a monitoring system to evaluate the integration of migrant workers.<sup>279</sup>

In 2009, the NIP was strengthened by the Government, in particular including more measurable objectives and the creation of an "integration contract" to be signed by all migrant workers, newcomers and already resident ones.<sup>280</sup> Other specificities of the German integration policy are that the State is taking a strong role ; integration policies have moved to the centre of political attention ; and a majority of integration measures are – in a wide sense – measures of education, teaching and counseling.<sup>281</sup> Overall, the Summit and the NIP fostered a paradigm shift in the way the question of migration was addressed in Germany, as it recognized openly for the first time that Germany is a country of migration.<sup>282</sup> However,

the ambivalence of the German approach to integration and migration is reflected in the recent debate that took place over the contested multiculturalism of the country.<sup>283</sup>

A follow-up programme to the Summits was launched by the Federal Ministry of Labour and Social Affairs. The XENOS-Living and Working in Diversity (2008-2011), followed by XENOS-Integration and Diversity (2011-2013), are being funded by the European Social Fund (ESF). Named after the ancient Greek word for stranger, the XENOS programme promotes social inclusion and workplace diversity in Germany. Its aim is to foster tolerance and to redress xenophobia and racism ; XENOS focuses in particular on preventive measures that apply tried and tested methods to combat exclusion and discrimination in the labour market and the society at large.<sup>284</sup> The German Anti-Discrimination Act draws on these programmes, but fails to specifically address migrant-related discrimination. In particular, the NIP does not contain grounds for discrimination on the basis of nationality. This has been identified as a reason for limited integration success according to the MIPEX evaluation.<sup>285</sup> This has also been identified by the Special Rapporteur against Racism, during his visit to Germany in June 2009, who recommended that the National Action Plan against Racism be reinforced with the involvement of migrants' associations.<sup>286</sup>

#### 2.4.4 Cooperation among States

Bilateral agreements on social security rights: Germany has signed 18 bilateral social security agreements. These agreements ensure the portability of contributions made by migrant workers who have worked regularly in Germany to the national social security system. The agreements generally cover health insurance, long-term care insurance, pension insurance, unemployment insurance and/or work accident insurance. These are complemented by bilateral agreements covering health benefits while the migrant workers reside and work in the country of employment and Germany.

Memorandum of Understanding on seasonal workers programmes: The German Labour Ministry has signed several MOUs with Labour Ministries of countries of origin of migrants that cover the seasonal workers scheme. An interesting aspect of the implementation of the scheme is the role played by the German Employment Service that tests the local labour market and monitors employers on the respect of migrant workers' rights.<sup>287</sup>

## 2.5 IRELAND

In 2008, third-country nationals represented 3.7 per cent of the total Irish population.<sup>288</sup> It is estimated that 16.1 per cent of Irish citizens live abroad.<sup>289</sup>

The Junior Ministry for Integration was created in 2007 and is tasked with developing and coordinating integration policy across Government departments and promoting the integration of legal immigrants (including refugees).<sup>290</sup>

In October 2010, the Joint Committee of Representatives of the Irish Human Rights Commission and the Northern Ireland Human Rights Commission called on both Ireland and the UK to ratify the ICRMW.<sup>291</sup>

### 2.5.1 Examples of rights recognized to irregular migrant workers and their families

Access to education to undocumented migrant children in Ireland is protected under the Education Act of 1998 that states that education shall be made available "to people resident in the State".<sup>292</sup> Under the Immigration, Residence and Protection Bill 2010, the right to education for all children under 18 is recognized.<sup>293</sup>

Under the Irish Health Act, free access to health care is guaranteed to those "ordinarily resident". This, in practice, excludes irregular migrant workers from access to medical treatment. Only urgent medical care is provided to every person, upon payment of fees.<sup>294</sup>

### 2.5.2 Regularization schemes

Until 2005, every child born in Ireland could obtain Irish citizenship (this was changed by the 2004 Citizenship Referendum that entered into force on 1 January 2005). As a result, there were many families

where parents were undocumented while children had Irish citizenship. In 2005, the Government decided to regularize those parents by granting them a temporary leave to remain (residence permit) and right to work for two years.<sup>295</sup> Irregular migrants could apply until 31 March 2005 and had to sign a Statutory Declaration about their future conduct, including acceptance of the following conditions to be granted permission to remain:

- to obey the laws of the State and not become involved in criminal activity ;
- to make every effort to become economically viable in the State by engaging in employment, business or a profession ;
- to take all steps (such as appropriate participation in training or language courses) to enable them to engage in employment, business or a profession ; and
- that the granting of permission to remain does not confer any entitlement or legitimate expectation on any other person whether related or not to enter the State.

Among the 17, 900 applications, 16, 693 permits were granted.<sup>296</sup> In 2009, the Government announced that it would renew for three years all residence permits granted on that basis, after which beneficiaries would be able to apply for Irish citizenship.

In 2009, the Government launched an Undocumented Workers Scheme directed to previously regular migrant workers who had become irregular through no fault of their own. Commonly known as a “Bridging Visa” scheme, this programme grants these irregular migrant workers a four-month temporary residence permission to re-enter the work permit system.<sup>297</sup>

### 2.5.3 The Immigration, Residence and Protection Bill

In 2002, Ireland initiated a process to reform its immigration legal framework. In 2008, the Irish Government launched a new Bill on Immigration, Residence and Protection to put in place “an integrated statutory framework for the development and implementation of Government immigration policies into the future”.<sup>298</sup> The Bill would replace a number of legislations, some of which are outdated, regarding immigration policy, into a single document. It contains a series of measures specifying:

- Visa and residence conditions and processes (Parts 3, 4 and 5).
- Creation of the status of long-term resident, and rights and privileges entitled (Part 5, Sections 46-48).
- Combatting trafficking and protection of trafficked persons, including children (Part 8, Section 139).
- Asylum rules (Part 7).

The Bill clearly excluded “foreign nationals unlawfully present in the State” from access to a number of rights, such as the right to work, the right to access any social benefits and services.<sup>299</sup> This was justified as a tool to limit irregular migration by sending a clear message that irregular migrants were not welcomed. A few exceptions included the right to access urgent medical care. These provisions were criticized by a number of organizations.<sup>300</sup>

In July 2010 some amendments to the 2008 Bill were introduced, including additional protective provisions regarding the rights of victims of trafficking and irregular migrant workers ; it included some alternatives to arrest and detention for irregular migrant workers. It should also be noted that a number of recommendations made by the Immigrant Council of Ireland<sup>301</sup> to the Government regarding the 2008 Bill were taken into consideration and introduced in the 2010 version of the Bill.<sup>302</sup> To date, this Bill has not been adopted by the Irish Parliament. It is currently being examined by the House of Oireachtas.

### 2.5.4 The Green Card for skilled migration

The Employment Permits Act of 2006 created the Green Card scheme for high-skilled migrant workers in a limited number of occupations. The Green Card entered into force in January 2007. Green Card holders are entitled to bring their families with them. In comparison, regular work permit holders must have resided and worked legally for one year in Ireland before they can be joined by their families. In both cases, family members have access to work. According to MIPEX,<sup>303</sup> the Green Card Scheme gives more rights to skilled migrant workers.

In 2009, the Green Card scheme was closed to some occupations, but kept for others with an annual salary of minimum €60,000.

### 2.5.5 Access to unemployment benefits and work schemes

Third-country migrant workers have access to the Jobseekers' Benefit in Ireland if they have made at least 104 weekly Pay Related Social Insurance contributions and if they have a valid residency stamp. These benefits are granted for 12 months. In addition, unemployed workers in Ireland have access to Jobseeker Assistance.<sup>304</sup> However, this benefit is accessible depending on the "Habitual Residence Condition" (HRC) for persons, including non EU-EEA migrant workers who can prove that their "centre of interest" is in Ireland.<sup>305</sup> The HRC took effect in 2004 and is used to grant access to a series of social rights, such as the Supplementary Welfare Assistance (SWA), the Child Benefit, and the One-Parent Family Benefit.<sup>306</sup> "Habitual residence means you have a proven close link to Ireland"<sup>307</sup> and the HRC is assessed by a Social Welfare Officer, who takes into account factors such as length and continuity of residence in Ireland, the nature and pattern of employment, and the "future intentions of (the) applicant as they appear from all the circumstances".<sup>308</sup> It seems that, following the economic crisis, access to Social Benefits by third-country national migrant workers has been facilitated and has indeed increased.<sup>309</sup> In particular, the Training and Employment Authority (Foras Áiseanna Saothair - FAS) recently confirmed that non-EEA work permit holders who have been dismissed can access self-service facilities of the FAS Employment Services Offices.<sup>310</sup>

In addition, other more flexible measures have been introduced recently to protect migrant workers who have become unemployed: the period to find employment was extended from three to six months, before losing the residence permit; they no longer need to satisfy the Labour Market Needs Test when applying for new work permits; and have access to the new Work Placement Programme that is designed to offer unemployed people relevant work experience.<sup>311</sup>

## 2.6 ITALY

In 2008, third-country nationals represented 4.2 per cent of the total Italian population.<sup>312</sup>

### 2.6.1 Examples of rights recognized to irregular migrant workers and their families

Italy guarantees migrants the right to instruction in the same manner as it does for Italian citizens regardless of migration status. Access to education is guaranteed under Article 34 of the Italian Constitution for "everyone". The 1998 Immigration Act integrated the framework for the right to education for non-Italian students into national legislation.<sup>313</sup>

Italian national legislation protects access to health care for irregular migrant workers.<sup>314</sup> Law N°. 40 of 6 March 1998 (Turco-Napolitano) regulates health care for irregular migrants<sup>315</sup>; and Legislative Decree N°. 286 of 25 July 1998 regulates the implementation of the Law. Free health care coverage includes urgent medical care and preventive care such as prenatal and maternity care, care for children, vaccinations, and the diagnosis and treatment of infectious diseases. In practice, interpretation of the Law may differ at the regional level, and there is a documented lack of knowledge about their right to access health among irregular migrants.<sup>316</sup>

Regularization: Six regularization schemes were organized in Italy between 1982 and 2002. They allowed the regularization of almost 1.5 million migrant workers.<sup>317</sup> Since 2002, regularizations have been replaced by a more effective labour migration policy that allows for more control over the influx



of migrants in the country. However, between August and September 2009, personal and home care workers could regularize their status. A total of 300,000 applications were made by employers. A fee of €500 was due to apply that can be anticipated as a limiting element of the success of this last regularization programme.

### 2.6.2 The 1998 Turco-Napolitano Law

The Italian migration law of 1998,<sup>318</sup> called Legge Turco-Napolitano after the Ministers who supported it, was the first marker in Italy of the creation of the Schengen border regime ; for instance, it created administrative detention centres for migrants. But because it was influenced, though indirectly, by the content of the ICRMW,<sup>319</sup> the law was a successful balance between control measures and respect for the dignity and rights of migrants. Indeed, the law's objectives were to improve efficiency in managing the flow of immigrant labour ; increase prevention and containment of illegal immigration ; and expand measures for effective integration of legal foreigners.<sup>320</sup> The law recognized social rights to migrant workers, including those in an irregular situation. It even differentiated between rights recognized to irregular migrant workers and rights recognized to regular migrant workers, the latter enjoying almost the same civil rights as national citizens.<sup>321</sup> It facilitated access to work and integration, healthcare and education, contained a right to family reunification, and to housing and social integration.<sup>322</sup>

The first amendments to the 1998 law were made with the Bossi-Fini Law in 2002.<sup>323</sup> This law contained some restrictive measures, such as immigrant quotas, mandatory employer-immigrant contracts, and stricter illegal immigration deportation practices ; and some protection measures such as amnesties for irregular immigrants who have worked and lived in the country for over three months,<sup>324</sup> new provincial immigration offices to help manage immigrant worker and family reunification cases, and regularization of certain categories of irregular migrant workers.<sup>325</sup>

Most of the provisions of the 1998 Law were in effect until relatively recently, when the Government started taking overtly restrictive measures against immigration. In particular, recent Italian legislation targets undocumented migrants, including family members and unaccompanied children. Italian Law N°. 94 of 2009<sup>326</sup> criminalizes undocumented entry in and stay on Italian territory, punished with pecuniary sanctions and immediate expulsion. It created a national framework for citizens' groups aiming at the protection of the population against immigrants, hence encouraging violent attitudes towards migrants. The 2009 Law also weakened the status of regular migrant workers, including through a points-based system for the renewal of stay permits and more restrictive housing requirements for family reunion.<sup>327</sup> Moreover, Italian Law N°. 125 of 2008 allows a judge to pronounce a prison sentence one-third longer if the crime was committed by an undocumented migrant worker.<sup>328</sup>

The official aims of such measures, as presented by the Italian authorities, are based on security concerns, i.e., the will to combat irregular movement onto Italian soil and to protect Italian citizens. However, parts of Italian society which are critical of this development – as well as many international observers – argue that the authorities' security-focused approach stems from deliberate populism, identifying the migrants as easy scapegoats for society's broader problems.<sup>329</sup> In the light of such a security-driven volte-face in the Italian approach to immigration, reflected in recent laws, rules and practices, the loss of the 1998 Turco-Napolitano Law seems regrettable. Moreover, it appears that the recent restrictive measures fail to achieve their declared goals. As shown in several publications, irregular migration to Italy is in fact unofficially encouraged, as a cheap and flexible workforce is considered necessary for the Italian economy.<sup>330</sup> Maintaining migrant workers in a precarious situation can generate tensions. Together with the widespread association of irregular migration with crime (in the media as well as in the political discourse), such tensions do not ultimately contribute to improved security.<sup>331</sup>

Finally, as we will now see, some aspects of the liberal 1998 Law remain in the Italian legislation, mainly concerning migrant workers and their families in a regular situation.

### 2.6.3 Protecting migrant workers from employment discrimination

Italy has generous constitutional and legal guarantees against discrimination in employment of regular migrant workers. The implementation of EU Directive 2000/78/EC on the general framework for equal treatment and Directive 2000/43/EC on racial or ethnic origin discrimination reinforced this protection.<sup>332</sup>

However, Council Directive 2000/43/EC stipulates that the prohibition against discrimination “should also apply to nationals of third countries, but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and occupation”.<sup>333</sup> Equally, Council Directive 2000/78/EC stipulates that it applies to third-country nationals but does not cover differences based on nationality.<sup>334</sup> In 2003, implementing Decrees of the two EU Directives in Italy did not include the nationality grounds for discrimination, following the text of the EU Directives. But Italian Act N° 286 of 1998 regulating immigration and the legal conditions of foreigners – an Act that is still in force - specifically prohibits discrimination based on nationality and thereby goes further than the EU Directives and Italian implementation Decrees, although the latter are more recent.

Italian legislation against employment discrimination covers access to an economic activity, working conditions and vocational training. It prohibits discrimination both in public and private employment in access to employment, self-employment or occupation, including selection criteria and recruitment conditions ; employment and working conditions, including promotions, dismissals and pay ; access to all types and all levels of vocational guidance, training and retraining, including practical work experience ; and membership of and involvement in organizations of workers or other organizations whose members carry out a particular profession, including the benefits they provide.<sup>335</sup>

The ICRMW protects workers from discrimination based on their status as migrants. The general anti-discrimination principle is affirmed in Article 7. It is further adapted to specific rights of migrant workers in a number of Articles. With regard to employment and conditions of work, Article 43 stipulates that regular migrant workers shall benefit from equality of treatment with nationals with regard to access to educational institutions and services ; access to vocational guidance and placement services ; access to housing, including social housing schemes and protection against exploitation in respect of rents ; and access to social and health services. Article 54 covers equality of treatment of regular migrant workers with nationals with regard to protection against dismissal ; unemployment benefit ; access to public work schemes intended to combat unemployment ; and access to alternative employment in the event of loss of work or termination of other remunerated activity.

Regarding equality of treatment with nationals on remuneration, working conditions and terms of work, Article 25 of the ICRMW<sup>336</sup> covering these rights applies to all migrant workers, in a regular and irregular situation. Article 27 protects equality of treatment of all migrant workers with nationals with respect to social security. In addition, Article 25 explicitly covers protection against dismissal further contained in Article 54 (applicable to regular migrant workers) while Article 27.1 implicitly encompasses unemployment benefits.<sup>337</sup> These elements in the Italian legislation apply only to “legally residing migrant workers” and yet, Article 25.3 stresses the applicability of these protections to irregular migrant workers.<sup>338</sup>

Apart from its limitations with regard to irregular migrant workers, the Italian legislation on anti-discrimination in employment affords extensive remedies to regular migrant workers who have been discriminated against on the grounds listed above. This is in addition to simple and accessible procedures that constitute guarantees for the effective implementation of the rights of migrant workers against discrimination in employment.<sup>339</sup>

Inter alia, the Italian legislation covering anti-discrimination safeguards in access to employment responds to the right of regular migrant workers to “freely choose their remunerated activity” contained in Article 52 of the ICRMW. While Alinea 1 states the principle of free choice of remunerated activity, Article 52.2 lists a number of restrictions to this principle, namely the possibility for a State of employment to restrict access to limited categories of employment to national citizens ; and to restrict free choice of employment based on the evaluation of the migrant worker’s qualifications acquired outside its territory. Article 52.3 concerns limitations to the right to freely choose a remunerated activity based on the length of stay or work of the migrant worker in the territory of the State of employment. Without indicating what the length of stay should be, Article 52.3 allows a State of employment to limit the possibility for temporary migrant workers to change work before they have stayed and worked for a given length of time in the State of employment.

In the case of Italy, temporary migrant workers are allowed to change work, therefore to exercise their right to freely choose a remunerated activity, after a two-year stay.<sup>340</sup>

## 2.6.4 Seasonal work scheme

Seasonal workers have facilitated procedures with regard to entry and residence in Italy. Initially, the duration of the seasonal work permit varies between 20 days and a maximum of nine months. Seasonal workers who have previously performed seasonal work in Italy have priority to re-enter Italy as seasonal workers if they have respected the conditions of their initial contract, and particularly if they returned to their country of origin at the end of the initial seasonal work permit.

In addition, after two years of repeated employment as a seasonal worker, and if the seasonal worker returned to his/her country of origin at the end of each seasonal work permit, the seasonal worker may obtain a multiple-entry work permit of up to three years. Under certain conditions, the residence permit for seasonal employment may also be converted into a residence permit for salaried employment for a set or undetermined period.<sup>341</sup>

This incentive for return of seasonal migrant workers at the termination of their seasonal permit contributes to reducing irregular migration in Italy. Seasonal migrant workers are granted a very temporary right to reside and work in Italy, after which their stay in Italy becomes irregular. Encouraging seasonal workers to leave the country at the end of the temporary period of work in Italy prevents them from falling into irregularity.<sup>342</sup> This is in line with the spirit of the ICRMW that encourages States Parties to take measures to prevent the irregularity of migrant workers rather than “repress” it.

Finally, seasonal workers under multiple-entry permits, as well as salaried employment permit holders, may be joined by their families. Spouses and minor children are eligible, and under certain circumstances, this also applies to children over 18 years of age and dependent parents. This is in line with Articles 44.2 and 44.3 of the ICRMW. The migrant workers must prove an adequate income that takes into consideration the income of family members.

## 2.7 NORWAY

In 2008, third-country nationals represented 2.7 per cent of the total Norwegian population.<sup>343</sup>

### 2.7.1 Examples of rights recognized to irregular migrant workers and their families

The right to emergency health care is recognized to all irregular migrant workers in Norway, but is not as such protected under national legislation. Rather, the reference seems to be the International Human Rights Conventions that Norway has ratified and that protects the right to health care (Convention on the Rights of the Child and International Covenant on Economic, Social and Cultural Rights).<sup>344</sup>

### 2.7.2 The new Immigration Act and Immigration Regulations

The Immigration Act and Immigration Regulations entered into force on 1 January 2010. The spirit of the law can be summarized as “fewer but better protected” migrant workers. A number of key aspects of the new law include:<sup>345</sup>

- A single residence permit now replaces previous residence and work permits.
- Increased attention to the best interests of the Child.
- Possibility for migrant workers to start work before the administrative process is completed.
- Tightened family reunion rules.

Legal migration is mostly limited to skilled labour.<sup>346</sup> The understanding of “skilled worker” is set out clearly and is limited to expertise, diplomas and work experience in areas varying from craftsmanship to university degree, with a required level usually equivalent to Norwegian standards. A residence permit can be granted if the migrant worker has received a confirmed offer for a full-time job. The salary rules follow collective agreements of the relevant sector, and where these do not exist, public services scales (Article 25 of the ICRMW) ; they vary according to the degree of post-graduate diplomas. Exceptional

circumstances are envisaged. Finally, the migrant worker has to fill out a form in order to be issued with a residence permit.

The employer can apply to employ a migrant worker only if she/he agrees, with some exceptions. Surprisingly, the application must be submitted to the police district where the enterprise is located, if it is done by the employer, or if the migrant worker is already in Norway. In these cases, the police may grant a “provisional confirmation” and/or a temporary residence permit allowing her/him to work while the application is being processed. This means that entry visas can be issued before the end of the application process for migrant workers abroad whose employer applied on their behalf. In other cases, the migrant worker must apply to the Norwegian diplomatic representation in her/his country of current residence and wait for the application to be processed. This clearly encourages employers to apply on behalf of the workers – often because both the workers and the enterprises require the employment to commence - while at the same time placing the responsibility for the credentials of the migrant worker applicant on the employers. Such employers have to be previously authorized by the authorities (Article 66.2 of the ICRMW).

The residence permit is granted for one year. It can be renewed by the police, a month ahead of the end of the permit (Article 51 of the ICRMW). Residence permits are granted for a type of work ; migrant workers wishing to change type of work must apply for a new residence permit (Article 51 of the ICRMW), but they are free to change employer and work as long as they stay in the same category of work, under the same permit (Article 52 of the ICRMW). During the validity of the residence permit, migrant workers are free to leave and enter Norway (Article 38 of the ICRMW).

If the migrant worker loses his/her job, the residence permit continues to be valid for six months and allows the person to look for a job. After this period, the person can apply for a jobseeker residence permit, under certain conditions, and remain an additional six months (see below). After this period (one year after the dismissal), the migrant worker must return home. S/he can re-apply for a residence permit only if s/he receives a confirmed job offer or, for a skilled jobseeker, residence permit after one year in the country of origin.

The residence permit is the basis for family reunification (Article 44 of the ICRMW). Stricter rules apply for family reunification under the new Immigration Act. These are rather complex and vary according to the member of family applying and the status of the family member residing in Norway.<sup>347</sup> The family members entitled to family reunification are the following: spouse, partner, cohabitant ; fiancé(e) ; minor and unmarried children ; and other dependent members of family.<sup>348</sup> Parents whose adult children live in Norway can also apply for a nine-month visit permit. In addition, under strong humanitarian considerations, other members of the family can apply for reunification.

The family member living in Norway (sponsor) is also subject to conditions. This is a combination of a number of criteria:

- A subsistence requirement allowing the sponsor to support the family members financially. This combines a minimum monthly salary of approximately €2,300 that will be counted as the future income and, in some cases, that was earned during the last 12 months ; and not receiving social support for the past 12 months. There are exceptions to these rules, including some under strong humanitarian circumstances.
- In addition, the sponsor must prove that they meet the housing requirement, that is having “a home that is big enough to house the relatives” other than immediate family.
- A requirement for four years’ employment or education in Norway only for families that were constituted after the sponsor established in Norway. This criterion never applies to children.

Additionally, residence permits are also granted to skilled job-seekers in Norway,<sup>349</sup> in order for them to find skilled work as defined above. These permits are tied to financial conditions (the jobseeker must prove to have sufficient resources for the duration of her/his stay as a jobseeker) and are not renewable. This residence permit is granted for six months ; it does not allow the migrant worker to work but to seek employment. It does not allow family reunion. The skilled jobseeker is free to leave and enter Norway during the period of the permit. Third-country nationals who do not need a visa to enter Norway do not

need to apply for a skilled jobseeker residence permit. They can enter Norway to seek employment by registering at a police office within three months of entry. This applies to a number of migrant workers, including persons who hold residence permits in Norway and other Schengen countries ; persons with valid Norwegian immigrant passports ; and foreign nationals with valid passports from countries with which Norway has entered into visa exemption agreements.<sup>350</sup>

Decisions regarding both resident permits for work and for family reunion can be appealed. First, the Norwegian Directorate of Immigration (UDI) will revise its own decision and either overturn or reverse it. In the case of a reversal, the UDI case officer will send the case to the Immigration Appeal Board for a final decision. Migrant workers whose residence permit application has been refused by the UDI shall normally leave the country within four weeks of the decision. However, it is possible for migrant workers to stay in Norway while the appeal is being processed (Art. 22.4 of the ICRMW).

An important aspect of these permits is that they allow migrant workers or migrant jobseekers (who are, according to the Article 2.1 of the ICRMW, “migrant workers” as they are “to be engaged in a remunerated activity”) to leave Norway and come back as often as they please. This allows them to keep strong ties with their country of origin, and their families (Article 38 of the ICRMW).

## 2.8 POLAND

In 2008, 0.1 per cent of the total Polish population were third-country nationals.<sup>351</sup> It is estimated that 8.2 per cent of Polish citizens live abroad.<sup>352</sup>

### 2.8.1 Examples of rights recognized to irregular migrant workers and their families

Right to education of undocumented migrant children: The Polish Constitution guarantees the right to free public education for all children, irrespective of their legal status. In addition, the law specifies that education is compulsory for elementary and junior high-school education. Public schools are subsidized by public funds that reimburse school fees and costs for every child, regardless of their nationality.<sup>353</sup> Access to education is therefore implicitly protected by Polish legislation.<sup>354</sup> In 2009, a modification to the Act on the System of Education recognized access to free education to all children of migrant workers.

The right of irregular migrant workers to access free emergency medical care is protected by Article 7 of the Law on Health Protection that stipulates that medical providers cannot refuse treatment to a person whose life or health is endangered. Concerning other medical care, access depends on the category of irregular migrant workers ; those who are rejected asylum seekers and who have overstayed their work permit have access to free primary and specialist care.<sup>355</sup>

### 2.8.2 Regularization of irregular migrants

Poland has organized two successive processes of regularization of migrant workers irregularly residing on its territory, called “great abolitions”. The first one took place in 2003 and the latest in 2007. The law organizing regularization in 2007 applied only to migrant workers who had not submitted an application under the 2003 law,<sup>356</sup> and used the same model as in 2003. The conditions required for regularization were:<sup>357</sup>

- Having resided in Poland for ten years or more, without interruption.
- Not having a legal residence on 20 July 2007.
- Having applied for legal residency status before 20 January 2008.
- Indicating a place for accommodation and proof of its legality.
- Either having the support from an employer or proving to be in possession of available resources sufficient to cover all needs, including health care.

Article 69 of the ICRMW encourages States Parties to use, whenever possible, regularization as a means to put an end to irregular migration. Therefore, countries such as Poland that decide to regularize



a number of irregular migrant workers and their families residing on their territory, tackle irregularity of migrant workers and thus contribute to the promotion of “sound, equitable and humane conditions in connection with international migration of migrant workers and members of their families” (Art. 64 of the ICRMW). But Article 69.2 recommends to States, when they consider regularizing migrant workers, to take into account “the circumstances of their entry, the duration of their stay in the States of employment and other relevant considerations, in particular those relating to their family situation”.

The conditions established by the 2007 Polish regularization law fall short on some of these aspects. It does give priority to long-term residents (ten years minimum) but it does not give any importance to the family situation of the migrant workers, nor to their conditions of stay and/or entry. It appears that this law disadvantaged the majority of irregular migrants in Poland and only applied to a very limited number of irregular migrant workers.<sup>358</sup>

In 2003, 2,747 irregular migrant workers (from Armenia, Viet Nam, and - far behind the first two - Ukraine) were regularized, whereas in 2007, there were only 177. They were granted a one year residence permit with the possibility of renewal.<sup>359</sup>

### 2.8.3 Steps towards a new migration legislation

To date, Polish legislation on migration contains the Act on Aliens of 13 June 2003 that covers entry, admission, residence, return and registration of foreigners. Poland has mainly been seen as a sending country in terms of international migration. Its accession to the EU (1 May 2004) and entry into the Schengen area (21 December 2007) contributed to the recognition of Poland as a receiving country and a major transit country. Since 2004, the country has updated its migration legislation significantly, mostly integrating the Acquis of the EU migration policy. Recently, labour shortage has forced Poland to adapt its legislation to a new reality.

In an effort to develop Polish migration legislation, an Inter-Ministerial Committee for Migration was created in February 2007 to advise, and be consulted by the Prime Minister on migration issues. The Committee’s objective is to ensure the coordination of efforts and actions undertaken by Governmental administration organs with regard to migration, to exchange information and to monitor the work carried out at European Community level. Its tasks include:

- initiating legislative and institutional change related to migration and recommending such change to the Council of Ministers for the adoption of its standpoint thereon ;
- preparing proposals concerning modification of the current scope of competence related to migration ;
- issuing opinions on multi-annual and annual national programmes of the European Fund for the Integration of Third-Country Nationals ;
- suggesting direction of action to be taken for integration of foreigners in Poland ; exchanging information and monitoring the work carried out within the EU in the field of migration ; and
- cooperating with governmental administration organs, local governments and non-governmental organizations in the field of migration.

An interesting aspect of the efforts of the Government to adapt its migration policy is the consultation with actors in the field of migration who have been asked to share their opinions about the current legislation and areas where it can be improved. In February 2009, the Inter-Ministerial Committee decided to appoint a Working Group for developing a Migration Strategy for Poland. The Working Group is mandated to evaluate the current legislation, elaborate proposals and monitor the implementation of the strategy.

### 2.8.4 Encouraging the return of Polish migrant workers

Poland counts 3,102,600 of its citizens living abroad, which represents 8.2 per cent of its population. Part of the Polish migration policy addressing labour shortages is to encourage the return of Polish citizens

living and working abroad. The Government has launched several campaigns, mainly targeting young Polish workers. In 2008, the campaign “Do you plan to return?” aimed at facilitating smooth returns and showcasing employment opportunities. The campaign published a guide book and a website, providing administrative and practical information on finding a job in Poland. In addition, Poland passed the Tax Abolition Act, which allowed Poles who obtained income abroad between 2002 and 2007 to apply for a refund on taxes they had already paid. The Act also provides relief from double taxation.<sup>360</sup>

These measures are relevant under provisions of the ICRMW: Article 47 covers the right of regular migrant workers to transfer their earnings and savings from the country of employment. In particular, Article 47.2 encourages States to “take appropriate measures to facilitate such transfers”. In addition, Articles 65 and 67 contain recommendations to States of origin to organize the “orderly return of migrant workers”, including through providing information on the conditions and prospects for return (Article 65.1 (d)).

## 2.9 PORTUGAL

Remittances sent to Portugal are five times larger than the transfers made by immigrants in Portugal to their country of origin.<sup>361</sup> In 2008, 3.1 per cent of the population were third -country nationals.<sup>362</sup> It is estimated that 20.8 per cent of Portuguese citizens live abroad.<sup>363</sup>

### 2.9.1 Examples of rights recognized to irregular migrant workers

Access to health care: The Portuguese Constitution defines the right to health as universal and the public health care system is available to all residents, regardless of their nationality, legal status, or economic situation.<sup>364</sup> According to the Decree-Law 25360/2001, of 12 December 2001, and the Circular Informativa N°. 14/DSPCS of 2 April 2002, irregular migrant workers have access to the services of the National Health Service (NHS) by presenting a residence certificate that can be obtained after having resided 90 days in Portugal. Irregular migrants have to pay medical fees. Pre- and post-natal care, treatment of contagious diseases (such as HIV/AIDS and tuberculosis), vaccination and family planning is provided free of charge, including to irregular migrants who have stayed less than 90 days or who cannot prove it. Emergency care is provided in any case, though migrants may have to reimburse the fees, according to their status. Access to health care by irregular migrants is limited in practice by a number of factors: lack of awareness of their rights, fear of being deported, or difficulties in obtaining the residence certificate.<sup>365</sup> Right to access health care is recognized as a fundamental human right in Portugal for regular and irregular migrants, as the adoption of Informative Circular N°. 12/DQS/DM - 07/05/09122 on Immigrant Access to the National Health Service stipulates.<sup>366</sup>

Children: Decree N°. 67/2004 of 25 March 2004 protects the right of undocumented migrant children under 16 to free health care and education, on the same basis as for national citizens. School is compulsory from the age of six to 15. The Government additionally funds programmes to facilitate the integration of immigrant pupils in the education system, in particular focusing on language courses.<sup>367</sup>

### 2.9.2 Rights of regular migrant workers

In 2007, Portugal adopted a law on the legal framework of entry, permanence, exit and removal of foreigners into and out of national territory.<sup>368</sup> This law transferred into national legislation the Family Reunification Directive<sup>369</sup> and the long-term residents Directive,<sup>370</sup> among others. With this law, Portugal terminated a labour migration system based on quotas and adopted a new system, “global contingent”, which reports total labour needs and is published every year.<sup>371</sup>

Article 83 of that Law stipulates that any temporary or permanent resident permit holder is entitled to education and tuition ; engaging in a subordinated professional activity ; engaging in an independent professional activity ; professional guidance, training, improvement and rehabilitation ; health care ; and recourse to the law and courts. In addition, Article 83.2 guarantees equality of treatment of foreigners with nationals, in particular with regard to social security ; fiscal benefits ; participation in workers’ unions ; recognition of diplomas, certificates and other professional credentials or documents that grant them access to goods and services.

It is interesting to note that Article 83 formally refers to “rights” of residence permit holders and applies “without prejudice to the application of special stipulations and other rights established in the law, or

in international conventions that Portugal is a Party to (...). When compared to the ICRMW, Article 83 seems to be in compliance with Articles 26, 27, 38, 40, 43, 48, and 54.

Article 85 of the Law allows temporary residence permit holders to be absent from Portugal for a maximum of six consecutive months or eight interpolated months ; it allows permanent residence permit holders to be absent for up to 24 consecutive months or 30 interpolated months. In addition, some exceptions exist that allow for longer absence (Article 38 of the ICRMW).

In the context of the economic crisis, Portugal has eased the renewal of temporary residence permits in order to protect unemployed temporary migrant workers from expulsion by reducing the threshold amount of the condition of sufficient means of subsistence.<sup>372</sup> Article 1 of Ordinance N°. 760/2009, of 16 June 2009, stipulates that migrant workers who find themselves unemployed involuntarily and who therefore cannot prove sufficient means of subsistence can exceptionally see their resident permit prolonged.<sup>373</sup> This also applies to their family members. The criterion for determining the means of subsistence has been lowered to, for the first adult, 50 per cent of the Minimum Monthly Guaranteed Wage and 30 per cent for the other members of the family unit.

After five years of uninterrupted legal residence in Portugal as a temporary worker (with the exclusion of seasonal workers), a foreign resident may obtain a long-term (or permanent) residence permit under the following conditions:

- 1) having stable and regular resources for his/her own livelihood and his/her family members without help from the solidarity subsystem ;
- 2) holding a health insurance ;
- 3) having lodgings ; and
- 4) being proficient in basic Portuguese<sup>374</sup>.

Consecutive authorized absences from Portugal set forth in Article 85 do not interrupt the required five-year stay as long as they do not exceed ten months in total.

Article 133 of the 2007 Law states that “Beneficiaries of the long-term status benefit from equal treatment with the national citizens under the stipulations of the Constitution and the law”.

### 2.9.3 Family reunion

Articles 98 to 108 of the 2007 Law cover the “right to family reunification”. Family reunification is possible for temporary and permanent residence permit holders, without conditions as to the length of time the applicant has already spent in Portugal. The right applies to spouses and de facto partners ; their minor, unmarried children ; minor adopted children ; direct first line ascendants of the sponsor or his/her spouse or partner “provided they depend of either of those” ; and underage brothers or sisters provided they are under the tutelage of the resident. Article 101 sets forth two conditions for family reunification: “the applicant must have secured 1) lodgings and 2) subsistence means, such as defined in the administrative rule mentioned in sub-heading d), paragraph 1, article 52.”

Family members are granted a residence permit, with the same duration validity as temporary resident applicants, or for a maximum of two years for the family of permanent residence permit holders. After two years, family members can be granted their autonomous permit. Interestingly, the duration of marriage or of the de facto relationship does not interfere with the right to family reunification, nor does the fact that “family ties having been created before or after the resident entered in Portugal exist”.<sup>375</sup> However, for marriages of more than five years duration, the spouse obtains an autonomous residence permit immediately.<sup>376</sup>

### 2.9.4 Regularizations

Portugal had recourse to collective regularization programmes until 2007. The last regularization that took place was intended to “clean-up-the-State”,<sup>377</sup> before implementation of a new migration legislation

which aims at improving migrant labour recruitment. The new Law contains a number of legal grounds for individual regularization, although these existed in previous legislation as well. Article 88.2 of the Law sets forth that, under exceptional circumstances, irregular migrant workers can be granted a residence permit under certain conditions: having an employment contract or proof of being in a labour relation (certified either by labour unions or NGOs sitting on the Consultative Council for Immigration Affairs, or the Labour Inspection) ; having entered and stayed legally in Portugal ; and being registered with the Social Security system. Migrant workers in an irregular situation who overstayed the duration of their entry visa would have to pay a fine for remaining irregularly in Portugal.<sup>378</sup>

In addition, victims of trafficking have a right to be regularized under Article 109 of the Law, whether they entered Portugal illegally or not, and whether they fulfill the conditions for a residence permit or not. Article 122 lists cases where third-country nationals do not need a residence visa to obtain a residence permit.

Finally, after Article 134 of the Law that lists the grounds for removal of a foreign citizen from Portugal, including illegal entry or stay on Portuguese territory, Article 135 contains a list of cases when this removal is not possible: when the migrant worker was born and resides in Portugal ; when the migrant worker has minor children with Portuguese nationality who reside in Portugal ; if the migrant worker has minor children of foreign nationality who reside in Portugal and has authority over them and responsibility for their care and education ; and migrant workers who have lived in Portugal since they were under ten years old. Even though this Article does not specifically mention the regularization of foreign citizens falling under these exceptions, it clearly indicates that removal is not an option, including for those in an irregular situation. This is an example of legislation that has employed the means to end the irregular stay of migrant workers and has selected available options (return or regularization) according to human considerations, such as family ties, length of stay and circumstances of their entry in the country, as listed in Article 69 of the ICRMW.

### 2.9.5 Integration

Portugal has developed a comprehensive national structure to deal with issues related to the integration of immigrants. This system is supervised by a high-level body dealing with immigration and ethnic minority issues, the High Commission for Immigration and Intercultural Dialogue (ACIDI, formerly High Commission for Immigration and Ethnic Minorities/ACIME),<sup>379</sup> created in 1992. It is an interdepartmental support and advisory structure of the Government directly under the Prime Minister whose goal is to facilitate the integration of immigrants in Portuguese society. ACIDI priorities are: making the State the principal source of help for the integration of immigrants ; combating social exclusion ; sensitizing public opinion towards a spirit of welcoming and tolerance ; and working in a spirit of co-responsibility with immigrant associations and NGOs.<sup>380</sup> ACIDI has entered into formal cooperation agreements with a large number of immigrant organizations in the country.

ACIDI's mandate is complemented by a broad national support system for immigrants functioning through a decentralized network of public assistance centres specially dedicated to the needs and enquiries of immigrants. This system comprises two National Immigration Support Centres, over 60 Local Immigration Support Centres and a Mission for Dialogue with Religions.

One area of ACIDI's work is combating stereotyping of immigrants in public opinion. It has conducted several initiatives to foster and strengthen a positive image of immigration, including targeting the media, such as the Journalism for Tolerance Prize. In addition, the Immigration Observatory, a research institute on migration, contributes to documenting migration in Portugal, thus contributing to counter stereotypes and myths about migration.<sup>381</sup>

ACIDI published a study on the ICRMW in which it concluded that obstacles to ratification could be overcome easily by adjustments to legislation and highlighted the political nature of the obstacles to ratification.<sup>382</sup>

In 2007, Portugal adopted an ambitious and coherent plan for integration of immigrants.<sup>383</sup> It contains 123 measures to improve access to training, family reunion, housing, health, funding for associations, anti-discrimination enforcement mechanisms and equality policies. The plan was evaluated in 2009 and showed that 81 per cent of its measures have already been implemented or are being implemented.<sup>384</sup> Integration of immigrants in Portugal has been acknowledged as a good practice on several occasions,

including by the Directorate-General on Justice, Freedom and Security of the European Commission<sup>385</sup> and the Migration Integration Policy Index (MIPEX),<sup>386</sup> where it ranked second. In addition, in the Human Development Report 2009,<sup>387</sup> Portugal was the country that achieved the highest ranking in terms of the attribution of rights and services to international migrants.

## 2.10 SPAIN

In 2008, third-country nationals represented 7 per cent of the total Spanish population.<sup>388</sup>

### 2.10.1 2009 Aliens Law

In 2000, Spain adopted an Organic Law<sup>389</sup> on aliens that emphasized rights recognized to migrant workers, known as the Organic Law on the rights and freedoms of foreigners in Spain and their social integration. It struck a balance between managing migration and respecting migrants' rights, including those in an irregular situation. However, this law was modified, and its protection of migrants' rights was limited by Organic Laws 8 / 2000 of 22 December, 11/2003 of 29 September and 14/2003 of 20 November.

A New Organic Law on Aliens<sup>390</sup> came into force on 11 December 2009, further modifying the Organic Law of 2000 and rectifying protection afforded to migrants. Three reasons were given by the Government for adopting this Law: the transpositions of EU Directives (in particular the Return Directive and the Sanctions Directive) ; decisions of the Constitutional Court in 2007 recognizing fundamental human rights of irregular migrants ; and the need to answer new challenges brought by new patterns of migration.

The law contains a number of improvements regarding migrant workers' rights.<sup>391</sup> Specifically, modifications brought by the 2009 Law to Title I of the 2000 Organic Law aim at "shaping the framework of rights and liberties of foreigners, regardless of their status in the country".<sup>392</sup> It differentiates between rights recognized to all migrants and rights recognized to regular migrants ("extranjeros residentes")

All migrants, including those in an irregular situation, are entitled to:

- Right to documentation (Article 4 of the modified Organic Law 4/2000).
- Basic, free and compulsory education for minors under 16, and to non-compulsory education for minors under 18 (Article 9 of the modified Organic Law 4/2000).
- The right of assembly on an equal footing with national citizens for all (Article 7 of the modified Organic Law 4/2000).
- The right to sanitary assistance under certain conditions and to urgent medical assistance (Article 12 of the modified Organic Law 4/2000).
- The right to join trade unions and to strike following Constitutional Court decisions in 2007<sup>393</sup> (Article 11 of the modified Organic Law 4/2000).
- The right to basic social services and provisions (Article 14.2 of the modified Organic Law 4/2000).
- The right to transfer their earnings and savings to their country of origin (Article 15.2 of the modified Organic Law 4/2000). This Article also specifies that the Government will adopt measures to facilitate such transfers.
- Free legal aid (Article 22 of the modified Organic Law 4/2000).
- Article 23.2 introduces a new ground in the prohibition of discriminatory actions by public services staff based on the migrant situation.



Regular migrants are additionally entitled to:

- Right to free circulation and establishment in the country (Article 5 of the modified Organic Law 4/2000)<sup>394</sup>.
- Right to vote in municipal elections under certain conditions (Article 6 of the modified Organic Law 4/2000).
- Right to social security, under certain conditions (Article 10 of the modified Organic Law 4/2000).
- Family reunification already provided for under the Organic Law of 2000<sup>395</sup> has now been extended to unmarried couples (Article 17.4 of the modified Organic Law 4/2000). The 2009 Law also grants work permits to relatives who are of working age (spouse and children older than 16, Article 19 of the modified Organic Law 4/2000). In parallel, the group of family members in ascending line who can be reunited have been reduced to those over the age of 65, except where there are humanitarian reasons (Article 17.1.d of the modified Organic Law 4/2000) and except for long-term residents. The conditions for family reunification have not changed: the sponsor must have stayed one year in Spain and must have obtained the renewal of his/her residence permit to apply for family reunification ; the sponsor must be able to support him/herself financially and his family,<sup>396</sup> and the sponsor must have adequate housing for him/herself and family.

Special attention is given in the 2009 Organic Law to the gender dimension of migration: in the new Article 2 bis, effective equality between women and men is listed as a principle upon which the Spanish migration policy must be applied in practice ; and the new Article 31 bis contains protection measures for migrant women who are the victims of domestic violence, regardless of their status. Finally, for the first time, Spanish legislation contains protection provisions for victims of trafficking under Article 59 bis of the modified Organic Law 4/2000.

It is interesting to read in the Preamble of the 2009 Alien Law that “Spain is firmly committed to defending human rights ; this is why public authorities must promote the full integration of immigrants into our country and ensure coexistence and social cohesion between immigrants and the native population”.<sup>397</sup> Further, the Law lists the following as the first of its objectives: “establish a framework of rights and liberties for foreigners that guarantees to all the full exercise of fundamental rights.”<sup>398</sup> The Spanish migration Law of 2009 is an illustration of a combined concern for regulating migrant movements on national territory and for addressing the vulnerability of migrants, including those in an irregular situation. In many respect it shares the same “spirit” as the ICRMW.

### 2.10.2 Examples of rights recognized to irregular migrant workers and their families

Right to health is recognized in Spain to all persons, including regular and irregular migrant workers and their families.<sup>399</sup> Irregular migrant workers have access to health care through an individual health card that they can obtain if 1) they present their identity documents ; 2) register with the local town, except for pregnant women and children and in urgent medical situations ; and 3) have limited financial resources.<sup>400</sup> In practice, the conditions mean that access to health care can be limited or impossible if the persons do not have identity documents, or through fear of registering and therefore becoming more vulnerable to arrest and return procedures. These conditions show that pregnant women and children are afforded a higher degree of protection by not having to register, although they do have to present identity documents.<sup>401</sup> Finally, Spanish health care is decentralized and access for undocumented migrants in practice varies considerably from one region to another.<sup>402</sup>

As noted above, access to basic, free and compulsory education for minors under 16, and to non-compulsory education for minors under 18 is guaranteed by Article 9 of the modified Organic Law 4/2000, regardless of their status. Spanish legislation on migration further contains a number of rights recognized to migrant workers and members of their families in an irregular situation that match provisions of the ICRMW. In some instances, a clear similarity can be found in the wording of the respective provisions. This is particularly the case of the right to transfer earnings and savings (Article 32 of the ICRMW) ; the right to basic social services and provisions (Article 27) and the right to join trade unions (Article 26).

### 2.10.3 Regularizations

The reduction of the number of irregular migrant workers in the country has been a priority of Spanish migration policy over the last two decades. The legislation contains individual regularization procedures. But five regularization programmes have also been organized since 1997, showing that regularization is considered as a relevant tool to reduce irregular migration. It is estimated that about 1.2 million migrants were regularized, most of them after 2005.<sup>403</sup>

The last programme took place in 2005. It was based on a Regulation on the Rights and Liberties of Foreigners in Spain and their Social Integration (Reglamento de Ley Orgánica 4/2000 sobre Derechos y Libertades de Extranjeros en España y su Integración Social) and was part of a comprehensive policy to reduce irregular migration in Spain. Employers could ask for the regularization of their irregular migrant employees if the latter had the following documents:

- a work contract of minimum six months ;
- a certificate of address registration from the local authorities ;
- a title, diploma or recognized experience showing that the person had the necessary competences to carry out the work ;
- certification of no previous criminal conviction in Spain and the country of previous residence.

Regularized migrant workers were granted a one-year residence and work permit that could be renewed. The 2005 regularization programme in Spain was cited as an example of good practice by the Committee on Migration, Refugees and Population of the Council of Europe.<sup>404</sup> Between February and May 2005, 577,923 migrants were regularized, out of 700,000 applications, and an additional 400,000 family members were consequently regularized.<sup>405</sup>

### 2.10.4 Voluntary Return Plan and renewal of residence and work permits

In June 2008, the Spanish Government announced a Voluntary Return Plan to encourage migrant workers who had lost their job to return to their countries of origin. The scheme was later passed into law in September 2008.<sup>406</sup> It is permanently open to non-EU regular migrant workers from countries that have a reciprocal social welfare agreement with Spain (20 countries). The conditions to apply for voluntary return are:

- legal residence in Spain, either permanent or temporary ;
- unemployed as a consequence of an employment termination ;
- registered at the Public Office of Employment ;
- entitled to receive unemployment benefits ;
- no involvement in any of the actions that prohibit exit from Spain under Spain's Immigration Law.

The scheme proposes the payment of the total unemployment benefit these workers are entitled to in two lump sums - 40 per cent before departure and 60 per cent upon arrival – on the condition that they would not return to Spain for at least three years for professional activities. It additionally funds travel back to the home country and assists migrants in the return. After the period of three years, migrant workers who were permanent residents should be granted the same status if they decide to come back, and temporary migrant workers would be allowed to re-enter Spain and would even be given priority.

Initially, it was hoped that many unemployed migrant workers would take the opportunity and return to their countries of origin. The scheme was also criticized for merchandizing migrant workers and for indirectly putting the responsibility for the economic crisis on their shoulders.<sup>407</sup> As of April 2010, 8,451 migrant workers, out of 11,660 applications received, were returned. Reasons for the limited success are to be found in the limited number of migrants who could apply, the administrative burden the move entails as well as the personal motivations of migrants.<sup>408</sup>

### 2.10.5 Strategic Plan for Citizenship and Integration

The integration of immigrants is a serious concern and policy area in Spain. Several programmes have been developed, mainly aimed at helping migrants integrate into society and at work, as well as informing migrants about their rights.<sup>409</sup> A Plan for the Social Integration of Immigrants (Plan para la Integración Social de los Inmigrantes, or PISI) was passed on 2 December 1994, and the General Programme for the Regulation and Co-ordination of the Foreign Population and Immigration (Programa Global de Regulación y Coordinación de la Extranjería y la Inmigración, commonly known as the GRECO Plan) was carried out from 2001 to 2004. This later Plan was considered a good practice in terms of integration policy.<sup>410</sup>

The Strategic Plan for Citizenship and Integration (Plan Estratégico de Ciudadanía e Integración, PEI) 2007-2010 aimed at reinvigorating the integration of immigrants in Spain. It is based on the belief that integration policies must address both the immigrant and the national population ; and that integration policies must have a holistic approach.<sup>411</sup> It argues that: "Immigrants of various origins, cultures and characteristics are here to stay, and make up our common identity as Spanish society."<sup>412</sup> PEI recognizes the role that is played by regional and local actors in the integration of immigrants, while reaffirming the national dimension of the framework it establishes.

PEI recommends 12 areas of action, namely reception, education, employment, housing, social services, health, childhood and youth, equal treatment, women, participation, awareness raising and co-development. From a methodological point of view, the Plan promotes dialogue, participation and consensus, and additionally promotes cooperation among all actors, including migrants associations, at national, regional and local levels.

A budget of €2,005,017,091 was established and the implementation of PEI was supported by a special fund. Finally, the Plan anticipated three types of evaluation mechanisms. PEI was recently mentioned as a good practice by the Committee on the Rights of the Child.<sup>413</sup> The Spanish Government is currently evaluating and planning a new Plan for 2011-2013.

## 2.11 SWEDEN

In 2008, third-country nationals represented 3.1 per cent of the total population.<sup>414</sup>

### 2.11.1 Examples of rights recognized to irregular migrant workers and their families

Access to health care for irregular migrant workers and their families is not protected as such under Swedish law. But the Health and Medical Services Act applies to the whole population.<sup>415</sup> The Committee on Economic, Social and Cultural Rights noted "with appreciation the efforts taken to continue ensuring the high standard of health in the State party and that health care is accessible to all, including undocumented persons."<sup>416</sup>

Concerning access to education for irregular migrant children, it seems that the current situation where this right is not recognized in Sweden may change.<sup>417</sup>

### 2.11.2 MIPEX results

Sweden was classified first among the 28 countries that were studied for the Migrant Integration Policy Index (MIPEX) published in 2007.<sup>418</sup> This study evaluated policies, legislations and practices of the then 25 EU Member States, Canada, Norway and Switzerland, and ranks countries according to the policies that promote best integration in European societies. Sweden came first for best practices in all areas that were part of the study, namely: labour market access (Articles 43 and 52 of the ICRMW) ; family reunion (Article 44) ; long-term residence ; political participation (Articles 41 and 42) ; access to nationality ; and anti-discrimination (Article 7). It scores a 100 per cent on best practices, on the basis of MIPEX criteria, in labour market access, including for the rights associated with it.<sup>419</sup> Sweden's political participation rights for migrant workers were also estimated as best practices: "Any legal resident of three years can vote in regional and local elections and stand for local elections. They can join political parties and form their own associations, which can receive public funding or support at all levels of governance. The State actively informs migrants of these rights and does not place any further conditions on rights, funding or support."<sup>420</sup>

### 2.11.3 New law, new approach to migration

On 15 December 2008, new rules for labour migration entered into force in Sweden. Contrary to most recent EU Member States' modifications of labour migration laws and practice, Sweden chose to look at migration from a constructive perspective. This approach is described as follows: "The Government's basic premise is that immigration helps vitalize society, the labour market and the economy, thanks to the new knowledge and experience that new arrivals bring from their home countries."<sup>421</sup> Consequently, new immigration rules reflect this openness to migration, coupled with a needs-based approach. Employers who are not able to meet their labour needs through recruitment in Sweden, other EU/EEA countries or Switzerland are able to recruit persons of all skill levels if certain fundamental conditions, including salary and other employment conditions, are fulfilled.<sup>422</sup>

The influence of internationally led processes on migration management, in particular the Global Forum on Migration and Development (GFMD), is explicit in the discourse of the Swedish Ministry of Justice about migration and development: "The Government's objective is to increase coherence between migration and development in order to strengthen the positive effects and reduce the negative effects of migration on development. Migration and development is an important issue at both the EU and the international level, and regional and international cooperation has been deepened, partly thanks to the GFMD. The links between migration and development affect several areas, including the labour market, trade, health, education and human rights."<sup>423</sup>

The approach taken by the Swedish Government is also in line with the EU Global Approach to Migration. In particular, Sweden is in the process of evaluating the positive impacts of circular migration to and from Sweden on development, in order to promote it as a form of legal migration. To this end, a Committee for Circular Migration and Development was appointed in July 2009 in order to propose measures to remove obstacles to circular migration.<sup>424</sup> Among the identified areas, the following rights of migrant workers are said to be preconditions: freedom to leave and re-enter Sweden without limit (Article 38 of the ICRMW), portability of social benefits (Article 43.1(a)), and rights inherent to successful integration.<sup>425</sup> However, Sweden's interpretation of family links is limited under the concept of "global families", i.e. when family members stay in their country of origin and do not live with their migrant family member, which is not along the lines of Article 44.<sup>426</sup>

The Swedish approach to circular migration further takes into consideration the development of the societies of origin. However, the particularity of the Swedish case is that it does so outspokenly, promoting a more transparent and forward-looking approach to what remains after all a labour-demand based policy. On paper, at least, the rights of circular migrants are given an important place for a successful model. What remains to be seen is whether such a constructive approach has an impact on the level of recognition and effective protection of migrant workers' rights.

## 2.12 THE UK

In 2009, the UK generalized a pilot points-based Highly Skilled Migration Programme to all immigration categories available to foreign nationals in a Points-Based Migration System. The system is designed to respond to specific labour demands in the UK. Migrant worker applicants must have the required number of points, based on evaluation of their education qualifications, work experience, past earnings, achievements in the field and knowledge of English, in order to be granted a work permit in a given sector and at a given level. In most cases, applicants must be "sponsored" by an authorized employer. The points-based migration system has been interrupted for some categories and limited in others, as a result of the economic crisis.

In October 2010, the Joint Committee of Representatives of the Irish Human Rights Commission and the Northern Ireland Human Rights Commission called on both Ireland and the UK to ratify the ICRMW.<sup>427</sup>

In 2008, 3.9 per cent of the total population were third-country nationals.<sup>428</sup>

### 2.12.1 Examples of rights recognized to irregular migrant workers and their families

Right to health: Irregular migrant workers have access to Accident and Emergency care, free of charge.<sup>429</sup> Other treatment must be reimbursed by the patient residing irregularly.<sup>430</sup> Treatment is classified according

to gravity: “immediately necessary treatment”, “urgent treatment” and “non-urgent treatment”.<sup>431</sup> Health care providers may refuse to treat or may stop treating irregular migrants for lack of payment. However, “immediately necessary treatment”, including pre- and post-natal care, should never be withheld for any reason.<sup>432</sup> Prior to 2004, failed asylum seekers<sup>433</sup> were considered “ordinary residents” after one year residence in the UK and were as such entitled to free health care on an equal footing with UK nationals and other regular migrants. This has changed, however, and they now have the same access to health care as other irregular migrants.<sup>434</sup>

The right to education is not specifically protected by law for undocumented migrant children in the UK. It is considered to be implicit, as UK legislation does not contain any impediment for undocumented migrant children to access education.<sup>435</sup>

### 2.12.2 Regularization mechanisms and programmes

The United Kingdom is officially reluctant to regularize irregular migrants, especially through collective regularizations or amnesties.<sup>436</sup> However, several types of regularization can be found in the UK policies and practices.

The UK has organized several regularization programmes that have been limited in scale. These were aimed at legalizing “fait accompli” situations, such as the Regularisation of Overstayers Scheme in October 2000, following important changes in the law affecting overstayers. In general, these schemes follow a modification in legislation, often more restrictive on the interpretation of regular status, and aim at avoiding certain immigrants becoming irregular following the change of legislation.<sup>437</sup> In 1998, the UK also organized regularization of asylum seekers whose application had been pending for at least three years. They were granted a permanent residence status (indefinite leave to remain), under certain conditions.<sup>438</sup> Another interesting regularization - that of seriously ill foreigners - resulted from the condemnation of the UK by the European Court of Human Rights<sup>439</sup> on the grounds of violation of Article 3 of the ECHR that prohibits inhuman, cruel or degrading treatment.<sup>440</sup>

Second, regularization of irregular migrant workers is possible under UK legislation, on an individual basis. An April 2003 rule still in force allows a migrant worker irregularly residing in the UK to apply for indefinite leave to remain on the condition that she/he has stayed for at least 14 years in the UK. The person applying to the Home Office will be granted this permanent residence status based on “compassionate circumstances, strength of connection to the UK and previous criminal record”. The rule typically applies to failed asylum seekers who were not deported and irregular migrant workers who were not identified as such. Although it is strongly criticized,<sup>441</sup> this rule legalizes a de facto situation where persons have lived and worked normally, though “clandestinely”, for so long that there is no other realistic option to put an end to the irregularity of their stay than through regularization. The length of stay is indeed an element that Article 69.2 of the ICRMW encourages States of employment to take into consideration for regularizations.

Third, the Home Office ordered a “family amnesty” in 2003 that granted residence permits to all asylum seekers – regardless of the pending or refused status of their case – who had been in the UK for four or more years and have a dependent minor child in the UK. These families were granted indefinite leave to remain. It is estimated that 16,870 families had benefited from this discretion by January 2006.<sup>442</sup>

### 2.12.3 Family reunification and family rights

In the UK, temporary work permit holders may be joined by their families, applying either at the same time as the migrant worker or later. The notion of family depends on the status of the migrant worker (“sponsor”) but the common understanding of family is broad:<sup>443</sup> husband, wife or civil partner ; and children under 18. It corresponds to the definition given in the ICRMW, Article 4: “persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by the applicable legislation or applicable bilateral agreements between the States concerned.” Often, national legislation on family reunification for migrant workers limits the possibility of family reunification to “spouses and minor children”, even though national law might otherwise consider other relationships as producing effects equivalent to marriage. The family members of work permit holders in the UK are eligible to a permit whose duration depends on the sponsor’s permit.



In Article 44.2, covering family rights and reunification applicable to regular migrant workers and their families, the ICRMW repeats the definition of spouses contained in Article 4. However concerning dependent children, the Convention refines the applicability of Article 44 to “minor dependent unmarried children”. In the case of the UK, the understanding of family members is broadened for migrant workers who are settled or eligible for settlement in the country (indefinite leave): fiancé(e)s and proposed civil partner, cohabitees (unmarried or same-sex partner) who have been in a relationship akin to marriage for the previous two years. Family members are entitled to a two-year permit renewable into a permanent residence permit. In addition, children over 18 as well as dependent parents (elderly dependent relatives) may join permanent resident migrant workers in the UK under exceptional circumstances, and given certain financial conditions.<sup>444</sup> This corresponds to Article 44.3 of the ICRMW regarding other dependents.<sup>445</sup>

In addition, dependents of work permit holders are entitled to work, either as employees or self-employed workers, on the condition that they hold a valid United Kingdom Entry Clearance. This is in compliance with Article 53 of the ICRMW, which deals with permission to work for family members, on two grounds: because family members have access to work and because they can freely choose their remunerated activity.<sup>446</sup> UK law does not even contain the restrictions of Article 53.1, limiting the right to work to “family members who have themselves an authorization of residence or admission that is without limit of time or is automatically renewable (...)”. Hence, UK legislation allows temporary reunified family members to work.

However, family reunification is tied in all cases to financial conditions<sup>447</sup> defined as follows: “the family members must be able to support themselves for the entire duration of their stay in the United Kingdom without needing help from public funds (for example benefits provided by the State)”.<sup>448</sup> Such conditions are not mentioned in the text of Article 44 of the ICRMW and are questionable, particularly with regard to the fact that the migrant worker contributes to social taxes and should therefore benefit from social assistance that generally includes family allowances. This right is in addition entailed in Article 45.1(c) of the ICRMW whereby “members of the family of migrant workers shall (...) enjoy equality of treatment with nationals of the States in relation to access to social and health services, provided that requirements for participation in the respective schemes are met”. In fact, the very high financial conditions imposed for family reunification can result in practice in the inaccessibility for most migrant workers and members of their families of the right to family reunification that is recognized in principle under UK law.<sup>449</sup>

#### 2.12.4 Mainstreaming a rights-based approach to the administration of migration policy

During his visit to the United Kingdom in June 2009, the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, commended the establishment of the independent Chief Inspectorate of the United Kingdom Border Agency (UKBA). This mandate was created in 2007 to provide an independent, external assessment of the agency, both in the UK and abroad. The Chief Inspector is independent of both the agency and the Home Office, and reports directly to the Home Secretary.<sup>450</sup> The UKBA is the main governmental agency responsible for migration governance. The Special Rapporteur particularly mentioned the function of reviewing the process involved in handling individual cases ; examining UKBA goals and programmes to determine their compliance with international obligations ; and carrying out unannounced inspections at ports and embassies.

The Chief Inspector does not handle individual cases or complaints, but rather carries out analysis of the overall efficiency and effectiveness of UKBA work, particularly with regard to the UK’s international obligations. She/He can adopt a variety of approaches to inspections, including: site visits, review of sample case files, interviews with staff, stakeholders and the public ; and other methods such as ‘mystery shoppers’, as appropriate. The Chief Inspectorate publishes thematic as well as annual reports that are available on its website. The rights of migrants are not specifically mentioned as a component of the Chief Inspector’s assessment. However, a rights-based approach is discernible in the Criteria for Core Inspection Programme developed by the Chief Inspectorate to guide his work.<sup>451</sup>

The mandate of the Chief Inspector could be identified as a good practice under Article 65 of the ICRMW: “States Parties shall maintain appropriate services to deal with questions concerning international migration of workers and members of their families (...)”.

## Conclusions

Ratification of the ICRMW faces opposition in numerous European States principally on the ground that it protects a group of persons not deemed “entitled” to this level of protection. The rationale for the drafting of the ICRMW was indeed that it specifically protects the rights of all migrant workers and members of their families, including when they are undocumented or in an irregular situation, because they are more vulnerable to abuse. However, most national legislation and practices in the European States covered in this study recognize rights to irregular migrant workers in principle, which are also covered in other international human rights treaties to which these States are parties. Mainstreaming the positive approach to migration that is documented and increasingly acknowledged in international fora such as the GFMD - including by European States - and that is already being integrated in some individual EU Member States’ migration policies, would contribute to reducing the gap that exists between recognition and protection of all migrant workers’ rights.

The developing role of the EU in the area of migration is a key component of the discussion on ratification of the ICRMW in Europe. Rights of migrant workers are progressively being integrated into EU legislation, measures and policies while EU Member States increasingly tend to subordinate their responsibilities for protecting the rights of migrant workers to the EU Institutions. Progress on ratification of the ICRMW – in Europe and beyond - cannot objectively be made without clear support from the EU ; and EU Institutions have indeed shown such support, some consistently calling on EU Member States to ratify the ICRMW. However, there is now a clear demand for a more elaborated and forward-looking policy at the EU level concerning the rights of all migrant workers, including those in an irregular situation. Endorsement of the rights contained in the ICRMW by the EU would lay the ground for ratification of the ICRMW by individual European States and for a regional and more effective protection framework. The publication at the EU level of annual reports on the record of EU Member States regarding regular and irregular migrant workers’ and members of their families’ rights would contribute to documenting protection gaps and forge a “culture” for protection of migrant workers.

The ICRMW is the only core international human rights treaty that no EU Member State has ratified. Besides the perception of double standards that this creates with regard to EU human rights policy towards third countries, the fact that a human rights treaty is regarded as secondary to migration management priorities undermines the very nature of the human rights recognized and protected in the ICRMW – universality, indivisibility and inalienability. European States are faced with a political choice regarding migration: they can continue to approach it as a threat, even though it is increasingly recognized as a tool, or they can decide that migration encompasses various dimensions that must be dealt by different means. The human dimension of migration, embodied symbolically in this debate by the ICRMW, must not be forgotten politically, and must be framed with appropriate universal human rights tools.

Ratification of the ICRMW can arguably be viewed as a positive opportunity for European States. This study makes clear that ratification would not lead to major changes of legislation in most European States, and would not generate insurmountable difficulties. In fact, in most cases, ratification would represent a political recognition by ratifying States of rights already protected under national legislation and policies. Ratification would also confirm the willingness of European States to be accountable to all human rights of all individuals residing within their territory.

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## ANNEX I: RECOMMENDATIONS TO AND RESPONSES OF EUROPEAN STATES ON RATIFICATION OF THE ICRMW DURING UNIVERSAL PERIODIC REVIEWS (UPR)

To date, Austria, Belgium, Bulgaria, Denmark, Estonia, Greece, Hungary, Ireland, Latvia, and Lithuania have not been reviewed under the UPR.

### CYPRUS

UPR November 2009

**Recommendations:** to consider the ratification of the (...) the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) (Argentina) ; to consider the possibility of acceding to the ICRMW and intensify efforts to prevent discrimination against this population (Algeria) ;to adhere to the principles of the ICRMW and give positive consideration to its eventual ratification (Mexico) ; to plan to ratify, in addition to the instruments announced in the report, the ICRMW (Democratic Republic of the Congo) ;

**Status:** Rejected

**Reply:** This is an issue which requires further consideration among the competent ministries, bearing in mind the limitations posed by European Union jurisdiction with regard to migrant workers, arising from the fact that the Council of the European Union has competency over measures on immigration and on the protection of the rights of third-country nationals, in particular with regard to conditions of stay. (A/HRC/13/7/Add.1)

### CZECH REPUBLIC

UPR April 2008

**Recommendation:** to adhere to (Algeria), or to consider the ratification of (Mexico), the International Convention on the Protection of the Rights of All Migrants Workers and Members of Their Families

**Status:** Rejected (only recommendation rejected)

**Reply:** Presently, the signature of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990 which, to date, has been ratified by only 37 States, is not being considered. It is to be noted that the rights of migrant workers and their families are comprehensively protected under existing national legislation and the Czech Republic's international commitments. (A/HRC/8/33/Add.1)

### FINLAND

UPR April 2008

**Recommendation:** (by Algeria, Bolivia, Ecuador, Egypt and Mexico) to consider ratifying the International Convention for the Protection of the Rights of All Migrant Workers and Members of Their Families

**Status:** Accepted

**Reply:** Finland is not party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which only a few States have ratified. Wide consultations on the content of the Convention and its possible effects on Finnish legislation have to be carefully examined before our position towards the ICRMW could be revised. Those consultations should involve all the ministries and other relevant actors in Finland. At this moment, it is not envisaged that such consultations could be commenced in the near future. The rights of immigrants, including migrant



workers, are already covered by our national legislation, European Union legislation, as well as by other human rights instruments, including the European Convention on Human Rights. Finnish legislation does not separate migrant workers from other immigrants. The basic rights and freedoms of the Finnish Constitution protect everyone residing in Finland. (A/HRC/8/24/Add.1)

**Mid-term review:** As stated during the review of Finland's human rights situation, Finland is not party to the International Convention for the Protection of the Rights of All Migrant Workers and Members of Their Families, which only a few States have ratified. The rights of immigrants, including migrant workers, are already covered by national legislation, European Union legislation, as well as international human rights conventions and other similar instruments to which Finland is party. Finnish legislation does not separate migrant workers from other immigrants. They face similar challenges including in access to employment and services. The basic rights and freedoms included in the Finnish Constitution protect everyone residing in Finland. ([http://www.upr-info.org/IMG/pdf/Finland\\_mid-term\\_review\\_11Jun10.pdf](http://www.upr-info.org/IMG/pdf/Finland_mid-term_review_11Jun10.pdf))

## FRANCE

UPR May 2008

**Recommendation:** (by Egypt) to accede to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

**Status:** Rejected

**Reply:** At present, France does not plan to accede to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

**Comments:** A discussion involving all the relevant Government departments was initiated in 2007 and will therefore continue. To date, two types of difficulty have been noted, namely, provisions that raise problems under French law, and major legal obstacles posed by Community jurisdiction with regard to migrant workers, arising from the fact that the Council of the European Union and, consequently, all member States, are competent to adopt measures on immigration and on the protection of the rights of third-country nationals, in particular with regard to conditions of stay. Consequently, no State member of the European Union has signed the Convention to date. Generally speaking, the Convention brings together principles already contained in other treaties, in particular the human rights covenants and conventions and those of the International Labour Organization (ILO) and the Council of Europe, which France has ratified and is currently implementing. These fundamental rights are therefore guaranteed in France, even though it has not ratified the Convention. This is the case, for instance, with regard to the right to emergency medical care, the right to education and enrolment in school, the right to equal remuneration and the right of review and to individual decisions in the event of expulsion. In this respect, it is worth mentioning the State medical aid system, which, combined with the practice of admitting any person in distress to the emergency wards of public hospitals, sets France above the minimum standard called for by the Convention. The same is true of the unconditional admission of all children to French schools and of compliance with the principle of "equal pay for equal work". Lastly, it should be noted that France has acceded to the Council of Europe's European Social Charter, the European Migrant Workers Convention and the ILO Migration for Employment Convention (Revised), 1949 (N°. 97). Nevertheless, France intends to participate actively in the international community's discussions on the issue of migrants, in particular, in the context of the work of the forthcoming Manila forum.

**Mid-term Report:** In accordance with the commitments made, open discussions relating to possible accession to the Convention have been ongoing since 2008.

At a national level, exchanges have taken place within the National Consultative Commission on Human Rights (CNCDH), notably with the audience of the Minister for Immigration, Integration, National Identity and Mutually-Supportive Development on 19 November 2009. On this occasion, and if the Commission's consolidated position is favourable to ratification, the Government could present its assessment of the obstacles - technical, legal and also of principle - to France's ratification of the Convention.

The question raised is on the added value of the Convention in relation to commitments made by France concerning respect for human rights and migrants' rights, in particular the UN International Covenant on Civil and Political Rights and the UN International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, ILO Convention N°. 97, The European Social Charter and the Council of Europe's European Convention on the Legal Status of Migrant Workers.

At a European level, informal exchanges have taken place, at the initiative of the European Commission (the Immigration and Asylum Committee of 16 March 2010) on the basis of its questionnaire to the Member States on the accession of EU Member States to this Convention. With the exception of one Member State, all Member States are opposed to the ratification of the Convention.

The main obstacles to accession are linked to the lack of distinction in this Convention between migrant workers residing legally and those residing illegally for the granting of rights. In addition, several Member States questioned the legitimacy of a Member State's accession to the Convention, insofar as some of the provisions of the aforementioned Convention fall under the shared competence of the Member States and the European Union.

Further analysis will have to be carried out by the legal services of the Commission and the Council on the issue of the joint accession of Member States and of the European Union to the Convention.

In parallel to these discussions, the Spanish Presidency of the European Union has informed the Chairman of the UN Committee on the Protection of the Rights of Migrant Workers and Members of Their Families of the extremely reserved position of the EU (Member States and Commission) on such an accession to the Convention. This letter was validated by the Member States and the Commission, and was co-signed by the Presidency of the Council.

Nevertheless, the protections guaranteed continue to evolve: The directive of the European Parliament and of the Council of 18 June 2009 thus sets out minimum standards on sanctions and measures against employers of illegally staying third-country nationals. The bill transposing this directive, which modifies the Code on the Entry and Stay of Foreigners and the Right to Asylum as well as the Labour Code, in the part relating to illegal employment, will also increase the protection of foreigners without a residence permit by improving the information to which they are entitled and by guaranteeing their remuneration, including in the case of a forced return to their country of origin.

## GERMANY

UPR February 2009

**Recommendations:** to sign (Azerbaijan), ratify (Egypt, Azerbaijan), accede to (Algeria, Morocco), take necessary steps to become a party to (Ecuador) the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

**Status:** Rejected

**Reply:** Germany cannot accept this recommendation. The reasons for this position were already stated in a declaration issued on the occasion of the adoption of the Convention at the United Nations General Assembly in 1990 and remains fully valid:

(a) Fundamental human rights are already enshrined in the International Covenant on Civil and Political Rights (Civil Rights Covenant) and in the International Covenant on Economic, Social and Cultural Rights (Social Rights Covenant). These rights apply equally to migrant workers without exception.

(b) The main reason for the German Government's decision not to ratify the Convention is that the term 'migrant worker' as used in the Convention is too broad and includes persons who unlawfully reside and unlawfully work in the country. This protects the position of unlawfully resident migrant workers in a way that goes far beyond the unquestionable necessity of granting them all human rights. Also taking into consideration the German Immigration Act, which is aimed at preventing illegal immigration, the ratification of the Convention is not intended.

**Recommendation:** to maintain under study the ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families from a human rights perspective, recognizing the fact that human rights are universal in nature and therefore are not conditioned by migrant status (Mexico) ; set an example itself accepting that the thousands of migrants workers from its development partners should be able to live in Germany benefiting from the protection of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families as it can truly protect the most elementary rights (Algeria) (A/HRC/11/15/Add.1)

**Status:** Rejected

**Reply:** Germany cannot accept this recommendation and refers to its comments on recommendation N°. 1. (A/HRC/11/15/Add.1)

## ITALY

UPR February 2010

**Recommendations:** (by Algeria) to consider, possibly within the framework of a desirable re-orientation of European policy, ratifying the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, even if initially with reservations ; (by Azerbaijan, Chile, Egypt, Islamic Republic of Iran, Mexico and the Philippines) to consider ratification of the International Convention.

**Status:** Rejected

**Reply:** Italian legislation already guarantees most of the rights contained in the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. However Italy is not in a position to ratify this instrument because it does not draw any distinctions between regular and irregular migrant workers and the signature and ratification could only be planned jointly with the other European Union partners as many provisions of the Convention fall within the European Union domain. (A/HRC/14/4/Add.1)

## LUXEMBOURG

UPR December 2008

**Recommendation:** (by Algeria, Egypt and Mexico) to consider ratifying the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

**Status:** rejected

**Reply:** With regard to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, however, major legal obstacles connected with the European Community's competence in matters relating to migrant workers currently preclude ratification by Luxembourg. Luxembourg would like a study to be carried out within the European Union to identify possible ways of facilitating ratification of the Convention. Like its European partners, Luxembourg will continue to take an active part in the international community's consideration of the question of migrant workers. (A/HRC/10/72/Add.1)

## MALTA

UPR May 2009

**Recommendations:** (by Mexico) to accede to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) ; (by Brazil, Algeria and Burkina Faso) to comply with the principles of ICRMW and consider the possibility of eventual ratification ; and (by Argentina) to consider ratifying the International Convention for the Protection of All Persons from Enforced Disappearance and the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

**Status:** Rejected

## NORWAY

UPR December 2009

**Recommendation:** to consider the possibility of signing and/or ratifying (Argentina)/consider the ratification of (Azerbaijan)/consider acceding to (Algeria)/consider positively acceding to (Mexico)/ratify ICRMW (Chile, Nigeria), as recommended by the Committee on the Elimination of Racial Discrimination, the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination against Women (Mexico, Nigeria).

**Status:** Rejected

**Reply:** Not accepted. Norway has ratified all the key human rights instruments and the ILO core conventions on workers' rights. These also apply to foreign nationals resident in Norway. Norway decided not to ratify the UN Convention on Migrant Rights in 2002. Norway gives high priority to efforts to improve labour standards, which are also crucial in the context of migrants' rights. (A/HRC/13/5/Add.1)

## POLAND

UPR April 2008

**Recommendation:** to ensure that practical policies in the area of immigration be geared to the standards set forth by the principles enshrined in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and to ratify the Convention (Mexico)

**Status:** Rejected

**Reply:** Polish law guarantees most of the rights envisaged in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. To ratify the Convention, it would be necessary to modify regulations concerning migrant workers regularly employed in Poland and to introduce fundamental modifications concerning irregular migrant workers. It should be noted, however, that Poland lawfully guarantees the basic human rights of all migrant workers and members of their families (regardless of their legal status) – including rights guaranteed under the Convention. (A/HRC/8/25/Add.1)

## PORTUGAL

UPR December 2009

**Recommendations:** to sign and ratify (Egypt)/consider ratifying (Algeria, Nigeria, Philippines)/ratify (Argentina) the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families as a way of allowing immigrants to enjoy all of the rights provided for in this international legal instrument (Algeria)/and hold national consultations in this regard (Philippines).

**Status:** Rejected

## ROMANIA

UPR May 2008

**Recommendation:** to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Algeria, Mexico)

**Status:** Rejected

## SLOVAKIA

UPR May 2009

**Recommendations:** to ratify/accede/adhere to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Mexico, Argentina, Azerbaijan, Algeria) bearing in mind the voluntary commitment in its candidature to the Human Rights Council to work for the universal ratification of all United Nations human rights instruments and actively encourage countries which are not yet party to them to ratify them (Algeria)

**Status:** Accepted

**Reply:** The possibility of acceding to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families will be carefully considered. (A/HRC/12/17/Add.1)

## SLOVENIA

UPR February 2010

**Recommendations:** to examine the possibility of joining (Algeria)/sign and ratify (Egypt)/ratify (Bosnia and Herzegovina)/consider the ratification (Argentina) of the Convention on Migrant Workers and Members of Their Families (Algeria, Egypt, Bosnia and Herzegovina, Argentina)

**Status:** No clear position

**Reply:** Slovenia cannot, at this point in time, make a definitive statement. Slovenia already guarantees most of the rights contained in the Convention to migrant workers and their family members on its labour market and shares the objectives of the Convention. (A/HRC/14/15/Add.1)

## SPAIN

UPR May 2010

**Recommendations:** Sign and ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Indonesia, Burkina Faso) ;

Ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Azerbaijan) ;

Ratify and implement the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Bolivia) ; Ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families as a fundamental step towards the protection of human rights (Guatemala) ;

Ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and, by taking that measure, clearly demonstrate its firm and decisive commitment to protecting migrant groups and to finding solutions to problems that may arise, by fully respecting the fundamental freedoms of those affected (Paraguay) ;

Adhere to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Nicaragua) ; Pursue its efforts, and continue, to guarantee all human rights ; and accede to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Palestine) ;

Become a party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Pakistan) ;



Consider ratifying the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Argentina) ;

Consider the ratification of the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Peru) ; Consider ratifying the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Nigeria) ;

Reconsider, in the same spirit of openness, the possibility of ratifying the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, in accordance with paragraph 12.1 of recommendation N°. 1737 of 17 March 2006 of the Parliamentary Assembly of the Council of Europe, of which Spain is an active member (Algeria) ;

**Status:** No clear position

**Reply:** 1. The rights established in this Convention<sup>1</sup> are set forth in general terms, albeit not in full detail, in a number of universal human rights instruments to which Spain is already a party, as well as in various European treaties.<sup>2</sup> To date, only 42 States have ratified this Convention, and none of the member States of the European Union has done so (largely because the European Union takes the view that its position was not considered when the Convention was drafted and when it was adopted by the General Assembly).

2. In addition, under the domestic legal system, ample protection for the rights of migrants is provided in the Spanish Constitution, in Organization Act N°. 4/2000 of 11 January, on the rights and freedoms of aliens in Spain and their social integration, and in its implementing regulations, especially since the most recent amendment (Organization Act N°. 2/2009 of 11 December). (A/HRC/15/6/Add.1)

## SWEDEN

UPR May 2010

**Recommendations:** Proceed to the ratification of the International Convention for the Protection of the Rights of All Migrant Workers and Members of Their Families, in conformity with recommendation N°. 1737, of 17 March 2006, of the Council of Europe Parliamentary Assembly, of which Sweden is an active member (Algeria) ;

Ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Islamic Republic of Iran) ;

Ratify, as early as possible, the International Convention on the Rights of All Migrant Workers and Members of Their Families (China) ;

Consider ratifying the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Nigeria) ; Consider ratifying the International Convention on the Rights of All Migrant Workers and Members of Their Families (Bosnia and Herzegovina) ; Engage in national consultation on the possible ratification of the International Convention on the Rights of All Migrant Workers and Members of Their Families (Philippines) ; Become a State party to the International Convention for the Protection of the Rights of All Migrant Workers and Members of Their Families (Argentina)

**Status:** Rejected

## SWITZERLAND

UPR May 2008

**Recommendation:** to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Algeria, Egypt, the Philippines, and Guatemala)

**Status:** Rejected

## THE NETHERLANDS

UPR April 2008

**Recommendation:** to accede to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Egypt, Peru, Algeria)

**Status:** Rejected

**Reply:** The Kingdom of the Netherlands has not signed this Convention because it is opposed in principle to rights that could be derived from it by aliens without legal residence rights. The Kingdom of the Netherlands therefore cannot support this recommendation. (A/HRC/8/31/Add.1)

## UNITED KINGDOM

UPR April 2008

**Recommendations:** to protect the children and families of migrants and refugees (Algeria, Ecuador) and to accede to the International Convention on Protection of the Rights of All Migrant Workers and Members of Their Families. (Algeria, Ecuador and Egypt)

**Status:** Rejected

**Reply:** The UK applauds the intention and spirit of the recommendation to protect the children and families of migrants and refugees, but does not accept that accession to the ICMRW is required in order to achieve this.

In the UK, the rights of children and family members of migrants and refugees are already protected by UK legislation, including the Human Rights Act 1998, and by the UK's commitments under International Law. As the laws and systems to protect the health and safety, human rights, and employment rights of UK nationals extend to foreign nationals, the UK has no plans to sign the International Convention on Protection of the Rights of All Migrant Workers and Members of Their Families. (A/HRC/8/25/Add.1)

## ANNEX II: RATIFICATION OF INTERNATIONAL AND REGIONAL CONVENTIONS PROTECTING MIGRANT WORKERS' RIGHTS BY EU COUNTRIES

	International human and labour rights instruments														Regional human rights instruments	
	Specific to migrant workers				Not specific, but applying to, migrant workers										Specific to migrant workers	
	ICRMW 2003	ILO C. 97 1949	ILO C. 143 1975	ICERD 1969	ICCPR 1976	ICESCR 1976	CEDAW 1981	CAT 1987	CRC 1990	CRPD 2008	ECHR 1953	ECLSMW 1983				
Convention Entry into force																
Austria	-	-	-	9/5/1972	10/9/1978	10/09/1978	31/3/1982	29/7/1987	6/8/1992	26/9/2008	3/9/1958	-				
Belgium	-	27/07/1953	-	7/8/1075	21/4/1983	21/04/1983	10/7/1985	25/6/1999	16/12/1991	2/7/2009	14/6/1955	-				
Bulgaria	-	-	-	8/8/1966	21/9/1970	21/09/1970	8/2/1982	16/12/1986	3/6/1991	S	7/9/1992	-				
Cyprus	-	23/09/1960	28/06/1977	21/4/1967	2/4/1969	02/04/1969	23/7/1985	18/7/1991	7/2/1991	S	6/12/1962	-				
Czech Republic	-	-	-	22/2/1993	22/2/1993	22/02/1993	22/2/1993	22/2/1993	22/2/1993	28/9/2009	18/3/1992	-				
Denmark	-	-	-	9/12/1971	6/1/1972	06/01/1972	21/4/1983	27/5/1987	19/7/1991	24/7/2009	13/4/1953	-				
Estonia	-	-	-	21/10/1991	21/10/1991	21/10/1991	21/10/1991	21/10/1991	21/10/1991	S	16/4/1996	-				
Finland	-	-	-	14/7/1970	19/8/1975	19/08/1975	4/9/1986	30/8/1989	20/6/1991	S	10/5/1990	-				
France	-	29/03/1954	-	28/7/1971	4/11/1980	04/11/1980	14/12/1983	18/2/1986	7/8/1990	18/2/2010	3/5/1974	22/9/1983				
Germany	-	22/06/1959	-	16/5/1969	17/12/1973	17/12/1973	10/7/1985	1/10/1990	6/3/1992	24/2/2009	5/12/1952	-				
Greece	-	-	-	18/6/1970	5/5/1997	16/05/1985	7/6/1983	6/10/1988	11/5/1993	S	28/11/1974	-				
Hungary	-	-	-	4/5/1967	17/1/1974	17/01/1974	22/12/1980	15/4/1987	7/10/1991	20/7/2007	5/11/1992	-				
Ireland	-	-	-	29/12/2000	8/12/1989	08/12/1989	23/12/1985	11/4/2002	28/9/1992	S	25/2/1953	-				
Italy	-	22/10/1952	23/06/1981	5/1/1976	15/9/1978	15/09/1978	10/6/1985	12/1/1989	5/9/1991	15/5/2009	26/10/1955	27/2/1995				
Latvia	-	-	-	14/4/1992	14/4/1992	14/04/1992	14/4/1992	14/4/1992	14/4/1992	1/3/2010	27/6/1997	-				
Lithuania	-	-	-	10/12/1998	20/11/1991	20/11/1991	18/1/1994	1/2/1996	31/1/1992	18/8/2010	20/6/1995	-				
Luxembourg	-	-	-	1/5/1978	18/8/1983	18/08/1983	2/2/1989	29/9/1987	7/3/1994	S	3/9/1953	-				
Malta	-	-	-	27/5/1971	13/9/1993	13/09/1990	8/3/1991	13/9/1990	30/9/1990	S	23/1/1967	-				
Netherlands	-	20/05/1952	-	10/12/1971	11/12/1978	11/12/1978	23/7/1991	21/12/1988	6/2/1995	S	31/8/1954	1/5/1983				
Poland	-	-	-	5/12/1968	18/3/1977	18/03/1977	30/7/1980	26/7/1989	7/6/1991	S	19/1/1993	-				
Portugal	-	12/12/1978	12/12/1978	24/8/1982	15/6/1978	31/07/1978	30/7/1980	9/2/1989	21/9/1990	23/9/2009	9/11/1978	1/5/1983				
Romania	-	-	-	15/9/1970	9/12/1974	09/12/1974	7/1/1982	18/12/1990	28/9/1990	S	20/6/1994	-				
Slovakia	-	-	-	28/5/1993	28/5/1993	28/05/1993	28/5/1993	28/5/1993	28/5/1993	26/5/2010	18/3/1992	-				
Slovenia	-	29/02/1992	29/05/1992	6/7/1992	6/7/1992	06/07/1992	6/7/1992	16/7/1993	6/7/1992	24/4/2008	28/6/1994	-				
Spain	-	21/03/1967	-	13/9/1968	27/4/1977	27/04/1977	5/1/1984	21/10/1987	6/12/1990	3/12/2007	4/10/1979	1/5/1983				
Sweden	-	-	-	6/12/1971	6/12/1971	06/12/1971	2/7/1980	8/1/1986	29/6/1990	15/12/2008	4/2/1952	1/5/1983				
United Kingdom	-	20/01/1951	-	7/3/1969	20/5/1976	20/05/1976	7/4/1986	8/12/1988	16/12/1991	8/6/2009	8/3/1951	-				
European Union	-	-	-	-	-	-	-	-	-	S	Under discussion	-				

Legend: "00/00/0000" date of ratification or accession; "S" convention signed; "-" convention neither signed nor ratified

## ANNEX III: EMIGRATION FLOWS FROM EUROPE

	Total population	Stock of emigrants	Stock of emigrants as % of population	Top destination countries
	Thousands			
Austria	8,400.0	598.3	7.1%	Germany, Switzerland, USA
Belgium	10,800.0	455.0	4.3%	France, Spain, Netherlands
Bulgaria	7,600.0	1,200.6	16%	Turkey, Spain, Germany
Cyprus	900.0	149.6	17%	UK, Australia, Greece
Czech Republic	10,500.0	370.6	3.6%	Slovakia, Germany, Austria
Denmark	5,500.0	259.6	4.7%	Sweden, USA, Germany
Estonia	1,300.0	169.5	12.7%	Russia, Finland, Sweden
Finland	5,300.0	329.5	6.2%	Sweden, Germany, UK
France	62,600.0	1,742.1	2.8%	Spain, Belgium, Germany
Germany	81,900.0	3,540.6	4.3%	USA, Turkey, UK
Greece	11,300.0	1,210.3	10.8%	Germany, USA, Australia
Hungary	10,000.0	462.7	4.6%	Germany, USA, Canada
Ireland	4,500.0	737.2	16.1%	USA, UK, Australia
Italy	60,200.0	3,481.6	5.8%	Germany, France, USA
Latvia	2,300.0	272.6	12.2%	Russia, USA, UK
Lithuania	3,300.0	440.4	13.5%	Russia, Poland, UK
Luxembourg	500.0	57.8	11.8%	Germany, Belgium, France
Malta	4,000.0	107.5	26.2%	Australia, UK, USA
Netherlands	16,500.0	993.4	6%	Germany, Canada, Belgium
Poland	38,100.0	3,102.6	8.2%	Germany, UK, USA
Portugal	10,600.0	2,230.0	20.8%	France, Brazil, Germany
Romania	21,500.0	2,769.4	13.1%	Italy, Spain, Hungary
Slovakia	5,400.0	520.1	9.6%	Czech Republic, UK, Germany
Slovenia	2,000.0	132.0	6.5%	Germany, Croatia, Austria
Spain	46,000.0	1,373.1	3%	France, Germany, Argentina
Sweden	9,300.0	317.9	3.4%	Norway, USA, Finland
United Kingdom	61,800.0	4,668.3	7.5%	Australia, USA, Canada
European Union (27 countries)	502,100.0	32,692.0	9.5%	
+				
Norway	4,800.0	184.0	3.8%	Sweden, USA, Spain
Switzerland	7,700.0	407.8	5.4%	Spain, France, Germany
<b>Total</b>	<b>514,600.0</b>	<b>32,284.0</b>	<b>9.2%</b>	

Source: The World Bank, Migration and Remittances, Factbook 2011, second edition, November 2010

## ANNEX IV: IMMIGRATION FLOWS INTO EUROPE

	Total population	Stock of Immigrants	Females as % of immigrants	Stock of immigrants as % of population	Top source countries
	Thousands				
Austria	8,400.0	1,310.2	52.2%	15.6%	Germany, Bosnia and Herzegovina, Turkey
Belgium	10,800.0	1,465.7	32.8%	13.7%	France, Morocco, Italy
Bulgaria	7,600.0	107.2	57.9%	1.4%	Turkey
Cyprus	900.0	154.3	57.2%	17.5%	UK, Australia, Greece
Czech Republic	10,500.0	453.0	53.2%	4.4%	Slovakia, Ukraine, Poland
Denmark	5,500.0	453.7	59.9%	8.8%	Turkey, Germany, Iraq
Estonia	1,300.0	182.5	59.6%	13.6%	Russia, Ukraine, Belarus
Finland	5,300.0	225.6	47.7%	4.2%	Sweden, Estonia, Russia
France	62,600.0	6,684.8	51.3%	10.7%	Algeria, Morocco, Portugal
Germany	81,900.0	10,758.1	46.7%	13.1%	Turkey, Italy, Poland
Greece	11,300.0	1,132.8	44.6%	10.1%	Albania, Bulgaria, Romania
Hungary	10,000.0	368.1	51.2%	3.7%	Germany, USA, Canada
Ireland	4,500.0	898.6	49.6%	19.6%	UK, Poland, USA
Italy	60,200.0	4,463.4	53.1%	7.4%	Romania, Albania, Morocco
Latvia	2,300.0	335.0	59.3%	15%	Russia, Ukraine, Uzbekistan
Lithuania	3,300.0	128.9	56.6%	4%	Russia, Belarus, Ukraine
Luxembourg	500.0	173.2	50.2%	35.2%	Portugal, France, Belgium
Malta	4,000.0	15.5	51.6%	3.8%	UK, Australia, Canada
Netherlands	16,500.0	1,752.9	51.9%	10.5%	Turkey, Suriname, Morocco
Poland	38,100.0	827.5	59.0%	2.2%	Ukraine, Belarus, Germany
Portugal	10,600.0	918.6	50.3%	8.6%	Angola, France, Mozambique
Romania	21,500.0	132.8	51.3%	0.6%	Moldova, Bulgaria, Ukraine
Slovakia	5,400.0	130.7	56.0%	2.4%	Czech Republic, Hungary, Ukraine
Slovenia	2,000.0	163.9	46.6%	8.1%	Bosnia and Herzegovina, Croatia, The former Yugoslav Republic of Macedonia
Spain	46,000.0	6,900.5	44.3%	15.2%	Romania, Morocco, Ecuador
Sweden	9,300.0	1,306.0	50.5%	14.1%	Finland, Iraq, Poland
United Kingdom	61,800.0	6,955.7	49.7%	11.2%	India, Poland, Pakistan
European Union (27 countries) +	502,100.0	31,692	51.6%	10.2%	
Norway	4,800.0	485.4	47.4%	10%	Sweden, Denmark, USA
Switzerland	7,700.0	1,762.8	49.7%	23.2%	Italy, Germany, Portugal
<b>Total</b>	<b>514,600.0</b>	<b>32,284.0</b>	<b>51.4%</b>	<b>10.6%</b>	

Source: The World Bank, Migration and Remittances, Factbook 2011, second edition, November 2010



## ANNEX V : RIGHTS RECOGNIZED TO IRREGULAR MIGRANT WORKERS AND MIGRANT FEMALES UNDER ICRMW ARTICLES AND CORRESPONDING ARTICLES IN INTERNATIONAL HUMAN RIGHTS TREATIES

	ICRMW	UDHR	ICESCR	ICCPR	CESCR & Protocols (P)
Non-discrimination	7	2 & 7	Arts. 2 & 3	2, 3 & 26	14
Right to leave any country and re-enter his/her own	8	13.2	-	12.2 & 12.4	2.2P4 & 3.2P4
Right to life	9	3	-	6	2
Right to protection against torture	10	5	-	7	3
Right against slavery and forced labour	11	4	-	8	4
Freedom of thought	12	18	-	18	9
Freedom of opinion and expression	13	19	-	19	10
Right to privacy and family	14	12	-	17	1P1
Right to property	15	17	-	-	8
Right to liberty and security	16	3	-	9	5
Rights during deprivation of liberty	17	-	-	10	5
Right against arbitrary arrest and detention	16	9	-	-	5
Right to an effective remedy and to a fair trial	18	8 & 10	-	14	6 & 13
Presumption of innocence and right of defence	18	-	-	14	6
Principle of legality and proportionality of criminal offence and penalties	19	11	-	15	7
Protection from imprisonment for not fulfilling a contractual obligation	20.1	-	-	11	1P4
Right not to lose residence or work permit for not fulfilling a contractual obligation	20.2	-	-	-	-
Right not to have ID papers confiscated or destroyed	21	-	-	-	-
Protection against collective expulsion	22	-	-	13	4
Right to consular protection and assistance	0.23	-	-	-	-
Right to recognition as a person before the law	24	6	-	16	-
Right to equal treatment with nationals on work conditions and terms of employment	25	23	7	-	-
Right to join trade unions	26	-	8	22	-
Right to social security	27	22	9	-	-
Right to urgent medical care	28	-	12	-	-
Right of every child to a name and a nationality	29	15	-	24	-
Right to education	30	26	13	-	2P1
Respect for cultural identity and cultural links with countries of origin	31	27	15	27	-
Right to transfer savings and earnings	32	-	-	-	-
Right to information	33	-	-	-	-

<sup>1</sup> Trends in International Migrant Stock: The 2008 Revision (United Nations database, POP/DB/MIG/Stock/Rev.2008), p. 2.

<sup>2</sup> Ibid.

<sup>3</sup> These include EU citizens and third-country nationals: Migration and migrant population statistics, Eurostat, October 2010, [http://epp.eurostat.ec.europa.eu/statistics\\_explained/index.php/Migration\\_and\\_migrant\\_population\\_statistics](http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Migration_and_migrant_population_statistics).

<sup>4</sup> Table: Non-national population resident in EU Member States, by group of citizenship, 2009.png, Migration and migrant population statistics, op. cit.

<sup>5</sup> Migration and migrant population statistics, Eurostat, October 2010, op. cit.

<sup>6</sup> See Table in Annex II.

<sup>7</sup> The ICRMW equally applies to third-country nationals and EU citizens from another EU country. However, EU citizens are already extensively protected under the Free Movement framework. EU citizens and third-country nationals fall under very distinct legal regimes, and the situation of migrant workers who are EU citizens was felt to be less relevant to the discussion about the ICRMW.

<sup>8</sup> The Working Group for the drafting of the ICRMW was established by a UN General Assembly Resolution in 1979, began work in 1980 and completed its work in June 1990. The ICRMW was adopted the same year. For a description of the ICRMW drafting process, see Juhani Lonnröth, "The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotiation", in *International Migration Review*, Number 25, 1991.

<sup>9</sup> Euan MacDonald and Ryszard Cholewinski, *The Migrant Workers Convention in Europe: Obstacles to the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families: EU/EEA Perspectives*, Paris: UNESCO 2007, p. 22.

<sup>10</sup> Graziano Battistella, "Migration and human rights: the uneasy but essential relationship", in Paul de Guchteneire, Antoine Pécoud and Ryszard Cholewinski, eds., *Migration and Human Rights – The United Nations Convention on Migrant Workers' Rights*, Paris and Cambridge: UNESCO publishing and Cambridge University Press, 2009, p. 55.

<sup>11</sup> Ibid., p. 55.

<sup>12</sup> Felicitas Hillmann and Amanda Klekowski von Koppenfels, "Migration and human rights in Germany", in *Migration and Human Rights – The United Nations Convention on Migrant Workers' Rights*, op. cit., p. 329.

<sup>13</sup> Paul de Guchteneire and Antoine Pécoud, "Introduction: the UN Convention on Migrant Workers' Rights", in *Migration and Human Rights – The United Nations Convention on Migrant Workers' Rights*, op. cit., p. 12.

<sup>14</sup> See "Years between the adoption and the entry into force of international human rights instruments", in Mariette Grange, *Strengthening Protection of Migrant Workers and Their Families with International Human Rights Treaties – A Do-it-yourself Kit*, Geneva: International Migration Commission, 2006, p. 19.

<sup>15</sup> Paul de Guchteneire and Antoine Pécoud, "Introduction: the UN Convention on Migrant Workers' Rights", op. cit., pp. 25 & 30.

<sup>16</sup> As of 25 November 2010: Albania, Algeria, Argentina, Azerbaijan, Belize, Bolivia, Bosnia and Herzegovina, Burkina Faso, Cape Verde, Chile, Colombia, Ecuador, Egypt, El Salvador, Ghana, Guatemala, Guinea, Guyana, Honduras, Jamaica, Kyrgyzstan, Lesotho, Libyan Arab Jamahiriya, Mali, Mauritania, Mexico, Morocco, Nicaragua, Niger, Nigeria, Paraguay, Peru, Philippines, Rwanda, Senegal, Seychelles, Sri Lanka, St. Vincent and the Grenadines, Syrian Arab Republic, Tajikistan, Timor-Leste, Turkey, Uganda, Uruguay.

<sup>17</sup> Compilation of guidelines on the form and content of reports to be submitted by States Parties to the International Human Rights Treaties, addendum (HRI/GEN/2/Rev.2/Add.1), 6 May 2005 and Guidelines for the periodic reports to be submitted by States Parties under article 73 of the Convention (CMW/C/2008/1), 22 May 2008.

<sup>18</sup> International Steering Committee for the Campaign for Ratification of the Migrants Rights Convention, *Guide on Ratification – International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, Geneva: 2009, p. 28.

<sup>19</sup> Apart from the distinction the ICRMW makes itself in Parts III and IV between regular and irregular migrant workers and their families.

<sup>20</sup> David Weissbrodt and Stephen Meili, "Human Rights and Protection of Non-Citizens: Whither Universality and Indivisibility of Rights?", in *Refugee Survey Quarterly*, Human Rights and Mobility, 2010 (28)4, p. 43.

<sup>21</sup> See Table 1 "Evolution of Non-Discrimination Grounds in Core Human Rights Instruments", in Grange Mariette, *Strengthening Protection of Migrant Workers and their Families with International Human Rights Treaties – A Do-it-yourself Kit*, op. cit., p. 26.

<sup>22</sup> International Steering Committee for the campaign for ratification of the migrants rights Convention, *Guide on Ratification – International Convention on the protection of the rights of all migrant workers and members of their families*, Geneva, April 2009, p. 17.

<sup>23</sup> Ryszard Cholewinski, *Migrant Workers in International Human Rights Law – Their protection in countries of employment*, Oxford: Clarendon Press, 1997, p. 138.

<sup>24</sup> Preamble, Recital 15 ICRMW: "Considering also that recourse to the employment of migrant workers who are in an irregular situation will be discouraged if the fundamental human rights of all migrant workers are more widely recognized and, moreover, that granting certain additional rights to migrant workers and members of their families

in a regular situation will encourage all migrants and employers to respect and comply with the laws and procedures established by the States concerned”.

<sup>25</sup> See for instance Contribution by the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families to the High-level Dialogue on Migration and Development of the General Assembly, 3 July 2006, A/61/120 ; Migration and Development: a Human Rights Approach, Office of the High Commissioner for Human Rights, 2006 ; or Ryszard Cholewinski, Protection of the human rights of migrant workers and members of their families under the UN Migrant Workers Convention as a tool to enhance development in the country of employment, UN Committee on Migrant Workers, Third Session, Day of General Discussion on “Protecting the rights of all migrant workers as a tool to enhance development”, <http://www2.ohchr.org/english/bodies/cmw/docs/cholewinski.doc>, 2005.

<sup>26</sup> See below under “Fighting irregular migration”.

<sup>27</sup> For a detailed description of the Committee on Migrant Workers, see The International Convention on Migrant Workers and its Committee, Fact Sheet N° 24 (Rev. 1), Office of the High Commissioner for Human Rights, New York and Geneva, 2005 ; and Carla Edelenbos, “Committee on Migrant Workers and implementation of the ICRMW” in Migration and Human Rights – The United Nations Convention on Migrant Workers’ Rights, op. cit., pp. 100-121.

<sup>28</sup> The second sentence could be interpreted as an anticipated counter argument about the applicability of part of the Convention to irregular migrant workers. At least the aim of this sentence is to make clear that irregular migrant workers may well be irregular (the State is sovereign to decide upon this), but they do have rights.

<sup>29</sup> See International Steering Committee for the campaign for ratification of the migrants rights Convention, Guide on Ratification – International Convention on the protection of the rights of all migrant workers and members of their families, Geneva: 2009, p. 25-34.

<sup>30</sup> Portable rights are entitlements that continue to be recognized to migrant workers after the termination of their stay in their country of employment and upon return to their country of origin.

<sup>31</sup> See Table in Annex III: Emigration flows from Europe.

<sup>32</sup> See, inter alia, Euan MacDonald and Ryszard Cholewinski, The Migrant Workers Convention in Europe: Obstacles to the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families: EU/EEA Perspectives, Paris: UNESCO 2007.

<sup>33</sup> Title IV on asylum and migration of the Treaty funding the European Community was moved from the Third to the First Pillar.

<sup>34</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification entered into force on 3 October 2003. Member States’ legislation had to comply with this Directive by no later than 3 October 2005.

<sup>35</sup> Council Directive 2003/109/EC of 25 November 2003 on a long-term resident status for third-country nationals who have legally resided for five years in the territory of a Member State entered into force on 23 January 2004. Member States’ legislation had to comply with this Directive by 23 January 2006 at the latest.

<sup>36</sup> Directive on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service was adopted by the Council on 13 December 2004 (Directive 2004/114). It entered into force on 12 January 2005. Member States’ legislation had to comply with the Directive by 12 January 2007.

<sup>37</sup> Directive for the facilitation of the admission of researchers into the EU was adopted by the Council on 12 October 2005 (Directive 2005/71). Its provisions had to be implemented by Member States by 12 October 2007.

<sup>38</sup> COM (2005) 389.

<sup>39</sup> Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, COM(2001) 386 final, July 2001.

<sup>40</sup> COM (2005) 669.

<sup>41</sup> Elizabeth Collett, Beyond Stockholm: overcoming the inconsistencies of immigration policy, European Policy Centre, EPC Working Paper N°32, 2009, pp. 12-16.

<sup>42</sup> Council Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (Blue Card Directive).

<sup>43</sup> For example the Commission’s Report on the application of Directive 2003/86 on the right to family reunification published on 8 October 2008, MEMO/08/611.

<sup>44</sup> Directive on Common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive), 2008/115/EC.

<sup>45</sup> See for instance Amnesty International, EU return directive affects dignity and security of irregular migrants, 4 July 2008, available at <http://www.amnesty.org/en/news-and-updates/EU-return-directive-affects-dignity-security-irregular-migrants-20080704>, UNHCR Position on the Proposal for a Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals, UNHCR, 16 June 2008, available at <http://www.unhcr.org/refworld/pdfid/4856322c2.pdf> and UN experts express concern about proposed EU Return Directive, Press Release, 18 July 2008, available at <http://www.unhcr.ch/Hurricane/Hurricane.nsf/0e3eb737630f44ea80256601005b87be/227c3a187c0bdb81c125748a0037a405?OpenDocument>. Latin American countries also criticized this text: Latin American leaders condemn ‘racist’ EU law, 2 July 2008, EUObserver.com, available at: <http://euobserver.com/9/26432/?rk=1>.

<sup>46</sup> COM (2005) 390.

<sup>47</sup> For a more detailed description, see below “The EU Integration policy”.

- <sup>48</sup> Elizabeth Collett, *Beyond Stockholm: overcoming the inconsistencies of immigration policy*, op. cit., p. 78.
- <sup>49</sup> See, “The ratification of the ICRMW and Europe”
- <sup>50</sup> René Plaetevoet and Marika Sidoti, *Ratification of the UN Migrant Workers Convention in the European Union – Survey on the positions of governments and civil society actors*, December 18, December 2010.
- <sup>51</sup> The European Council adopted the Global Approach to Migration: Priority actions focusing on Africa and the Mediterranean region, Presidency Conclusions 15-16 December 2005.
- <sup>52</sup> Including: A Common Immigration Policy for Europe: principles, actions and tools, COM/2008/0359.
- <sup>53</sup> The EU Acquis is the compilation of all binding EU legislation, applicable in EU Member States. See: European Union. *Acquis of the European Union – Title II of the TEC, Part II of the TEC, Title VI of the TEC*, Brussels: European Commission, DG Justice, Freedom and Security, 2009.
- <sup>54</sup> Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents.
- <sup>55</sup> Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, Brussels, 23 October 2007, COM(2007) 638 final.
- <sup>56</sup> See below (Section on the EU Integration Policy) a comparison between the General Framework Directive Proposal and the ICRMWC. See also Euan MacDonald and Ryszard Cholewinski, “The ICRMW and the European Union”, in *Migration and Human Rights – The United Nations Convention on Migrant Workers’ Rights*, op. cit., pp. 387-390.
- <sup>57</sup> Directorate General for Justice, Freedom and Security, Fact Sheet on Migrant’s Rights.
- <sup>58</sup> Paul de Guchteneire and Antoine Pécoud, “Introduction: the UN Convention on Migrant Workers’ Rights”, in *Migration and Human Rights – The United Nations Convention on Migrant Workers’ Rights*, op. cit., p. 26.
- <sup>59</sup> Amnesty International, “Human rights must top the agenda: Amnesty’s appeal to the Austrian Presidency of the EU”, 13 January 2006, available at: <http://www.amnesty.eu/en/press-releases/human-rights-in-the-eu/security-and-human-rights/human-rights-must-top-the-agenda-amnesty-s-appeal-to-the-austrian-presidency-of-the-eu-0249/>.
- <sup>60</sup> Speech by Ban Ki-Moon, Secretary-General of the United Nations (Strasbourg, 19 October 2010), available at [http://www.coe.int/t/dc/press/news/20101019\\_speech\\_ban\\_ki\\_moon\\_EN.asp?](http://www.coe.int/t/dc/press/news/20101019_speech_ban_ki_moon_EN.asp?).
- <sup>61</sup> Adopted in Rome on 5 November 1950 by the Council of Europe.
- <sup>62</sup> Adopted on 24 November 1977 by the Council of Europe, this Convention only applies to citizens of other States Parties to the Convention.
- <sup>63</sup> Ryszard Cholewinski, *Protecting Migrant Workers in a Globalized World*, Migration Information Source, March 2005, <http://www.migrationinformation.org/Feature/display.cfm?id=293>.
- <sup>64</sup> COE Member States are: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, The Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom.
- <sup>65</sup> Patrick Taran, “The need for a rights-based approach to migration in the age of globalization”, in *Migration and Human Rights – The United Nations Convention on Migrant Workers’ Rights*, op. cit., p. 156.
- <sup>66</sup> The Commission recommended the ratification of the ICRMW by EU Member States, as this would be “an expression of the value the Union attaches to the improvement of the situation of migrant workers and their families residing in the Union and guarantees that the rights accorded to them correspond with the most high level international norms”, Communication to the Council and the European Parliament on Immigration and Asylum Policy, Com (94) 23 final, available at: [http://aei.pitt.edu/1262/01/immigration\\_asylum\\_COM\\_94\\_23.pdf](http://aei.pitt.edu/1262/01/immigration_asylum_COM_94_23.pdf).
- <sup>67</sup> European Parliament, Resolution on development and migration, INI/2005/2244, 6 July 2006, point 80.
- <sup>68</sup> European Parliament, Resolution on the situation of fundamental rights in the European Union 2004-2008, INI/2007/2145, 14 January 2009, point 158.
- <sup>69</sup> Ibid. , point 159.
- <sup>70</sup> Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, Brussels, 23 October 2007, COM(2007) 638 final.
- <sup>71</sup> December 18, *The UN Migrant Workers Convention – Steps towards ratification in Europe*, op. cit., p. 23.
- <sup>72</sup> For an overview of EU Governments’ positions, see *ibid.*, p. 7 ; and René Plaetevoet and Marika Sidoti, *Ratification of the U.N. Migrant Workers Convention in the European Union – Survey on the positions of Governments and civil society actors*, op. cit.
- <sup>73</sup> See below under “Ratification of the ICRMW in European states: issues at stake”.
- <sup>74</sup> See for instance the question put to Parliament in Spain in 2010: Congreso de los Diputados, *Contestación del Gobierno, Pregunta al Gobierno con respuesta escrita*, 184/082989, Autor: Llamazares Trigo, Gaspar, *Medidas y plazos para la incorporación de España a la Convención de Derechos de los Trabajadores Inmigrantes de Naciones Unidas*, Boletín Oficial de las Cortes Generales, N. D-459, 14 October 2010, p. 310, available at [http://www.congreso.es/public\\_oficiales/L9/CONG/BOCG/D/D\\_459.PDF](http://www.congreso.es/public_oficiales/L9/CONG/BOCG/D/D_459.PDF).
- <sup>75</sup> See for example the Recommendation made by the Joint Committee of Representatives of the two Human Rights Commissions on the Island of Ireland to the British and Irish Governments to commit to key international standards, Press Release, 15 October 2010,



[http://www.nihrc.org/index.php?page=press\\_news\\_details&category\\_id=2&press\\_id=430&Itemid=65](http://www.nihrc.org/index.php?page=press_news_details&category_id=2&press_id=430&Itemid=65).

<sup>76</sup> See for example: December 18, The U.N. Migrant Workers Convention – Steps towards ratification in Europe, op. cit. ; and René Plaetevoet and Marika Sidoti, Ratification of the UN Migrant Workers Convention in the European Union – Survey on the positions of governments and civil society actors, op. cit.

<sup>77</sup> UNESCO sponsored a series of research studies on the obstacles to ratification of the ICRMW, and particularly Euan MacDonald and Ryszard Cholewinski, The Migrant Workers Convention in Europe: Obstacles to the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families: EU/EEA Perspectives, op.cit.

<sup>78</sup> In particular, CERD and CEDAW consistently recommend that States under review ratify the ICRMW.

<sup>79</sup> Such as the Special Rapporteur on the Rights of Migrants, in particular on the occasion of visits to Spain, Italy, the United Kingdom and Romania.

<sup>80</sup> See Annex I: Recommendations to and responses of European States about ratification of the ICRMW during UPR reviews.

<sup>81</sup> See Annex I: Recommendations to and responses of European States about ratification of the ICRMW during UPRs. Finland replied that “Wide consultations on the content of the Convention and its possible effects on the Finnish legislation have to be carefully examined before our position towards the CMW could be revised. Those consultations should involve all the ministries and other relevant actors in Finland. At this moment, it is not envisaged that such consultations were to be commenced in the near future” while Slovakia replied that “The possibility of acceding to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families will be carefully considered”.

<sup>82</sup> Euan MacDonald and Ryszard Cholewinski, The Migrant Workers Convention in Europe - Obstacles to the Ratification of the International Convention on the Promotion of the Rights of All Migrant Workers and Members of their Families: EU/EEA Perspectives, op.cit.

<sup>83</sup> In order to get a clear view on the possibilities for broad implementation of the Convention, in 2002 UNESCO undertook a series of country studies on the obstacles to the ratification of the Convention and on the political and social impacts of ratification. The description of this project is available at: <http://www.unesco.org/new/en/social-and-human-sciences/themes/social-transformations/international-migration/projects/unesco-project-on-the-international-migrants-rights-convention/>.

<sup>84</sup> Elizabeth Collett, Beyond Stockholm: overcoming the inconsistencies of immigration policy, op. cit., p. 38.

<sup>85</sup> Brian Opeskin, The influence of International Law on the International Movements of Persons, Human Development Research Paper 2009/18, United Nations Development Programme, 2009, p. 7.

<sup>86</sup> See Table in Annex V on Rights recognized to irregular MW and MF under ICRMW articles and corresponding articles in international human rights treaties.

<sup>87</sup> See the General Comment of the Human Rights Committee N° 29 on Freedom of Movement (Art. 12), 02/11/1999, CCPR/C/21/Rev.1/Add.9.

<sup>88</sup> Euan MacDonald and Ryszard Cholewinski, The Migrant Workers Convention in Europe - Obstacles to the Ratification of the International Convention on the Promotion of the Rights of All Migrant Workers and Members of their Families: EU/EEA Perspectives, op. cit., pp. 51-52.

<sup>89</sup> ICRMW Preamble, Recital 15: “Considering also that recourse to the employment of migrant workers who are in an irregular situation will be discouraged if the fundamental human rights of all migrant workers are more widely recognized and, moreover, that granting certain additional rights to migrant workers and members of their families in a regular situation will encourage all migrants and employers to respect and comply with the laws and procedures established by the States concerned”.

<sup>90</sup> See Annex I on the Recommendations to and responses of European States about ratification of the ICRMW during UPR reviews.

<sup>91</sup> Annex I.

<sup>92</sup> Recommendations made by Human Rights Council Members to European States are formulated using different wording, such as “consider the possibility of signing and/or ratifying” ; “consider the possibility of acceding” ; “consider ratifying” ; “take necessary steps to become a party to” ; “sign” ; “sign and ratify” ; “adhere” ; “accede” ; “ratify” ; or “proceed to ratification”.

<sup>93</sup> The International Convention on the Protection of All Persons from Enforced Disappearance, the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

<sup>94</sup> December 18, The U.N. Migrant Workers Convention – Steps towards ratification in Europe, op.cit, p. 10.

<sup>95</sup> See Table in Annex V .

<sup>96</sup> The right to transfer their savings and earnings is however at the heart of the discussions that focus on the positive effects of migration on development. For instance, in the report of the United Nations Secretary-General on “International Migration and Development” (2 August 2010, A/65/203), facilitating the transfer of remittances is recognized as a good practice. This is relevant even though Article 32 ICRMW applies “upon the termination of [migrant workers’] stay in the state of employment” because it demonstrates that the right of migrant workers to transfer their earnings and savings is a widely recognized right.

<sup>97</sup> It is relevant to mention here that under Article 46 of the EU Charter, all citizens of the EU are entitled to the right



to have consular services.

<sup>98</sup> David Weissbrodt and Stephen Meili, "Human Rights and Protection of Non-Citizens: Whither Universality and Indivisibility of Rights?", *op. cit.*

<sup>99</sup> Michael Jandl, Christina Hollomey and Anna Stepien, *Migration and Irregular Work in Austria: Results of a Delphi-Study*, International Migration Papers N° 90, International Labour Organization and International Centre for Migration Policy Development, 2007, p. 17.

<sup>100</sup> Martin Rhus and Bridget Anderson, *The origins and functions of illegality in migrant labour markets: An analysis of migrants, employers and the state in the UK*, Working Paper 06-30a. Oxford University, 2008, COMPAS.

<sup>101</sup> Caritas/Migrantes, *Immigrazione. Dossier Statistico 2005. XV Rapporto sull'immigrazione*. Rome, Idos, p. 121 ; cited in Graziano Battistella, "Migration and human rights : the uneasy but essential relationship", in *Migration and Human Rights – The United Nations Convention on Migrant Workers' Rights*, *op. cit.*, p. 64.

<sup>102</sup> See below under "Is the ICRMW superfluous in Europe ?".

<sup>103</sup> See below in Part II, under "Examples of developments in national legislations on migration in European countries".

<sup>104</sup> See for instance: Martin Rhus, *Migrant Rights, Immigration Policy and Human Development*, Human Development Research Paper 2009/23, United Nations Development Programme, 2009

<sup>105</sup> Euan MacDonald and Ryszard Cholewinski, *The Migrant Workers Convention in Europe - Obstacles to the Ratification of the International Convention on the Promotion of the Rights of All Migrant Workers and Members of their Families: EU/EEA Perspectives*, *op.cit.*, p. 80.

<sup>106</sup> Patrick Taran and Eduardo Geronimi, *Globalization, Labour and Migration: Protection is paramount*, *Perspectives on Labour Migration 3 E*, 2003, p. 6, cited in Ryszard Cholewinski, *Protection of the Human Rights of Migrant Workers and Members of their Families under the UN Migrant Workers Convention as a Tool to Enhance Development in the Country of Employment*, UN Committee on Migrant Workers, Third Session, Day of General Discussion on "Protecting the rights of all migrant workers as a tool to enhance development", 2005, <http://www2.ohchr.org/>, p. 13.

<sup>107</sup> Kristina Touzenis, "Migration and human rights in Italy: prospects for the ICRMW", in *Migration and human rights: the United Nations Convention on Migrant Workers' Rights*, *op. cit.*, p. 345.

<sup>108</sup> Patrick Taran, *To be or not to be ruled by Law: Migration in the 21<sup>st</sup> Century and the 1990 International Convention*, *op. cit.*, p. 5.

<sup>109</sup> Ryszard Cholewinski, *Protection of the Human Rights of Migrant Workers and Members of their Families under the UN Migrant Workers Convention as a Tool to Enhance Development in the Country of Employment*, *op. cit.*, p. 13.

<sup>110</sup> See below "Cooperation with third countries" under "Developments in the EU migration policy".

<sup>111</sup> FRONTEX was established by Council Regulation (EC) 2007/2004/ (26.10.2004, OJ L 349/25.11.2004). It coordinates operational cooperation between Member States in the field of management of external borders ; assists Member States in the training of national border guards, including the establishment of common training standards; carries out risk analysis ; follows up the development of research relevant for the control and surveillance of external borders ; assists Member States in circumstances requiring increased technical and operational assistance at external borders ; and provides Member States with the necessary support in organizing joint return operations.

<sup>112</sup> See for instance: Ryszard Cholewinski, *Protection of the Human Rights of Migrant Workers and Members of their Families under the UN Migrant Workers Convention as a Tool to Enhance Development in the Country of Employment*, *op. cit.*

<sup>113</sup> Ratification of the ICRMW came out clearly at the Civil Society days (civil society forum held prior to the GFMD) as a crucial recommendation to States taking part in the successive GFMD. See for instance "Statement of the Civil Society Days Global Forum on Migration and Development Puerto Vallarta, Mexico, 8-9 November 2010", available at: [http://www.december18.net/sites/default/files/statementcivilsocietydays\\_gfmd.pdf](http://www.december18.net/sites/default/files/statementcivilsocietydays_gfmd.pdf), p. 4.

<sup>114</sup> Euan MacDonald and Ryszard Cholewinski, "The ICRMW and the European Union", in *Migration and Human Rights – The United Nations Convention on Migrant Workers' Rights*, *op. cit.*, p. 375.

<sup>115</sup> CMW/C/DZA/CO/1, paras. 32 and 33.

<sup>116</sup> *Compilation of findings and observations by the United Nations Human Rights system relating to the human rights of migrants*, Office of the High Commissioner for Human Rights, August 2006, p. 18, § 32.

<sup>117</sup> Euan MacDonald and Ryszard Cholewinski, *The Migrant Workers Convention in Europe - Obstacles to the Ratification of the International Convention on the Promotion of the Rights of All Migrant Workers and Members of their Families: EU/EEA Perspectives*, *op. cit.*, p. 53.

<sup>118</sup> *Ibid.*, pp. 57-60.

<sup>119</sup> December 18, *The U.N. Migrant Workers Convention – Steps towards ratification in Europe*, *op.cit.*, p. 9.

<sup>120</sup> CMW/C/MEX/CO/1, § 12.

<sup>121</sup> CMW/C/PHL/CO/1, § 12.

<sup>122</sup> CMW/C/MLI/CO/1, § 9.

<sup>123</sup> CMW/C/BOL/CO/1, § 10.

<sup>124</sup> CMW/C/BIH/CO/1, § 8.

<sup>125</sup> *Avis sur la convention internationale sur la protection des droits de tous les travailleurs migrants et des membres de leur famille et réponse du gouvernement*, Commission Consultative des droits de l'homme, 23 June 2005.

<sup>126</sup> UN Special Rapporteur on Torture presents preliminary findings on his Mission to Greece, 20 October 2010, available at: [http://www2.ohchr.org/english/issues/torture/rapporteur/docs/PressStatement20102010\\_en.doc](http://www2.ohchr.org/english/issues/torture/rapporteur/docs/PressStatement20102010_en.doc) .

<sup>127</sup> See United Nations Q&A on the Convention on the rights of persons with disabilities at <http://www.un.org/disabilities/convention/questions.shtml>.

<sup>128</sup> In addition, 17 EU States have ratified the CRPD to date.

<sup>129</sup> Economic migration, social cohesion and development: towards an integrated approach, Thematic Report, 8th Council of Europe Conference of Ministers Responsible for Migration, pp. 40-44.

<sup>130</sup> Guide on Ratification – International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, op. cit., p. 33.

<sup>131</sup> In France for instance, it is estimated that around €533 million are being spent every year to implement the expulsion policy: CIMADE, Le coût de la politique d'enfermement et d'expulsion, 27 January 2010, available at: [http://www.cimade.org/minisites/mesnil2/rubriques/121-L-industrie-de-l-expulsion?page\\_id=2151](http://www.cimade.org/minisites/mesnil2/rubriques/121-L-industrie-de-l-expulsion?page_id=2151).

<sup>132</sup> For example, in Italy, according to the Italian Audit Court (Corte dei Conti) the fight against irregular migration in 2004 to apply the Bossi-Fini law cost a total of €115,467,000, or rather €320,000 per day. In comparison, the total sum invested in immigrant integration and assistance projects in the same year amounted only to a mere €29 million. International Center for Policy Migration Development, REGINE, Regularisations in Europe - Study on practices in the area of regularisation of illegally staying third country nationals in the Member States of the EU, Appendix A, country studies, Ref. JLS/B4/2007/05, Vienna: 2009. 77.

<sup>133</sup> See Table in Annex II.

<sup>134</sup> See for instance: December 18, The UN Treaty Monitoring Bodies and Migrant Workers: a Samizdat Brussels: 2007, available at: <http://www.december18.net/article/un-treaty-monitoring-bodies-and-migrant-workers-samizdat-updated>; Isabelle Slinckx, "Migrants' rights in UN human rights conventions" in Migration and human rights. The United Nations Convention on Migrant Workers' Rights, op. cit.

<sup>135</sup> Isabelle Slinckx, "Migrants' rights in UN human rights conventions", op. cit., pp. 143-144.

<sup>136</sup> Euan MacDonald and Ryszard Cholewinski, The Migrant Workers Convention in Europe - Obstacles to the Ratification of the International Convention on the Promotion of the Rights of All Migrant Workers and Members of their Families: EU/EEA Perspectives, op. cit., p. 34.

<sup>137</sup> Theme Concept Paper, Fourth Meeting of the Global Forum on Migration and Development Mexico 2010, available at: [http://www.gfmd.org/mexico-2010/files/Revised\\_Theme\\_Concept\\_Paper.pdf](http://www.gfmd.org/mexico-2010/files/Revised_Theme_Concept_Paper.pdf), p. 1.

<sup>138</sup> "The new perspective of human development transcends the usual debates about the economic effects and consequences of migration; and opens a space to discuss certain issues that still need to be addressed more thoroughly, such as health, education, training and gender; and the human rights and protection of all migrants", *Ibid.*, p. 2.

<sup>139</sup> For instance in the field of family reunification and family life.

<sup>140</sup> This is clearly the case of certain rights recognized to irregular migrant workers, such as the rights to access medical treatment, as understood by the CESCR – and not only urgent medical care – and access to free and public education for migrant children of parents in an irregular situation.

<sup>141</sup> David Weissbrodt and Stephen Meili, "Human Rights and Protection of Non-Citizens: Whither Universality and Indivisibility of Rights?", in Refugee Survey Quarterly, Human Rights and Mobility, 2010 (28)4.

<sup>142</sup> Patrick Taran, "The need for a rights-based approach to migration in the age of globalization", in Migration and Human Rights – The United Nations Convention on Migrant Workers' Rights, op. cit., and Patrick Taran, To be or not to be ruled by Law: Migration in the 21<sup>st</sup> Century and the 1990 International Convention, Eighth International Metropolis Conference, Vienna, 2003, [http://international.metropolis.net/events/8th\\_vienna\\_conf\\_2003/en/WS2.5Taran.pdf](http://international.metropolis.net/events/8th_vienna_conf_2003/en/WS2.5Taran.pdf).

<sup>143</sup> See Annex I.

<sup>144</sup> Answer given by Italy to the recommendation made by the Human Rights Council to ratify the ICRMW during the UPR in February 2009. See Annex I.

<sup>145</sup> "Par ailleurs, la France ne peut agir seule sur ce sujet puisque les politiques d'asile et de migration relèvent en grande partie de la compétence communautaire, ce qui suppose une coordination de l'ensemble des Etats membres", Réponse du Ministre des affaires étrangères et européennes à une question d'un sénateur publiée dans le JO Sénat du 18/10/2007 - page 1865.

<sup>146</sup> There are some studies that look at aspects of the EU Acquis and compare them with international human rights standards. See, for instance, European Union Agency for Fundamental Rights, Detention of third-country nationals in return procedures, Vienna: FRA, 2010. Ryszard Cholewinski and Euan MacDonald do give some indications regarding the compatibility between the ICRMW and some EU legislation and practices: "The ICRMW and the European Union", op. cit. More analysis is also proposed below in this study, under Part II. Finally, the International Organization for Migration was mandated by the European Commission to look at some aspects of national legislations of the 27 EU Member States in the field of migration in a systematic way, even though no reference is made to human rights obligations of EU Member States. See International Organization for Migration, Laws for legal Immigration in the 27 EU Member States, International Migration Law, Geneva: IOM 2009 and Stefano Bertozzi, Opening Europe's door to unskilled and low-skilled workers: A practical handbook, Bureau of European Policy Advisers (BEPA), European Commission, Luxembourg: Publications Office of the European Union, 2010.

<sup>147</sup> See above, under "Developments in the EU migration legislation and policy".

<sup>148</sup> Article 2 of the Consolidated versions of the Treaty on the Functioning of the European Union, Official Journal C 115, 09/05/2008 P. 0001 - 0388.

<sup>149</sup> This rule allowing Member States to take more favourable measures is systematically included in EU Directives.

<sup>150</sup> The International Convention on Migrant Workers and its Committee, Fact Sheet N° 24 (Rev. 1), Office of the High Commissioner for Human Rights, New York and Geneva, 2005.

<sup>151</sup> The accession of the European Union to the ECHR is now legally possible after the entry into force of the Lisbon Treaty that actually calls for it (article 6(2) “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties”) and the latest Protocol to the ECHR of June 2010. See: EU accession to the European Convention on Human Rights, [http://www.coe.int/t/dc/files/themes/eu\\_and\\_coe/default\\_EN.asp](http://www.coe.int/t/dc/files/themes/eu_and_coe/default_EN.asp).

<sup>152</sup> See CRC General Comment N° 6 on the Treatment of Unaccompanied and Separated Children Outside Their Country of Origin (CRC/GC/2005/6) or CERD General Comment N° 30 on Non-citizens (2004).

<sup>153</sup> Charter of Fundamental Rights of the European Union, Official Journal C83 of 30, 3, 2010.

<sup>154</sup> In Part II, under “Developments in the EU migration policy”.

<sup>155</sup> Euan MacDonald and Ryszard Cholewinski, *The Migrant Workers Convention in Europe: Obstacles to the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families: EU/EEA Perspectives*, op.cit., p. 84.

<sup>156</sup> Amnesty International, *Ratification de la convention internationale relative aux droits de tous les travailleurs migrants et des membres de leur famille*, SF08R41-1, December 2008, available at: [http://www.amnesty.fr/var/amnesty/storage/fckeditor/File/sf08r41\\_01\(1\).pdf](http://www.amnesty.fr/var/amnesty/storage/fckeditor/File/sf08r41_01(1).pdf).

<sup>157</sup> December 18, *The U.N. Migrant Workers Convention – Steps towards ratification in Europe*, op.cit., p. 10.

<sup>158</sup> International Steering Committee for the Campaign for Ratification of the Migrants Rights Convention, *Guide on Ratification – International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, Geneva: 2009, p. 33.

<sup>159</sup> Euan MacDonald and Ryszard Cholewinski, *The Migrant Workers Convention in Europe: Obstacles to the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families: EU/EEA Perspectives*, op. cit., p. 64.

<sup>160</sup> Patrick Taran, “The need for a rights-based approach to migration in the age of globalization”, in *Migration and Human Rights – The United Nations Convention on Migrant Workers’ Rights*, op. cit., p. 151.

<sup>161</sup> Spain, Italy, Luxembourg and Malta. see: December 18, *The U.N. Migrant Workers Convention – Steps towards ratification in Europe*, op.cit., p. 12 ; France, see Hélène Oger, “The French political refusal on Europe’s behalf”, in *Migration and human rights. The United Nations Convention on Migrant Workers’ Rights*, op. cit., pp. 302-305 ; the UK, see Ryan Bernard, “Policy on the ICRMW in the United Kingdom”, in *Migration and human rights. The United Nations Convention on Migrant Workers’ Rights*, op. cit., p. 289.

<sup>162</sup> Euan MacDonald and Ryszard Cholewinski, *The Migrant Workers Convention in Europe: Obstacles to the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families: EU/EEA Perspectives*, op. cit., p. 42.

<sup>163</sup> “Sign the Petition Asking EU Member States to Ratify the Migrant Workers Convention”, <http://www.december18.net/ratify-migrants-workers-convention>.

<sup>164</sup> Euan MacDonald and Ryszard Cholewinski, *The Migrant Workers Convention in Europe: Obstacles to the ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families: EU/EEA Perspectives*, op. cit., p. 46.

<sup>165</sup> Partido Socialista Obrero Español (PSOE), *Programa elecciones generales 2008*, p. 44, available at <http://www.psoe.es/download.do?id=141749>.

<sup>166</sup> Congreso de los Diputados, *Contestación del Gobierno, Pregunta al Gobierno con respuesta escrita, 184/082989*, Autor: Llamazares Trigo, Gaspar, *Medidas y plazos para la incorporación de España a la Convención de Derechos de los Trabajadores Inmigrantes de Naciones Unidas*, Boletín Oficial de las Cortes Generales, N. D-459, 14 October 2010, p. 310, available at [http://www.congreso.es/public\\_oficiales/L9/CONG/BOCG/D/D\\_459.PDF](http://www.congreso.es/public_oficiales/L9/CONG/BOCG/D/D_459.PDF).

<sup>167</sup> Euan MacDonald and Ryszard Cholewinski, *The Migrant Workers Convention in Europe: Obstacles to the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families: EU/EEA Perspectives*, op. cit., p. 64.

<sup>168</sup> “50 MEPs support our petition campaign!”, <http://www.december18.net/article/over-30-meps-support-our-petition-campaign>.

<sup>169</sup> Charter of Fundamental Rights of the European Union, 2007/C 303/01, Official Journal of the European Union, C 303/15, 14 December 2007.

<sup>170</sup> Amendments to the original text adopted in December 2000 mainly concern changes due to the adoption of the Lisbon Treaty. They do not concern the content of the rights recognized in the Charter.

<sup>171</sup> Article 6(1) of the Treaty on European Union, as modified by the Lisbon Treaty, provides that the Charter is legally binding and has the same legal value as the Treaties: “1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted in Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.”

<sup>172</sup> The ECtHR case law is described throughout *Detention of third-country nationals in return procedures*, European Union for Fundamental Rights Agency (FRA), September 2010.

<sup>173</sup> Jacqueline Duthéil de la Rochère, “The Protection of Fundamental Rights in the EU: Community of values with Opt-Out?”, in: Ingolf Pernice and Evgeni Tanchev (eds.): *Ceci n’est pas une Constitution - constitutionalisation*

without a Constitution? (Nomos 2009), p. 121.

<sup>174</sup> Ryszard Cholewinski, Protection of the Human Rights of Migrant Workers and Members of their Families under the UN Migrant Workers Convention as a Tool to Enhance Development in the Country of Employment, UN Committee on Migrant Workers, Third Session, Day of General Discussion on “Protecting the rights of all migrant workers as a tool to enhance development”, <http://www2.ohchr.org/>, 2005.

<sup>175</sup> Mariette Grange, Strengthening Protection of Migrant Workers and their Families with International Human Rights Treaties – A Do-it-yourself Kit, op.cit., p. 20.

<sup>176</sup> European Commission adopts strategy to ensure respect for EU Charter of Fundamental Rights, IP/10/1348, Brussels, 19 October 2010.

<sup>177</sup> Ibid.

<sup>178</sup> Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, COM(2001) 386 final, July 2001.

<sup>179</sup> Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

<sup>180</sup> Article 5, Blue Card Directive.

<sup>181</sup> Council Directive 2009/50/EC, Preamble, Recital (7).

<sup>182</sup> Steffen Angenendt and Roderick Parkes, The Blue Card Impass - Three Options for EU Policy on Highly Qualified Immigrants, German Institute for International and Security Affairs, available online: [http://www.swp-berlin.org/en/produkte/swp\\_aktuell\\_detail.php?id=12454&PHPSESSID=45555019161b071154dcc516e534d95a](http://www.swp-berlin.org/en/produkte/swp_aktuell_detail.php?id=12454&PHPSESSID=45555019161b071154dcc516e534d95a).

<sup>183</sup> Elizabeth Collett, Beyond Stockholm: overcoming the inconsistencies of immigration policy, op.cit., p. 36.

<sup>184</sup> Article 6 of the Treaty of the European Union, Official Journal C83/13, 30.3.2010:

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.”

<sup>185</sup> “Common Basic Principles for Immigrant Integration Policies in the European Union” (2004), European Council, 2618th Council Meeting, 19 November 2004.

<sup>186</sup> Ibid.

<sup>187</sup> A Common Agenda for Integration - Framework for the Integration of Third-Country Nationals in the European Union, Commission Communication, COM(2005) 389, 1 September 2005.

<sup>188</sup> Steffen Angenendt and Roderick Parkes, Asylum and Immigration Cooperation after Lisbon – New competencies, better policies?, German Institute for International and Security Affairs, SWP Comments 29, December 2009, p. 2.

<sup>189</sup> MIPEX (Migrant Integration Policy Index), British Council and Migration Policy Group, 2007, p. 4, available online at: <http://www.integrationindex.eu/>.

<sup>190</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

<sup>191</sup> Elizabeth Collett, Beyond Stockholm: overcoming the inconsistencies of immigration policy, op. cit., p. 39.

<sup>192</sup> Ibid., p. 39.

<sup>193</sup> Pablo Sanchez, Migration and Integration at the EU Level: a Rights-based Perspective, Social Watch, p. 7.

<sup>194</sup> Steffen Angenendt and Roderick Parkes, The Blue Card Impasse - Three Options for EU Policy on Highly Qualified Immigrants, op.cit., 2010.

<sup>195</sup> Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, COM(2007) 638 final, October 2007.

<sup>196</sup> It should be noted however that, according to Article 3.2 of the Proposal, the Directive would not apply to family members of EU citizens in some cases ; intra-corporate transferees ; asylum-seekers ; long-term residents; seasonal workers ; and migrants under a suspended expulsion order. The Proposal does not apply to irregular migrant workers in any case, as it applies to “third-country workers legally residing in a Member State” (Article 3.1).

<sup>197</sup> See above under “The ratification of the ICRMW and Europe”.

<sup>198</sup> Migration policy, Ju 09.06e, Fact sheet, Ministry of Justice, March 2010, available online at: <http://www.sweden.gov.se/content/1/c6/14/08/34/d29dec99.pdf>.

<sup>199</sup> Elizabeth Collett, Beyond Stockholm: overcoming the inconsistencies of immigration policy, op. cit., p. 31

<sup>200</sup> Steffen Angenendt and Roderick Parkes, Asylum and Immigration Cooperation after Lisbon – New competencies, better policies ?, op. cit., p. 2.

<sup>201</sup> Khalid Koser, Study of Employment and Residence Permits for Migrant Workers in Major Countries of Destination,



International Labour Office, International Migration Programme, International Migration Paper N°. 95 – Geneva: ILO, 2009, p. 16.

<sup>202</sup> Organisation for Economic Co-operation and Development (OECD), Migration for employment: Bilateral agreements at a crossroads, Paris: OECD, 2004, p. 8, cited in Khalid Koser, Study of Employment and Residence Permits for Migrant Workers in Major Countries of Destination, op. cit., p. 17.

<sup>203</sup> Global Approach to Migration: Priority actions focusing on Africa and the Mediterranean, Council of the European Union, 15744/05, 13 December 2005.

<sup>204</sup> Table 1: Non-national population, 2008, in Katya Vasileva, Citizens of European countries account for the majority of the foreign population in EU-27 in 2008, EUROSTAT, Statistics in focus, 94/2009, p. 3.

<sup>205</sup> PICUM, Undocumented Children in Europe: Invisible Victims of Immigration Restrictions, Platform for International Cooperation on Undocumented Migrants, 2008, p. 16-17.

<sup>206</sup> Ryszard Cholewinski, Study on obstacles to effective access of irregular migrants to minimum social rights, Council of Europe, December 2005, p. 35.

<sup>207</sup> Ibid., p. 37.

<sup>208</sup> PICUM, Undocumented Children in Europe: Invisible Victims of Immigration Restrictions, op. cit., p. 17.

<sup>209</sup> One example is the “Solidarity Fund” put in place in the town of St. Niklaas, where schools raise money for a common fund that serves to help irregular migrant families pay school-related fees such as supplies. PICUM, Undocumented Children in Europe: Invisible Victims of Immigration Restrictions, op. cit., p. 24.

<sup>210</sup> Article 13(1) ICESCR: “The States Parties . . . agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society...”.

<sup>211</sup> Committee on Economic, Social and Cultural Rights (CESCR), General Comments N° 13: The right to education (Art.13), 08/12/1999, E/C.12/1999/10, paras. 6 & 7.

<sup>212</sup> Ryszard Cholewinski, Study on obstacles to effective access of irregular migrants to minimum social rights, op. cit., p. 38.

<sup>213</sup> Carin Bjorngren Cuadra, Policies on Health Care for Undocumented Migrants in EU27 – Country report Belgium, Health Care in NOWHERELAND, April 2010.

<sup>214</sup> Ibid., p. 11.

<sup>215</sup> Ibid., p. 12.

<sup>216</sup> Ibid., p. 10.

<sup>217</sup> CEAR, Cire, Hungarian Helsinki Committee, Good practices for a Europe of protection – a memorandum for the Trio of Spain, Belgium and Hungary, December 2009, p. 9, available at: <http://www.vluchtelingenwerk.be/bestanden/publicaties/trio-memorandum.pdf>

<sup>218</sup> Country Profiles of 22 EU Member States and the USA, REGINE – Regularisation in Europe - Study on practices in the area of regularisation of illegally staying third country nationals in the Member States of the EU, International Centre for Migration Policy Development (ICMPD), Vienna, 2009, Ref. JLS/B4/2007/05, pp. 14-24.

<sup>219</sup> Ibid., p. 19-20.

<sup>220</sup> Juliel Tieleman, Regularization Campaign in Belgium: A Breakthrough, migrationonline.cz, November 2009, available at [http://www.migrationonline.cz/e-library/?x=2205155#\\_ftn1](http://www.migrationonline.cz/e-library/?x=2205155#_ftn1).

<sup>221</sup> Governmental Circular, point 1.2.

<sup>222</sup> Governmental Circular, point 2.8 A.

<sup>223</sup> Governmental Circular, point 2.8 B.

<sup>224</sup> Background paper, Roundtable 1 - Partnerships for Migration and Human Development: shared prosperity – shared responsibility, Global Forum on Migration and Development, p. 8.

<sup>225</sup> Table 1: Non-national population, 2008, in Katya Vasileva, Citizens of European countries account for the majority of the foreign population in EU-27 in 2008, op.cit., 94/2009, p. 3.

<sup>226</sup> Carin Bjorngren Cuadra, Policies on Health Care for Undocumented Migrants in EU27 – Country report Czech Republic, Health Care in NOWHERELAND, April 2010.

<sup>227</sup> Lucie Cerna, Policies and practices of highly skilled migration in times of economic crisis, International Migration Paper N°. 99, International Labour Office, ILO, Geneva, 2010, p. 10.

<sup>228</sup> Act N°. 382/2008 Coll.

<sup>229</sup> International Organization for Migration, Migration and the Economic Crisis in the European Union: Implications for policy, Brussels: IOM, 2010, p. 75.

<sup>230</sup> It was estimated that 12,000 migrant workers had lost their jobs in the first three months of 2009 and the number was expected to increase.

<sup>231</sup> Marketa Rulikova, Depart ‘Voluntarily’ or Decline to Illegality? Response to the Economic Crisis among Immigrants in the Czech Republic, Draft, 15 February, 2010.

<sup>232</sup> Resolution N°. 587.

<sup>233</sup> Government launches second phase of project to repatriate foreign workers, Cezky Rozhlas, 28 July 2009, available online at: <http://www.radio.cz/en/section/curraffrs/government-launches-second-phase-of-project-to-repatriate-foreign-workers>.



- <sup>234</sup> An Interview with Běla Hejrná from the Ministry of the Interior on the Voluntary Returns Project for Illegal Immigrants and about foreigners lacking permission to reside in the Czech Republic, migrationonline.cz, 15 September 2009, available at: <http://www.migrationonline.cz/e-library/?x=2197614>.
- <sup>235</sup> Ibid.
- <sup>236</sup> Jochen Blaschke, Trends on regularization of third country nationals in irregular situation of stay across the European Union, Directorate General internal policies of the Union, European Parliament, January 2008, available online at: [http://aa.ecn.cz/img\\_upload/6334c0c7298d6b396d213ccd19be5999/INFORME\\_PE\\_REGULARIZACIONESmikel.pdf](http://aa.ecn.cz/img_upload/6334c0c7298d6b396d213ccd19be5999/INFORME_PE_REGULARIZACIONESmikel.pdf).
- <sup>237</sup> This is in fact a growing activity of the IOM, as the Return Assistance to Migrants and Governments page shows on IOM Website: <http://www.iom.int/jahia/Jahia/activities/by-theme/regulating-migration/return-assistance-migrants-governments>.
- <sup>238</sup> Governmental measure of 1 January 2009. See International Organization for Migration, Migration in the economic crisis, op. cit., p. 74.
- <sup>239</sup> International Organization for Migration, Laws for Legal Immigration in the 27 EU Member States, International Migration Law, Geneva: IOM, 2009, p. 207.
- <sup>240</sup> Articles 42-44.
- <sup>241</sup> Ministère de l'Immigration, de l'Intégration, de l'Identité nationale et du Codéveloppement.
- <sup>242</sup> Décret N° 2007-999 du 31 mai 2007 relatif aux attributions du ministre de l'Immigration, de l'Intégration, de l'Identité nationale et du Codéveloppement, J.O N° 125 du 1 juin 2007, page 9964, texte N° 11.
- <sup>243</sup> Avis sur la convention internationale sur la protection des droits de tous les travailleurs migrants et des membres de leur famille et réponse du gouvernement, Commission Consultative des droits de l'homme, 23 June 2005.
- <sup>244</sup> Table 1: Non-national population, 2008, in Katya Vasileva, Citizens of European countries account for the majority of the foreign population in EU-27 in 2008, op.cit., 94/2009, p. 3.
- <sup>245</sup> Carin Bjorngren Cuadra, Policies on Health Care for Undocumented Migrants in EU27 – Country report France, Health Care in NOWHERELAND, April 2010, p. 12.
- <sup>246</sup> PICUM, Access to health care for undocumented migrants in Europe, Platform for International Cooperation on Undocumented Migrants (PICUM), Brussels, 2007, p. 30.
- <sup>247</sup> Study of the Office of the United Nations High Commissioner for Human Rights on challenges and best practices in the implementation of the international framework for the protection of the rights of the child in the context of migration, A/HRC/15/29, 5 July 2010, p. 20, § 81.
- <sup>248</sup> Loi N° 98-349 du 11 mai 1998 relative à l'entrée et au séjour des étrangers en France et au droit d'asile.
- <sup>249</sup> Observatoire du Droit à la Santé des Etrangers (ODSE), La régularisation pour raisons médicale en France, un bilan de santé alarmant, 2008, available online: <http://www.actupparis.org/spip.php?article3380>.
- <sup>250</sup> PICUM, Undocumented Children in Europe: Invisible Victims of Immigration Restrictions, Platform for International Cooperation on Undocumented Migrants, 2008, p. 16. The principled right to education for every child is affirmed in the 1956 Constitution.
- <sup>251</sup> Committee on the Rights of the Child, Concluding Observations to France, CRC/C/FRA/CO/4, 11 June 2009, § 50.
- <sup>252</sup> Silvia González del Pino, International Human Rights Instruments and their Applicability to the Promotion and Protection of Human Rights of Migrant Domestic Workers in Europe, OHCHR, 2010, p. 7.
- <sup>253</sup> The Chèque emploi service universel (Cesu), on [www.anglais.urssaf.fr](http://www.anglais.urssaf.fr), latest update on 28 July 2008.
- <sup>254</sup> <http://www.securite-sociale.fr/comprendre/europe/conventions/convbilaterales.htm>.
- <sup>255</sup> Projet de loi relative à l'immigration, à l'intégration et à la nationalité.
- <sup>256</sup> Texte adopté N° 542: <http://www.assemblee-nationale.fr/13/ta/ta0542.asp>.
- <sup>257</sup> Council Directive 2009/50/CE of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.
- <sup>258</sup> Directive 2008/115/CE of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.
- <sup>259</sup> Directive 2009/52/CE of the European Parliament and Council of 18 June 2009, laying down minimum standards on sanctions and measures applicable to employers of third-country nationals in irregular situation.
- <sup>260</sup> Directive 2008/115/CE of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.
- <sup>261</sup> Analyse collective du projet de loi Besson du 30 mars 2010 relatif « à l'immigration, à l'intégration et à la nationalité », [http://www.gisti.org/IMG/pdf/hc\\_analyse-pjl-besson-20100330.pdf](http://www.gisti.org/IMG/pdf/hc_analyse-pjl-besson-20100330.pdf).
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- <sup>265</sup> Carin Bjorngren Cuadra, Policies on Health Care for Undocumented Migrants in EU27 – Country report Germany, Health Care in NOWHERELAND, April 2010, p. 8.
- <sup>266</sup> Asylbewerberleistungsgesetz (AsylbLG) Section 1 N°. 5.
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- <sup>298</sup> “Launch of new Immigration Bill”, Department of Justice and Law Reform, 29 January 2008.
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- <sup>302</sup> Immigrant Council of Ireland, The Immigration, Residence and Protection Bill 2010 - a critical overview, September 2010, p. 9.
- <sup>303</sup> MIPEX (Migrant Integration Policy Index), British Council and Migration Policy Group, 2007, p. 92, available online at: <http://www.integrationindex.eu>.

- <sup>304</sup> Dismissed workers can access self-service facilities of the FAS Employment Services Offices as well as availing themselves of an interview with an Employment Services Officer if they wish. A new policy has been agreed whereby work permit holders who have been dismissed can now be registered on FAS's database and actively matched against any suitable and available job.
- <sup>305</sup> Habitual residence condition, Department of social protection, Leaflet SW 108, October 2009, p. 3 ; available online at <http://www.welfare.ie/EN/Publications/SW108/Documents/sw108.pdf> .
- <sup>306</sup> Torben Krings, "Ireland Case study", op. cit., p. 112.
- <sup>307</sup> Habitual residence condition, op. cit.
- <sup>308</sup> Torben Krings, "Ireland Case study", op. cit., p. 112.
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- <sup>311</sup> Torben Krings, "Ireland Case study", op. cit., p. 114.
- <sup>312</sup> Table 1: Non-national population, 2008, in Katya Vasileva, Citizens of European countries account for the majority of the foreign population in EU-27 in 2008, op.cit., 94/2009, p. 3.
- <sup>313</sup> PICUM, Undocumented Children in Europe: Invisible Victims of Immigration Restrictions, op.cit, 2008, p. 17.
- <sup>314</sup> Carin Bjorngren Cuadra, Policies on Health Care for Undocumented Migrants in EU27 – Country report Italy, Health Care in NOWHERELAND, April 2010, p. 10.
- <sup>315</sup> Article 33 reads as follows: "Foreign nationals staying on the national territory without regular permits of stay have a right to seek medical assistance in public health institutions or accredited private facilities operating with the national health service, for urgent or primary outpatient and hospital treatment, even on an ongoing basis, in case of sickness or accidents, as well as for preventive medical treatment for the safeguard of individual and collective health".
- <sup>316</sup> Carin Bjorngren Cuadra, Policies on Health Care for Undocumented Migrants in EU27 – Country report Italy, op. cit., p. 11.
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- <sup>319</sup> Patrick Taran, "Human Rights of Migrants: Challenges of the New Decade", International Migration, 2000, 38(6), p. 18.
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- <sup>321</sup> Kristina Touzenis, "Migration and human rights in Italy: prospects for the ICRMW", in Migration and human rights: the United Nations Convention on Migrant Workers' Rights, de Guchteneire, Paul, Antoine Pécoud and Ryszard Cholewinski, eds., Paris and Cambridge: UNESCO publishing and Cambridge University Press, 2009, p. 348.
- <sup>322</sup> Ibid., p. 348.
- <sup>323</sup> Law N°189 of 30 July 2002.
- <sup>324</sup> Decree-law of 6 September 2002.
- <sup>325</sup> Rima Al-Azar, Italian Immigration Policies – the metaphor of water, op. cit.
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- <sup>330</sup> Kristina Touzenis, "Migration and human rights in Italy: prospects for the ICRMW", op. cit., p. 345.
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- <sup>333</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Recital 13. Article 3.2 also reiterates this limitation.
- <sup>334</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Recital 12.
- <sup>335</sup> Marilyn O'Rourke, Legal prohibitions against employment discrimination available to migrant workers employed in Europe: A review of international instruments and national law in four selected countries, op. cit., p. 25 and following.
- <sup>336</sup> Article 25 of the ICRMW sets equality of treatment of all migrant workers with regard to remuneration ; conditions of work such as overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and any other conditions ; and terms of work such as minimum age of employment,

restrictions on home work and any other matters.

<sup>337</sup> Ryszard Cholewinski, Protection of the Human Rights of Migrant Workers and Members of their Families under the UN Migrant Workers Convention as a Tool to Enhance Development in the Country of Employment, UN Committee on Migrant Workers, Third Session, Day of General Discussion on “Protecting the rights of all migrant workers as a tool to enhance development”, <http://www2.ohchr.org/>, 2005, available at: <http://www2.ohchr.org/english/bodies/cmw/docs/cholewinski.doc>, p. 6, para. 11

<sup>338</sup> “States Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle by reason of any irregularity in their stay or employment. In particular, employers shall not be relieved of any legal or contractual obligation, nor shall their obligations be limited in any manner by reason of such irregularity.” Article 25.3 goes beyond the anti-discrimination principle based on nationality by grounding anti-discrimination on the irregularity of the stay or employment of the migrant worker.

<sup>339</sup> Marilyn O’Rourke, Legal prohibitions against employment discrimination available to migrant workers employed in Europe: A review of international instruments and national law in four selected countries, *op. cit.*, p. 29

<sup>340</sup> Khalid Koser, Study of Employment and Residence Permits for Migrant Workers in Major Countries of Destination, *op.cit.*, ILO, 2009, p. 14

<sup>341</sup> IOM, Laws for legal immigration in the 27 EU Member States, International Migration Law N° 16, International Organization for Migration, 2009, p. 346.

<sup>342</sup> Philip Martin, Towards effective temporary worker programmes: issues and challenges in industrial countries, International Migration Papers N° 89 ; International Labour Office, Geneva, ILO 2005, p. 33.

<sup>343</sup> Table 1: Non-national population, 2008, in Katya Vasileva, Citizens of European countries account for the majority of the foreign population in EU-27 in 2008, *op.cit.*, 94/2009, p. 3.

<sup>344</sup> Migration and Health – Challenges and Trends, Norwegian Directorate of Health, May 2009, available at: [http://hiderefer.com/?http://www.helsedirektoratet.no/vp/multimedia/archive/00133/Migration\\_and\\_health\\_133289a.PDF](http://hiderefer.com/?http://www.helsedirektoratet.no/vp/multimedia/archive/00133/Migration_and_health_133289a.PDF).

<sup>345</sup> Norwegian Directorate of Immigration, UDI, 28 January 2010, available online at: <http://www.udi.no/Norwegian-Directorate-of-Immigration/Oversiktsider/The-new-Immigration-Act-and-Immigration-Regulations/> .

<sup>346</sup> Immigration Act Chapter 3 and the Immigration Regulations Chapter 6. See also Skilled Workers Fact Sheet, The Directorate of Immigration (UDI), 4 October 2010, available online: [http://www.udi.no/Global/upload/Publikasjoner/FaktaArk/Faktaark\\_fagler\\_Skilled\\_workers-EN.pdf](http://www.udi.no/Global/upload/Publikasjoner/FaktaArk/Faktaark_fagler_Skilled_workers-EN.pdf).

<sup>347</sup> Family Immigration Fact Sheet, The Directorate of Immigration (UDI), 22 March 2010, available online: [http://www.udi.no/Global/upload/Publikasjoner/FaktaArk/Faktaark\\_Familie\\_Family\\_immigration-EN.pdf](http://www.udi.no/Global/upload/Publikasjoner/FaktaArk/Faktaark_Familie_Family_immigration-EN.pdf).

<sup>348</sup> This category comprises a single mother or father over the age of 60 without any dependents in the home country, a single child between 18 and 21 who used to live in Norway with a permit, a single child over 18 who would remain alone in the country of origin, a foster child under 18 under certain conditions, and a full sibling under the age of 18 who has no living parents or other care providers in his/her home country or country of residence.

<sup>349</sup> Skilled Jobseekers Fact Sheet, The Directorate of Immigration (UDI), 4 October 2010, available online: [http://www.udi.no/Global/upload/Publikasjoner/FaktaArk/Faktaark\\_Fagler\\_arbeidssoker-Skilled\\_jobseekers-EN.pdf](http://www.udi.no/Global/upload/Publikasjoner/FaktaArk/Faktaark_Fagler_arbeidssoker-Skilled_jobseekers-EN.pdf) .

<sup>350</sup> Visa Fact sheet, The Directorate of Immigration (UDI), 22 March 2010, available online: [http://www.udi.no/Global/upload/Publikasjoner/FaktaArk/Faktaark\\_Visum\\_Visa-EN.pdf](http://www.udi.no/Global/upload/Publikasjoner/FaktaArk/Faktaark_Visum_Visa-EN.pdf).

<sup>351</sup> Table 1: Non-national population, 2008, in Katya Vasileva, Citizens of European countries account for the majority of the foreign population in EU-27 in 2008, *op.cit.*, 94/2009, p. 3.

<sup>352</sup> See Table in Annex III.

<sup>353</sup> Dace Akule and al., Learning to Welcome: Integration of immigrants in Latvia & Poland, Migration Policy Group, p. 93-94, available online at: [http://www.migpolgroup.com/publications\\_detail.php?id=181](http://www.migpolgroup.com/publications_detail.php?id=181).

<sup>354</sup> PICUM, Undocumented Children in Europe: Invisible Victims of Immigration Restrictions, *op.cit.*, 2008, p. 16.

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<sup>356</sup> Act on Aliens of June 2003.

<sup>357</sup> Mirosław Bieniecki, Regularization of Immigrants in Poland: What was wrong with it and what should be done?, May 2008 ; available online at: <http://www.migrationonline.cz/e-library/?x=2094766>.

<sup>358</sup> *Ibid.*

<sup>359</sup> Dušan Drbohlav, Ágnes Hárs & Izabela Grabowska-Lusińska, eds., Experiencing immigration: Comparative analysis of the Czech Republic, Hungary and Poland, IDEA Working Paper, Warsaw: Centre for Migration Research, 2009, available online: [http://www.idea6fp.uw.edu.pl/pliki/WP14\\_Experiencing\\_immigration.pdf](http://www.idea6fp.uw.edu.pl/pliki/WP14_Experiencing_immigration.pdf), p. 73.

<sup>360</sup> Krystyna Iglicka and Magdalena Ziolek-Skrzypczak, EU Membership Highlights Poland’s Migration Challenges, September 2010, available online: [http://oppenheimer.mcgill.ca/IMG/pdf/EU\\_Membership\\_Highlights\\_Poland.pdf](http://oppenheimer.mcgill.ca/IMG/pdf/EU_Membership_Highlights_Poland.pdf).

<sup>361</sup> Vitorino, A. (ed.), Immigration: Opportunity or Threat? Recommendations of the Gulbenkian Immigration Forum, Estoril, Principia Editora, 2007, p. 21, quoted in J. Peixoto, and C. Sabino, Immigration, the labour market and policy in Portugal: trends and prospects, IDEA Working Paper, Warsaw: Center for Migration Research, 2009, p. 8.

<sup>362</sup> Table 1: Non-national population, 2008, in Katya Vasileva, Citizens of European countries account for the majority of the foreign population in EU-27 in 2008, *op.cit.*, 94/2009, p. 3.

<sup>363</sup> See Table in Annex III.

<sup>364</sup> Pedore Pita Barros and Isabel Medalho Pereira, Health Care and Health Outcomes of Migrants: Evidence from



Portugal, Human Developments Reports, Research Paper 2009/28, UNDP, 2009, p. 1.

<sup>365</sup> J. Peixoto, and C. Sabino, Immigration, the labour market and policy in Portugal: trends and prospects, IDEA Working Paper, Warsaw: Center for Migration Research, 2009, p. 45, available online: [http://www.idea6fp.uw.edu.pl/pliki/WP6\\_Portugal.pdf](http://www.idea6fp.uw.edu.pl/pliki/WP6_Portugal.pdf).

<sup>366</sup> This circular clarifies and develops Order N°. 25.360/2001, of 16 November, issued by the Ministry of Health, regarding access to the National Health Service by regular and irregular immigrants.

<sup>367</sup> J. Peixoto, and C. Sabino, Immigration, the labour market and policy in Portugal: trends and prospects, op. cit., p. 46.

<sup>368</sup> Act 23/2007 of 4 July 2007.

<sup>369</sup> Council Directive n. ° 2003/86/CE, of 22 September 2003, concerning family reunion.

<sup>370</sup> Council Directive n. ° 2003/109/CE, of 25 de November 2003, concerning the status of long-term resident to third-country residents.

<sup>371</sup> Joaquin Arango and others, The making of an immigration model: inflows, impacts and policies in Southern Europe, IDEA Working Papers, IDEA, 2009, available at: [http://www.idea6fp.uw.edu.pl/pliki/WP\\_9\\_Southern\\_countries\\_synthesis.pdf](http://www.idea6fp.uw.edu.pl/pliki/WP_9_Southern_countries_synthesis.pdf), p. 40.

<sup>372</sup> International Organization for Migration, Migration and the Economic Crisis in the European Union: Implications for policy, Brussels: IOM, 2010, p. 34.

<sup>373</sup> Art. 1, Portaria n.º 760/2009 de 16 de Julho, Diário da República, 1.ª série — N.º 136 — 16 de Julho de 2009

<sup>374</sup> Article 126, Act 23/2007.

<sup>375</sup> Article 98, Act 23/2007.

<sup>376</sup> Article 107, Act 23/2007.

<sup>377</sup> Joaquin Arango et al, The making of an immigration model: inflows, impacts and policies in Southern Europe, op. cit., p. 35.

<sup>378</sup> J. Peixoto, and C. Sabino, Immigration, the labour market and policy in Portugal: trends and prospects, op. cit., p. 44.

<sup>379</sup> Initially called High Commission for Immigration and Ethnic Minorities/ ACIME, it was recently renamed as High Commission for Immigration and Intercultural Dialogue (Alto Comissariado para a Imigração e Diálogo Intercultural – ACIDI). In 2002, it was changed into a public body and its scope of intervention has been broadened.

<sup>380</sup> <http://www.interculturaldialogue.eu/web/intercultural-dialogue-country-sheets.php?aid=115>.

<sup>381</sup> J. Peixoto, and C. Sabino, Immigration, the labour market and policy in Portugal: trends and prospects, op. cit., p. 47.

<sup>382</sup> René Plaetevoet and Marika Sidoti, Ratification of the UN Migrant Workers Convention in the European Union – Survey on the positions of governments and civil society actors, op.cit, p. 70.

<sup>383</sup> Resolution of the Council of Ministers n° 63-A/2007, of 3 May 2007.

<sup>384</sup> Annual Policy Report Portugal - European Migration Network, Serviço de Estrangeiros e Fronteiras, 2009, p. 46

<sup>385</sup> Handbook on Integration for Policy Makers and Practitioners, 2004 and 2010 editions.

<sup>386</sup> See: <http://www.integrationindex.eu/integrationindex/2509.html>.

<sup>387</sup> UNDP, Human Development Report 2009 – Overcoming Barriers: Human Mobility and Development, United Nations Development Programme, 2009.

<sup>388</sup> Table 1: Non-national population, 2008, in Katya Vasileva, Citizens of European countries account for the majority of the foreign population in EU-27 in 2008, op.cit., 94/2009, p. 3.

<sup>389</sup> Ley Orgánica 4 / 2000 of 11 January 2000.

<sup>390</sup> Organic Law 4/2000 on the rights and freedoms of foreign nationals in Spain and their social integration.

<sup>391</sup> Information was collected in the Annual Policy Report on Immigration and Asylum of Spain, European Migration Network, 2009.

<sup>392</sup> Preamble of the 2009 Organic Law, part IV.

<sup>393</sup> Case 236/2007 of 7 November and 259/2007 of 19 December.

<sup>394</sup> The right to free circulation is additionally protected in the Spanish Constitution (Art. 19) where it is not limited to regular migrant workers.

<sup>395</sup> Organic Law 4/2000, , op.cit.

<sup>396</sup> Although the 2009 Law excluded the possibility of taking into account income from social welfare, it created the possibility to take into account the income of the partner.

<sup>397</sup> “Por otra parte, España está firmemente comprometida con la defensa de los derechos humanos, por lo que los poderes públicos deben favorecer la plena integración de los inmigrantes en nuestro país y garantizar la convivencia y la cohesión social entre los inmigrantes y la población autóctona”.

<sup>398</sup> Establecer un marco de derechos y libertades de los extranjeros que garantice a todos el ejercicio pleno de los derechos fundamentales.

<sup>399</sup> Article 43 of the 1978 constitution. The general preamble to the 1986 general law on health states that “all Spanish citizens, as well as foreign citizens residing in the country, have the right to health and to healthcare.” Médecins du Monde Access to healthcare for undocumented migrants in 11 European countries, European Observatory on access to healthcare, September 2009, p. 19.

<sup>400</sup> Article 12 of the modified Organic Law 4/2000. This last condition is not required in a number of Autonomous Regions such as Andalucía, the Valencian Community and Murcia. Ibid. p. 20.

<sup>401</sup> Although access in practice to health care for migrant children was mentioned by the Committee on the Rights



of the Child as an area of concern: Committee on the Rights of the Child, Concluding Observations, Spain, CRC/C/ESP/CO/3-4, 29 September 2010, para. 25.

<sup>402</sup> Carin Björngren Cuadra, Policies on Health Care for Undocumented Migrants in EU27 – Country report Spain, Health Care in NOWHERELAND, April 2010, p. 11.

<sup>403</sup> Ibid., p. 7.

<sup>404</sup> Council of Europe, Regularisation programmes for irregular migrants, Report, Doc. 11350, Council of Europe, Strasbourg, July 2007.

<sup>405</sup> Regularization Programme of Spain, 2005, ILO online Good Practices on Labour Migration policies and Programmes, [http://www.ilo.org/dyn/migpractice/migmain.showPractice?p\\_lang=en&p\\_practice\\_id=23](http://www.ilo.org/dyn/migpractice/migmain.showPractice?p_lang=en&p_practice_id=23).

<sup>406</sup> Adopted by Royal Decree Law N°4/2008 of 19 September 2008, the Plan de Retorno Voluntario was further described in the Real Decreto 1800/2008 of 3 November 2008.

<sup>407</sup> María Pabón López and Roxana A. Davis, Immigration Law Spanish- Style II: A Study of Spain's Voluntary Immigrant Return Plan and Circular Migration, [http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=maria\\_lopez](http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=maria_lopez).

<sup>408</sup> Ibid.

<sup>409</sup> European Agency for Safety and Health at Work, Literature Study On Migrant Workers, 2006, p. 42.

<sup>410</sup> The GRECO Plan of the Ministry of Interior of Spain, 2005, ILO online Good Practices on Labour Migration policies and Programmes, [http://www.ilo.org/dyn/migpractice/migmain.showPractice?p\\_lang=en&p\\_practice\\_id=10](http://www.ilo.org/dyn/migpractice/migmain.showPractice?p_lang=en&p_practice_id=10).

<sup>411</sup> Strategic Plan for Citizenship and Integration 2007 – 2010 - Executive Summary, p. 15.

<sup>412</sup> Ibid., p. 9.

<sup>413</sup> Committee on the Rights of the Child, Concluding Observations, Spain, CRC/C/ESP/CO/3-4, 29 September 2010, para. 5.

<sup>414</sup> Table 1: Non-national population, 2008, in Katya Vasilev, Citizens of European countries account for the majority of the foreign population in EU-27 in 2008, op.cit., 94/2009, p. 3.

<sup>415</sup> Carin Björngren Cuadra, Policies on Health Care for Undocumented Migrants in EU27 – Country report Sweden, Health Care in NOWHERELAND, April 2010, p. 10.

<sup>416</sup> CESCR, Concluding Observations, Sweden, E/C.12/SWE/CO/5, 1 December 2008.

<sup>417</sup> Carin Björngren Cuadra, Policies on Health Care for Undocumented Migrants in EU27 – Country report Belgium, op. cit., p. 6-7.

<sup>418</sup> MIPEX (Migrant Integration Policy Index), British Council and Migration Policy Group, 2007, p. 4, available online at: <http://www.integrationindex.eu/>.

<sup>419</sup> MIPEX, op. cit., p. 172.

<sup>420</sup> MIPEX, op. cit., p. 173.

<sup>421</sup> Migration policy, Ju 09.06e, Fact sheet, Ministry of Justice, March 2010, available online at: <http://www.sweden.gov.se/content/1/c6/14/08/34/d29dec99.pdf>.

<sup>422</sup> Migration and asylum Policy, Government Offices of Sweden Website, <http://www.sweden.gov.se/sb/d/3083>.

<sup>423</sup> Migration policy, Ju 09.06e, p. 3.

<sup>424</sup> Migration policy, Ju 10.08e, Fact sheet, Ministry of Justice, September 2010, p. 1, available online at: <http://www.sweden.gov.se/content/1/c6/15/26/50/d3ec05c1.pdf>

<sup>425</sup> Migration policy, Ju 10.08e, p. 3.

<sup>426</sup> Migration policy, Ju 10.08e, p. 3.

<sup>427</sup> Press Release, 15 October 2010, [http://www.nihrc.org/index.php?page=press\\_news\\_details&category\\_id=2&press\\_id=430&Itemid=65](http://www.nihrc.org/index.php?page=press_news_details&category_id=2&press_id=430&Itemid=65).

<sup>428</sup> Table 1: Non-national population, 2008, in Katya Vasileva, Citizens of European countries account for the majority of the foreign population in EU-27 in 2008, op.cit., 94/2009, p. 3.

<sup>429</sup> Statutory Instrument 1989 N°. 306 The National Health Service (Charges to Overseas Visitors) Regulations 1989, Article 3. Available online: <http://www.legislation.gov.uk/uksi/1989/306/made>.

<sup>430</sup> Implementing the Overseas Visitors Hospital Charging Regulations, Guidance for NHS trust Hospitals in England, National Health Service, 2007, Para. 1.3.

<sup>431</sup> Ibid., p. 9, para. 3.1.

<sup>432</sup> Cuadra, Carin Björngren. Policies on Health Care for Undocumented Migrants in EU27, Country Report United Kingdom, Health Care in NOWHERELAND, 2009, p. 13.

<sup>433</sup> The ICRMW applies to asylum seekers, as they are not refugees and therefore are not excluded from the application of the ICRMW according to Article 3. See the Concluding Observations of the Committee on Migrant Workers concerning the Syrian Arab Republic, CMW/C/SYR/CO/1 p. 5, para. 30.

<sup>434</sup> Failed asylum seekers and ordinary/lawful residence ; and when to provide treatment for those who are chargeable, Department of Health, 2 April 2009.

<sup>435</sup> European Commission, Integrating Immigrant Children into Schools in Europe, 2004, p. 33, and PICUM, Undocumented Children in Europe: Invisible Victims of Immigration Restrictions, Platform for International Cooperation on Undocumented Migrants, 2008, p. 16.

- <sup>436</sup> Study on practices in the area of regularisation of illegally staying third country nationals in the Member States of the EU, REGINE, Regularisations in Europe, Appendix A – Country Studies, Ref. JLS/B4/2007/05, Vienna : 2009, p. 111.
- <sup>437</sup> Ibid., p. 106.
- <sup>438</sup> Ibid., p. 107.
- <sup>439</sup> Apap et al., 2000, CEDH 2 May 1997.
- <sup>440</sup> Study on practices in the area of regularisation of illegally staying third country nationals in the Member States of the EU, op. cit., p. 108.
- <sup>441</sup> Also because criteria are often difficult to meet or because there is a need for a permanent regularization mechanism in the UK. See Migration Work and Migrants' Rights Network, Irregular Migrants: The urgent need of a new approach, May 2009, p. 22.
- <sup>442</sup> Carin Bjorngren Cuadra, Policies on Health Care for Undocumented Migrants in EU27 – Country report United Kingdom, op.cit., April 2010, p. 7.
- <sup>443</sup> Khalid Koser, Study of Employment and residence Permits for Migrant Workers in Major Countries of Destination, op.cit., 2009, p. 25.
- <sup>444</sup> IOM, Laws for legal immigration in the 27 EU Member States, International Migration Law N° 16, International Organization for Migration, 2009, p. 521.
- <sup>445</sup> Article 44.3 of the ICRMW reads as follows: "States of employment, on humanitarian grounds, shall favourably consider granting equal treatment, as set forth in paragraph 2 of the present article, to other family members of migrant workers".
- <sup>446</sup> Difference between "right to work/access to work" and "right to freely choose their remunerated activity". Of course, there are some limitations, foreseen in the ICRMW Article 53.2.
- <sup>447</sup> In addition to the conditions of holding a valid visa (between £120 and 690 and, as of November 2010, to speak English for family members of permanent foreign resident in the UK or British citizens.
- <sup>448</sup> Points Based System (Dependent) – Policy Guidance, Home Office, UK Border Agency, July 2010 ; available at <http://www.ukba.homeoffice.gov.uk/sitecontent/applicationforms/pbs/pbsdependantspolicy1.pdf> .
- <sup>449</sup> To illustrate the level of requirement, a Tier 2 migrant worker with a spouse and two children must prove that they hold £2,399 (€2,737) in available funds when they submit their application together. Points Based System (Dependent) – Policy Guidance, Home Office, UK Border Agency, July 2010, p. 10.
- <sup>450</sup> Home Office, UK Border Agency's Website: <http://www.ukba.homeoffice.gov.uk/aboutus/workingwithus/indbodies/chiefinspector/>.
- <sup>451</sup> Criteria for Core Inspection Programme, The Office of the Chief Inspector of the UK Border Agency, April 2009, [http://icinspector.independent.gov.uk/wp-content/uploads/2010/03/Criteria\\_for\\_core\\_programme.pdf](http://icinspector.independent.gov.uk/wp-content/uploads/2010/03/Criteria_for_core_programme.pdf).

