

I. International Legal Framework for the Protection of Migrant Workers

The protection of the rights of workers employed outside their countries of origin has been the subject of increasing concern throughout the UN system. A large array of international instruments exists to provide parameters for the regulation of international migration and standards for human and labour rights.

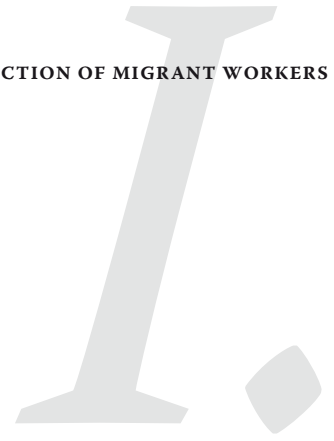
The rights and freedoms stipulated in the Universal Declaration of Human Rights apply equally to migrants as to any other individual, as do the provisions of the human rights instruments which have subsequently been developed by the UN. The protection of the human rights of men and women migrant workers and the promotion of their equal opportunity and treatment is also embedded in the Preamble to the Constitution of the International Labour Organization (ILO) of 1919, and in the Declaration of Philadelphia of 1944. Special attention is devoted to migrant workers in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998).

Apart from the adoption of specific international standards protecting the rights of migrant workers, which also form the basis of the recent non-binding ILO Multilateral Framework on Labour Migration (ILO, 2005), discussed in Section IX.2.5.2 below, concern for migrant workers has been expressed through the insertion of specific provisions targeting migrants in the respective Declarations, Plans and Programmes of Action of UN World Conferences¹ held over the past decade and the appointment of a UN Special Rapporteur on the human rights of migrants in 1997.²

While this chapter discusses the international legal framework for the *protection* of migrant workers, it is important to underline that other areas of international law are also relevant for the mobility of workers. One significant area is the law regulating international trade and particularly the provision of services under the General Agreement on Trade in Services (GATS), where Mode 4 is concerned with cross-border movements of “natural persons” for this purpose. As discussed below, international instruments protecting migrant workers do not generally disturb the sovereign right of states to regulate the admission of migrant workers into their territory, but GATS Mode 4 may have the potential to make a considerable impact on the temporary entry of workers in the context of services provision. Indeed, this would be the case if the current narrow categories under GATS Mode 4 applicable mainly to business executives and intra-corporate transferees were expanded to include broader groups of persons. GATS Mode 4 is discussed further in Section IX.1.7.2 in Chapter IX on Inter-state Cooperation.

1.1 International Human Rights Law

International human rights law is found in the International Bill of Rights, which contains the non-binding Universal Declaration of Human Rights (though most of its provisions are generally recognized as constituting International Customary Law) and two general human rights treaties, the International Cove-



nant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).³ It should be emphasized that these instruments protect all human beings regardless of their nationality and legal status.⁴ Therefore, migrant workers, as non-nationals, are generally entitled to the same human rights as citizens. While the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) (1990) (Section I.2.2 below) is the only UN instrument of direct relevance to migrant workers (Cholewinski, 1997: ch. 4), there are also several other UN instruments that are of potential importance in terms of protecting migrants from discrimination and exploitation on grounds other than their non-national status. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1965), currently one of the most widely ratified of the UN human rights conventions, binds States parties to outlaw discrimination on the grounds of race, colour, descent, or national or ethnic origin against all individuals within the jurisdiction of the State and to enact sanctions for activities based upon such discrimination. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979) consolidates the provisions of existing UN instruments concerning discrimination on the basis of sex and applies to citizens and non-citizens. Other human rights instruments of relevance to migrant workers include the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1984) and the International Convention on the Rights of the Child (CRC) (1989).

It is important to keep in mind a number of basic or fundamental rights, which are frequently violated in respect of migrant workers. These rights are found in the general international human rights instruments and are also protected by most national constitutions. Clearly, these rights include freedom from slavery, forced labour, degrading or inhuman treatment or punishment. There is little doubt that the working and living conditions of some migrant workers in certain parts of the world are very similar to the situations depicted in these rights' violations. Such treatment is often evident in respect of those migrant workers who have been trafficked or abused; placed in situations of debt bondage where they find themselves unable to escape a certain abusive employment situation until they have paid off their debts to the employer, agent or recruiter; and other forms of exploitation. Women migrants, because of the gender-specific jobs or sectors in which they predominate, are particularly vulnerable to such abuses. Slavery and forced or compulsory labour in respect of migrant workers is prohibited by general international human rights law, specific international instruments against slavery and slavery-like practices and ILO standards (Sections I.2.1 and I.3 below).

Formerly accounting for only a small percentage of clandestine migration, labour trafficking and smuggling have been broadly affected by the changing nature of international migration, and “unless [they are] brought under control, [they] could become one of the dominant forms of abusive migration in the years to come” (ILO, 1999: para.289). Recognizing that such action requires a comprehensive international approach, the UN General Assembly adopted, in 2000,

the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Trafficking Protocol) and the Protocol Against the Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol), supplementing the UN Convention Against Transnational Organized Crime (UN, 2000b).⁵ The broad range of measures required to prevent or reduce irregular migration, including its most abusive forms, are considered in Chapter VIII.

All migrant workers and their families regardless of their legal status are also entitled to the right to be free from arbitrary arrest and detention, which is protected by international human rights standards against deprivation of liberty, such as those in ICCPR (Art. 9). Many migrants, including those authorized to work, are often subject to confinement and harassment by border officials as well as the police in destination countries.⁶

Particularly important human rights for migrant workers are the freedom of movement within the country and the right to leave.⁷ Unfortunately, it is not uncommon for employers, recruitment agents, or even government officials in certain countries, to confiscate the passports of migrant workers to ensure that they do not leave before their work is completed. While these rights might justifiably be restricted for a number of legitimate reasons, such as the protection of national security and public order, provided that the means adopted are proportional to the objective concerned, the confiscation of a passport to ensure that a migrant worker completes his or her work cannot constitute a legitimate State objective.⁸

Special attention should also be devoted to ensuring that migrant workers and their families are afforded effective protection from violence, threats and intimidation, and from xenophobia and discrimination, including at the hands of public officials and private persons or entities (e.g. employers) as well as the general population (Section II.2.5 below). In this regard, an important right is the right of equal access with nationals to the courts (including labour courts or tribunals),⁹ so that migrant workers can seek redress for abuses in the country of employment. This right should be facilitated and also include provision for free legal assistance, particularly if migrants do not possess the means to pay.

Finally, while not central to the protection of migrant workers, international refugee law, as embodied largely in the 1951 Geneva Convention relating to the Status of Refugees and its 1967 Protocol (UN, 1951, 1967) is of some relevance. Firstly, migrants who are victims of trafficking for the purpose of labour exploitation may well also have a valid claim for refugee status on account of their persecution by non-state actors (Art.1(A)(2)). Secondly, the Geneva Convention contains a number of provisions on access to employment applicable to refugees who are lawfully staying in the territory of Contracting parties (Art.17).

1.2 ILO and UN Conventions concerning Migrant Workers: A Complementary Set of Standards

1.2.1 ILO conventions

The first international instruments providing for more comprehensive solutions to the problems facing migrant workers include the Migration for Employment Convention, 1949 (Revised) (No. 97) and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), as well as their accompanying Recommendations.¹⁰ Forty-five states have ratified Convention No. 97 and 19 have ratified Convention No. 143.¹¹ Because migration often has consequences on both the migrant workers and members of their families, ILO instruments on migrant workers provide for guarantees and facilities to assist migrant workers and their families in all stages of the migration process. It is worth recalling that the ILO Conventions do not affect the sovereign right of each Member State to allow or refuse a foreigner entry to its territory and that it is for each State to determine the manner in which it intends to organize the potential entry of migrant workers or the refusal of their entry. The instruments' provisions do not depend on reciprocity and are also intended to cover refugees and displaced persons in so far as they are workers employed outside their country.

While the ILO instruments concerning migrant workers do not cover all migrant-related operations (for example, they do not deal with the elaboration and establishment of a national labour migration policy), the principles enshrined in these instruments provide an important framework for guidance on what should constitute the basic components of a comprehensive labour migration policy, the protection of migrant workers and measures to facilitate as well as to control migration movements. More specifically, they call for measures aimed at regulating the conditions in which migration for employment occurs and at combating irregular migration and labour trafficking, and measures to detect the illegal employment of migrants with the aim of preventing and eliminating abuses. They also contain provisions on cooperation between states and with employers' and workers' organizations in this regard.

In addition, the instruments call for measures relating to the maintenance of free services to assist migrants and the provision of information, steps against misleading propaganda, and the transfer of earnings. They define parameters for recruitment and contract conditions, participation of migrants in job training and promotion, and for family reunification and appeals against unjustified termination of employment or expulsion. They contain special provisions on access to social services, medical services and reasonable housing. Lastly, but essentially, they call for the adoption of a policy to promote and guarantee equality of treatment and opportunity between regular status migrants and nationals in employment and occupation in the areas of access to employment,¹² remuneration, social security, trade union rights, cultural rights and individual freedoms, employment taxes and access to legal proceedings.

It should be noted that Conventions Nos. 97 and 143 allow for a number of exceptions with respect to the categories of migrants covered by the instruments, notably seafarers (covered by a wide range of specific Conventions), frontier workers and short-term entry members of the liberal profession and artists, as well as the self-employed. Convention No. 143 also excludes trainees and specific duty assignments. However, these exclusions in this Convention only apply to Part II, which deals with equality of opportunity of regular migrants with nationals. They do not exclude these cate-

gories of migrant workers from the basic level of protection relating to basic human rights provided for in Part I of Convention No. 143.

I.2.2 UN Migrant Workers Convention (ICRMW)

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (UN Migrant Workers Convention, ICRMW)¹³ was adopted in December 1990. To date, it has been accepted by 34 States, but it has not been ratified by a single major country of employment. However, a number of significant countries of origin, such as Mexico and the Philippines, have accepted it.¹⁴ The UN Convention embodies most of the substantive provisions of the ILO Conventions and in some ways goes beyond them. The UN Convention and ILO Conventions Nos. 97 and 143 can therefore be considered as complementary.

While the long-term objective of the UN Convention is to discourage and eliminate irregular migration, at the same time it furthers the rights and protections of persons migrating for employment, including those who find themselves in an irregular situation. Other significant aspects of the Convention include the fact that ratifying States are not permitted to exclude any category of migrant worker from its application (Art. 88), the "indivisibility" of the instrument, and the fact that it includes every type of migrant worker, including those excluded from existing ILO instruments.¹⁵ The Convention also provides for a broad definition of "family" taking into account a more modern and up-to-date composition of it (Arts. 4 and 44(2)). Compared to the specific ILO instruments, the UN Convention seems to articulate more broadly the principle of equality of treatment between migrant workers (irrespective of status) and nationals before the courts and tribunals, with respect to remuneration and other working conditions as well as with respect to migrant workers' access to urgent medical assistance and education for children of migrant workers (Arts. 18(1), 25, 28 and 30 respectively). It also contains more extensive rights for migrant workers to transfer their earnings and savings (Arts. 32 and 47), and migrant workers appear to benefit from a clearer level of protection in relation to expulsion (Art. 22).

In terms of the right to reimbursement of social security contributions, however, the ILO instruments (including the specific Conventions on social security) define migrant workers' rights more clearly (Sections I.2.3, VII.5.2 and VIII.4.4). As regards additional rights from which documented migrants and members of their families may benefit (ICRMW, Part IV), the ILO and UN instruments are quite similar, except that ILO Conventions provide for more distinct rights for migrant workers to form a trade union, and the right to equal treatment in terms of access to education, housing and vocational and social services. Finally, ICRMW provides for the possibility of individual complaints by migrant workers (Art.77), but does not, unlike the ILO instruments, emphasize the involvement of workers' and employers' organizations.

I.2.3 Protection of the rights of irregular migrants

At the heart of the protection of the rights of men and women migrant workers lies their potential vulnerability to discrimination, exploitation and abuse, especially in marginal, low status and inadequately regulated sectors of employment. In addition, migrants without an authorization for entry and/or employment are at the margins of protection by safety and health, minimum wage and other standards as they are most often employed in sectors where those standards are either not applicable, or not respected or enforced. It is therefore imperative that countries ensure some minimum standards of protection, including the basic human rights, for all migrants workers, *whatever their status*. ICRMW and ILO Convention No. 143 contain provisions intended to ensure that all migrant workers enjoy a basic level of protection even when they have immigrated or are employed illegally and their situation cannot be regularized. Under Convention No. 143 (Arts.1 and 9(1)), these relate to basic human rights, protective measures for migrant workers who have lost their employment and certain rights arising out of past employment as regards remuneration, social security and related benefits (Chapter VIII). ICRMW extends to migrant workers who enter or reside in the host country without authorization (and members of their families), rights which were previously limited to individuals involved in regular migra-

tion for employment, going beyond those elaborated in Convention No. 143.

In addition to measures to protect the rights of migrant workers, the most recent ILO instruments on migrant workers and the UN Convention (Part VI) both place great emphasis on efforts to curb irregular migration and illegal employment and the need to formulate appropriate migration policies to that effect; the imposition of sanctions to give effect to regulations in this area; exchanging information; providing information to migrant workers; and facilitating the provision of consular services.

I.3 Other ILO Instruments relevant to Migrant Workers

In addition to the specific ILO standards safeguarding the rights of migrant workers, other important ILO instruments are applicable. Many relevant provisions in the more widely ratified ILO fundamental Conventions as well as in other even less ratified Conventions are not limited to nationals or to those migrants with regular residence and employment status.¹⁶ It is important to consider these standards when looking for guidance for the development of comprehensive labour migration policies. It is also worth recalling that, unless otherwise specified in the ILO instruments concerned, all of the Conventions and Recommendations adopted by the International Labour Conference to date cover nationals and non-nationals, while at the same time maintaining the sovereign right of States to regulate access to the territory or to the national labour market.

Some principles and rights at work that derive from the ILO Constitution and that have been expressed and developed in eight ILO Conventions¹⁷ are deemed to be fundamental for the protection of human rights for all workers, including migrant workers, by the international community and the ILO. They concern freedom of association and the right to collective bargaining (Section VII.2.3 below), freedom

from forced labour and child labour and non-discrimination in employment and occupation (Section VII.2.1 below). Moreover, following the adoption of the 1998 ILO Declaration on Fundamental Principles and Rights at Work,

all members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of their membership of the Organization, to respect and to promote and to realize in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions (ILO, 1998: para.2).

Migrant workers' rights are not only a matter of fundamental rights found in the eight core ILO Conventions. The international labour standards in the areas of social security, maternity protection, employment policy, the regulation of private and public employment agencies, occupational safety and health, conditions of work, protection of wages and labour inspection, as well as those covering sectors employing a large number of migrant workers have been identified by ILO as equally important to the promotion of decent work of all migrant workers (Textbox I.1). The ILO instruments that promote equality of treatment between migrant workers and nationals in the field of social security are particularly relevant and are discussed further in Section VII.5 below.¹⁸

Considering the increase in private employment agencies dealing with the recruitment of migrant workers, the Private Employment Agencies Convention, 1997 (No. 181) has become one of the most relevant ILO standards for migrant workers today (Sections III.2.1 and VI.4.5.2 below). Convention No. 181 requires ratifying States to adopt measures to provide adequate protection for and prevent abuses of migrant workers recruited or placed in its territory by private employment agencies. These measures shall include laws or regulations that provide for penalties, including prohibition of those private employment agencies which engage in fraudulent practices and abuses (Art.8(1)). In addition, the Protection of Wages Convention, 1949 (No. 95) deserves particular attention as it provides for the settlement of wages due upon the termination of a contract and prohibits "any deduction of wages with a view to ensuring a direct or indirect

TEXTBOX I.1

Principal ILO Conventions relevant to Migrant Workers

Migration for Employment Convention (Revised), 1949 (No. 97)
Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)

Forced Labour Convention, 1930 (No. 29)
Abolition of Forced Labour Convention, 1957 (No. 105)

Freedom of Association and Protection of the Rights to Organize Convention, 1948 (No. 87)

Right to Organize and Collective Bargaining Convention, 1949 (No.98)

Equal Remuneration Convention, 1951 (No. 100)

Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

Minimum Age Convention, 1973 (No. 138)

Worst Forms of Child Labour Convention, 1999 (No. 182)

Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19)

Equality of Treatment (Social Security) Convention, 1962 (No. 118)

Social Security (Minimum Standards) Convention, 1952 (No. 102)

Maintenance of Social Security Rights Convention, 1982 (No. 157)

Protection of Wages Convention, 1949 (No. 95)

Employment Policy Convention, 1964 (No. 122)

Employment Service Convention, 1948 (No. 88)

Private Employment Agencies Convention, 1997 (No. 181)

Labour Inspection Convention, 1947 (No. 81)

Labour Clauses (Public Contracts) Convention, 1949 (No. 94)

Plantations Convention, 1958 (No. 110)

Employment Injury Benefits Convention, 1964 (No. 121)

Labour Inspection (Agriculture) Convention, 1969 (No. 129)

Nursing Personnel Convention, 1977 (No. 149)

Occupational Safety and Health Convention, 1981 (No. 155)

Safety and Health in Construction Convention, 1988 (No. 167)

Working Conditions (Hotels and Restaurants) Convention, 1991 (No. 172)

Safety and Health in Mines Convention, 1995 (No. 176)

Maternity Protection Convention, 2000 (No. 183)

Safety and Health in Agriculture Convention, 2001 (No. 184)

payment for the purpose of obtaining or retaining employment”. Consequently, any deductions from wages for payments to fee-charging agencies for the purpose of obtaining or retaining employment would be contrary to the Convention.¹⁹

1.4 Regional Instruments

When identifying relevant standards concerning labour migration and the protection of migrant workers in OSCE countries, it is useful to look at the set of regional standards elaborated in Europe and North America. However, it is worth recalling here that where regional instruments on migration are more restrictive than the relevant UN or ILO standards, especially when these have been ratified by the Member State concerned, they should not be considered as a replacement for international standards set in this domain.

The Council of Europe’s instruments in the field of labour migration cover general human rights as well as more specific agreements relating to migrants and migrant workers. The European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) (Council of Europe, 1950) has broadest application in that it applies to all persons within the jurisdiction of States parties (Art. 1), including migrant workers and regardless of their legal status. While there are no specific provisions on migrant workers in the ECHR, migrants have obtained remedies from the European Court of Human Rights under its case law in protection of their right to respect for family life and the non-discrimination principle (Arts. 8 and 14 respectively) (see Textbox VII.5). The European Social Charter (1961) and its Additional Protocol (1988), as well as the Revised European Social Charter (Council of Europe, 1996), include a number of provisions relating to individuals living and working in countries of which they are not nationals, covering the right to engage in a gainful occupation in another Contracting party’s territory, provision of information to migrant workers, facilitation of the migration process, equality of treatment of nationals and non-nationals in employment, the right to family reunification, and guarantees against expulsion, etc. (Arts.18 and 19). These instruments, however, are, on their face, only relevant to mi-

grants who are nationals of Council of Europe Member States, and their application is conditional on reciprocity, although this formal position was challenged recently by the European Committee of Social Rights, which monitors the application of the Charter and Revised Charter and administers the Collective Complaints Protocol (Council of Europe, 1995).²⁰ The European Convention on the Legal Status of Migrant Workers (Council of Europe, 1977) includes provisions relating to the main aspects of the legal status of migrant workers coming from Contracting parties, and especially to recruitment, medical examinations and vocational tests, travel, residence and work permits, family reunion, housing, conditions of work, transfer of savings, social security, social and medical assistance, expiry of the contract of employment, dismissal and re-employment, and preparation for return to the country of origin. However, to date, only eight Council of Europe Member States have ratified this Convention.²¹

With regard to the EU framework, as observed in Section IX.1.3 below, differences exist in terms of rights and benefits granted to migrant workers coming from within the EU, from future accession countries, and migrant workers coming from third countries. The Treaty Establishing the European Community (EC Treaty) provides for freedom of movement for workers from EU Member States (although transitional arrangements are in place limiting this freedom for nationals from the new Member States – see Textbox IX.4) and prohibits any discrimination based on nationality between these workers as regards employment, remuneration and other conditions of work and employment, including social security (Arts. 12 and 39).²² The EC Treaty also invites the Council of Ministers to take measures necessary to ensure equality of treatment and opportunity between men and women and to combat discrimination based on, inter alia, race, ethnic origin, religion or belief, and sexual orientation.²³ It affords migrant workers from EU Member States a set of social rights unequalled in other regions of the world. Furthermore, the Council is also empowered to take measures in the field of asylum, immigration and safeguarding of the rights of nationals of third countries, although the measures adopted to date on legal migration have afforded third-country nationals lesser rights than those granted EU citizens.²⁴

Although not a legally binding instrument, the EU Charter of Fundamental Rights, adopted in 2000 (EU, 2000d), is a major point of reference in this context as most of its provisions are applicable to all persons irrespective of their nationality. It sets out in a single text, for the first time in the EU's history, the whole range of civil, political, economic and social rights of EU citizens and all persons resident in the EU.

While the inter-American system for the protection of human rights does not provide for a specific instrument on migrant workers, they enjoy the general protection provided by the Organization of American States (OAS), which adopted the 1948 American Declaration on the Rights and Duties of Man (OAS, 1948) and the 1969 American Convention on Human Rights (Pact of San José) (OAS, 1969). Both instruments guarantee freedom from discrimination. Certain principles applicable to migrants and their families have also been developed on the basis of the case law of the Inter-American Commission on Human Rights (IACHR)

and the Inter-American Court of Human Rights.²⁵ In light of the enormous importance that migration has acquired in the past decade, the IACHR decided to devote special attention to the situation of migrant workers and their families in the Americas. The OAS General Assembly adopted several resolutions and organized Summits of Heads of State. In 1997 the IACHR appointed a Special Rapporteur on Migrant Workers and their Families.²⁶

The North American Free Trade Agreement (NAFTA) deals only marginally with migration issues through the North American Agreement on Labour Cooperation (NAALC) and also in the body of NAFTA itself, which permits the entry of a certain quota of investors, highly qualified personnel and executives of multinational corporations between signatory States. NAFTA is addressed in Section IX.1.4 below.

ENDNOTES

- 1 The most extensive provisions on the protection of the rights of migrant workers, including trafficked and smuggled migrants, are found in the Durban Declaration and Programme of Action against Racism, Racial Discrimination, Xenophobia and Related Intolerance, adopted in 2001 (UN, 2002).
- 2 For more information on the work of the Special Rapporteur, see <http://www.ohchr.org/english/issues/migration/rapporteur/index.htm>.
- 3 Both the ICCPR and ICESCR have been ratified by nearly all OSCE countries, with the exception of Andorra (signed ICCPR but not ratified; ICESCR), the Holy See (ICCPR; ICESCR), and the United States (signed ICESCR but not ratified).
- 4 The universality of general human rights instruments in terms of the right-holder is underlined by the Special Rapporteur on the rights of non-citizens (Weissbrodt, 2003: 2).
- 5 The purpose of the Trafficking Protocol is (a) to prevent and combat trafficking in persons, paying particular attention to women and children; (b) to protect and assist victims of such trafficking, with full respect of their human rights; and (c) to promote cooperation among States parties in order to meet those objectives (Art. 2). The Smuggling Protocol aims to prevent and combat smuggling of migrants, as well as to promote cooperation among States parties to that end, while protecting the rights of smuggled migrants (Art. 2). However, the Protocols are not strictly-speaking human rights instruments because they have been adopted in a criminal law context.
- 6 See also ICRMW Art.16(1), which provides for the right of liberty and security of the person and Art. 16(4), which specifically prohibits arbitrary arrest or detention.
- 7 E.g. ICCPR, Art.12(1) and (2). The right to leave is also protected by ICRMW (Art. 8(1)).
- 8 Confiscation of passports is prohibited explicitly by ICRWC (Art.21). Moreover, countries of origin concerned about the "brain drain" of skilled persons cannot impose restrictive measures with a view to preventing such persons leaving the country. They have to seek other means to encourage their nationals to stay in the country or to support "brain circulation".
- 9 E.g. ICRMW Art.18(1).

ENDNOTES

- 10 ILO Recommendations No. 86 and No. 151.
- 11 19 OSCE countries have ratified at least one of these instruments, namely: Albania (C97), Armenia (C97/C143), Belgium (C97), Bosnia and Herzegovina (C97/C143), Cyprus (C97/C143), France (C97), Germany (C97), Italy (C97/C143), Moldova (C97), Netherlands (C97), Norway (C97/C143), Portugal (C97/C143), San Marino (C143), Serbia and Montenegro (C97), Slovenia (C97), Spain (C97), Sweden (C143), The Former Yugoslav Republic of Macedonia (C97/C143) and the UK (C97).
- 12 Convention No. 143, Art. 14(a), however, permits limited restrictions on equality of opportunity in access to employment (Textbox VII.1). With respect to access to employment and protection against loss of employment, see also ILO (1999: paras. 381-401 and 577-597).
- 13 The ICRMW was adopted by the UN General Assembly (Resolution 45/158) on 18 December 1990 and entered into force on 1 July 2003.
- 14 Five OSCE countries (Azerbaijan, Bosnia and Herzegovina, Kyrgyzstan, Tajikistan and Turkey) have ratified the Convention. It should be recalled, however, that labour migration remains a dynamic phenomenon and that countries of origin may well become future destination countries: for example, Mexico is now also a recipient of migrant labour from Central American countries, such as Guatemala.
- 15 It should be noted however that, while the designation of frontier workers, seafarers and the self-employed is very important and useful, they are not covered specifically in ICRMW's substantive provisions.
- 16 When considering the applicability of ILO instruments to all migrant workers, whether temporary or permanent, or in a regular or irregular situation, a distinction needs to be made between scope and application. For example, while the Conventions may not explicitly exclude irregular workers from their scope of application, it may be difficult to apply certain provisions in practice with regard to these workers. This may be the case especially in areas such as social security or maternity protection where entitlements to benefits may be subject to completion of a qualifying period (based on the period of employment or residence) or depend on contributions made by the workers concerned. Irregular workers, due to their status, are often not in a position to participate in contributory social security schemes.
- 17 Forced Labour Convention 1930 (No. 29) and the Abolition of Forced Labour Convention 1957 (No. 105); the Freedom of Association and Protection of the Right to Organize Convention 1948 (No. 87) and the Right to Organize and Collective Bargaining Convention 1949 (No. 98); the Equal Remuneration Convention 1951 (No. 100) and the Discrimination (Employment and Occupation) Convention 1958 (No. 111); and the Minimum Age Convention 1979 (No. 138) and the Worst Forms of Child Labour Convention 1999 (No. 182).
- 18 For a detailed overview of the ILO instruments on social security, see Humblet and Silva (2002: 41-45).
- 19 Cf. ILO, (2003a: para. 267); for a more detailed explanation on the application of Article 9 of Convention No. 95 see also paras. 268-271.
- 20 This Protocol allows certain trade unions and NGOs to bring complaints against those Contracting parties accepting the procedure under the Protocol. In a case against France, (International Federation of Human Rights (FIDH) v. France decided in September 2004), the Committee found a violation of Article 17 of the 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 practices 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. See Council of Europe (1996: paras. 29-32).

ENDNOTES

- 21 France, Italy, Netherlands, Norway, Portugal, Spain, Sweden, and Turkey. The Convention has been signed by Belgium, Germany, Greece, Luxembourg, Moldova, and Ukraine.
- 22 See also Council Regulation 1612/68/EEC (EU, 1968), which deals principally with equality of treatment in respect of access to employment, working conditions, social and tax advantages, trade union rights, vocational training and education.
- 23 See respectively Council Directives 76/207/EEC (EU, 1976) and 2000/43/EC (EU, 2000a) which give effect to Article 13 of the EC Treaty.
- 24 Despite the promises of the provision of “near equality” for third-country nationals made by the European Council in its Conclusions adopted at Tampere, Finland in October 1999 (See EU, 1999).
- 25 See in particular the Court’s Advisory Opinion on the Legal Status of Undocumented Migrants: “The Court considers that undocumented migrant workers, who find themselves in a situation of vulnerability and discrimination with respect to workers who are nationals, have the same labour rights that belong to the rest of the workers in the State in which they are working, and this last must take all necessary measures to see that this is recognized and complied with in practice. Workers, being entitled to labour rights, must be able to count on all adequate means to exercise them.” (Inter-American Court of Human Rights, 2003: para.160).
- 26 For the website of the Special Rapporteur, see <http://www.cidh.org/Migrantes/defaultmigrants.htm>.