Constructing a Rights-Based Legal Framework for the Regulation of Labour Migration in the Mediterranean Region

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Workshop 2
The Socio-Legal Consequences of Migration in the Mediterranean Region
Abstract

A rights-based legal framework for the regulation of labour migration is supported internationally within the UN system by the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, relevant ILO instruments, and more recently by the ILO plan of action for migrant workers adopted by the International Labour Conference in June 2004. A number of countries south and north of the Mediterranean are already parties to some of these instruments, even though their implementation has arguably been less successful. A rights-based approach is not so evident, however, in the activities of other pertinent actors in the region, such as the European Union, and in the intergovernmental processes occurring there (i.e. the Barcelona Process under EU auspices and the “5 + 5 Dialogue” on Migration in the Western Mediterranean).

This research paper examines whether the construction of a robust legal framework to regulate labour migration in the region, focused more on the migrant worker and his or her needs rather than on the economic forces that drive migration, is a feasible project. What concrete advantages would such a framework have for migrant workers and their families? Would it contribute to the reduction of irregular migration for employment in the region? Might the successful establishment of such a framework eventually lead to more orderly movements between the south and north shores of the Mediterranean and thus become an important factor in the stimulation of economic growth and prosperity in the region as a whole?
1. Introduction

International labour migration in Europe, and especially in the European Union (EU), is climbing the political agenda. The demographic deficit in Europe, characterized by low birth rates and aging populations and compounded by labour shortages in both skilled and lower-skilled jobs, has led a number of governments in the EU to seek labour from overseas as one of the solutions to this phenomenon. This solution is now also being promoted by the European Commission in its recent policy plan on legal migration, which identifies the current situation and prospects of labour markets in the EU as reflecting a “need scenario”.¹ A critical issue, however, is less the growing recognition that migrant workers are needed for all sectors of the economy but more under what conditions will they be expected to work in the destination country. In the era of globalization, where employers, in order to compete in the global market, favour greater flexibility in working practices and more temporary employment,² the risk exists that decent work for all categories of migrant workers, and particularly those in low-skilled jobs, will be few and far between and that their situation, if indeed they are lawfully employed, will not differ much from the ranks of irregular migrant workers who are already found in many parts of Europe.

It is not in dispute that human rights are applicable to all persons regardless of nationality or legal status. A specific rights-based legal framework for the regulation of labour migration is supported internationally within the UN system by the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the international labour law of the International Labour Organization (ILO), including the specific instruments adopted to protect migrant workers, and more recently in the ILO plan of action for migrant workers adopted by the International Labour Conference in June 2004. A number of countries south and north of the Mediterranean are already parties to some of these instruments, even though their implementation has arguably been less successful.³ In addition, at the regional level, Council of Europe instruments provide a network of human rights safeguards, and, in the European Convention on Human Rights (ECHR),⁴ this protection is extended to all persons who find themselves within the territory of the 46 Member States belonging to the Council of Europe. However, a rights-based

³ See Annex 1.
⁴ Rome, 4 November 1959; European Treaty Series (ETS) No. 5; entry into force 3 September 1953; ratified by 46 States Parties.
approach is not so evident in the activities of other pertinent actors in the region, such as the EU as well as in the intergovernmental processes occurring there (i.e. the Barcelona Process and European Neighbourhood Policy under EU auspices and the “5 + 5 Dialogue” on Migration in the Western Mediterranean).

This paper analyses the rights-based legal framework that is currently applicable to migrant workers in the Mediterranean and MENA region at the international and regional levels. It then provides a critique of the increasingly influential EU law and policy in this area, both the migration measures adopted for internal EU consumption and the external dimensions of this policy projected into the EU neighbourhood, which encompasses Central and Eastern European countries beyond the new Member States in the enlarged EU of 25 as well as the countries on the southern shores of the Mediterranean in the MENA region. The paper examines whether the construction of a robust legal framework to regulate labour migration in the region, which focuses on the migrant worker and his or her needs rather than on the economic forces that drive labour migration, is at all possible, or whether a more subtle approach is preferable, which aims at mainstreaming more comprehensive human rights safeguards into both the legal and non-legally binding processes that are occurring in the region.

2. Rights-based Legal Framework for the Protection of Migrant Workers

The international migration of persons for employment is not only characterized by out-migration from the Mahgreb and other parts of the MENA region, such as the desperate irregular migration taking place across the Mediterranean that is often highlighted in the media when tragedies occur at sea, or the legal migration of migrants workers from North Africa to southern European countries in particular, but also by labour migration to and within the region, such as the transit migration from sub-Saharan Africa, the employment of temporary workers and female domestic workers in Israel and other parts of the Middle East, as well as intra-regional migration to countries such as Libya. The normative framework applicable to migration for employment from and within the Mediterranean and MENA region is generally regulated by international and regional norms concerned with the

protection of the human and labour rights of migrant workers and the EU framework, although there are also bilateral labour migration arrangements between developing sending countries in the region and developed receiving countries.\(^6\)

Migrant workers constitute a particularly vulnerable group in human rights terms, particularly when they find themselves in an irregular or undocumented situation in the country of employment, which is a significant feature of labour migration to countries on the northern shores of the Mediterranean. It is not surprising therefore that their protection during the whole process of labour migration, but particularly while in the country of employment, is considered a principal concern of the international and regional normative framework that has been developed to date. As discussed below, the international and regional human rights protection regimes are applicable, with few exceptions, to all persons regardless of their nationality and legal status, and thus encompass migrant workers and their families. The same is true of international labour law as found in the numerous Conventions adopted by the ILO.

### 2.1 International Human Rights Law

The international protection of human rights is organized on three levels. Firstly, there is the protection afforded under the UN Charter-based organs. The Charter-based system of human rights protection includes three mechanisms:\(^7\) possibilities for bringing complaints before the Commission on Human Rights under the confidential 1503 procedure in “situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the Commission”\(^8\); the 1235 procedure by which the Commission can hold an annual public debate focusing on gross violations in a number of countries;\(^9\) and the designation of a thematic rapporteur or working group to consider violations of human rights relating to a specific theme. In this regard, in 1999, at its 55\(^{th}\) Session, the Commission appointed a Special Rapporteur for the human rights of migrants. The Special Rapporteur was appointed for an initial three-year period with the mandate to examine “ways and means to overcome the obstacles existing to the full and effective protection of the human rights of this vulnerable group, including obstacles and difficulties for the return of migrants who are non-documented or in an irregular situation”.\(^10\)

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\(^6\) E.g. Spain and Morocco.
\(^8\) UN ECOSOC Res. 1503 (XLVIII) (1970).
\(^9\) UN ECOSOC Res. 1235 (XLII) (1967).
\(^10\) CHR Res. 1999/44 of 27 April 1999 (adopted without a vote), para. 3.
encompasses a number of functions, which, bearing in mind that many migrants are women, include the need “to take into account a gender perspective when requesting and analysing information, as well as to give special attention to the occurrence of multiple discrimination and violence against migrant women”. The mandate of has now been extended on two occasions. The first Special Rapporteur was Ms. Gabriela Rodríguez Pizarro (Costa Rica) (1999-2005) and Mr. Jorge Bustamente (Mexico) is the current incumbent. To date, the Special Rapporteur has issued six general reports, which have addressed a number of issues of relevance to the region, such as the poor working and living conditions of migrant workers in El Ejido (Almería) in the Andalusia region of Spain and the deaths of irregular migrants in a shipwreck off the Moroccan coast. The Special Rapporteur has also conducted a number of country visits, including visits to Italy, Morocco, and Spain.

Secondly, there are now seven core international treaties addressing human rights concerns. Two of these treaties, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both adopted in 1966, together with the Universal Declaration of Human Rights (UDHR) of 1948, comprise the so-called International Bill of Rights. While the UDHR is not a legally binding treaty, it is considered as the forerunner to the ICCPR and ICESCR and most of its provisions are widely accepted today as constituting International Customary Law. The other five core human rights treaties concern specific thematic issues or the protection of vulnerable groups of persons: International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1965; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) 1984; Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979; Convention on the Rights of the

11 CHR Res. 1999/44, *ibid*, para. 3. The other functions are: (a) To request and receive information from all relevant sources, including migrants themselves, on violations of the human rights of migrants and their families; (b) To formulate appropriate recommendations to prevent and remedy violations of the human rights of migrants, wherever they may occur; (c) To promote the effective application of relevant international norms and standards on the issue; (d) To recommend actions and measures applicable at the national, regional and international levels to eliminate violations of the human rights of migrants.
16 With the exception perhaps of the right to seek asylum in Article 14 UDHR, which is not found subsequently in the ICCPR or ICESCR or in any other of the core human rights instruments, although it is arguable that this right is the *raison d’être* of the international protection of refugees.
Child (CRC) 1989; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) 1990. While the ICMW is the only core human rights treaty that focuses specifically on the protection of non-citizens, clearly the other human rights instruments, with the exception of a few provisions, are also applicable to migrants. Indeed, this position was underscored only recently by the Sub-Commission’s Special Rapporteur on the human rights of non-citizens:

Based on a review of international human rights law, the Special Rapporteur has concluded that all persons should by virtue of their essential humanity enjoy all human rights unless exceptional distinctions, for example, between citizens and non-citizens, serve a legitimate State objective and are proportional to the achievement of that objective.

States Parties’ compliance with core international human rights instruments is monitored by bodies set up under the treaties concerned which consider periodic State reports and issue Concluding Observations. Five of the instruments also provide for individual and inter-State complaints mechanisms.

Thirdly, human rights are also protected on the regional level where political, social and cultural similarities among the participating States usually facilitate consensus on the establishment of stronger enforcement mechanisms. The regional system for the protection of human rights in Europe and particularly its application to migrants from the southern shores of the Mediterranean is considered in Section 2.3 below.

Human rights instruments, both at the international and regional level, apply equally to citizens and non-citizens with few exceptions, such as the enjoyment of political rights.

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18 Sub-Commission on the Promotion and Protection of Human Rights, which is a subsidiary body of the Commission on Human Rights.


20 With the exception of the Committee on Economic, Social and Cultural Rights, established by UN ECOSOC Res. 1985/17 of 28 May 1985.

21 ICCPR, ICERD, CAT, CEDAW and the ICMW. The individual complaints mechanism under CEDAW has only recently become operational, with the entry into force of the Optional Protocol (G.A. Res. A/54/4 of 6 October 1999; entry into force 22 December 2000), while no State parties to date have made a declaration under Article 77 ICMW recognizing the competence of the Migrant Workers Committee to receive and consider individual complaints.
defined usually in terms of the right to vote and stand for political office. Consequently, migrants are generally entitled to the full range of civil and political and economic, social and cultural rights on equal terms with nationals. While the principle of equality and non-discrimination inherently allows for distinctions to be made between different groups of persons, its proper application means distinctions on the ground of a person’s nationality or legal status are impermissible unless justified by a valid and legitimate State objective and applied proportionally to that objective.

Unfortunately, a considerable gulf exists between the rhetoric of the universal application of human rights, in terms of both their geographical and personal scope, and the enjoyment of these rights in practice. This gulf is accentuated in respect of migrants who are more vulnerable to human rights abuses because they are not citizens of the country in which they reside and particularly if they are present in the territory on an irregular or undocumented basis. Being also of a different race or ethnicity or being a woman in exploitative or vulnerable employment, such as sex work or domestic work, often results in further serious abuses. Consequently, the effective application and implementation of the principle of non-discrimination on the grounds of race, ethnic origin and sex is particularly important in respect of migrants. As recognized in the October 2005 report of the Global Commission on International Migration, there is a need to intensify efforts across the board to ensure that the human rights commitments States have entered into at the international and regional level are effectively put into practice on the basis of the non-discrimination principle.22

The particular vulnerability of migrants places them at risk of a violation of a number of fundamental civil and political rights. The accentuated risks of suffering discrimination on the grounds of race, ethnicity, sex and nationality, both at the hands of officials and the general population in the destination country and during the migration process generally, have already been referred to. The dangers migrants encounter in this process, particularly at the hands of traffickers and smugglers, can put their lives at risk23 or lead them to experience conditions akin to slavery, debt-bondage or forced labour practices, which are outlawed in international human rights law and international labour law.24 Such conditions may also

22 Global Commission on International Migration (GCIM), Migration in an interconnected world: New directions for action (GCIM, October 2005), ch 5.
23 For the right to life, see Article 3 UDHR, Article 6(1) ICCPR and Article 4(1) ACHR.
24 Article 4 UDHR: “No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms”. See also Article 8(1) and (2) ICCPR and the general principle enunciated in Article 8(3) ICCPR that “[n]o one shall be required to perform forced or compulsory labour”. For the ILO instruments abolishing forced labour, see Section 2.2 below.
amount to inhuman or degrading treatment. It is important to underline the absoluteness of such guarantees, which international human rights law views as rights that cannot be derogated from under any circumstances, including during time of war or other public emergency situations that threaten the life of democratic nations. While derogation from rights such as the right to security and liberty of the person is permissible, this can only occur under strict conditions that respect the principles of non-discrimination and proportionality. This was illustrated most vividly in a recent case of the United Kingdom’s highest court, the House of Lords, which ruled that the Government’s potentially indefinite detention of foreign terrorist suspects, some of whom originated from Mahgreb countries, was not an acceptable derogation from this right under the ECHR. The right to liberty and security of person in the ICCPR and EHCR can however be limited under certain conditions, particularly when the individual concerned is arrested, suspected or convicted of a crime. Detention of migrants apprehended for clandestine entry or for overstaying the period of validity of their visa or residence permit with a view to their eventual expulsion is practiced by many governments and is explicitly permitted in the European context. However, arbitrary arrest and detention is expressly prohibited in international and European human rights law and migrants’ different nationality or lack of a legal status in the destination country cannot excuse States from their obligations under international law to ensure due process guarantees and dignified and humane treatment of migrants while they are held in detention. In particular, the prohibition on the collective expulsion of non-nationals is arguably a recognized principle of International Customary Law, which also finds expression in the ICMW and the ECHR. Indeed, the ICMW is the most protective instrument of irregular migrants in international human rights law and explicitly guarantees them not only the basic human rights found in the other more general instruments but also affords them additional rights, such as elaborate individualized protection against expulsion, which is limited to lawfully resident migrants.

25 Article 5 UDHR; Article 7 ICCPR.
26 Article 4 ICCPR; Article 27 ACHR. See also Article 15 ECHR.
28 Article 9 ICCPR; Article 5 ECHR.
29 E.g. Article 5(1)(f) ECHR.
30 Article 9 UDHR; Article 9(1) ICCPR; Article 5 ECHR.
31 Articles 9(4) and 10(1) ICCPR; Article 5 ECHR.
32 Article 22(1) ICMW and Article 4 of Protocol No. 4 to the ECHR. See also Article 22(9) of the American Convention on Human Rights (ACHR).
33 Articles 22(2)-(9) ICMW.
in other instruments, such as the ICCPR and the ECHR. This question is discussed further in Section 2.3 below.

The equal importance attached to the protection of civil and political rights and economic, social and cultural rights and the interdependence of both sets of rights was confirmed by the international community of States in the 1993 Vienna Declaration and Programme of Action on human rights. Generally-speaking, international and regional human rights law also guarantees the economic, social and cultural rights of migrants on an equal footing with nationals. This basic principle constitutes an important starting-point given that States often consider that in practice they are justified in restricting the access of migrants to these rights on the grounds that they need to ring-fence their welfare systems from abusive claims and, increasingly, as a means of attempting to deter irregular migration. However, such actions must be justified within the narrow constraints of the non-discrimination principle which, as noted above, may condone distinctions between groups of persons but only if they are carefully crafted to meet a legitimate State objective. The ICESCR is the widely accepted international human rights instrument specifically dedicated to the protection of economic, social and cultural rights. While this treaty contains no individual or inter-State complaints mechanism, the body responsible for monitoring and supervising State party compliance with the ICESCR, the Committee on Economic, Social and Cultural Rights (CESCR), has played a pivotal role, especially by way of its General Comments, in explaining the nature of State party obligations under the ICESCR and articulating the meaning of the specific rights protected. The CESCR has underlined that the “progressive” nature of obligations in the ICESCR does not excuse States Parties from a minimum core commitment to ensure that the satisfaction of a minimum level of each of the rights in the ICESCR is guaranteed immediately to all persons within their jurisdiction, citizens and non-citizens alike. Indeed, the principle of non-discrimination is an integral element of the minimum core content of all economic, social and cultural rights. The only permissible distinctions between nationals and migrants are recognized explicitly in the ICESCR in Article 2(3), which permits developing countries to limit the economic rights of

34 Article 13 ICCPR: Article 1 of Protocol No. 7 to the ECHR.
35 Vienna Declaration and Programme of Action (http://www.ohchr.org/english/law/vienna.htm), para. 5: “All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis”.
36 While not legally binding, General Comments or General Recommendations issued by the human rights treaty bodies constitute authoritative interpretations of the provisions of international human rights treaties.
37 UN, ECOSOC, CESCR, 5th Session, General Comment 3 on the nature of state parties obligations: Article 2(1) ICESCR (adopted on 14 December 1999), (http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/94b6baf59b43a424e12563ed0052b664?Opendocument), para. 10.
non-nationals within their territory,\textsuperscript{38} and implicitly with reference to the right to work in Article 6 ICESCR. However, in its most recent General Comment on the right to work, the Committee has underlined that “[t]he principle of non-discrimination as set out in article 2.2 of the Covenant, and in article 7 of the [ICMW], should apply in relation to employment opportunities for migrant workers and their families”,\textsuperscript{39} which means clearly that distinctions between nationals and non-nationals with regard to access to employment can only be justified with a view to meeting legitimate State objectives and in accordance with the proportionality principle. All other social rights, such as the right to just and favourable conditions of work, trade union rights, social security, the right to an adequate standard of living, including adequate food, clothing and housing, and the rights to health and education\textsuperscript{40} are applicable to non-citizens on an equal basis with nationals, a position also confirmed by the CESCR’s General Comments on the provisions in question.\textsuperscript{41} Indeed, the CESCR has underlined on a number of occasions the interdependence of economic and social rights with one another as well as with civil and political rights. For example, satisfaction of the right to health, understood in a holistic sense to include preventive, curative and palliative health care and not merely access to mere medical treatment, cannot be fully realized if the person concerned is denied access to adequate food or housing or employment.\textsuperscript{42} Health care is also intrinsically tied to the right to life, but the effective enjoyment of other civil and political rights, such as freedom of assembly, association and expression, are also closely related with adequate health care provision, housing conditions and educational guarantees. As far as cultural rights are concerned, the ICESCR provides for the right of everyone to take part in cultural life.\textsuperscript{43} Moreover, the Human Rights Committee, responsible for monitoring the application of the ICCPR, has underlined that the specific guarantees concerned with the

\textsuperscript{38} Article 2(3) ICESCR: “Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.”

\textsuperscript{39} UN, ECOSOC, CESCR, 35\textsuperscript{th} Session, General Comment 18 on the right to work: Article 6 ICESCR (adopted on 24 November 2005), UN Doc. E/C.12/2005/ (http://www.ohchr.org/english/bodies/cescr/docs/gc18.doc), para. 18.

\textsuperscript{40} Articles 7, 8, 9, 11, 12 and 13 ICESCR respectively

\textsuperscript{41} See e.g. UN, ECOSOC, CESCR, 22\textsuperscript{nd} Session, General Comment 14 on the right to the highest attainable standard of health: Article 12 ICESCR (adopted on 11 August 2000), UN Doc. E/C.12/2004/5 (http://www.ohchr.org/tbs/doc.nsf{(Symbol)}/40d009901335860e2c1256915005090be?OpenDocument), para. 34.

\textsuperscript{42} Cf. ibid, para. 3.

\textsuperscript{43} Article 15(1)(a) ICESCR.
protection of persons belonging to ethnic, cultural and linguistic minorities in Article 27 ICCPR also apply to non-citizens.44

2.1.1 UN Convention on Migrant Workers

As observed above, there is now one core UN human rights instrument devoted exclusively to the protection of migrant workers. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) 199045 came into force in July 2003 after having obtained its twentieth ratification. As with the specific ILO instruments protecting migrant workers (see Section 2.2 below), the ICMW covers the entire labour migration continuum, although its scope is considerably broader and the provisions are more detailed. The ICMW is by far the lengthiest core international human rights instrument containing 93 articles. In Part III, the ICMW underlines in explicit terms that all human rights, both civil and political rights and economic, social and cultural rights, which are found in other more general human rights instruments, apply to all persons, including migrant workers and members of their families irrespective of their legal status.

Unfortunately, the attempt to articulate the economic, social and cultural rights of migrants in the ICMW has not necessarily followed the clear principled rubric enunciated in the ICESCR and articulated further by the CESCR in its work. While the ICMW is commendable in terms of its attempt to articulate the universal personal scope of human rights by affording explicit guarantees to irregular migrants, shortcomings exist particularly regarding its approach to social rights. For example, irregular migrants are only guaranteed access to urgent medical care,46 which falls short of the more holistic understanding of the right to health in the ICESCR, and there is no explicit right to shelter or more extensive housing guarantees, although in this regard Article 81 ICMW is particularly important because it subjects the standards in the ICMW to more favourable provisions found in other multilateral or bilateral instruments as well as national legislation or practice. Despite these discrepancies, the challenge that remains for policymakers at all levels of government and other stakeholders, such as trade unions and NGOs, is how to effectively secure economic, social and cultural rights in law and practice to various categories of migrants, including

45 For a detailed analysis of the ICMW, see R. Cholewinski, Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment (Oxford: Clarendon Press, 1997), ch. 4.
46 Article 28 ICMW.
those with secure residence status, temporary status as well as migrants in an irregular situation.  

Part IV of the ICMW only applies to regular migrant workers and affords them more extensive rights. For example, it contains State obligations to facilitate family reunion for migrant workers and to ensure their equality of treatment with nationals in respect of access to housing, including social housing. In Part V, the ICMW permits States Parties to limit the rights of particular categories of migrant workers, including temporary migrants such as seasonal workers, project-tied workers or specified-employment workers. Part VI of the ICMW imposes obligations on all States Parties to consult and cooperate with one another to ensure that international labour migration takes place in sound, equitable, humane and lawful conditions. It includes State obligations to collaborate with a view to preventing and eliminating irregular migration, including the imposition of sanctions on those who exploit irregular migrants, such as traffickers, smugglers and employers. This Part, therefore, dispels the myth that the ICMW somehow promotes irregular migration. On the contrary, the ICMW sees the implementation of the provisions relating to the protection of all migrant workers, including irregular migrants, as a means to the elimination of this phenomenon. However, the sovereignty of States to decide on the admission of foreigners into their territory is not affected by the ICMW, which is only concerned with the treatment of migrant workers and their families during the migration process. To date, 34 States Parties have ratified the ICMW, although none of them are major receiving countries. As documented in Annex I, significant migrant sending and transit countries have accepted the ICMW in the Mediterranean and MENA region: Algeria, Egypt, Libya, Morocco, Syria, and Turkey.

2.2 International Labour Law

When considering the application of international labour law to all persons, including migrant workers and members of their families, it is important to note that non-ratification of

47 With regard to the difficult question of securing the rights of irregular migrants, the NGO, Platform for International Cooperation on Undocumented Migrants (PICUM), recently published an innovative report advancing ten recommendations how civil society (NGOs, trade unions and other organisations) can take action to protect the rights of irregular migrant workers. PICUM, Ten Ways to Protect Undocumented Migrant Workers (Brussels: PICUM, October 2005). The report is available from http://www.picum.org/.
48 Articles 44(2) and 43(1)(d) ICMW.
49 Article 68(1) ICMW.
50 Recital 14 ICMW: “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”.
51 Article 79 ICMW.
the eight fundamental ILO conventions, which are concerned with the abolition of forced labour and child labour, trade union rights and non-discrimination, does not excuse Member States from the general obligations found therein. In June 1998, the International Labour Conference adopted the ILO Declaration on Fundamental Principles and Rights at Work, which underscored the special importance of the eight core conventions by observing that ILO Member States, including those that have not ratified the instruments in question, by virtue of their membership in the Organization are required to respect, promote and realize in good faith the principles concerning the fundamental rights which are the subject of these conventions.

For example, the right to freedom of association and collective bargaining is considered a fundamental principle in the ILO Constitution as well as comprising two of the eight fundamental ILO conventions, and the ILO’s Committee on Freedom of Association, which is responsible for monitoring Member States’ compliance with this principle, concluded in 2001 that the Foreigners’ Law in Spain constituted an infringement of the unequivocal right to establish and join trade unions in Article 2 of ILO Convention No. 87 on Freedom of Association and Collective Bargaining by making its exercise dependent on authorization of the migrant’s presence or status in Spain.

The ILO instruments discussed below relating to migrant workers are not considered as core ILO conventions, although the Declaration underscores the need to devote “special

52 Conventions No. 29 of 1930 concerning Forced or Compulsory Labour and No. 105 of 1957 concerning the Abolition of Forced Labour; No. 138 of 1973 concerning Minimum Age for Admission to Employment and No. 182 of 1999 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour; No. 87 of 1948 concerning Freedom of Association and Protection of the Right to Organize and Protection of the Right to Organize and No. 98 of 1949 concerning the Application of the Principles of the Right to Organize and Bargain Collectively; No. 100 of 1951 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value and No. 111 of 1958 concerning Discrimination in respect of Employment and Occupation.


54 Ibid. para. 2. The Declaration contains a “promotional follow-up” enabling the ILO Governing Body to request, on an annual basis, reports from those ILO Member States which have not ratified these conventions to supply information on the efforts undertaken to give effect to the fundamental rights and freedoms (ibid., Annex, Part I).

55 See Case No. 2121 (23 March 2001): Complaint by the General Union of Workers of Spain (UGT) - Denial of the right to organize and strike, freedom of assembly and association, the right to demonstrate and collective bargaining rights to “irregular” foreign workers. ILO, Committee on Freedom of Association, Report No. 327, Vol. LXXXV, 2002, Series B, No. 1, para. 561; also available from http://webfusion.ilo.org/public/db/standards/normes/libsynd/index.cfm?hdroff=1 Article 2 of Convention No. 87 reads: “Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization”. Emphasis added.
attention to the problems of persons with special needs, particularly the unemployed and migrant workers”.

ILO Conventions No. 97 of 1949 (C97) and No. 143 of 1975 (C143) are the specific ILO instruments aimed at the protection of migrant workers and are both supported by non-binding Recommendations. These conventions are concerned not only with the protection of migrant workers while in the country of employment but also apply to the whole labour migration continuum from entry to return. C97 covers the conditions governing the orderly recruitment of migrant workers and also enunciates the principle of their equal treatment with national workers in respect of working conditions, trade union membership and enjoyment of the benefits of collective bargaining, accommodation, social security, employment taxes and legal proceedings relating to matters outlined in the Convention. Its other objective is to ensure the orderly flow of migrants from countries with labour surpluses to countries with labour shortages, which is reflected in a number of its provisions as well as the Annexes. C143 is broader in scope and devotes a whole part to the phenomenon of irregular migration and to inter-State collaborative measures considered necessary to prevent it. In keeping with the ILO’s ethical prerogative of social justice and protecting all workers in their working environment, Article 1 of C143 imposes an obligation on States Parties “to respect the basic human rights of all migrant workers”, which also confirms the applicability of this instrument to irregular migrant workers. More specifically, Article 9(1) of Part I of C143 emphasizes that irregular migrant workers should be entitled to equal treatment in respect of “rights arising out of past employment as regards remuneration, social security and other benefits”. However, Part II of C143 concerned with equality of opportunity and treatment is limited in its application to lawfully resident migrants. Relatively-speaking, ratification of these two instruments has not been wide-ranging. Moreover, only a few countries in the

56 Recital 4 of the Declaration, ibid.
57 See respectively Conventions No. 97 of 1949 concerning Migration for Employment (Revised) and No. 143 of 1975 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, referred to simply as the Migrant Workers (Supplementary Provisions) Convention. Recommendation No. 86 of 1949 concerning Migration for Employment (Revised), which includes an Annex containing a model bilateral labour migration agreement, and Recommendation No. 151 of 1975 concerning Migrant Workers accompany the conventions.
58 The equal treatment provision is Article 6 of C97.
59 See in particular the informational provisions in Articles 2 and 3 and the State obligation in Article 4 to take measures “to facilitate the departure, journey and reception of migrants for employment”.
60 See Part I of C143 on Migrations in Abusive Conditions.
61 Emphasis added.
Mediterranean region, South-eastern Europe and MENA are among the 43 countries that have ratified C97 and the 18 States that have accepted C143.62

2.2.1 ILO Draft Framework on Labour Migration

In June 2004, the ILO’s International Labour Conference adopted Conclusions on a fair deal for migrant workers in the global economy as well as a plan of action for migrant workers. Rather than asking States to agree to a set of legally binding principles, this plan seeks to work with the social partners and other international organizations to develop “a non-binding multilateral framework for a rights-based approach to labour migration, which takes account of labour market needs”63 A draft version of this framework has now been developed and comprises a set of principles and guidelines in a broad range of areas such as: decent work; means for international cooperation on migration; effective management of labour migration; protection of migrant workers; prevention of and protection against abusive migration practices; social integration and inclusion.64 With reference to the June 2004 Conclusions, the draft urges the ILO Governing Body “to periodically review the progress made in the implementation of the multilateral framework”, and also contains examples of best practices relating to the areas identified.65 The draft framework was discussed at a tripartite meeting of experts in October/November 2005 and is scheduled for adoption by the ILO Governing Body in March 2006.

2.3 Regional Human Rights Law: Council of Europe Instruments

In 1950, the Council of Europe adopted the European Convention on Human Rights (ECHR), which has now been ratified by 46 States Parties, including all the countries on the northern shores of the Mediterranean, and which applies to all persons residing within the jurisdiction of those States, including regular and irregular migrants.66 The case law of the European Court of Human Rights, which is the principal body responsible for the application of the ECHR, has protected migrants from Turkey and the Mahgreb region on many occasions.67

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62 See Annex I.
65 Ibid. at p. 18 and Annex respectively.
66 Article 1 of the ECHR reads: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”. Emphasis added.
occasions. In particular, Court has ruled that the expulsion for the commission of criminal offences of second-generation migrants, who have been resident in States Parties for a considerable length of time and who have not been able to acquire the citizenship of their adopted countries, constitutes, under certain circumstances, a disproportionate violation of their right to respect for private and family life under Article 8.\(^{67}\) But the Court has shirked from adopting the views of some dissenting judges in these cases, notably that second-generation migrants, who have not acquired the citizenship of the host country, should nevertheless be treated effectively as *de facto* citizens and not be expelled at all.\(^{68}\) According to the Court, expulsion of the migrant as a “double punishment” for the commission of particularly serious criminal offences, such as those relating to drugs and use of firearms, is in principle a justifiable restriction on the right to family life and would normally outweigh other disadvantages migrants might experience in returning to the country of origin, such as their poor knowledge of the language or minimal family ties.\(^{69}\) While most of these cases before the Court under Article 8 ECHR have concerned migrants who are already in the State party and facing expulsion, in certain more limited circumstances Article 8 ECHR may impose a positive obligation on States Parties to admit a family member in a situation where the family unit cannot reasonably be expected to relocate to the country of origin. Indeed, the Court arrived at this conclusion in the case of a Moroccan minor, who wished to enter the Netherlands to be reunited with her parents.\(^{70}\)

The ECHR also affords supplementary protection against *refoulement* where returning an individual to a country where he or she may fear persecution in the form of degrading or ill-treatment would not necessarily be contrary to the *non-refoulement* provision of the Geneva Convention Relating to the Status of Refugees (Article 33) because the person concerned is concerned to be a threat to the security of the host country. Such protection is


\(^{68}\) E.g. see the separate concurring opinion of Judge Martens in *Beldjoudi*, *ibid.*, para. 2. See also R. Cholewinski, “Strasbourg’s ‘Hidden Agenda’?: The Protection of Second-Generation Migrants from Expulsion under Article 8 of the European Convention on Human Rights” (1994) 12 *Netherlands Quarterly of Human Rights* 287.


available because of the absolute nature of the right to freedom from torture and degrading treatment in Article 3 of the ECHR, which precludes the return of non-nationals to their country of origin or a third country for national security reasons if they face a real risk of such treatment in that country.\(^71\) Indeed, it is the strength of this provision that caused the United Kingdom to derogate from Article 5 of the ECHR (right to liberty and security of the person) by allowing the Home Secretary (Interior Minister) to certify a non-national as an international terrorist suspect and to detain that person indefinitely in the event that he or she could not be expelled to his or her country of origin or third country for practical and/or legal (i.e. Article 3 ECHR) reasons.\(^72\) As noted above, however, the highest Court in the United Kingdom, the House of Lords, found this derogation was disproportionate and, moreover, that the domestic provisions in question were contrary to Article 5 ECHR as read with Article 14 (the non-discrimination provision – discussed below) in that they amounted to unjustifiable discrimination on the ground of nationality because they were not applicable to UK nationals.

While the detainees in potentially indefinite detention in the UK eventually succeeded in their human rights claim under the ECHR of discrimination on the basis of nationality, the ECHR affords incomplete protection against discrimination. Article 14 ECHR\(^73\) is limited because it can only operate in conjunction with other rights in the ECHR. Consequently, discrimination in the employment or social spheres for example would not normally be prohibited because the ECHR does not contain any rights specifically concerning these areas.\(^74\) Although Article 14 does not refer expressly to “nationality” as a prohibited ground of discrimination, the Court has found that the text of the provision is sufficiently broad to include distinctions based on this ground, which will constitute discrimination in the absence of reasonable and objective justifications. In Gaygusuz v. Austria,\(^75\) which concerned discrimination against a lawfully resident Turkish migrant worker in respect of a contributory social security benefit, the Court argued that this constituted an integral aspect of the right to


\(^{73}\) Article 14 ECHR reads: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.

\(^{74}\) See, however, Protocol No. 12 to the ECHR (Rome, 4 November 2000, ETS No. 177), which extends the non-discrimination principal to all the activities of public authorities. While it recently came into force (1 April 2005), Protocol No. 12 has only been ratified by 11 States, the majority of which are countries of southern and south-eastern Europe (Albania, Armenia, Bosnia and Herzegovina, Croatia, Cyprus, Georgia, San Marino, Serbia and Montenegro, and the Former Yugoslav Republic of Macedonia).

\(^{75}\) Gaygusuz v. Austria (1996) 23 EHRR 364.
property protected by Article 1 of the First Protocol to the ECHR.\textsuperscript{76} In \textit{Poirrez v. France},\textsuperscript{77} and in specific reliance on the judgment in \textit{Gaygusuz}, the Court went further because it found that the same principle applied in respect of distinctions on the basis of nationality in respect of an Ivory Coast national resident in France who was denied access to a non-contributory welfare benefit available to disabled persons. Despite this evolving liberal jurisprudence, the Court seems to have deliberately avoided finding distinctions flowing from EU law as falling within the ambit of prohibited nationality discrimination. In the case of a Moroccan second-generation migrant facing expulsion from Belgium, the argument that this proposed expulsion constituted discrimination under Article 14 ECHR because Belgian nationals and EU nationals could not have been expelled for similar reasons was rejected by the Court. With regard to Belgian nationals, the comparison was inappropriate because they had a right of abode in Belgium and could not be expelled and with regard to other similarly situated EU citizens, the distinction was objectively and reasonably justified because “Belgium belongs, together with [EU] States to a special legal order”,\textsuperscript{78} thus recognizing implicitly the unique role played by the developing concept of European citizenship. However, a similar argument failed in the UN, where the Human Rights Committee in its opinion in \textit{Karakurt v. Austria},\textsuperscript{79} could not justify distinctions based on nationality in respect of a Turkish national lawfully resident in Austria whose application to stand for election to a works council (in a private company) was denied because only Austrian nationals and EU citizens could benefit from such an entitlement.

In this era, heavily impregnated by the security agenda and the “war on terrorism”, the protection afforded migrants against expulsion is a fragile concept. As noted earlier, international human rights law is not as comprehensive here as in other areas. Migrants in an irregular situation and rejected asylum-seekers face a particular risk of arbitrary expulsion. While a detailed clause is found in the UN Convention on Migrant Workers affording all migrants, including irregular migrants, extensive procedural safeguards against expulsion,\textsuperscript{80} this instrument has not been ratified by a single EU Member State. However, explicit rights in the ECHR relating to non-nationals, including safeguards against their expulsion are found

\textsuperscript{76} Paris, 20 March 1952, \textit{ETS} No. 9.
\textsuperscript{78} \textit{Moustaquim}, above n. 67, para. 49. Emphasis added.
\textsuperscript{80} Article 22 in Part III of the Convention.
in Protocols No. 4 and 7,\(^\text{81}\) which have not been as widely ratified as the main text of the ECHR itself. Protocol No. 7 contains a provision on procedural safeguards relating to the expulsion of lawfully resident aliens.\(^\text{82}\) In Protocol No. 4, pertinent provisions include the right to free movement for lawfully resident migrants within the State of residence and the freedom to leave any country, including one’s own, as well as the prohibition on collective expulsion of aliens.\(^\text{83}\) This prohibition was cited in a decision concerning the expedited forced removal of rejected Roma asylum-seekers from Belgium and in a friendly settlement between the Italian government and a group of migrants from Kosovo.\(^\text{84}\) In the former case, it is significant that the Court strongly implied, in defining collective expulsion, that even where individual determinations of a migrant’s situation are made, the context of the return, which may implicate the removal of a whole group of persons, can nonetheless taint the expulsion with a collective character and thus be unlawful:

> [Collective expulsion is] any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group. That does not mean, however, that where the latter condition is satisfied the background to the execution of the expulsion orders plays no further role in determining whether there has been compliance with Article 4 of Protocol No. 4.\(^\text{85}\)

More recently, the Italian authorities were accused of collectively expelling migrants from the small island of Lampedusa near Sicily. It had been alleged that these migrants, who had travelled by boat from the coast of North Africa, had not been subject to adequate individual examinations of their cases, including the existence of any possible refugee claims.\(^\text{86}\) A number of NGOs also lodged a complaint with the European Commission calling on it to sanction Italy for contravening international and European human rights laws.\(^\text{87}\)

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\(^{81}\) Protocol No. 4 to the ECHR securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, Strasbourg, 16 September 1963, ETS No. 46; Protocol No. 7 to the ECHR, Strasbourg, 27 November 1984, ETS No. 117. Out of the 46 Council of Europe Member States, 40 have ratified Protocol No. 4 and 39 have ratified Protocol No. 7. In southern Europe, Greece, Spain and Turkey have not ratified Protocol No. 4, and Spain and Turkey have not ratified Protocol No. 7.

\(^{82}\) Protocol No. 7, Article 1.

\(^{83}\) Protocol No. 4 to the ECHR, Articles 2(1), 2(2) and 4.


\(^{85}\) Čonka v. Belgium, ibid, para. 59. Emphasis added.

\(^{86}\) See European Parliament Resolution of 14 April 2005 on Lampedusa, which, inter alia, “[c]alls on the Italian authorities and on all Member States to refrain from collective expulsions of asylum seekers and “irregular migrants” to Libya as well as to other countries and to guarantee that requests for asylum are examined individually and the principle of non-refoulement adhered to” (para. 1).

The ECHR is the most significant human rights for protecting migrants in Europe because it is not limited in personal scope to Contracting Party nationals who are lawfully present in the territory, which is the position with the European Convention on the Legal Status of Migrant Workers. The counterpart to the ECHR, the European Social Charter and its revised version, is also similarly restricted in personal scope. The Charter and the Revised Charter are applicable to “foreigners only insofar as they are nationals of other Contracting Parties lawfully resident or working regularly within the territory of the Contracting Party concerned”. Nonetheless, this formal position has been questioned recently by the European Committee of Social Rights, which monitors the application of the Charter and Revised Charter and administers the Collective Complaints Protocol, allowing specific trades unions and NGOs to bring complaints against those Contracting Parties accepting the procedure under the Protocol. In a case against France, decided in September 2004, the Committee found a violation of Article 17 of the European Social Charter concerning protection and assistance to children and young persons in respect of national measures limiting the access of the children of irregular migrants to health care provision. The Committee found it difficult to apply the restrictive personal scope of the Charter to a situation which involved the denial of the fundamental right to health care to a particularly vulnerable group of persons, such as children. The Committee reasoned that it was necessary to interpret limitations on rights restrictively in order to preserve the essence of the right and to achieve the overall purpose of the Charter. The restriction in this case went to the very dignity of the human being and impacted adversely on children who were exposed to the risk of no medical treatment. Given that medical care is a prerequisite to the preservation of human dignity, legislation or practice denying entitlement to such treatment to foreign nationals within the territory of a State party, even if they are unlawfully present there, cannot be justified under the Charter. The controversial nature of this opinion was reflected in the slim majority that voted in its favour, although a subsequent Resolution of the Council of Europe’s political body, the Committee of Ministers, took note of a measure passed by the

88 Strasbourg, 24 November 1977, ETS No. 93; entered into force 1 May 1983: ratified by 8 States Parties (France, Germany, Italy, Netherlands, Norway, Portugal, Spain, Turkey).
89 European Social Charter (18 October 1961; ETS No. 35) and the Revised Social Charter (3 May 1996; ETS No. 163).
90 Appendix to the European Social Charter, ibid and the Revised Social Charter, ibid.
93 Ibid, paras. 29-32.
French Government in response to this decision.\textsuperscript{94} Clearly, this opinion may have a very significant impact in the future on the interpretation of some other provisions of the Charter, including Article 19 concerned with the right of migrant workers and their families to protection and assistance.

3. EU Law and Policy

EU law and policy in respect of non-EU or third-country nationals has developed on a number of levels. Firstly, measures have been adopted under Title IV of Part 3 of the EC Treaty with a view to preventing and addressing the problem of irregular migration. As discussed below, these measures have largely been restrictive in content and designed to prevent the phenomenon, to identify irregular migrants in EU territory and to punish those who facilitate irregular movements. Secondly, measures have also been adopted on legal migration, although progress here has been much slower as EU Member States have struggled to reach consensus. However, agreement has now been reached on the rules for family reunification, the treatment of third-country nationals who are long-term residents, and the admission of students and researchers from third-countries.\textsuperscript{95} To date, however, no agreement has been possible on the adoption of common rules for the admission and treatment of third-country nationals for the purpose of employment, although the European Commission, after a consultation exercise with Member States and other stakeholders, has advanced a number of policy options in this area, which are discussed in Section 3.2 below. A third level of activity concerns the integration of migration issues into EU external relations policy. As far as the Mediterranean and MENA region is concerned, policy developments have taken place under the auspices of the Barcelona Process and, more recently, the European Neighbourhood Policy (ENP).

\textsuperscript{94} See Committee of Ministers Resolution ResChS(2005)6 – Collective complaint No. 14/2003 by the International Federation of Human Rights Leagues (FIDH) against France (4 May 2005) (http://wcd.coe.int/rsi/common/renderers/source_file.jsp?id=856639&SourceFile=1), which “takes note of the circular DHOS/DSS/DGAS No. 141 of 16 March 2005 on the implementation of urgent care delivered to foreigners resident in France in an illegal manner and non-beneficiaries of State Medical Assistance”.

3.1 Irregular and Legal Migration

The vulnerable situation of irregular migrants in Europe has arguably been exacerbated by EU policies, which have focused largely on preventive and restrictive measures and the imposition of sanctions on those who facilitate and profit from irregular migration.\(^96\) In addition to the adoption of a number of legally binding measures on irregular migration under Title IV of Part Three of the EC Treaty,\(^97\) concerning carrier sanctions, mutual recognition of broadly defined expulsion decisions, prevention of the facilitation of irregular migration, trafficking in human beings, and cooperation between Member States in returning irregular migrants by air,\(^98\) the EU has adopted a series of operational “soft law” measures, such as an extensive plan to prevent irregular migration and human trafficking, an action programme on return and a plan for the management of the EU’s external borders.\(^99\) In the context of implementing the policy on external borders, a number of operations have been undertaken in southern Europe in particular focusing on preventing irregular migration and the control of maritime borders.\(^100\) These developments have resulted in the establishment of a formal EU body to coordinate such activities, namely the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the

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97 See Article 63(3)(b) EC, which mandates the Council of Ministers to take measures on “illegal immigration and illegal residence, including repatriation of illegal residents”.


100 A compilation of such activities can be found in the EU Council of Ministers, Report on the Implementation of Programmes, ad hoc centres, pilot projects and joint operations, Doc. 10058/1/03 (11 June 2003). See e.g. the projects conducted in the Eastern Mediterranean: “Deniz” (with the United Kingdom taking the lead), aimed at proactive enforcement action in Turkey in respect of irregular migration by sea from that country; and “Triton” (with Greece taking the lead) with a view to producing concrete operational results in tackling irregular migration by sea by arresting traffickers and irregular migrants and seizing means of maritime transportation. \textit{Ibid} at pp. 17-18 and 22-24 respectively.
EU or FRONTEX for short,\textsuperscript{101} which is based in Warsaw and which was mandated to start its activities on 1 May 2005.

The developing EU policy on readmission is a further example of a restrictive approach. The EU is slowly moving towards the adoption of EU-wide readmission agreements containing reciprocal obligations by which both parties to the agreement agree to accept back their own nationals found to be residing in an irregular situation in the territory of the other party as well as third-country nationals who came from the territory of the party concerned. Such agreements have already entered into force with Hong Kong, Macao and Sri Lanka, and an agreement has been signed with Albania and initialled with the Russian Federation. Readmission agreements with a number of other countries in the Mediterranean and MENA region are also on the agenda. Negotiations with Morocco are reportedly almost complete and negotiations have been approved for Algeria, Turkey, China, Pakistan and Ukraine.\textsuperscript{102} These readmission agreements are proving difficult to negotiate for the EU, which is not surprising given that in practice they will operate to benefit solely EU Member States and thus do not provide any incentives for the third countries concerned to adopt them.\textsuperscript{103} However, it is noteworthy that the recent readmission agreement with the Russian Federation was adopted in the context of a parallel agreement on visa facilitation with that country, and that a similar approach is contemplated for Ukraine and the Former Yugoslav Republic of Macedonia.\textsuperscript{104}

With regard to legal migration and the treatment of third-country nationals in the EU, despite the measures referred to above on family reunification, long-term residents, students and researchers, notable distinctions remain between EU citizens, who may freely take up work in another EU Member States, and those third-country nationals lawfully resident in EU

\textsuperscript{103} EU readmission policy has also been criticised for the absence of adequate human rights provisions and safeguards, particularly to ensure adequate protection from \textit{refoulement} for asylum-seekers and refugees. See S. Peers, “Irregular Immigration and EU External Relations” in \textit{Irregular Migration and Human Rights: Theoretical, European and International Perspectives}, above n. 96, 193. See also the articles on readmission agreements in (2003) 5 \textit{European Journal of Migration Law} No. 3, including E.A. Mrabet, “Readmission Agreements, The Case of Morocco,” 379-385.
\textsuperscript{104} Individual EU Member States, such as Italy, have also adopted arrangements, which combine readmission with provisions reserving access to the labour market to third-country nationals from the countries concerned as part of the annual immigration quota, although these labour migration quotas remain rather limited as compared with the demand. Italy has adopted these arrangements with a number of countries in the region, namely Albania, Egypt, Morocco and Tunisia.
territory. These distinctions operate on a number of levels. Firstly, the economic and social benefits tied to the free movement regime are limited to EU nationals, and, as noted in Section 2.3 above, the European Court of Human Rights has found that such distinctions are justifiable and do not infringe the non-discrimination principle. Secondly, third-country nationals of certain countries (especially Turkey and the Mahgreb countries) have a “privileged status” because of Association agreements, which these States have entered into with the EU, although these agreements are hardly uniform in their application. For example the Association Agreement with Turkey, as implemented by the EC-Turkey Association Council, grants Turkish citizens lawfully resident in EU territory a degree of access to employment, which is not enjoyed by Algerian, Moroccan or Tunisian nationals. 105 Thirdly, the introduction of clear distinctions between nationals of these countries and other third-country nationals questions the conformity of these measures with the international human rights principles concerning equal treatment in respect of access to economic and social rights in the country of residence. 106 Fourthly, as far as the revised EU Association Agreements with Morocco, Tunisia and Algeria are concerned, equal treatment with nationals in respect of employment conditions and social security benefits is explicitly only available to lawfully resident migrants. 107 While this position is supported by the non-binding EU Charter on Fundamental Rights in respect of social security, 108 it is not in conformity with international human rights standards and international labour law, which affords all workers regardless of legal status equal treatment in respect of their employment conditions as well as rights to irregular migrants arising out of past employment, including the possibility of reimbursement of past social security contributions. 109 Finally, admission to EU territory is not facilitated

106 However, as far as access to social security is concerned, all third-country nationals who move between EU Member States can now benefit from EU-wide protection. See Council Regulation 859/2003/EC of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality, OJ 2003 L 124/1.
107 See e.g. Euro-Mediterranean Association Agreement with Morocco, OJ 2000 L 70/2, Article 66: “The provisions of this chapter [on Workers in Title VI of the Agreement on Cooperation in Social and Cultural Matters] shall not apply to nationals of the Parties residing or working illegally in the territory of their host countries”. Identical provisions are found in the Euro-Mediterranean Agreements with Algeria (Doc. 6786/02 – 12 April 2002), Article 69, and Tunisia, OJ 1998 L 97/2, Article 66.
108 OJ 2000 C 364/1, Article 34(2): “Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices”. Emphasis added.
109 See respectively ICESCR, Article 7; and ILO Convention No. 143, Article 9(1) and ICMW, Articles 25 and 27.
and virtually all countries located on the southern shores of the Mediterranean and in the MENA region (with the exception of Israel) require visas for short-term visits to the EU. On the entry into force of the Amsterdam Treaty in 1999, parts of the Schengen acquis, which include the rules for issuing uniform “Schengen” visas concerned with short-term visits for up to three months, were integrated into the Community pillar. However, these rules remain vulnerable to discriminatory application given their vague nature and continuing lack of adequate cooperation among EU Member States in this area. Unfortunately, the EU Race Equality Directive, adopted to implement the general non-discrimination provision of the EC Treaty (Article 13 EC), excludes distinctions based on nationality from the concept of racial and ethnic discrimination, and national authorities therefore appear to have considerable discretion to make distinctions in terms of admission and the conditions of employment and residence.

3.2 European Commission Policy Plan on Legal Migration

In December 2005, in response to the invitation of the European Council in the Hague Programme on Strengthening Freedom, Security and Justice in the EU, adopted in November 2004, the European Commission presented its Policy Plan on Legal Migration, which defines a road-map for policy-making in this field for the period 2006-2009. The Policy Plan follows the adoption by the Commission of a Green Paper or consultative document on

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110 See Council Regulation 539/2001/EC of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ 2001 L 81/1. Ireland and the UK are not participating in this measure and apply their own visa lists.

111 Article 62(2)(b) EC.

112 R. Cholewinski, Borders and Discrimination in the European Union (London/Brussels: Immigration Law Practitioners’ Association/Migration Policy Group, 2002). The rules containing the criteria and conditions for issuing “Schengen visas” are found in the Common Consular Instructions (OJ 2002 C 313/1), which are set for review later in 2006.


114 Ibid., Article 3(2): “This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned”. However, it is arguable that Article 12 EC, which was principally concerned with the abolition of discrimination between EU citizens, must now operate also in respect of Title IV of Part 3 of the EC Treaty concerned with asylum and immigration matters and on the basis of which provisions distinctions between groups of third-country are made.

115 Recital 13 to the Preamble of the Directive, ibid., is more explicit on this latter point: “[T]he prohibition of 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 to occupation”.


117 Policy Plan on Legal Migration, above n. 1.
this question in January 2005.\footnote{European Commission, \textit{Green Paper on an EU approach to managing economic migration} (COM (2004) 811, 11 January 2005). These developments followed a proposed Commission Directive on labour migration from third countries, which the Commission eventually withdrew because of the lack of any consensus on the proposal in the Council. See European Commission, \textit{Proposal for a 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, 11 July 2001).} As noted in the \textit{Introduction}, the Plan describes the current situation and prospects of labour markets in the EU as a “need” scenario,\footnote{Policy Plan on Legal Migration, above, n. 1, at p. 4.} thus clearly recognising that the admission of both highly skilled and less-skilled migrant workers from third countries should be facilitated. It proposes the adoption of a general framework directive guaranteeing a common framework of rights to \textit{all} third-country nationals in legal employment in EU Member States and would therefore not be limited by reference to their length of stay, although the level of the rights that would be protected is not specified at this stage.\footnote{Ibid at p. 6.} Depending on the degree of the protection granted a measure to harmonize the treatment of all third-country nationals lawfully resident in the EU, but who do not qualify for long-term resident status, is much needed and would be welcome. However, given the experience to date of the negotiations of the Directives on family reunification and the status of long-term residents, there is a real risk that consensus might only be found on the level of the lowest common denominator with the result that the more liberal positions of some Member States regarding the treatment of migrant workers from third countries would be undermined.

The Policy Plan also recommends the adoption of four specific directives governing the conditions of entry and residence of highly skilled workers, seasonal workers, Intra-Corporate Transferees (ICT) and remunerated trainees.\footnote{Ibid at pp. 6-8.} Other proposed actions include: establishment by the end of 1997 of an EU Immigration Portal on EU policies, news and information; extension of the services provided by the European Job Mobility Portal and the EURES network to third-country nationals; assistance to Member States on integration; and cooperation with third countries, including the adoption of arrangements for managed temporary and circular migration and the provision of professional training and language courses in the country of origin for those leaving to work in the EU.\footnote{Ibid at pp. 8-11.} While the explicit recognition of the need in the EU for migrant labour from third countries is a positive development, Member States will have to demonstrate considerable political will to ensure
the speedy adoption and effective implementation of the legally binding measures and actions proposed in the Policy Plan.

3.3 Barcelona Process

The restrictive EU approach to the admission of migrants from third countries persists in the 1995 Barcelona Declaration, which marked the beginning of a new regional partnership between the EU and eastern and southern Mediterranean countries, and is seen as a particularly important component of EU external relations policy. In the section on “Partnership in social, cultural and human affairs: developing human resources, promoting understanding between cultures and exchanges between civil societies”, the Declaration includes an undertaking “to guarantee protection of all the rights recognized under existing legislation of migrants legally resident in their respective territories”. Given the universal application of international and regional human rights standards to all persons irrespective of nationality or legal status, discussed in Sections 2.1 and 2.3 above, the reference here to migrants “legally resident” is unfortunately restrictive. While there are specific references in the Declaration to “illegal immigration”, these are only found in the context of closer cooperation, combating this phenomenon and readmission, which is hardly surprising given that most labour migration in the region is from the southern to the northern shores of the Mediterranean, and that much of it is irregular.

3.4 European Neighbourhood Policy

The enlargement of the EU in May 2004 by ten new Member States resulted in innovative thinking by EU institutions and the governments of the old Member States regarding the developing of a new policy of “rapprochement” towards countries in the immediate neighbourhood of the EU. The principal contours of the European Neighbourhood Policy (ENP) are laid out in two Commission documents, the first issued one year prior to enlargement in March 2003 and the second document in May 2004. The ENP encompasses

123 Barcelona Declaration, adopted at the Euro-Mediterranean Conference, 27-28 November 2003. For the text of the Declaration, see http://europa.eu.int/comm/external_relations/euromed/bd.htm. The 12 Mediterranean partners are Morocco, Algeria, Tunisia (Maghreb); Egypt, Israel, Jordan, the Palestinian Authority, Lebanon, Syria (Mashrek); and Turkey, Cyprus and Malta. Libya has observer status.

124 Emphasis added.


17 countries: the three Western Newly Independent States (WNIS) (Belarus, Moldova, Ukraine); the three countries of the Southern Caucasus (Armenia, Azerbaijan, Georgia); and 10 countries in the MENA region (Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Syria, Tunisia and the Palestinian Authority). While the difficult political and human rights situation in Belarus and Libya has resulted in minimal EU relations with those countries, it is clear that the ENP is also addressed to them. However, the ENP is not addressed to EU acceding or candidate countries (Bulgaria and Romania and Croatia and Turkey respectively) or the countries in the Western Balkans to which the Stabilization and Association Process is applicable. Indeed, the ENP is aimed at those neighbouring countries which either cannot become EU members because they are outside of Europe or which currently do not have the perspective of membership of the EU, at least not in the medium-term. The ENP also engages Russia to a certain degree despite the separate policy conducted by the EU towards that country in the context of the so-called Northern Dimension. The principal objective of the ENP is to ensure that EU enlargement will not create new dividing lines between the larger EU and neighbouring countries and also afford these countries a stake in the EU internal market and more opportunities to participate in EU activities. However, the intention is not to replace existing relations with these countries, which are based largely on bilateral Association or Partnership and Cooperation agreements and existing regional dialogue as is the case with the Barcelona process between the EU and MENA countries, but to supplement and build on these arrangements with a view to achieving a more enhanced cooperation. In the longer term,

127 The ENP has only recently been applied to these three countries as they were not considered to be part of the original proposal. See Wider Europe – Neighbourhood, above n. 126, at p. 4 (n. 4).
128 All of the MENA countries are also full participants in the Barcelona process (see http://europa.eu.int/comm/external_relations/euromed/index.htm and Section 3.3 above), with the exception of Libya which has observer status.
129 Albania, Bosnia and Herzegovina, Croatia, FYR of Macedonia, Serbia and Montenegro. For an overview of this process see http://europa.eu.int/comm/external_relations/see/actions/index.htm.
130 Wider Europe – Neighbourhood, above n. 126, at pp. 4 and 5 (inset). The criteria for EU membership are laid out in Article 49 of the Treaty on European Union, which begins: “Any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union”. Article 6(1) reads: “The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States”.
131 Wider Europe – Neighbourhood, above n. 126, at p. 4; European Neighbourhood Policy, Strategy Paper, above n. 126, at p. 3: “The objective of the ENP is to share the benefits of the EU’s 2004 enlargement with neighbouring countries in strengthening stability, security and well-being for all concerned. It is designed to prevent the emergence of new dividing lines between the enlarged EU and its neighbours and to offer them the chance to participate in various EU activities, through greater political, security, economic and cultural cooperation”.
The [ENP]'s vision involves a ring of countries, sharing the EU’s fundamental values and objectives, drawn into an increasingly close relationship, going beyond co-operation to involve a significant measure of economic and political integration. This will bring enormous gains to all involved in terms of increased stability, security and well being.\textsuperscript{133}

While the development of the framework for greater integration between the EU and ENP countries is to be governed essentially by a coherent approach and uniform principles, the policy is differentiated “reflecting the existing state of relations with each country, its needs and capacities, as well as common interests”.\textsuperscript{134} The Commission underlines that the ENP must be developed on the basis of a genuine partnership between the EU and the participating third countries,\textsuperscript{135} although how this will be actually achieved remains to be seen.

Migration and asylum issues are tied closely to the ENP action areas concerning the commitment to shared values (which includes respect for human rights) and justice and home affairs. However, the importance of these issues is seen mainly from the perspective of the EU and its security concerns in terms of combating terrorism, transnational organized crime and trafficking in human beings, improving the efficiency of border management and the conclusion of readmission agreements.\textsuperscript{136} Both of the Commission’s flagship Communications on the ENP also raise the possibility of the adoption of a more liberal visa regime, although only the first document refers explicitly to facilitating the movement of persons from the participating third countries across the EU external border through the development of a local border traffic regime and the promotion of lawful labour migration.\textsuperscript{137} More specifically, with regard to the cooperation in the Mediterranean region in the field of justice and home affairs, the ENP foresees improvement of border management, including short sea-crossings; cooperation in the fight against illegal immigration; management of legal migration; and implementation of migration plans (e.g. with the three central Maghreb countries, Libya and Egypt).\textsuperscript{138} General Action Plans, key political documents seen as the stepping-stone to greater integration with the EU, have also recently been adopted for

\begin{footnotes}
\item[133] European Neighbourhood Policy, Strategy Paper, above n. 126, at p. 5.
\item[134] Ibid., at p. 3.
\item[135] Ibid., at p. 8: “Joint ownership of the process, based on the awareness of shared values and common interests, is essential. The EU does not seek to impose priorities or conditions on its partners”. Interestingly, this emphasis on partnership is stronger than in the Commission’s Wider Europe – Neighbourhood Communication, above n. 126, at pp. 16-17: “Action Plans and accompanying benchmarks should be established by the Council, based on proposals from the Commission, wherever possible with prior discussion with the partner countries concerned”. Emphasis added.
\item[136] Wider Europe – Neighbourhood Communication, above n. 126, at pp. 11 and 14; European Neighbourhood Policy, Strategy Paper, above n. 126, at p. 17.
\item[137] Wider Europe – Neighbourhood Communication, above n. 126, at p. 11.
\item[138] European Neighbourhood Policy, Strategy Paper, above n. 126, at p. 23.
\end{footnotes}
Morocco, Tunisia, Israel, Jordan, and the Palestinian Authority. However, the reference here to the management of legal migration is significant and is discussed further below.

While the adoption of amendments to rules governing the crossing of the external border are not a stated objective of the ENP, as noted above, the successful development of the ENP might lead to the eventual adoption and implementation of more liberal visa arrangements for third country nationals from the countries concerned, or, in the longer term, the transfer of these countries to the positive visa list. The establishment of workable local border traffic regimes facilitating the movement of persons resident in border regions across the EU external border would be another positive result of this policy. The Council of Ministers is already discussing such a proposal, although such a measure if adopted would be far more relevant to local border traffic movements in Central and Eastern Europe. Its relevance to countries in the Mediterranean and MENA region would be limited to movements across the Greek and Turkish borders, between Turkey and Bulgaria once the latter country accedes to the EU, and movements between Morocco and the Spanish enclaves of Ceuta and Melilla.

One area that is not addressed sufficiently in the JHA arm of the ENP is the promotion of the lawful admission of migrant labour into the EU from the neighbouring countries. This lack of emphasis is particularly problematic given the reality, for example, of considerable irregular labour migration into the EU from the MENA region. As observed in Section 3.2 above, however, the development of an EU approach to managing economic migration from third countries has recently been discussed by the Commission in a policy plan on legal migration advanced in December 2005. Some of the ENP action plans recently adopted with countries in the region foresee action in this area. For example, the ENP Action Plan for Morocco states the following under the heading “Ensuring effective management of migration flows”:

– Continue the exchange of information on legal migration in the context of existing structures, in particular in the Working Party on Social Affairs and Migration: inventory of existing routes and commitments made by Member States; ways of managing legal migration.
– Information campaigns in Morocco on legal migration opportunities to the EU (including family reunification, equal treatment for and integration of migrants) and

139 See the ENP website at [http://europa.eu.int/comm/world/enp/index_en.htm](http://europa.eu.int/comm/world/enp/index_en.htm).
on the risks of illicit migration and, in Europe, information campaigns on the positive aspects of migration.  

Interestingly, the Commission also asks the question in its Green Paper (which preceded the policy plan on legal migration) whether preferences regarding access to the labour markets of EU Member States should be given to certain third-country nationals and whether such preferences should be linked to special frameworks, such as pre-enlargement strategies and the ENP. \(^{142}\) In responding to the Commission’s consultation, the Egyptian Government answered positively to the latter question:

With regard to the Community preference principle, it is important to give preference to migrant workers who are nationals of third countries that have partnership agreements with the EU and are involved in consultations with the EU concerning European neighbourhood policy. It is also essential to give priority to migrant workers from third countries who are already working or living in any of the EU member states.  

While the creation of a robust and feasible policy on legal migration into the EU for the nationals ENP countries, including those south of the Mediterranean, might well mitigate the potential adverse impact of restrictive policies elsewhere and also have additional benefits in terms of the objectives of the ENP and the economic development of the countries concerned, considerable scepticism remains about progress in this area given the current and likely future opposition from the new Member States. These countries may rightly see the development of an EU common approach to legal migration from third countries as somewhat premature given that the labour markets of most of the old Member States, in accordance with the current transitional arrangements of the EU Accession Treaty, remain closed to their nationals.  

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\(^{142}\) Green Paper on an EU approach to managing economic migration, above n. 118, at p. 11.


\(^{144}\) See e.g. see the Polish Government’s “non-paper” concerning the Commission’s Green Paper, ibid. To date, only three countries (Ireland, Sweden and the United Kingdom), have opened their labour markets to the nationals of the eight Central and Eastern European new Member States (Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia). The transitional arrangements regarding free movement of workers are not applicable to nationals of Cyprus and Malta.
4. “5 + 5 Dialogue” on Migration in the Western Mediterranean

The 5 + 5 Dialogue on Migration in the Western Mediterranean\(^\text{145}\) concerns ten countries: five EU Member States – France, Italy, Portugal, Spain and Malta; and five countries south of the Mediterranean – Algeria, Libya, Mauritania, Morocco and Tunisia. The Dialogue is based on an interregional multilateral approach and its purpose is to hold frequent and informal meetings between the governments to discuss the various dimensions of migration. To date, a number of ministerial meetings have been held, with the most recent in Tunis in 2002, in Rabat in October 2003 and in Algiers in September 2004. The Tunis meeting resulted in the Tunis Declaration,\(^\text{146}\) which commits the participants to a number of political objectives, such as the establishment of regional processes for consultation, information exchange, and analysis of migration trends; addressing the phenomenon of irregular migration and trafficking in human beings, including the promotion of readmission agreements; linkages between migration and co-development; management of regular migration flows and movement of persons, including the introduction of a more streamlined approach to visa policy; and initiating actions with a view to improving the health of migrant workers. Importantly, from a rights perspective, the Tunis Declaration also underlines the need to integrate migrants on the basis of respect for their fundamental rights while respecting cultural diversity. In particular, the facilitation of family reunification, promotion of free movement of regular migrants between countries of origin and destination, equal treatment with nationals in respect of access to employment, vocational training, decent housing and other economic and social rights, and raising the awareness of the rights and obligation of migrants are identified as specific goals. Moreover, another objective concerns the management of labour migration to address skills shortages in countries of the Western Mediterranean, including the implementation of vocational training opportunities in regions with a high migration potential in source countries, to better match supply and demand.

5. Conclusion: Prospects for a Rights-based Legal Framework for Labour Migration in the Mediterranean Region

The construction of a rights-based framework for labour migration in the Mediterranean and MENA region is a multifaceted task. It is difficult to see how one all-


encompassing approach can provide a solution to the problems faced by migrants. The ICMW has the potential to play a significant role as a norm-setting instrument regulating labour migration in the region from a rights perspective, although it has only been accepted by sending countries on the southern shores of the Mediterranean and by none of the significant receiving countries on its northern shores, such as France, Spain and Italy. Even in the southern countries, much work remains to be done for the ICMW to be effectively implemented there, although, with time, it should have a profound impact on the treatment of transit migrants in countries, such as Libya and Morocco, which have ratified the ICMW. The specific ILO instruments have received relatively few ratifications and the draft ILO Framework on Labour Migration, which includes a follow-up mechanism, has not yet been adopted by the ILO Governing Body. Once adopted, however, implementation of the Framework will require considerable political will on the part of Member States and the social partners as well as additional resources. Regional human rights standards, particularly those found in the ECHR, remain a concrete source of protection given its strong enforcement mechanism, although these are not tailored to the specific situation and concerns of migrants and often require considerable imagination on the part of lawyers for their effective application. Moreover, resources and the virtues of perseverance and patience are additional essential factors for litigants to succeed in actions before the European Court of Human Rights.

No perfect solution to the human rights needs of migrant workers and their families can therefore be identified in the Mediterranean and MENA region. A comprehensive approach is required that mainstreams human rights in all the processes taking place there. Given the increasing influence of the EU on a number of levels, in the development of the law and policy on migration and asylum and the migration components in its external relations policy manifested in the region under the auspices of the Barcelona process and the ENP, it is unfortunate that the adoption of a more robust human rights framework has been put on hold by the rejection in France and the Netherlands of the Constitution for Europe, which would have given legally binding status to the EU Charter of Fundamental Rights. It is therefore crucial that human rights are mainstreamed more explicitly into future EU legal measures and policy actions. Some positive developments can be detected, such as the introduction of a number safeguards in the proposed European Commission Directive on
common standards and procedures for the return of irregular migrants, the commitment in the policy plan on legal migration to adopt a framework Directive addressing the rights’ situation of economic migrants from third countries lawfully residing in EU territory, and the recent focus on visa facilitation as an incentive to the conclusion of readmission agreements. Nonetheless, much still remains to be done at the political level before such a rights-based legal framework can emerge to address the burning migration issues in the region.

Annex I

Ratifications by the Countries in the Mediterranean Region and MENA region and the Balkans of International Conventions for the Protection of the Rights of Migrant Workers

<table>
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<tr>
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<th>C143</th>
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Sources:
Annex II

Map of the Mediterranean and MENA Region

Source: