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Tackling irregular forms of migration

Irregular migrants in the European Union – do they enjoy the rights contained in the UN Migrant Workers Convention?

Disertation thesis

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I declare that I have written the submitted dissertation independently, all the used sources and literature have been properly cited and the work has not been used to obtain another or the same title.

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In Prague on 20 August 2012

Signature

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1. INTRODUCTORY CHAPTER

Tackling the irregular forms of migration or even fighting irregular migration is in recent years more and more filling the first pages of newspapers, coming from politicians on European and also national level. Although the reason for such claims is often rooted in fear and a certain level of populism, this issue becomes more and more the subject of specific EU and Member states laws and policies. As will also be explored further on, the EU migration policies are increasingly focusing on securitization and external border control, criminalization and externalization of migration. On the opposite, this research takes a human rights perspective on irregular migration. One of the best ways how to tackle irregular migration is to help those that fall into irregularity because of administrative reasons based in the host country legislation as labour migrants or as unsuccessful asylum seekers, is to give them the possibility to legalize their status. This is not always possible in the current political situation, the minimal human rights necessity should thus always be that migrants in irregular situation will have access to fundamental human rights and freedoms.

1.1 Introduction: Irregular migrant workers in Europe

There were 191 million migrants in 2005 in the world and the number is still growing (Chetail 2008: 184). Managing immigration became a priority at international level in recent years and we see more and more global actions and links between migration and development, migration and economic growth etc. However difficult realities go along with migrants themselves. Migrant workers in Europe face violations of their rights in the form of low wages, poor working conditions, absence of social protection, denial of freedom of association, etc. (ILO 2004). The situation of some irregular migrants in Europe is due to their vulnerability even worse and their human rights are being put at stake (Vanheule et al. 2004: 319). Krause (2008: 333) compares this situation to Hannah Arendt's perspective of the situation of thousands of people after the First World War in Europe, who did not fit in any "framework of the general law".

International migration is not a new phenomenon. On the other hand, it has always been a natural part of people's lives all over the world. Only the migration management, including restrictions of migration are the inventions of the 20th century. The first instruments regarding the migration regulation appeared in the end of 19th century in the USA and in 1905 in the UK. As we know it today, such a migration management tools only emerged after the World War I. in connection with the notion of a nation state in Europe. Europe has historically been an area of emigration and in the long term it is very new for the territories to have become destination countries for foreign nationals. Boeles (2009: 116) calls freedom of movement as a historical norm in human society referring to the origins of the norm in the Magna Carta of 1215. The freedom of movement is embedded in the UDHR (Art 13) and other important human right treaties (Art 2 Protocol No. 4 ECHR, Art 12 ICCPR, Art 5(d)(i)(ii) ICERD, Art 10 CRC). Some scholars even put the freedom of movement above all the other human rights (Juss 2004).

This research works with the term "*irregular migrants*" in line with the UN Migrant Workers Convention (CMW) definition[1] as a broad term including third country nationals who have no residence status and others that would be liable to expulsion if detected. It means that it includes undocumented migrant workers as well as those that conduct irregular work on a tourist visa or during visa-free tourism, and others working in breach of the regulations (like seasonal or contract workers). Further on, the category of irregular migrants also includes those that are in possession of forged documents or those having assumed false identities. The negative association of the term "*illegal*" with "*criminal*" has been pointed out by several researchers (Sciortino 2004: 17, Triandafyllidou 2009: 2, Cholewinski 2004). To avoid this negative connotation, this research is using the already widely deployed term irregular migrants (Discussed in detail under *1.6 Terminology*).

[1] The CMW provides a definition of a migrant in an irregular situation (or non-documented) in its Art.5:

For the purposes of the present Convention, migrant workers and members of their families:

a. Are considered as documented or in a regular situation if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party;

b. Are considered as non-documented or in an irregular situation if they do not comply with the conditions provided for in subparagraph (a) of the present article.

Irregular migrants mainly work in low-skilled low-paid jobs to which they often are overqualified filling in positions of jobs unattractive to natives (Menz 2011: ix). Depending on a country and a specific economy, it can be generalized that migrants in irregular situation often work in agriculture, manufacturing or construction work, which are often jobs of seasonal character. Andrea Rea (2011) explains, why is it generally necessary to have undocumented workers in agriculture. He claims that in this type of employment it is necessary to have more workers than the actual work, so that the business can always react on the actual higher need for workforce, which is unpredictable. This flexibility of workforce is something from which European economies profit (Menz 2011: 35) while in the same time the rights of the workers are often put at stake, health and safety being ignored. Migrants and especially the irregular ones are thus present at the so-called secondary labour market that is often significant by outsourcing and subcontracting (Menz 2011: 92-3).[2] In the same time, although it is difficult to prove, in many cases there is a high probability that states being aware of this situation knowing the profit of having cheap labour without access to rights that would make them more expensive and less flexible, tacitly tolerate the situation of irregular migrants, ignoring their basic human rights.

We do not know exactly how many irregular migrants are there today in Europe, as they are obviously not registered anywhere and the current estimates rather vary (See more under *1.4 Statistics on irregular migration*). There might be currently roughly about two to four million irregular migrants in the EU-27 (Kovacheva and Vogel 2009: 9 in Carrera & Merlino 2009: 14). The current situation of rightlessness (Hansen 2010a: 99) of certain groups of people in the world led the international community to development of instruments directed exclusively towards securing the rights of migrant workers, under the auspices of the United Nations (including the International Labour Organization), the Council of Europe and the European Union.

[2] The research of Georg Menz is based on a study of 6 EU Member States: France, Germany, UK, Italy, Ireland and Poland.

The set of fundamental human rights for all migrants, including those in irregular situation, is entailed in the UN Migrant Workers Convention (CMW)[3], which is being acknowledged as one of the nine key international human rights instruments by the Office of the High Commissioner for Human Rights (Cholewinski, McDonald, 2007: 85). It was adopted by the UN General Assembly in 1990; it came however into force only in 2003 when a sufficient number of countries have ratified it.

The CMW provides a guarantee of equal treatment of migrant workers and citizens and prohibits any discrimination. For the first time it provides a definition of migrant workers, seasonal workers, cross-border workers and their family members. In relation to irregular migrants, it secures basic human rights like right to life, prohibition of slavery and forced labour, degrading treatment or work in inhuman conditions, freedom to leave any state, freedom of thought, expression and religion, privacy protection, right to information or right to fair trial. In terms of social rights it provides for the conditions of work comparable to nationals, freedom of association in trade unions, certain access to social benefits, access to urgent medical health care or access to education for children.

Today, 44 prevailingly developing countries and so predominantly the countries of origin of migrants are among the state parties of the CMW. In Europe, only Albania, Bosnia and Herzegovina and Turkey have so far ratified the Convention. Developed countries that are most often also the destination countries of migrants, are not generally interested in its ratification. But why are the destination countries so reluctant from adopting the CMW?

One of the most often employed arguments by the EU Member states why not to accede to the CMW has been the claim of redundancy and unnecessity of it. Some EU Member states claim that the rights of migrant workers contained in the CMW are already covered by other international and regional instruments that are legally binding in the

[3] International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted by the UN General Assembly on 18 December 1990, entered into force on 1 July 2003)

EU.[4] Also some scholars like Boeles claim that the CMW does not add anything new, because fundamental human rights do apply also to illegal foreigners.[5] On the other hand Slinckx (2009: 149) shows in her comparative legal study that it is not that straightforward and that the CMW is rather complementary to other UN human rights treaties. Additionally to the claim of the CMW redundancy for the current EU legal framework, the EU Member States have several times repeated the fear that the ratification of the CMW could increase irregular migration to the EU and give irregular migrants more rights (Cholewinski, McDonald 2007: 85, December18 2010). Inspired by these two in fact contradictory arguments, this research aims to verify this claim by comparing the scope of rights of irregular migrant workers in EU Member States with the rights embedded in the CMW.

While the accession to the CMW has been discussed, it seemed that the European Commission would prepare a thematic study of the CMW to find out about its compatibility with EU policy and legislation in the area, but finally it did not happen.[6] As long as there has not been such a thorough examination of the rights contained in the CMW in the European Union, this research shall give at least a basic idea on how a CMW contained right for irregular migrants is today embedded in the EU legislation. As the Lisbon Treaty explicitely included in the primary legislation a common migration policy as its objective (Art. 79 TFEU) in the area of migration, the ratification of the CMW could actually be one of the steps towards approximation of migration policy in the EU.

1.2 Hypothesis and research questions

I expect that most of the fundamental human rights for all (including migrants in irregular situation) are embedded already in international human rights law that is also

[4] This claim has been observed already by Cholewinski and MacDonald (2007: 10) and recently also in the December18 study (2010: 90) that identified this claim by 19 EU Member States (Austria, Belgium, Czech Republic, Denmark, Finland, Greece, Hungary, Ireland, Italy, Lithuania, the Netherlands, Finland, Germany, Ireland, Poland, Portugal, Romania, Sweden, UK).

[5] Boeles, P., Eerlijke immigratieprocedures in Europa, translated and cited by Vanheule et al. (2004: 308), who also tend to agree with this claim.

[6] The former JHA Commissioner Mr. Vitorino has raised this claim on the March 5th 2004; According to Franco Frattini´s expression in February 2005, the Commission has adopted a negative stance towards the CMW. See: Cholewinski, MacDonald 2007: 82.

applicable in the European Union. But I expect the scope of the rights secured by the CMW to be broader then the protection provided for in the EU.

My main research questions then result: *What human rights are the irregular migrants entitled to in the EU, based on international and European legal instruments? Is the CMW indeed redundant and unnecessary in the legislative framework of the European Union or is it rather complementary with regard to the international and European law? And does it give any additional rights to irregular migrants?* Through these questions I would like to find out *whether there would be an added legal value of the CMW ratification throughout the EU and whether it would be beneficial.*

My research will explore the rights of irregular migrants in international and in European law in a focused and structured approach. The outcome of my research will be a detailed overview of the rights that irregular migrants are entitled to under international and European law, the comparison and interconnection of the two frameworks. It will also be a legal study of the scope of rights contained in the CMW compared to what is currently in force in the EU and will thus support or disprove the EU Member States arguments justifying the non-ratification of the CMW.

1.3 The Methodology, sources and structure

In the centre of my research there is the CMW containing the set of human rights standards for irregular migrants. The first part of my research (Chapter 2) focuses on the CMW, the context and background of its emergence including the drafting process and on its content. It is then framed in a wider context of international human rights law in the next chapter. Chapter 3 is focusing on fundamental human rights instruments and its monitoring bodies providing for general and specific protection of migrants´ rights, thus primary and secondary sources of international law are explored.

The next part of the research does first analyse the EU position towards the CMW and the main arguments of the EU Member States explaining their restrained attitude to it. In order to verify some of their main arguments, I then assess the scope of human rights of

irregular migrants in the European Union contained in the EU law, including the primary and secondary sources of European law (Chapter 4).

It has to be noted at this point that the individual rights of people, including irregular migrants, in EU Member States may vary based on the national legislation of the states. However the EU acquis in the field of human rights and more increasingly also in the migration domain should already be transversal for all the EU Member States, as well as the international obligations (while binding all individual EU Member States). Research has also shown that there is an increasing Europeanization of migration policies, soft-measures, legislation and the funding in the EU (Menz 2011: 40-51), which allows me to study the human rights standards in the EU as such.

The core of the research, the Chapter 5 is based on the comparative research method. Every single article from the CMW relating to the rights of irregular migrants is analysed and compared to the existing legal framework as described in Chapters 3 and 4.

Most of the research is based on desk research and analysis of primary sources of international and European law including also secondary sources of law, like case law, soft law treaty mechanisms´ opinions and explanations, available literature and already conducted studies in the field. When reading, describing and interpreting the primary sources of international and European law, the hierarchy of sources of international law and the principles of international law is being taken into account, as well as the hierarchy of EU law and legislation and EU elementary legal principles.

1.4 The statistics on irregular migration

In 2008 the EU estimated that there were about 8 million irregular migrant workers on its territory.[7] This figure appeared further in other policy papers (as e.g. in the Communication COM(2009) 262) and research papers and studies. Carrera & Merlino (2009: 14) explain that this figure originally appeared in an annex of the impact assessment that accompanied the proposal for the Employer Sanctions Directive in

[7] European Commission, Preparing the next steps in border management in the European Union, Impact Assessment, SEC(2008) 153 (Brussels, February 13, 2008), 6. in: Hansen 2010a, p.90.

2007. It stated that "the nine laregest former EU-15 would have between 4.4 and 5.5 million illegal migrants. Transposing these figures to the EU-25 would give an estimate of between six to eight million undocumented migrants". The CLANDESTINO project has however proven that there might be much fewer irregular migrants in the EU then previously assumed (Carrera & Merlino 2009: 14). It revealed that the Commission was using numbers "without any reliable source and specification of time frame". It then demonstrated that in 2005 the undocumented population in the EU more likely ranged between 2.8 and 6 million persons and a recent estimation concluded that in 2008 there were about 1.9 to 3.8 million irregular migrants in EU-27 (Kovacheva and Vogel 2009: 9 in Carrera & Merlino 2009: 14). These findings seem to be of extremely high importance in the EU as the over-estimated numbers might have led also to over-protective and security measures adoptions on the EU level.

1.5 The literature revision

Apart from the primary sources of my research – the sources of international and European law – I am looking into the doctrine. In terms of secondary sources of my research, the literature, most recent works on irregular migrants rights and the terminology include Bogusz et al. (2004), Krause (2008), Lutz (2007) Opeskin (2009), Wong (2010), Häusler (2010), Juss (2004), Guild (2004), Hansen (2010), Jandl and Kraler (2006) or Triandafyllidou (2009), Carens (2008). Regarding the EU migration law include Peers (2006) and Boeles et al. (2009), in relation to irregular migrants' rights, amongst the important is definitely Peers (2001, 2004, 2008).

The CMW has been first under-researched once it was adopted. Various initiatives have however brought it to life and to attention of scholars. Latest monography dealing with the CMW include Guchteneire, Pecoud and Cholewinski (2009) Migration and human rights : The United Nations Convention on Migrant Workers' Rights. The chapter on unsuccessful ratification process in Europe is mainly based on a thorough analysis of the arguments elaborated under UNESCO (Cholewinski, MacDonald 2007). A specific comparison of the other 6 core UN human rights treaties with the CMW has been done by the ICMC (2006) and Slinckx (2009). Various NGOs conducted recently some studies

on the non-ratification of the CMW in the EU, including December 18 (2005, 2010), PICUM (2010). Vanheule et al. (2004) conducted an extensive legal study of the possible impacts of the CMW ratification on Belgian jurisdiction. These studies underlie my hypothesis and research questions as I build on their findings on the EU Member states claims towards the CMW.

Regarding the criticism of the CMW, it is important to mention Böhring (1988), Nafziger and Bartel (1991) and Chetail (2010). Chetail has also done a thorough analysis of the Migration-Development nexus (2008) and is advocating for the importance of the CMW in other works. Most recently Ryan (to be published in 2012) focused on the Committee of Migrant Workers and its recommendations towards the contracting states.

1.6 Terminology

Generally on migration

Often, labour migrants are classified by scholars (Boeles 2009, Brandl 2007) as voluntary migrants to be distinguished from another important migrant group – the refugees – as involuntary or forced migrants. The reality is however much more complicated. People migrating for work have different reasons for that and find themselves in various situations and their decision to migrate is not always a 100% voluntary. The reasons can be economic (like unemployment in their country of origin), family related, environmental changes related but also of social nature (as for example the social stigmatization of those that would not migrate abroad in certain specific cases). It is very often the case that the extensive family burdens itself with debts to be able to send one person abroad. This dependency also blows the voluntary aspect of labour migration away and in this context, there is rather little substantiation to talk about voluntary migration.[8]

[8] Often mentioned push factors for migration are extreme poverty, unequal distribution of wealth in the world, vulnerability of women and children, domestic and social violence, armed conflict,

In the area of migration law and policy there is a terminological incoherence. That is why it is necessary to explain at least the most often deployed terms in the research.

Irregular migration

The terms *clanderstine, irregular, illegal, undocumented, unauthorized ((i)migration/(i)migrants)* or *sans-papiers* are used *ad promiscue* in the scholastic but also political and even legal discourse. In the general political discourse still the most frequently deployed term is *illegal migration.* Illegal migration is in a broad meaning used extensively for example by the European Union (Jandl and Kraler 2006) or by the national legislations and policy papers. However, in 2011, the European Commission already deployed the term "*irregular migrants (economic migrants trying to cross EU borders illegally)"* in its Communications.[9]

The term "illegal migration" is in fact incorrect also from the legal point of view as it does not make any sense and should not be therefore employed.

According to some scholars (Hansen 2010b) illegality itself is a political and legal construct. As *illegal* are being marked people, who have just made an administrative mistake, like have blown a term. European citizens also disobey the laws from time to time, but nobody would put them outside the law, call them "illegal". A French carpenter, who does one of his orders "tax free" so that the customer and himself both "gain on the price", is never going to be called an "illegal person". Also, this term is abusively used towards foreign nationals living for example in France, working for the same carpenter to enable him to provide inexpensive services. Peo Hansen (2010a: 89) calls the term illegal immigration an ideological and political term employed by the EU institutions and governments, enabling certain migration policies and discourses. It has always been popular for politicians to blame foreigners/migrants/the others for the problems of their own country. Using the natural xenophobia in people and racism present in the

globalisation, greater possibilities of movement, cultural practices, unemployment, poor education, lack of access to resources, access to information or false expectations.

[9] Communication from the Commission to the European Parliament, the Council, the ECOSOC and the Com of the regions, Communication on migration, Brussels, 4.5.2011, COM(2011) 248 final, http://ec.europa.eu/home-affairs/news/intro/docs/1_EN_ACT_part1_v11.pdf

European societies, the political discourse is often misusing the virtual "threat of illegal migration" to achieve its own goals.

The association of the term "illegal" with "criminal" has been pointed out by several researchers (Sciortino 2004: 17, Triandafyllidou 2009:2). Richard Cholewinski is using *"…the term "irregular migration" rather than "illegal migration" to avoid the connotation of illegality and criminality often associated with the latter*" (2004). PICUM[10] is also opposing the term "illegal" and trying to implement the use of correct terminology. They advocate for the use of the term 'undocumented migrants' (or alternatively, 'irregular migrants') as opposed to 'illegal migrants' n referring to migrants without a valid residence permit.[11]

Already in 1975 the UN General Assembly adopted a resolution inviting countries not to use the term "illegal migrants", rather to speak of "non-documented or irregular migrant workers".[12] It is however still being used extensively, although there has been seen an important shift towards the deployment of other terms of more neutral nature like irregular (in a broad sense meaning not regular, in violation of migration rules) or undocumented, meaning being not in possession of the required residence papers (Triandafyllidou 2009: 3).

According to Guild (2004: 3) there are various situations that may fall within the scope of irregularity, but generally three ways of becoming illegal can be described as apparent: (1) a person arriving in the territory of a state clandestinely, (2) the so- called "visa-overstays" when a foreigner stays in the territory longer than his permitted period of entry and residence, (3) foreigner working without a necessary permit in a manner

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10 Platform for International Cooperation on Undocumented Migrants

11 The reasons why PICUM criticize the term are as follows: (1) *Its connotation with criminality* as most irregular migrants are not criminals. Being in a country without the required papers is, in most countries, not a criminal offence but an administrative infringement. (2) Defining an individual or group as 'illegal' can be regarded as *denying them their humanity* and risks violating their innate right to recognition as a person before the law. (3) Labeling asylum seekers who may find themselves in an irregular situation as 'illegal' may further *jeopardize their asylum claims* as it encourages a political climate of intolerance towards those seeking asylum.

While referring to migrants as 'illegal' has political and/or societal consequences, it fails to take into account the varying degrees of compliance which may apply to the situation of any one migrant. For example, a migrant may be legally resident but working in violation of some or all of the conditions of their visa. http://picum.org/en/our-work/undocumented-migrants/terminology/

12 UN General Assembly Resolution 3449 (XXX) of 9 December 1975. Battistella 2009: 53

inconsistent with his immigration status. To these categories, definitely also (4) the rejected asylum seekers need to be added (Triandafyllidou 2009: 6).

The Committee on Migrant Workers (2011: 3) gives various examples of scenarios, when migrants fall within the definition of irregularity: working without work and/or residence permits; non-registration at social insurance institutions; non-registration at tax institutions, insufficient registration of the employment contract; irregular extension of a regular work permit; "pseudo-self-employed" activities; etc.

The President of the UN General Assembly has urged the world to tackle and break down myths about immigration and instead the key issue was to focus on migrants contributions to economic development in countries of origin, transit and destination.[13]

The EU

Throughout the European Union migration related acquis the term "illegal" is still widely used. The European Pact on Asylum on Immigration or the Stockholm Programme use a language of illegality in connection with verbs like "combating", "fighting" and "better controlling". By this, the EU policy is fostering an artificial ling between what is principally a social issue and penal, repressive administrative law and practices (Carrera & Merlino 2009: 11). Such a link creates a critical overlap between the category of undocumented migrants and potential criminals.

In EU law several instruments provide for a definition of "illegal migration". One definition can be found in the Return Directive. Its Article 3(2) it defines illegal stay.

> Illegal stay' means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State.

Employer sanctions Directive also provides for a definition in its Article 2(b).

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13 On 13 October 2011, see http://www.un.org/apps/news/story.asp?NewsID=40032&Cr=migrants&Cr1=

> 'Illegally staying third-country national' means a third-country national present on the territory of a Member State, who does not fulfil, or no longer fulfils, the conditions for stay or residence in that Member State.

Also the Regulation on statistics[14] provides with a definition A2(1)(r)

> "Third-country nationals found to be illegally present" means third-country nationals who are officially found to be on the territory of a Member State and who do not fulfil, or no longer fulfil, the conditions for stay or residence in that Member State.

All the mentioned definitions are rather similar in their wording. The general problem of defining irregular migration in EU legislation is also connected to the fact that the definition is always negative. But nowhere are already stated the specific conditions for stay, residence, etc. These are only governed by national legislation of each Member State.

Third country nationals – this term used in the terminology of the European Union encompasses non-EU nationals (and also stateless persons). Boeles (2009: 34) explains the emergence of this term as "third country nationals" are nationals not of the host state ("the first country") nor of another EU Member State (the would-be "second country") but of a third country. EU legislation defines the *third country national* as *any person who is not a EU citizen, a third country national family member of a Union citizen exercising his or her right to free movement or a third country national who, under agreements between the EC and the third countries, enjoys rights of free movement equivalent to those of EU citizens*.[15]

Within the European Union there have been criticisms of the current discourse in relation to irregular migration. The European Parliament stressed in its Resolution in January 2009 that the EU institutions shall no longer use the term "illegal immigrants". Also on the level of the Council of Europe the term irregular migrant is preferred to

[14] Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers.

[15] Art 3 Return Directive (2008/115/EC) and Art 2(6) Schengen Borders Code (Regulation EC 562/2006), Boeles 2009: 46

"illegal" (stated in Resolution 1509 of the Parliamentary Assembly in 2006) (Carrera & Merlino 2009: 12). Carrera & Merlino (2009: 32) also conclude that this official negative terminology used in the EU policy justifies repressive immigration measures.

The European Parliament, in its position on the regulation establishing the European Agency for the Management of Operational Cooperation at the External Border (FRONTEX), made a statement on terminology regarding irregular migration[16]:

> *The European Parliament stresses that the EU institutions should endeavor to use appropriate and neutral terminology in legislative texts when addressing the issue of third country nationals whose presence on the territory of the Member States has not been authorized by the Member States authorities or is no longer authorized. In such cases, EU institutions should not refer to "illegal immigration" or "illegal migrants" but rather to "irregular immigration" or "irregular migrants".*

National level

On the national level, there might be various legal terms in each country. Guild points out that states usually provide definitions of what is legal entry, leaving the definition of the opposite rather vague (2004: 4). The Odysseus Network has been analyzing the legal framework in particular Member States finding very different levels of definitions in every national law.[17] Guild describes the few definitions of illegal migration as unclear in case of Portugal or the UK that are one of few countries that provide such a definition in their legislations (2004:15). For instance in Belgium, one category that falls under the internationally recognized term irregular migrant would be "foreigners residing illegally, other would be "clandestine foreigners" and another one "tolerated foreigners" (Vanheule et al. 2004: 308).

The negative implications of using the term "illegal" to describe undocumented migrants has been studied by various research projects in the EU and compiled in a study by

[16] Source: European Parliament, 13 September 2011, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+20110913+SIT+DOC+PDF+V0//EN&language=EN

[17] Annex 1, pp 18-28, Guild 2004.

Carrera & Merlino (2009). Some of the projects pointed out that the description of undocumented migrants as "non-rights holders" or even as "non-persons" favours increased (in)security practices by public authorities. As stressed by one of the projects (CHALLENGE) the only offence committed by the person on the move is not respecting the administrative rules for legal entry and residency developed by the receiving state. It therefore is a "crimeless" offence, in which the only "victim" is the receiving state, whose capacity to effectively manage mobility is challenged (Carrera & Merlino 2009: 13).

The CMW

According to Vanheule et al. (2004: 308), all the terms employed by the EU or its member states would fall in the definition of the CMW in the Art. 5: not documented or in a regular situation.
The CMW provides a definition of what is a migrant in an irregular situation or non-documented:

> Article 5
> For the purposes of the present Convention, migrant workers and members of their families:
> a. Are considered as documented or in a regular situation if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party;
> b. Are considered as non-documented or in an irregular situation if they do not comply with the conditions provided for in subparagraph (a) of the present article.

This research works with the term "irregular" as, in line with the CMW and Triandafyllidou (2009:4), a broad term including third country nationals who have no residence status and others that would be liable to expulsion if detected. It means that it includes undocumented migrant workers as well as those that conduct irregular work on a tourist visa or during visa-free tourism, and others working in breach of the regulations (like seasonal or contract workers). Further on, the category of irregular migrants also includes those that are in possession of forged documents or those having assumed false identities.

Having a clear definition based on the CMW in force in the EU Member states would be a great asset of the CMW while ratified by the EU Member States, as it would help the harmonization of the terminology in this regard.

2. THE MIGRANT WORKERS CONVENTION

2.1. The UN Migrant Workers Convention (CMW)

Out of recognition of the need of deeper migrant protection, in 1990 the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) has been adopted. The Convention is being acknowledged as one of the nine key international human rights instruments by the Office of the High Commissioner for Human Rights (Cholewinski, McDonald, 2007: 85) and it articulates basic human but also social, economic or cultural rights of all persons irrespective of their migratory status.

The CMW is based on principles stemming from the ILO Conventions No 97 and 143, the Convention on the Protection of refugees (UN, 1951), Universal Declaration of Human Rights, CEDAW (UN, 1979) and the CRC (UN, 1989). Based on these documents it tries to emphasize the necessity of granting basic rights to migrant workers, that are to be basically already in force through the respected human rights instruments.

The core message of the Convention seems in underlining the necessity to protect inalienable human rights of all migrants simply because they are entitled to them as human beings. The CMW first of all aims to help vulnerable labour migrants, to raise the sensitivity of the governments towards this issue, so that the migrant workers would be perceived like humans and important economic actors rather then a tolerated labour force (December18: 2005). The Convention also supports international cooperation of states in prevention and tackling exploitation of migrant workers and in imposing sanctions for the violence that migrants are often facing.

The CMW has so far been signed and ratified by 44 mainly developing countries, so sending countries of migrants, although several of the state parties are also destination

countries for hundreds of thousands of immigrants.[18] However, the major destination countries, including the EU Member states, have not been interested in its signature or ratification so far, which strongly diminishes the effectiveness of the Convention. In Europe only Albania, Bosnia and Herzegovina and Turkey have ratified the CMW[19].

The criticism of the EU Member States for the non-adherence to the CMW has been severe and the importance of the European states signatures as main immigration countries has been highlighted.[20] It must though be also taken into account that the Euro-centric view of the world is not necessarily the right perspective. The CMW has been signed and ratified by other important countries throughout the world and its Committee has already done some interesting interpretative work.[21] The signatory countries are often labelled as primarily countries of origin of migrants, but they have more and more been also recognized as transit and destination countries (Ryan 2012: 20).

2.2. Background and context of its drafting process

The UN interest to protect the rights of migrants has increased in the 70s of the last century. In 1979 a working group on the preparation of the CMW has emerged and the creation of the document took eleven years. There has been already a very long negotiating period after the adoption of a treaty on migrant workers has been proposed by a General Assembly resolution of 17 December 1979[22] until the adoption of the treaty

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18 Those countries are for example Argentina, Ghana, Mexico or Senegal (ILO 2010: 136). Altogether there are 44 state parties and 15 signatories of the Convention until today. Out of the current ratifying countries, the largest concentration by continent was in the Americas, where 17 out of 35 UN members had ratified the Convention (Argentina, Belize, Bolivia, Chile, Colombia, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Jamaica, Mexico, Nicaragua, Paraguay, Peru, Saint Vincent and the Grenadines and Uruguay). There had also been extensive ratification in Africa, where 17 of 53 UN member states were parties, primarily in North and West Africa (Algeria, Burkina Faso, Cape Verde, Egypt, Ghana, Guinea, Lesotho, Libya, Mali, Mauritania, Morocco, Niger, Nigeria, Rwanda, Senegal, Seychelles and Uganda). By contrast, only six Asian states of 43 UN members and only four European states out of 47 UN members had ratified (Kyrgyzstan, Philippines, Sri Lanka, Syria, Tajikistan and Timor Leste – or seven if including Azerbaijan), while none of the 14 UN members in Oceania had done so (Ryan 2012: 17).

19 Azerbaijan sometimes claimed to be a European state (Ryan 2012: 20) when the membership in the Council of Europe is being taken as determinant.

20 See for example December 18 or PICUM

21 More on this in Ryan (2012).

22 UNGA Resolution 34/172, 17 December 1979

on 18 December 1990[23]. The length of the negotiations has mainly been caused by different opinions between states of origin and destination (Ryan 2012: 1). The countries of origin of migrants have in fact preferred a creation of such an international mechanism within the UN compared to an alternative of the ILO, where the "industrialised" countries had a greater say (Ryan 2012: 2). The destination countries were quite sceptic about the instrument from the beginning and were first of all afraid of further support for irregular migration. According to Ryan (2012: 3) an intervention of several southern and North European countries was very important, as they managed to incorporate their socially democratic approach to migration.

The Convention on Migrant Workers came into force only 13 years after its adopition, in 2003, when a sufficient number of countries (twenty) have ratified it.

2.3. Content with specific regard to irregular migrants

The Convention applies to the entire migration process of migrant workers and members of their families. It describes their rights and related protection at all stages of that process: during preparation, recruitment, departure and transit; stay in states of employment; and their return to or resettlement in countries of origin or residence (Committee on Migrant Workers 2011: 6).

In its introductory part, the convention provides a guarantee of equal treatment of migrant workers and citizens and prohibits any discrimination. For the first time it provides a definition of migrant workers, seasonal workers, cross-border workers and their family members. The CMW defines a migrant worker as *a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national* (Art.2). It distinguishes documented migrant workers (migrants that find themselves in a regular situation) from those that find themselves in irregular situation (undocumented migrants). All of those, including members of their families, are entitled to a set of basic human rights regardless of their status. In case of the

[23] UNGA Resolution 45/158, 18 December 1990

documented migrants, the CMW recognizes their entitlement for more rights additionally to the basic rights.

The CMW gives human and labour rights to migrant workers and members of their families, regardless to their immigration status (Part III), which means an explicit support to fundamental human rights of irregular migrants. The crucial part of the Convention (Part III.) is titled Human rights of all migrant workers and members of their families. Here, basic human rights like freedom to leave any state, right to life, prohibition of slavery and forced labour, degrading treatment or work in inhuman conditions, are secured. It also stresses migrant workers´ rights as freedom of thought, expression and religion, privacy protection, right to information, right to fair trial or right to access to education and health care.

It is specifically mentioned in Article 35 of the Convention that it shall not be in any case interpreted as

> implying the regularization of the situation of migrant workers or members of their families who are non-documented or in an irregular situation or any right to such regularization of their situation.

On the other hand, Article 69(2) gives support to regularizations if possible.

The CMW does not support irregular migration, as its Part IV gives certain rights only to regular migrants and the Part VI concerned with 'sound, equitable, humane and lawful conditions' in international migration provides measures to prevent irregular labour migration (Ryan 2012: 3). Part IV of the Convention thus deals specifically only with legal migrants and entitles them to additional rights. Migrants in regular situation have the right to stay in touch with their country of origin. Inter alia this means that they have the right to (temporarily) return to their country of origin, if they wish so. Cultural and other contacts with the country of origin shall be supported and the migrants also have the right to send remittances home. They are also entitled to the right to information about the conditions in the country of destination prior to departure, right to social services, taking part in trade unions and free choice of employment.

The distinction drawn within the Convention between the rights of irregular migrants and those of persons in a regular position led to Linda Bosniak's criticism in 1991 that 'under the terms of Convention, the undocumented continue to enjoy institutionally-sanctioned second- (or third-) class status.'[24]

Ryan (2012: 13) tends to agree with the criticism of the CMW concerning the fact, that some of the rights contained in the Part IV (rights to migrants in regular situation) could in principle have been extended also to irregular migrants, but were not. In this context, he specifically mentions: the right to participation in the political affairs in the state of origin, including the right to vote and to be elected there (Article 41); the right to equal treatment in education, vocational provision, housing, 'social … services', access to co-operatives and self-managed enterprises, and in cultural life (Article 43); the exemption from import and export duties and taxes when international migration occurs, freedom to transfer earnings and savings to the state of origin or elsewhere, and equal treatment in taxation (Articles 46-48) or the provision that expulsion should only be for reasons defined in national legislation (Article 56(1)).

Provisions of the CMW particularly relevant to the specific aspects of migration-development nexus recognized by Chetail (2008: 209) are:

1. The remittances – explicitly acknowledged as the right for all migrant workers to transfer their earnings and savings into their countries of origin (Article 32), while States have the obligation to facilitate such transfers for migrant workers who are in regular situation (Article 47). Importantly, this provision also applies to irregular migrants.
2. The CMW also governs temporary labour migration with some adjustments for seasonal workers (Article 59), project-tied workers (Article 61) and other specified-employment workers (Article 62).
3. The CMW addresses the need for consultation and cooperation between States to ensure that migration takes place in sound, equitable and lawful conditions (Article 64). This obligation of cooperation concerns, among others, the orderly return of migrant workers (Article 67(1)), their reintegration in countries of

[24] Bosniak, L. (1991), 'Human Rights, State Sovereignty, and the Protection of Undocumented Migrants Under The International Convention For The Protection of The Rights of All Migrant Workers and Members of Their Families' 25 *International Migration Review* 737, 759; in: Ryan 2012: 12.

origin (Article 67(2)), as well as the prevention and elimination of irregular migration (Article 68), including the imposition of sanctions on those who exploit undocumented migrants such as traffickers and employers.

2.4. The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families

The Article 72 of the CMW designates a monitoring committee. On 1 January 2001, six months after the Convention took effect, the Committee on Migrant Workers has been established by appointing 10 experts as its members (December18 2005: 17). By then, the CMW had less then 40 member parties; in the moment when the fourty-first country ratified the Convention, the number of experts rose to 14. The first session of the Committee took place in 2004, state parties are obliged to report to the Committee about implementation of the Convention. The state reports should include legal, judicial, administrative and other measures taken in order to strengthen the effectiveness of the Convention (Article 73). The Committee is supposed to consider the state reports. Article 73 requires States parties to submit an initial report within one year of its entry into force for the State Party concerned and then every five years.[25] Further on, the State Parties shall present an annual report to the UN General Assembly on the CMW implementation according to Art 74(7).

Optional Article 76 of the CMW allows for communications from one State Party claiming that another State Party is not fulfilling its obligations. The declaration under this article has so far only been made by Guatemala (Edelenbos 2009: 111). Article 77 of the CMW allows for individual complaints if that is declared by the respective state first.[26] Article 77(2) makes it a precondition to the Committee's considering an individual complaint that 'the same matter has not been, and is not being examined under another procedure of international investigation or settlement'. This replicates

[25] The Committee has so far (till 2011) received initial reports from Albania, Algeria, Argentina, Azerbaijan, Bolivia, Bosnia and Herzegovina, Chile, Colombia, Guatemala, Ecuador, El Salvador, Egypt, Mali, Mexico, Paraguay, the Philippines, Senegal, Sri Lanka, Syria and Tajikistan.

[26] As in most of the other treaties, it is not obligatory, "the states may"

the language of Article 5(2) of the First Optional Protocol to the ICCPR, which gives the Human Rights Committee jurisdiction over individual complaints (Ryan 2012: 21). Such a mechanism has not yet entered into force as the ten statements by State Parties required have not yet been reached (Slinkx 2009: 126). This declaration under Art 77 has so far only been made by Guatemala and Mexico (Edelenbos 2009: 111).

Hypothetically speaking, such an individual right to address the Committee could emerge under the CMW in one of the countries that have signed and ratified the CMW in the future. For the purpose of this research examining the gaps in rights between the CMW standards and the current situation in the EU, this would be a point, where the migrants in the EU have fewer rights then could possibly have under the CMW - meaning lack of access to international jurisdiction with an individual complaint.

The Committee has so far issued one General Comment on migrant domestic workers (General Comment No 1, 2010).

2.5. Analysis of the EU position towards the CMW

2.5.1. The EU Member states´ position

From the beginning, finding signatories of the Convention has been very problematic. Just like all other international treaties, the CMW is binding only for those countries that sign and ratify it. Until today, mostly the countries of origin of migrants have signed the Convention. The destination countries are generally reluctant to adopt the CMW. The fact that developed countries are not willing to sign the Convention and to put its legal orders in compliance with the CMW strongly decreases its efficiency.

Currently, there is no “EU stance” towards the CMW as one compact phenomenon. Although there is a common policy of the European Union in migration and asylum matters, the individual positions of individual Member States all together create the EU position relating to the CMW.

As has been stated earlier, no EU Member State has so far signed or ratified the CMW. However, the Flemish Government (not the federal Belgian government) was considering the possibility of ratification of the Convention and asked for an extensive legal study of its possible impacts on Belgian jurisdiction (Vanheule et al. 2004: 288). Recently, out of the 27 Member states, only Slovenian government is considering ratification of the CMW (December18 2010). Interestingly, Italy has actually used the CMW as a model for its laws (Vanheule et al. 2004: 318).

Looking closely at the reasons that prevent most of the countries from signing or ratifying the Convention, several main obstacles can be identified.[27] The main arguments of MSs against the CMW ratification have so far been as follows:

Other human right treaties provide for adequate protection

The most often employed argument is that the human rights protection for migrant workers is already sufficiently codified in their current legal systems and so the Convention is deemed to be redundant. This also is the main argument of the EU Member states. This claim has been namely raised by the following states: Austria, Belgium, the Czech Republic, Denmark, Finland, Germany, Greece, Hungary, Ireland, Italy, Lithuania, the Netherlands, Ireland, Poland, Portugal, Romania, Sweden, the UK.

However, such resilience of democratic states in cases of ratification of human rights treaties has been identified in various other cases as well. Wong (2010) has examined the scope of ratification of the core UN human rights instruments by the states during the last twenty years. Wong questions the motives of states when they ratify human rights treaties. The human rights treaties do not only function as driving forces for countries to secure some rights, but also as a means of expression of identification of a state with some human rights issues. From his empirical research it is clear that, contrary to all the expectations, the more democratic and wealthy states the less likely they are to ratify human rights conventions. The more a country is a country of immigration, the less likely it is to ratify the CMW. His findings argue against the "post-national citizenship perspective" (citizenship rights to be extended also to non-citizens)

[27] A thorough examination of the reasons of EU Member States reluctancy towards CMW ratification has been made by December18 (2010) and Cholewinski and McDonald (2007).

that has been one of his hypothesis and often argued by other scholars (Soysal 1994, Jacobson 1996, Maher 2002).

This argument is the basis of the core part of this research, the comparative Chapter 5 that examines all the rights conferred to irregular migrants in the CMW in comparison with the existing international and EU legal framework.

The CMW gives above-standard rights to irregular migrants

The next argument is often the fear that the Convention will provide wide rights to migrants, especially to the irregular ones, and to family reunification and that irregular migration will only be further supported by the Convention (Cholewinski, McDonald, 2007: 85). This has been claimed for example by Germany or Poland (December18 2010).

Limitation to state sovereignty

As one of the main legal obstacles has been identified the fear of states that its sovereign rights in migration management (determination of who can enter the MSs territory and setting of time limits) would be limited. The fear was expressed by Bulgaria, Germany and the UK (December18 2010).

This stays however in the sphere of state parties in case of the CMW ratification as it is evident from the Art. 79:

> Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families. Concerning other matters related to their legal situation and treatment as migrant workers and members of their families, States Parties shall be subject to the limitations set forth in the present Convention.

States generally consider the sphere of migration policy as internal and fear any interference in this exclusively internal matter in the framework of international law. Nevertheless, the CMW is not depriving the states of their sovereign right to manage immigration to their territory and according to Art. 34 of the CMW, *nothing in the*

Convention shall have the effect of relieving migrant workers and the members of their families from the obligation to comply with the laws and regulations of the state.

Also in other provisions, the CMW leaves freedom of policy regulating access of foreigners (the already mentioned Art. 79). The CMW is explicitly mentioning the possibility of state parties to develop their own policies guiding migrant workers activities (Art. 51, 52, 69) (Vanheule et al. 2004: 298).

Insufficient distinction between regular and irregular migrant workers

One of recently very often used arguments is that the CMW does not differentiate enough on the basis of legal status of migrants (government positions of France, the Netherlands, Austria, Bulgaria, Germany, Denmark, Hungary, Italy, Poland, Slovakia, Sweden and Spain, December18 2010). They very often claim that the distinction of regular and irregular migrants is not clear in the CMW.

This distinction is however straightforward already from the sole nature of the CMW. The CMW itself contains rights for regular migrants and members of their families, whereas Part III. of the CMW (the main question in the current research project) deals specifically with rights of migrants in irregular situation.

Ratification is an EU shared competence

As it has been already mentioned, none of the EU Member States has ratified the CMW so far[28] and there is a continuing discussion about the question, whether the EU itself could or could not ratify the CMW. Some of the Member States use the argument that ratification is of shared competence in the EU as an explication on why it itself cannot sign or ratify the CMW.[29]

The EU itself has the capacity to become a party to an international instrument (Art. 2 TFEU). It has recently happened in the case of the International Convention on the Rights of Persons with Disabilities in 2010, although, a ratification in all EU Member

[28] Based on a survey conducted by December18, only Slovenia is so far considering ratification of the CMW (December18, 2010: 77).

[29] France, Austria, Bulgaria, Cyprus, Czech Republic, Germany, Hungary, Ireland, Italy, Luxemburg, Portugal, Romania, Sweden, Spain (December18, 2010: 91).

States needs to follow. The EU officially joined the International Convention on the Rights of Persons with Disabilities on December 23, 2010, becoming the first intergovernmental organization to sign on to any human rights treaty and take on its binding obligations. Cholewinski (2004: 174-175) upholds another example of the signature (although not full ratification) of the UN Palermo Protocol[30] by the European Union and its Member States. Based on a Council Framework Decision (2002/629/JHA) the protection of trafficking victims shall be in accordance with the Protocol. Ratification of international treaties by the EU Member States or the EU itself gives complementary protection to the rights already secured by the EU legislation. The CMW does however not in fact explicitly provide a clause allowing for its ratification by regional or international organizations (December18 2010: 9). The European Commission has the stance that the EU itself cannot ratify the CMW and that it is the sole responsibility of each Member
State.[31]

Particularly the Amsterdam Treaty served to some Member states as an excuse on why not to sign and ratify the CMW. They claimed that with the Treaty of Amsterdam the competences in the area of asylum and migration have been shifted from the national level to the European level and so that the Member states would infringe the Treaty by signing and ratifying the CMW. France for example has argued that it would be acting unlawfully if it unilaterally ratified the CMW while referring to the 1971 AETR case[32] that stated as once Community rules on a certain issue have been established, Member States no longer had the power to undertake unilateral commitments with third countries in that field (MacDonald, Cholewinski 2009: 368).

However, the EU does not have exclusive competence in this field. Member states are not prohibited to sign and ratify any international standards in this area. In the area of freedom, security and justice there is shared competence of the EU and the Member states (Art 4(2)(j) TFEU). The EU overtakes exclusive competence over some issues,

30 The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children to the United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000

31 Reply of the European Commission´s representative at the CMW conference organized by the Belgian Presidency in October 2010 (December18 2010: 9).

32 Case 22/70 *Commission v. Council* (1971) ECR 263 (the AETR judgment)

when it is covered by its legislation, but it is definitely not the case of the provisions contained in the Migrant Workers Convention (CMW). The EU legislation in this area represents only minimum standards and it does not prevent Member States from adopting national (or international) standards more favourable than those laid down at the EU level (MacDonald, Cholewinski 2009: 368).

Cholewinski and MacDonald (2007: 68-69, 2009: 368) call the French claim a convenient alibi, concluding that the EU legislation in this area only sets the minimum standards but does not restrain Member states from adoption of more favourable national (or international) conditions. Immigration is recently forming a part of the shared competence of the MSs, but it does not mean that Member States are not allowed to sign an international convention on this matter. However, politically, in some Member states this view that MSs shall not proceed unilaterally seems to prevail as it is a convenient argument to evade questions about the non-ratification of the CMW.

Other general claims of various MSs include the argument of the incompatibility of the CMW with national law, the fact that the CMW has only been ratified by countries of origin or by few countries and thus lacks authority, or various administrative and financial obstacles.

To conclude, the claims of different Member States are of different nature. This shows already clearly that they are rather not very objective but subjective, or more precisely to say, are just being sought to excuse the reluctance of states to sign and ratify the CMW for political reasons. As already claimed by Cholewinski, the Member States try to defend themselves and seek excuses rather than having well-founded grounds for non-ratification.

EU Member States do generally focus more on migration regulation then on migrant rights support (Abimourchad, Martin 2008). The topic of labour migration is not being seen from the human rights angle; rather it is being used by politicians and the media in xenophobic connotations (Triandafyllidou, Gropas 2007: 55, 136). Support for the CMW on the political level in the EU is very low and it is clear that the main obstacles to ratification of the Convention are of political nature. The Convention is regarded very

negatively by the governments and is generally ignored, which, together with media and public scepticism, it does not create a suitable environment for its advocacy.

2.5.2. The views of the European institutions

European Parliament

The European Parliament is generally in favour of the ratification of the CMW by the EU Member states and has called for it several times in its resolutions. Actually one of the most important EU soft law documents on CMW is the declaration of the European Parliament in 1998.[33]

A resolution adopted on 7 February 2002 included a recommendation for EU countries to ratify the CMW. Support for the CMW has been expressed by the EP also by the following documents: the European Parliament resolution of 26 September 2007 on the policy plan on legal migration (2006/2251(INI))[34], the European Parliament resolution of 14 January 2009 on the situation of fundamental rights in the European Union 2004-2008 (2007/2145(INI))[35], the European Parliament resolution of 22 April 2009 on a Common Immigration Policy for Europe: Principles, actions and tools (2008/2331(INI))[36] and various other[37].

European Commission

In the past the European Commission recommended the ratification of the CMW when in 1994 it suggested that CMW could be used at a regional level an instrument of harmonization and recommended its ratification,[38] but its position changed significantly later on. In 2005 a reply to a letter sent by the EPMWR, Commissioner Frattini replied

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33 Available at: http://www.gisti.org/doc/plein-droit/38/europe.html

34 http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0414+0+DOC+XML+V0//EN

35 http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2009-0019&language=EN&ring=A6-2008-0479

36 http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2009-0257

37 http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2009-0090+0+DOC+XML+V0//EN, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-450.895+01+DOC+PDF+V0//EN&language=EN

38 European Communication on Immigration and Asylum Policies, COM (94) 23 final, 1994, cited by Vanheule et al. 2004: 317

that he did not consider as a priority the ratification of the CMW neither a study on its possible impacts on the EU in case of ratification.[39]

There is a correlation between the Commission stance and the stance of MSs, who were also first more favourable towards the CMW. The earlier positive position towards the CMW of the Commission has in recent years become negative, which influenced the opinions of Member states.

EESC

One of the most important EU soft law documents on CMW is EESC (European Economic and Social Committee) statement 2004/C 302/12 that supports the accession to CMW.[40]

2.6. Conclusion

The EU Member States have been raising questions related to the fear of the CMW interfering with their sovereign rights, especially in terms of broader rights to irregular migrants (See Chapter 2.5.). An answer to these worries has been provided by the Background Note of the Committee on Migrant Workers´ secretariat (2011: 8) dealing with the misconceptions related to the scope of the CMW and its added value with respect to reducing irregular movements of migrants:

> A common misconception is that the Convention encourages irregular migration by providing rights to migrant workers and members of their families in an irregular situation and that it thus limits the State's freedom in elaborating its migration policies. On the contrary, the Convention explicitly contains measures to be taken by States in order to discourage irregular migration. Thus, in conformity with Article 68: "States Parties, including States of transit, shall

[39] EPMWR, The U.N. Migrant Workers Convention: Steps towards ratification in Europe, cited in December18 2010

[40] The EESC has called upon the Commission and the Council to initiate that the Member States as well as the EU itself ratify the CMW in the next 24 months. 2004/C 302/12 (6.2)

collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation".

In addition, the scope of the application of the Convention finds it limits in the sovereign right of State to decide who can and cannot enter and remain on the national territory, as set out in Article 79: "Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families.". Indeed, the CMW contains three -cumulative- elements that can contribute to reducing irregular movements of migrants:

(a) Recognizes their basic human rights to avoid the unfair competition that their unauthorized work facilitates;

(b) Recognizes more rights to regular migrant workers in order to encourage the regular employment of migrants; and

(c) Foresees sanctions for employers that resort to irregular migrant labour.

CMW provisions which aim to prevent irregular migration require:

-Cooperation among States (Part VI and in particular Articles 64, 65, 67, 68);

-Promotion of sound equitable and humane conditions of migration (Article 64);

-Evaluation of labour needs and the consequences of international labour migration (Article 64);

-Elaboration and implementation of clear policies for entry and stay in the country (Article 5);

-Adequate information to employers and migrant workers (Article 65), and appropriate measures against the dissemination of misleading information (Article 68.1);

-Monitor recruitment of migrant workers by private agencies (Article 66);

-Sanctions for employers of migrants in an irregular situation, while ensuring that the rights of the migrant worker vis-à-vis their employer arising from employment are not impaired by such measures (Article 68.2); as well as for smugglers and traffickers (Article 68.1)

-Addressing the irregular status of migrants and considering possibilities for their regularization (Article 69);

-Orderly return of migrants (Article 67.1).

The analysis of each and single argument of the EU Member States has shown how little profound their arguments are and how most of the arguments truly have a political rather than factual/legal background.

3. INTERNATIONAL HUMAN RIGHTS LAW

> *"International human rights norms are generally applicable to every person as a consequence of being human, irrespective of their migration status. Therefore, as a general rule, human rights apply to migrants in an irregular situation, unless they are expressly excluded from the application of the provision. Similarly, core ILO instruments apply to all migrant workers without discrimination." (FRA 2011: 22)*

3.1. Universal legal framework with relation to migration: GC, CMW, Palermo protocols, GATS Mode 4

There is currently no universal legal framework on migration in the world that would be broad enough in personal, territorial or material scope. Rather the instruments currently in place are very limited in scope. International conventions with relation to foreign nationals with universal value are the Geneva Convention (1951 Convention relating to the status of refugees), the Palermo Protocols (2000 Human trafficking and Smuggling protocols to the UN Convention combating organized crime) and the UN Migrant Workers Convention (CMW) (Chetail 2011). While the personal scope of the Geneva Convention extends only to refugees, the CMW is focusing on migrant workers and the Palermo protocols foremost on combatting transnational organized crime linked to human smuggling and trafficking. None of these universal instruments deals with admission of people to a territory of a state. This is one of the major weaknesses of comprehensive international migration law, as the competences over admission of persons to a states territory remain in the individual states responsibility.

In relation to labour migration, there are two specific international legal instruments. The CMW and the General Agreement on Trade in Services (GATS). The only multilateral instrument addressing the sensitive issue of migrant workers admission is the GATS of the World Trade Organization, specifically its Mode 4, which was included at the request of developing States during the Uruguay Round (Chetail 2008: 209-210).

The Mode 4 only covers labour migration that is related to the supply of services; Article I:2(d) of the GATS defines it in broad terms as "the supply of a service […] by a service supplier of one Member, through presence of natural persons of a member in the territory of another Member." It thus covers service suppliers at all skills and for any occupations. The Annex on movement of natural persons supplying services, which is part of the Agreement, specifies that it applies to individuals who are "employed by a service supplier of a Member" as well as to individuals who are "service suppliers of a Member" (*i.e.* self-employed suppliers), so the personal scope of Mode 4 is relatively broad. It is however limited by applying only to the temporary movement of persons for the purpose of supplying a service.

And it does not apply to "measures affecting natural persons seeking access to the employment market" and those "regarding citizenship, residence or employment on a permanent basis" (negative definition).

The effectiveness of the Mode 4 depends on each Member's specific commitments, subject to any terms and conditions specified therein. While Mode 4 is applicable to both unskilled and skilled labor, specific commitments are generally limited to the highly skilled, whose impact on development is rather counterproductive.

3.2. The Migration-development nexus

According to Chetail (2008: 183-185) mobility has gradually become an integral part of globalizing world. It is crucial for development as the annual value of remittances is

about twice as much as the value of official development assistance. The restrictive immigration policies implemented by western States since the first oil shock in 1973 have rather fuelled the rise in irregular migration and have paradoxically encouraged the permanent settlement of undocumented migrants. This also led to professionalization of smuggling and trafficking.

The migration-development nexus is at the junction of two conflicting paradigms: (1) the predominantly negative view focuses on the need to eradicate the root causes of migration through development assistance and (2) the second paradigm emphasizes the positive effects of migration on poverty reduction in countries of origin together with the alleviation of demographic and labor market needs in countries of destination (Chetail 2008: 186).

Within the first paradigm, it is believed that migration can be prevented through aid and development is also being called as "root causes approach of migration" or "stay at home policy" (Chetail 2008: 187). This approach builds on investments to the emigration regions and sanctions against organizers of clandestine immigration. Instruments employing this policy in the EU were: The 1992 Edinburgh Declaration on principles of governing external aspects of migration policy of the European Council. The 1994 UN Cairo Declaration set the objectives as to address the root causes of migration, especially poverty, encourage cooperation and dialogue and maximize the benefits of migration, facilitate the reintegration process of returning migrants (2008: 189).

Contradicting this paradigm, it must be said that migration is the oldest action against poverty. It also remains a selective process, as the poorest people do not have the connections and the resources to engage in inter-continental migration. Additionally, development initially leads to an increase rather than a decrease in migration (Chetail 2008: 191). A long-term and durable strategy would be needed in this point, but the real goal behind of the western countries is far more to curb immigration then to contribute to the development of sending countries (2008: 192). It says also argued by Saskia Gent (2002: 15) that the root causes approach by the international community is in fact only concerned with restricting migration at any cost.

Amongst other initiatives, in 2006 the Global forum for migration and development (as a platform for states to enhance cooperation) emerged, followed by the Global migration group (for international organizations).

In the debate carried out since 2003 within various multilateral and regional initiatives, Chetail (2008: 206) identifies the enrichment of the traditional approach by four interrelated core components strengthening the positive impact of migration on development. Those are the facilitation of remittances, minimalization of negative consequences of highly skilled emigration, temporary labour migration schemes including the low-skilled migrants and profiding legal alternatives to irregular migration and the respect for fundamental rights and freedoms of all migrants. Chetail (2008: 207) also suggests the implementation and reinforcement of the existing legal framework based on two distinct but complementary normative pillars: The CMW and the GATS.

3.3. International human rights framework

This chapter aims at identifying the current international legal framework of migrant protection (with focus on irregular migrants) binding the Member States of the European Union.

3.3.1. Effects of international law in EU and national legislation

Only signed and ratified international conventions are binding individual states. States that ratify a treaty are then bound by its provisions and accept the treaty monitoring system. This is also the major weakness of international law compared to national jurisdictions, because the treaty-based rights cannot be enforced until the state itself agreed to that. While describing the international legal framework, this needs to be kept in mind. That's why the research focuses only on sources of international law that all the EU Member States are state parties to.

Also in case of signature and ratification of international treaties by states, states are usually able to make reservations and declarations in relation to international instruments, according to how the respective document allows it.[41] A reservation allows the state to be a party to the treaty, while excluding the legal effect of that specific provision in the treaty to which it objects. For example, the CMW allows reservations in its Art. 88, 91 and others, state parties may however never be able to exclude either one of the Parts of the Convention. The reservation shall also not be incompatible with the object and purpose of the CMW.

The EU itself has the capacity to become a party to an international instrument. It must however have the competences on external cooperation in the matter. International treaties signed by the EU are of pure or mixed nature – in case of the pure ones, the EU has exclusive competence in the matter, in case of the latter, the competence is shared and all EU Member states have to ratify the international treaty consequently so that it becomes legally binding.

The EU acceded to the International Convention on the Rights of Persons with Disabilities in 2010, although, a ratification in all EU Member States needs to follow (so it is a mixed agreement on the EU level as it is concluded in the area of shared competence). The EU officially joined the International Convention on the Rights of Persons with Disabilities on December 23, 2010, becoming the first intergovernmental organization to sign on to any human rights treaty and take on its binding obligations. In international customary law one of the guiding principles is the principle *pacta sunt servanda*. Based on this principle the EU itself is a party of the described human rights treaties (Boeles et al. 2009: 36).

Article 6 TFEU now explicitly mentions that the EU shall accede to the ECHR. The CoE had to change the Convention text to allow for the EU to accede. In the beginning of 2012, the EU Member states are in the process of negotiating specific technicalities in

[41] By the 1969 Vienna Convention on the Law of Treaties (VCLT), a reservation is defined as a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State. (Article 2 (1)(d))

relation to the factual accession of the EU to the ECHR. There will subsequently be double protection by the Court of Luxembourg and the Court of Strasbourg.

The relation of international and national law is classically guided by either monist or dualist system. The dualist theory defines international and national law as two independent and equal systems. Under dualist system (Germany, Italy, United Kingdom), international law must first be implemented into national law before the courts can take it into account. The implementation can be done either by incorporation or by transformation of the international legal norm into the national legislation. Under the monist system, international law always prevails over national in case of conflicting provisions (Belgium, Netherlands, France) and international law can be directly invoked before national courts (Boeles 2009: 37). EU law is on the contrary always directly applicable in the MSs according to the monist theory (CJEU judgement *Simmenthal II* 106/77 ECR [1978], 629).

As all the UN core human rights treaties have been ratified by EU Member states, the provisions granted in each of the conventions must be considered to be binding on all of the Member States. It is though important to note that "international human rights law, like any other form of law, can only be effective to the extent that it is implemented within a concrete national context."[42] EU Member States may interpret and apply international standards differently. Although the rights contained in other then national legislations binding the states should be comparable and it is what this study is working with, the reality will always have slight differences. The current free movement regime in the EU is not always inherently consistent and retains many possibilities for derogation for the Member States (Boeles 2009: 139).

The monist and dualist system must be also differed from the different effects of international treaties in national legislations based on their type and scope of application. Some international legal norms have direct effect, which means, that they do not need to be implemented to national laws once the treaty is signed and ratified and they take precedence over national law from that moment – can be applied in Court

[42] Battjes, Hemme; Dembour, Marie-Bénédicte; Hart, Betty de; Farahat, Anuscheh; Spijkerboer, Thomas; Walsum, Sarah van. European Journal of Migration & Law, Aug2009, Vol. 11 Issue 3, 199.

directly. Usually the fundamental human rights have direct effect and social and economic rights usually need implementation (Vanheule et al. 2004: 289, 318). Another impact of the ratification on the national legal framework can be the standstill effect that "protects […] against any substantive limitation or revocation" (Vanheule et al. 2004: 291), which is often the case in the case of social rights and would be the effect in most of the provisions of the CMW. Practically this means that whatever laws have been in force in time of ratification of the treaty, there should not be any aggravation of the current standards in the respective rights. The standstill effect does not ensure that the rights contained in the international document are literally in force in the country; however it saves the specific rights from worsening.

The legislations of individual Member States are different – some do go far beyond the international treaties, in some there are similar provisions in the national laws, but in all the states should always have the possibility to invoke the binding international instrument in court as international law prevails over national law, definitely in all cases regarding the basic human rights.

Effect of human rights treaties in national law

International migration law has many practical points of interaction with domestic migration law, though these interactions are complex and vary widely from state to state according to constitutional provisions, legal tradition and the source of international obligation (Shearer 1997, cited in Opeskin : 10).

Freedom in the way of implementation of various policies is widely given by the CMW itself (Vanheule et al. 2004: 318-319) by vague formulations in specific articles[43]. Other

[43] For instance Vanheule et al. (2004: 318-319) recognize vague formulations in the CMW inter alia in the following Articles: 18(3), 33 right to information; Art. 17(1), 31(1) respect for cultural identity; Art 17(6) consideration, when detaining a foreigner, for the situation of the detained foreigner and his or her family; Art 19(2) humanitarian considerations in imposing a sentence; Art. 22(5) compensation following the annulment of an expulsion order; Art. 25(3) taking "temporary measures" with reference to certain rights.

articles refer to the legitimate national limitations[44] so the Articles themselves do not provide for any legally binding claim, but first of all have a political meaning.

Some international legal norms have direct effect, which means, that they do not need to be implemented to national laws once the treaty is signed and ratified and they take precedence over national law from that moment – can be applied in Court directly. Usually the fundamental human rights have direct effect and social and economic rights usually need implementation (Vanheule et al. 2004: 289, 318). Another impact of the ratification on the national legal framework would be the standstill effect that "protects […] against any substantive limitation or revocation" (Vanheule et al. 2004: 291), which would be the effect in most of the provisions of the CMW. Practically this means that whatever laws have been in force in time of ratification of the treaty, there should not be any aggravation of the current standards in the respective rights. The standstill effect does not ensure that the rights contained in the international document are literally in force in the country; however it saves the specific rights from worsening.

The legislations of individual Member States are different – some do go far beyond the international treaties, in some there are similar provisions in the national laws, but in all the states should always be the possibility to invoke the binding international instrument in court as international law prevails over national law, definitely in all cases regarding the basic human rights which is the case in most studied laws.

It is important to note, that every EU Member State has its own specifics in terms of direct effect and standstill effect of international legal instruments.[45] It is of course always important to look at the legislation of each Member State in which way he has incorporated the laws into its legislation. For the purpose of this study I assume that states that adhered to an international document and did not use any reservations do also respect the rights that they are obliged to by the international treaty. Using this

[44] For example: Art 17(3) ("in so far as practicable"); Art. 22(2) ("in accordance with law"); Art. 22(5) ("according to the law"); Art. 27 ("in so far as they fulfil the requirements"); Art 31 ("may take appropriate measures"); Art. 33 ("they deem appropriate" and "as far as possible"). Vanheule et al. (2004).

[45] For the case of Belgium as an example see Vanheule et al. (2004). The significance of the UN migrant workers' convention of 18 December 1990 in the event of ratification by Belgium. *European Journal of Migration and Law, 6*, 289-294.

assumption it should be enough to compare the CMW rights with the rights in other international instruments, to which all the EU Member states are parties.

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3.3.2. Primary sources of international law

This research is, within the international law, going to focus on the nine crucial UN human rights conventions:

(1) International Convention on the Elimination of All Forms of Racial Discrimination (21 December 1965; Entry into force 4 January 1969),
(2) International Covenant on Economic, Social and Cultural Rights (16 December 1966; Entry into force 3 January 1976),
(3) International Covenant on Civil and Political Rights (16 December 1966; Entry into force 23 March 1976),
(4) Convention on the Elimination of All Forms of Discrimination Against Women (18 December 1979; Entry into force 3 September 1981),
(5) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984; Entry into force 26 June 1987),
(6) Convention on the Rights of the Child (20 November 1989; Entry into force 2 September 1990),
(7) International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (18 December 1990; Entry into force 1 July 2003),
(8) Convention on the Rights of Persons with Disabilities (13 December 2006; Entry into force 3 May 2008),

(9) International Convention for the Protection of All Persons from Enforced Disappearance (12 January 2007; not yet entered into force)

Most of the EU Member States are parties to the main international human rights instruments. Also some of them have certain declarations that might be limiting the rights of irregular migrants. FRA (2011) provides for an up-to-date overview:

EU MEMBER STATE	ICERD	ICCPR	ICESCR	CEDAW	CAT	CRC	ILO 87	ILO 143
Austria	x	(x)	x	(x)	x	x	x	
Belgium	x	x	(x)	x	x	x	x	
Bulgaria	x	x	x	x	x	x	x	
Cyprus	x	x	x	x	x	x	x	x
Czech Republic	x	x	x	x	x	x	x	
Denmark	x	x	x	x	x	x	x	
Estonia	x	x	x	x	x	x	x	
Finland	x	x	x	x	x	x	x	
France	x	(x)	(x)	(x)	x			
Germany	x	x	x	x	x	x	x	
Greece	x	x	x	x	x	x	x	
Hungary	x	x	x	x	x	x	x	
Ireland	x	x	x	x	x	x	x	
Italy	x	x	x	x	x	x	x	x
Latvia	x	x	x	x	x	x	x	
Lithuania	x	x	x	x	x	x	x	
Luxembourg	x	x	x	x	x	x	x	
Malta	x	(x)	x	x	x	x	x	
Netherlands	x	x	x	x	x	x	x	
Poland	x	x	x	x	x	x	x	
Portugal	x	x	x	x	x	x	x	x
Romania	x	x	x	x	x	x	x	
Slovakia	x	x	x	x	x	x	x	
Slovenia	x	x	x	x	x	x	x	x
Spain	x	x	x	x	x	x	x	
Sweden	x	x	x	x	x	x	x	x
United Kingdom	x	(x)	x	x	x	x	x	

Notes: *The parentheses (x) indicate reservations and de facto reservations (declarations) that may restrict the rights of migrants in an irregular situation.*

An underlined check means that individual complaint mechanisms are in force. For the ICESCR, of the 10 required ratifications of the Optional Protocol, only three have been submitted to date. Spain is the only EU Member State that has ratified the Protocol. An additional eight EU Member States have signed (Belgium, Finland, Italy, Luxembourg, the Netherlands, Portugal, Slovakia and Slovenia). Individual complaint mechanisms are not in place for the CRC and are not envisaged for ILO conventions
Source: FRA 2011: 20-21

There are of course other international instruments that have some impact on labour migration. Those are for example major international trade agreements that include provisions that support the temporary movement of persons between trade partners (General Agreement on Trade in Services GATS) or regional trade agreements concluded by the EU with third countries (Aleinkoff 2003: 24).

3.3.2.1. UN level: General protection

I will first identify the current international legal framework of migrant protection (with focus on irregular migrants) binding the Member States of the European Union. The protection of migrant workers is naturally entailed in all the international documents dealing with the rights of "all human beings". One of the important international instruments containing the rights of all human beings and therefore also of migrant workers is the Universal Declaration of Human Rights (UN, 1948). However, the Declaration being important human rights set, it is not a legally binding instrument.[46] The UN has subsequently developed a set of – in case of ratification – legally binding treaties deriving from the Universal Declaration. These instruments secure the basic human rights for all persons, regardless their legal status, this means including also the irregular migrant workers.

Apart from the CMW and a relatively new Treaty on Protection from Enforced Disappearance[47] that did not enter in force so far, all the EU Member States have so far

[46] However, the Declaration is today part of international customary law and in 1968 the UN International Conference on Human Rights decided that it "constitutes an obligation for the members of the international community" for all persons. See OHCHR, Fact Sheet No 2 (Rev.1), The international Bill of Human Rights, Geneva, June 1996, (http://www.unhchr.ch/html/menu6/2/fs2.htm)

[47] International Convention for the Protection of All Persons from Enforced Disappearance, UN, 20 Dec 2006

ratified all the core UN human rights instruments.[48] These include the International Covenant on Civil and Political Rights (ICCPR, 1966), the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD,1965), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984) and the Convention on the Rights of the Child (CRC, 1989).

While describing the scope of application of the international treaties, the respective monitoring bodies, as secondary sources of law, need also to be taken into account. Most of the UN treaties have set a treaty monitoring system, under which states are obliged to submit reports to the respective Committees. The committees supervise the implementation of the respective treaty. Aside from the reporting procedure, examination of individual complaints is envisaged in the treaties in case of some Committees (with the exception of ICESR and CRC (Slinkx 2009: 126)). Even the views of Committees are of a non-binding nature, the authority of its decisions is generally on the same level as for example the judgements of the European Court of Human Rights (ECtHR).

The human rights-treaty protection system faces some calls for reform (Edelenbos 2009: 118). Many states see the frequent reporting to different monitoring bodies as a burden. In order to unify the divergent interpretations of human right treaties by the Comittees, representatives of treaty bodies have met regularly on a Chairpersons meeting, and Inter-Committee meetings for several years now. They prepared harmonized guidelines and discuss further harmonization of working methods.

The two Covenants (ICCPR and ICESCR) entail basic human rights that are to be secured without any discrimination based on *i.a*. sex, age, religion, race or nationality (Art. 26 and 2 ICCPR, Art. 2(2) ICESCR). This means that the contained human rights are to be secured irrespectively of a persons legal status in the country where he is found

[48] The status of ratification of the international human rights treaties can be consulted at the UN Treaty Collection website (http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en)

(Häusler 2010: 3).[49] The Committee on Economic, Social and Cultural Rights[50] interpreted prohibition of discrimination on the basis of nationality in its interpretation of the Article 2(2) of the ICESCR (in its General Comment No. 20). In its point 29, the Committee states that the non-discrimination ground nationality means "The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation".[51]

In relation to migrant workers, the most important Comment of the Human Rights Committee[52] is the General Comment No. 15: *The position of aliens under the Covenant* [ICCPR](1986) stated that "the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness". This has been recalled in the General Comment No. 31: The nature of the general legal obligation imposed on States Parties to the Covenant (2004). It further confirmed that the rights contained in the Covenant are „not limited to citizens but are to be extended to asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party" (Slinkx 2009: 127). Additionally, the Committee's Observation No 23 served as explication of the extension of minority rights embeded in Art. 27 of the ICCPR to migrant workers and visitors (*personnes de passage*).[53]

Two restrictions, however, can be imposed on irregular migrants in the scope of the ICCPR. First, the right to liberty of movement and freedom to choose residence (Art 12) is only guaranteed to those that are lawfully residing within the territory. Second, the limitations to expulsion of foreigners (Art 13) apply only for the lawfully residing ones.

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49 With an exception of the Art 25 ICCPR that guarantees political rights solely to citizens.

50 The Committee on Economic, Social and Cultural Rights was established by Economic and Social Council resolution 1985/17 of 28 May 1985, to supervise the implementation of the International Covenant on Economic, Social and Cultural Rights and functions like a treaty body. Economic and Social Council resolution 1988/4 of 24 May 1988, requires States parties to submit an initial report within two years of its entry into force for the State party concerned and then every five years.

51 http://www2.ohchr.org/english/bodies/cescr/comments.htm

52 The Human Rights Committee was established pursuant to Article 28 of the International Covenant on Civil and Political Rights. Article 40 of the Covenant requires States parties to submit an initial report within one year of the Covenant's entry into force for the State party concerned and then upon the Committee's request. The Committee also considers communications under the First Optional Protocol (that needs to be ratified by the states concerned) received from individuals who assert that their rights have been violated without domestic redress.

53 ICCPR General Comment No. 23: Article 27 (Rights of Minorities)

Irregular migrants can thus be (with the exception of the *non-refoulement* principle) always expelled (Häusler 2010: 3). The ICESCR does not include any nationality based restrictions and grants its rights to everyone. However, several states that have ratified the Covenant made reservations or declarations (including Belgium[54]) against some rights and restricted their applicability to aliens (Häusler 2010: 4).

The General Comment No 14 on The Right to the highest attainable standard of health (2000) affirms (Slinkx 2009: 127):

> „…States are under the obligation to *respect* the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and **illegal immigrants**, to preventive, curative and palliative health services."

These Covenants guarantee a large amount of rights also for irregular migrants, they are however not given the full efficiency today, as will be examined in the national studies.

3.3.2.2. UN level: Specific protection: the ILO

Unlike the treaties with general human rights protection scope, we can also find specific treaties dealing specifically with migrant workers rights on the UN level. These include the UN Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live[55], the International Convention on the Reduction of Statelessness[56] or the Convention Relating to the Status of Refugees[57]. The last mentioned is also relevant to migrant workers as it introduced in the 1950s the *non-refoulement* principle that has then been taken by other international instruments and it became a very important provision for all migrants, not just refugees.

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54 The declaration of Belgium: With respect to article 2, paragraph 2, the Belgian Government interprets non-discrimination as to national origin as not necessarily implying an obligation on States automatically to guarantee to foreigners the same rights as to their nationals. The term should be understood to refer to the elimination of any arbitrary behavior but not of differences in treatment based on objective and reasonable considerations, in conformity with the principles prevailing in democratic societies.

55 http://www.un.org/documents/ga/res/40/a40r144.htm

56 http://www2.ohchr.org/english/law/statelessness.htm

57 http://www.unhcr.org/3b66c2aa10.html

Very specific protection to migrant workers is secured under the specialized UN agency, the International Labour Organization (ILO). The ILO has during the last century developed a broad framework of labour rights. Its core conventions cover for example the freedom of association or elimination of forced labour. The ILO works very intensely on migrant workers protection; however it has been inevitably criticized for not taking the irregular migrants into account and even for excluding them from its policies.

The ILO worked on workers' rights first of all international bodies from the beginning of the last century by its 1925 Convention concerning the Equality of Treatment. Specific migrant related instruments included The Convention No. 48 concerning the Maintenance of Migrants Pension Rights in 1935. The ILO attempted to strengthen the migrant workers protection in a similar manner as the CMW already in 1939 with its Convention concerning Migration for Employment No. 66. It has however never entered into force as it was not ratified by any single country. By that time the international climate was full of nationalism and protectionism (Battistella 2009: 49) and it resulted in the Second World War. The CMW has some similarities with the Convention No. 66, its position is though much better today. Upon adoption of the most crucial general international declarations and legal documents, the further ILO Conventions stem greatly from them (namely from the UN Universal Declaration on Human Rights (1948), ICESCR (1966) or the ICERD (1965)).

The 1998 ILO Declaration on Fundamental Principles and Rights at Work explicitly includes coverage of migrant workers under the ILO fundamental rights Conventions: Convention No. 87 and No. 98 (freedom of association, right to organize and collective bargaining), No. 100 and No. 111 (equal remuneration and equality and non-discrimination in employment and occupation) No. 29 and No. 105 (abolition of forced labour), and No. 138 and No. 182 (elimination of child labour) (Committee on Migrant Workers 2011: 6).

One of the most important ILO conventions in relation to migrant workers is the Migration for Employment Convention No. 97[58] that established equal treatment between nationals and regular migrants in the recruitment procedures, living and

[58] http://www.ilo.org/ilolex/cgi-lex/convde.pl?C097

working conditions, access to justice and tax and social security regulations (Taran 2009:154). This Convention has been ratified by forty-nine countries. The Convention No. 143[59] (1975) concerning Migrant Workers includes already also irregular migrants and has set the equality of treatment between migrants and national workers. It stresses protection for irregular migrants aiming to reduce exploitation and human trafficking. In its Article 3(b) it also requires contracting parties to take action against 'the organisers of illicit or clandestine movements of migrants for employment,' and against 'those who employ workers who have immigrated in illegal conditions' (Ryan 2012: 2). Only twenty-three countries have so far ratified this Convention. Both the Convention No. 97 and the No. 143 stand for a basis for drafting the CMW.

The ILO has currently elaborated a new Convention on Decent Work for Domestic Workers (adopted in June 2011 in Geneva).[60] The Convention builds on the current legal framework including the CMW. The Convention recognizes the need for deeper protection of one of the most vulnerable groups of workers, very often including migrant workers that are the domestic workers. The special vulnerability of migrant workers is mentioned already in the Preamble and the scope of the Convention including migrant workers is well supported by references to other ILO Migrant Workers Conventions and the CMW in the Preamble further on. Migrant domestic workers are then particularly addressed in Art. 7 of the Convention.[61]

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59 http://www.ilo.org/ilolex/cgi-lex/convde.pl?%0A%0AC143

60 ILO, International Labour Conference, 100th Session, 2011, Report IV(1) Decent work for domestic workers, 2010.

61 Article 7

1. National laws and regulations shall require that migrant domestic workers receive a written job offer or contract of employment addressing the terms and conditions of employment referred to in Article 6 prior to crossing national borders for the purpose of taking up domestic work to which the offer or contract applies, without prejudice to equivalent or more favorable measures under regional, bilateral or multilateral agreements, or under rules pertaining to the operation of a regional economic integration area.

2. Members shall cooperate with each other to ensure the effective protection of migrant domestic workers under this Convention.

The Art. 7(2) explicitly states that all the rights contained in the Convention should also apply to migrant domestic workers. Further on, migrant workers are again specifically mention in Art. 16 of the Convention in relation to employment agencies placements of workers and the need of an effective protection against abusive practices, including establishing the respective legal liability of the household and the agency.

The ILO supervisory mechanism is sometimes being upheld as more efficient than the one adopted by the UN conventions. This claim was raised for instance also as an objection to the CMW ratification (Battistella 2009: 61).

3.3.2.3. Criminal law response: Human trafficking

Being called the new form of slavery, human trafficking is currently the third most lucrative and most widespread activity of organized crime groups worldwide, following the trafficking of arms and drugs, and is also the least punished of the three above mentioned (Demir 2003). It links closely to migrant workers flows as it can be very often an unwanted consequence of labour migration. It is impossible to get an exact number of trafficked persons worldwide, however, estimations and different statistics speak about millions[62] of people trafficked annually and their number is increasing every year. Men, women and children can all become victims of trafficking; however, disproportionately most affected are women and girls. Nowadays, poverty disproportionately affects women and their children (Demir 2003), this new phenomenon is sometimes called the feminization of poverty.

Human trafficking entails breaches of nearly all fundamental human rights (for example the right to life and health, personal liberty and security, human dignity, freedom of movement or freedom of association). Victims of human trafficking are often subject to discrimination (because of victim's gender, foreign origin, illegal entry or stigmatization as a sex worker), sexual, physical and psychological violence, forced labour, slavery or slavery-like conditions. According to Obokata (2005) in some circumstances it can be even elevated to a crime against humanity. Human trafficking is better understood as a collection of crimes, criminal process than a single event.[63] Victims of trafficking are usually purchased, kidnapped, or deceived by the promise of employment or a better life.[64]

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62 All available statistics differ a lot and it is nearly impossible to get any reliable data

63 Human Trafficking - Reference Guide for Canadian Law Enforcement

64 People are mainly trafficked for working in the sex industry, forced labour and slavery (domestic servitude, industrial or agricultural labour or in some cases to act as camel jockeys), marriage, adoption,

International law efforts to combat trafficking in human beings date back to the beginning of 20th century.[65] Those particularly focused on prostitution (OHCHR, 2001: 243), whereas other forms of trafficking have been addressed only recently. Some UN human rights instruments relate also closely to trafficking, such as The Convention on the elimination of all forms of discrimination against women (art. 6), The Convention on the rights of the child (art. 35) and its Protocol on the sale of children, the ILO Convention on the prohibition and immediate action for the elimination of the worst forms of child labour, the Migrant Workers Convention or The Universal Declaration on human rights (art. 3: right to life, liberty and security, art. 4: prohibition of slavery and servitude).

The most important international instrument today is the 2000 Protocol to prevent, suppress and punish trafficking in persons, especially women and children (the Palermo Protocol), supplementing the UN Convention against transnational organized crime.[66] Chetail (2011) recognizes this instrument as one of the three universal treaties in the field of international migration law.[67]

International law provides a common basis for criminalization of the behaviour in national laws. Once the common definition is standardized, discrepancies in national laws should be eliminated. However, national laws need to be country specific, appropriate to a country's capacities and constraints.

The protection of victims should be aimed at repatriation, return to communities and reintegration into society (UNICEF 2003). Trafficked persons shall not be prosecuted for

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street begging, organ sale or recruitment of soldiers. The pull factors; in: Trafficking in women and children, seminar by Amnesty International, Bergen, Norway, 29.3.2006

65 The International Agreement for the Suppression of the White Slave Traffic (1904), the Convention Suppression of the Traffic in Women and Children (1921), the International Convention for the Suppression of the Traffic in Women of Full Age (1933), the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949).

66 The Palermo Protocol entails a definition of trafficking in Art. 3(a): "*Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.*

67 The Geneva Convention, the Palermo protocol and the Migrant Workers Convention

the illegality of their entry to the receiving country or involvement in unlawful activities. The victims shall be protected from further exploitation and their protection shall not be made conditional upon the willingness of the trafficked person to cooperate. Also, special protection for children needs to be ensured, regarding the best interests of the child (OHCHR 2002).

Although international attention to the problem of human trafficking increased in the last years, human trafficking is difficult to fight because of its specificity and variability. Both its causes and consequences need to be addressed. However, criminal law is important in combating the trafficking in human beings, in my opinion it is more crucial to eliminate the root causes of trafficking, such as inequality, poverty or discrimination. I would also recommend focusing more on penalizing the users and trying to diminish the demand in receiving countries. There ought to be a more comprehensive approach to the trafficking phenomenon and cooperation between the sending and receiving states shall be ensured.

3.3.2.4. UN level: International Treaty mechanisms

In case of monistic or dualistic systems, there is always the possibility of complaints carried out by individuals under some human rights treaties. Within the Council of Europe operates the jurisdiction of the European Court of Human Rights (ECtHR), securing the rights contained in the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR). Since the entry into force of Protocol 11 to the ECHR in 1998, the right to individual complaint has been expressly guaranteed (Boeles 2009: 37). In the European area this is so far the only court passing legally binding judgments.

Under the United Nations auspices there is the Human Rights Committee (HRC) securing the rights under the International Covenant on Civil and Political Rights (ICCPR). The decisions of the HRC and other UN Committees possess only a non-binding character and are usually referred to as “views” rather then judgements. However, the UN

Committees´ views are taken into account on the same level as ECtHR judgements and are referred to by scholars in the same manner as the legally binding acts.

An important source of case law are also the reports from the Special Rapporteur on the human rights of migrants appointed by the Human Rights Commission and similar significance has the UN High Commissioner for Human Rights that also touches the question of migrant workers occasionally.

Most of the UN treaties have set a treaty monitoring system, under which states are obliged to submit reports to the respective Committees. The committees supervise the implementation of the respective treaty. Aside from the reporting procedure, examination of individual complaints is envisaged in the treaties in case of some Committees (with the exception of ICESR and CRC (Slinkx 2009: 126)). Even the views of Committees are of a non-binding nature, the authority of its decisions is generally on the same level as for example the ECtHR judgements.

The human rights-treaty protection system faces some calls for reform (Edelenbos 2009: 118). Many states see the frequent reporting to different monitoring bodies as a burden. In order to unify the divergent interpretations of human right treaties by the Comittees, representatives of treaty bodies have met regularly on a Chairpersons meeting, and Inter-Committee meetings for several years now. They prepared harmonized guidelines and discuss further harmonizastion of working methods.

Besides the monitoring bodies to the two Covenants, the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, other international human rights instruments do also have its monitoring bodies.

The Human Rights Committee

The Human Rights Committee was established pursuant to Article 28 of the International Covenant on Civil and Political Rights. Article 40 of the Covenant requires States parties to submit an initial report within one year of the Covenant's entry into

force for the State party concerned and then upon the Committee's request. The Committee also considers communications under the First Optional Protocol (that needs to be ratified by the states concerned) received from individuals who assert that their rights have been violated without domestic redress.

For example its Observation No 23 served as explication of extension of minority rights content in Art. 27 of the ICCPR to migrant workers and visitors (personnes de passage).[68]

In the Communication *Karakurt v. Austria* (CDPR/C/74/D/965/2000, 4 April 2002) dealt with participation in work councils for non-EU nationals (this issue would fall within the remit of the CMW).

In relation to migrant workers, the most important Comment of the Human Rights Committee is the General Comment No. 15: *The position of aliens under the Covenant* (1986) stating that "the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness".

This has been recalled in the General Comment No. 31: The nature of the general legal obligation imposed on States Parties to the Covenant (2004). It further confirmed that the rights contained in the Covenant are „not limited to citizens but are to be extended to asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory ofr subject to the jurisdiction of the State Party". (Slinkx 2009: 127)

The Economic and Social Committee and its most important documents has been described above.

Committee on the Elimination of Racial Discrimination (CERD)

The Committee on the Elimination of Racial Discrimination was established pursuant to Article 8 of the International Convention on the Elimination of All Forms of Racial

68 ICCPR General Comment No. 23: Article 27 (Rights of Minorities)

Discrimination. Article 9 requires States parties to submit an initial report within one year after its entry into force for the State party concerned and then every two years**.** Individuals or groups who claim to be victims of racial discrimination can lodge a complaint against their State with the Committee. Such complaints are called 'communications'. This procedure is only available if the country concerned has declared that it recognizes the competence of the Committee to hear individual complaints.
CERD General Recommendation No. 30 on Discrimination against Non-citizens (2004) gives a special place to migrants, refugees and asylum seekers and considers that any differential treatment based on citizenship or immigration status is discriminatory (Slinkx 2009: 128).

Committee on the Elimination of Discrimination against Women

The Committee on the Elimination of Discrimination against Women was established pursuant to Article 17 of the Convention on the Elimination of All Forms of Discrimination against Women. Article 18 requires States parties to submit an initial report within one year after its entry into force for the State Party concerned and then every four years.

The CEDAW protocol allowing for individual complaints only entered into force in 2000 and none fo the few communications made are related to migration issues (Slinkx 2009: 126).

Committee against Torture

The Committee against Torture was established pursuant to Article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Article 19 requires States parties to submit an initial report within one year after its entry into force for the State Party concerned and then every four years. For individual complaints, the States must have recognized this right by making a declaration in accordance with Article 22 CAT.

Committee on the Rights of the Child

The Committee on the Rights of the Child was established pursuant to Article 43 of the Convention on the Rights of the Child. Article 44 requires States parties to submit an

initial report within two years of its entry into force for the State Party concerned and then every five years.

The mentioned Treaty Bodies that monitor the international human rights instruments have adopted general comments/recommendations relevant to migrant workers in an irregular situation (Committee on Migrant Workers 2011: 6):

ICCPR General Comment No. 15: The position of aliens under the Covenant;

ICCPR General Comment No. 32: Right to equality before courts and tribunals and to a fair trial (art. 14);

ICERD General Comment No. 30: Discrimination against non-citizens;

ICESCR General Comment No. 14: The right to the highest attainable standard of health

ICESCR General Comment 20: Non-Discrimination in economic, social and cultural rights (art. 2, para. 2);

CRC General Comment No. 6: Treatment of unaccompanied separated children outside their country of origin;

CEDAW General Recommendation No. 26: On women migrant workers;

CEDAW General Recommendation No. 28: On the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women

Other actors

The Special Rapporteur on the Human Rights of Migrants appointed by the Human Rights Commission conducts country visits and drafts policy recommendations for the countries visited. He has always recommended the ratification of the CMW during visits to countries that did not do so yet.

The UN High Commissioner for Human Rights also occasionally touches the question of migrant workers. For example in November 2010 invited states to ratify and effective implement the CMW at the IV Global Forum on Migration and Development in Mexico.

3.4. Regional level: The Council of Europe

3.4.1. The European Convention of Human Rights

The Council of Europe oversees a comprehensive regional human right s framework with approximately 200 legally binding treaties or conventions. Two core human rights instruments of the Council of Europe are the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, 1950) and the revised European Social Charter (ESC). Read in light of the resulting case law, both instruments are relevant for the protection of migrants in an irregular situation (FRA 2011: 23).

All 27 EU Member States are contracting parties of the ECHR. Unless otherwise specified, the provisions in the ECHR are of general application. Hence its rights and freedoms generally apply to everyone within the jurisdiction of the contracting parties. The EU is not party to the ECHR yet; the Treaty of Lisbon, however, provides the legal basis for accession. Individuals whose rights and freedoms provided for by the ECHR have been violated, can under certain conditions approach the European Court of Human Rights (ECtHR) whose judgments are binding.

The ECHR applies to all human beings, the rights contained in the ECHR and its Protocol are not limited to nationals of state parties to the Convention, so they also include "third country nationals" and "irregular migrant workers". Two provisions of the ECHR are central to the protection of migrants in an irregular situation: the right not to be subject to torture or inhuman and degrading treatment enshrined in Article 3; and the right to respect private and family life in Article 8. Although the fair trial guarantees enshrined in Article 6 of the ECHR do not apply to immigration rulings, the right to an effective remedy in these cases is guaranteed by Article 13 and Article 1 of Protocol 7 to the ECHR (FRA 2011: 23).

Some of the ECHR measures not directly linked to migration can protect irregular migrants: for instance the Art 8 (protection of private and family life: broad interpretation of the right to leave[69], Boeles 2009: 120) or the Art 1 Protocol 1 (protection of peaceful enjoyment of ones possessions including the housing or social security rights). The ECHR does however not contain the whole scale of economic social and cultural rights that are guaranteed by the core UN human rights instruments. It is clear under the ECHR case law that illegality of status does not automatically preclude enjoyment of Convention rights.[70]

The ECtHR refers occasionally to the principle of free movement in its judgments (Boeles 2009:116). Rights related to the freedom of movement are laid down by the Art 2 and Art 3 of the Protocol No. 4 ECHR. These contain:

a) the right to leave any country (Art 2(2))
b) the right to enter the territory of a state of which one is a national (Art. 3(2))
c) the freedom not to be expelled from ones own country (Art 3(1))
d) liberty of movement within the territory where one is "lawfully" present (Art 2(1))

According to the Explanatory Report on the Second to Fifth Protocols (H(71) 11 (1971), 40) the term "lawfully" relates to the power of states to control the entry of foreigners. Art 2 (3)(4) allows for restrictions of the freedom of movement that need to be in compliance with the principle of proportionality and the doctrine of "margin of appreciation" – a restriction must be necessary in a democratic society (Brandl 2007: 3).

3.4.1.1. The European Court for Human Rights

The Convention does not provide neither for the right to migration or right to asylum. However, by interpretation of individual rights (as the right to family life or protection against torture) the Court also pronounces some rights of migrants.

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69 *Iletmis v. Turkey*, No. 29871/96, para 50.

70 See Jeremy McBride, Irregular Migrants and the European Convention on Human Rights, AS/Mig/INf(2005)21, 2005

The European Court of Human Rights (ECtHR) delivers judgments of importance on migration and asylum issues protecting fundamental and procedural rights of migrants and asylum seekers in detention, facing expulsion, ill-treatment or other human rights violations. For example, the judgment in the case *Hirsi and Others v. Italy* concerns allegations of *refoulement* following the interception and return of boat people to Libya in the context of the push-back policy conducted by the Italian authorities in 2009. In addition, the ECtHR may apply interim measures (Rule 39) in deportation or extradition proceedings, where there are serious reasons to believe that there is a real risk of death or ill-treatment in the country of destination.

Bobek (2006) claims that it is not very clear whether we can speak about the obligatory character of the European Court for Human Rights decisions. He claims that the practice of states does not show that every proclaimed opinion made by the Court would have a direct application without other regards and the direct applicability of precedents differs from country to country. He however points out the importance and respect those judgements generally have (Bobek 2006: 86). In case of the ECtHR judgements, the weight of its arguments plays an important role (Bobek 2006: 87). All the EU Member States are state parties to the ECHR. Each state has however had the possibility to uphold a reservation or declaration and most of the Member states have used this opportunity.[71]

In domestic law, the ECtHR has a direct effect and international system of protection is subsidiary. Before any case is eligible to be brought to Court in Strasbourg, the domestic remedies need to be exhausted and there shall not be delay longer then 6 months. The Convention protection is of subsidiary nature and it therefore gives the national authorities the opportunity to deal with the alleged violations of the ECHR. The domestic remedy also has to be suspensive (which is important for example in cases of expulsion). The domestic remedies exhaustion is a condition, but taken that it is available in theory and also in practice, accessible and effective. This has been confirmed by the Court in 2007:

[71] Most of the states have reservations in relation to Art 5 and 6 ECHR (right to liberty and security and right to fair trial) to secure their own sovereignty above various issues that might be touching upon these.

"An applicant cannot be regarded as having failed to exhaust domestic remedies if he or she can show, by providing relevant domestic case law or any other suitable evidence, that an available remedy which he or she has not used was bound to fail. […] The fact that these proceedings were still pending at the time the applicant lodged the present application with the Court cannot be held against him in this context, since the act of lodging the objection did not suspend his expulsion, and his request for a provisional measure to stay his expulsion had been turned down."[72]

In 2002 the Court ruled that there is no need to exhaust domestic remedies in specific circumstances as in *Čonka v. Belgium* (2002), where there was no opportunity to appleal given to the applicants and as there has been an element of deceit in the false convocation of the Belgian authorities, the applicants did not have confidence in the system any more.

The burden of proof lies in the first place on the government and it shall not be applied in a formalistic, automatic or absolute way.

*"The remedy required by **Article 13** ECHR must be "effective" in practice as well as in law, in the sense either of preventing the alleged violation or its continuation, or of providing adequate redress for any violation that had already occurred."*[73]

In the most important and urgent cases, there is a possibility for interim measures to be deployed by the Court (usually in cases of threat to life (Art 2) or ill-treatment (Art 3)). In migration cases it is being used when there is a danger of deportation or extradition, so the majority of interim measures is to suspend a deportation order.

The scope of the ECHR protection is very broad and according to Article 1, it applies to everyone irrespective of nationality or legality of stay.

"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

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72 *Salah Sheekh v. Netherlands* (2007)
73 *Diallo v. Czech Republic*, 23 June 2011

This has been confirmed by various ECtHR judgements *(D. v UK, Soering v. UK, Amuur v. France*). In *Soering v. UK* the Court found for the 1st time that the State's responsibility could be engaged if it decided to extradite a person who risked being subjected to ill-treatment in the requesting country. In this case, the Court held that there would be a violation of Article 3 if the were to be extradited to the United States (real risk of being put on "death row", treatment going beyond the threshold set by Article 3).

Sylvie Sarolea[74] points to the changing rhetoric of the Court when it comes to migration related cases. Usually, the Court acknowledges the individual rights as principles and allows limitations in exceptional cases. However in migration related cases it always first highlights the principle of state sovereignty and the individual rights of foreigners become an exception here.

> *"The Court reiterates at the outset that the Convention does not guarantee the right of an alien to enter or to reside in a particular country […]*
>
> *Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens."*
>
> *"However, [expulsion] of an alien by a Contracting State may rise to an issue under article 3 [or article 8, etc.], and hence engage the responsibility of that State under the Convention, …"*

In various migration or asylum cases, interpretation of various ECHR articles appears. This is the so-called protection *par ricochet* (Šturma et al. 2006: 113) that allows the European Court to provide protection for asylum seekers, refugees or migrants through another provision in the ECHR. First of all the Art 2 and Protocol 6 and 13: right to life; Art 3: prohibition of torture, inhumane or degrading treatment or punishment; Art 5: deprivation of liberty; Art 6: fair trial; Art 8: private and family life; Art 13: effective remedy; Art 14 and Protocol n°12: non-discrimination.

74 Odysseus Network Certificate in European Law in Migration and Asylum, November 2011.

Right to life (Article 2 ECHR)

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
    a. in defence of any person from unlawful violence;
    b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
    c. in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 2 protects the right to life of everyone and Protocol 6 and 13 prohibit the death penalty relatively and absolutely respectively. This has thus direct consequences on deportations or removals to countries, where people would face it.[75]

Prohibition of torture (Article 3 ECHR)

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 3 is usually being used in cases of its indirect violation, when it comes to extradition or removal to third countries outside the Council of Europe (the so-called violation *par ricochet*), most recently also to CoE countries (see the *MSS case* relating to the Dublin Regulation). Direct violation of Article 3 is usually being found in cases of deprivation liberty (with regards to living conditions), while waiting for a decision in asylum cases (and the asylum seekers living conditions – no access to accommodation, money to buy food, medical care or schools).

The Article 3 is of absolute, non-derogeable nature. There is no second paragraph in the ECHR with regards to possible derogation under certain conditions. Article 15 ECHR

[75] See the case *Soering v. UK* 1989

allows for derogations in times of emergency, but Article 3 is again explicitly removed from the derogation possibility. The absolute nature of Article 3 has been several times challenged before the ECtHR, but never successfully.[76] In its indirect application, this protection equals to the principle of *non-refoulement*. The violation itself has a virtual character – as the seriousness of the risk needs to be proven (into consideration shall be taken the general situation in the country, the individual story of the person and his family, etc.). It applies to cases of extradition (*Soering v UK* 1989, Shamayev *and Others v. Georgia and Russia* 2005, *Klein v. Russia* 2010) or expulsion (*Vilvarajah v. UK* 1991, *Chahal v UK* 1996, *Y.P. and L.P. v. France* 2010).

In *Saadi v. Italy*, there was a question whether to return or not a Tunisian boy convicted of being a member of a terrorist group, back to Tunisia. The UK intervening in this case argued that as Article 2 ECHR protects the right to life of all citizens, it is the exception to Article 3 (while non-deportation of a terrorist would violate **Article 2**). The ECtHR has however firmly confirmed the absolute character of the Article 3.[77]

This principle is straightforward in cases of removal to countries outside the Council of Europe. The situation is however different when it comes to removal to another CoE country, as there the protection of the ECHR should apply. In the *M.S.S v. Belgium and Greece* (2011), the ECtHR ruled that by sending the Afghan national from Belgium to Greece (within the EU Dublin Regulation), the person concerned would be subject to torture, inhumane or degrading treatment first because of the conditions of reception/detention in Greece but also because of the risk of subsequent expulsion to a third country where there is a risk of bad treatment.[78] Also in *T.I. v. UK* (2000), where

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[76] See for example *Saadi v. Italy* 2008

[77] Additionally – the mere membership in an organization does not automatically mean that the person has committed a serious crime.

[78] M.S.S v Belgium & Greece (application no. 30696/09) concerned the expulsion of an asylum seeker (M.S.S.) to Greece by the Belgian authorities in application of the EU Dublin II Regulations. M.S.S. entered the EU through Greece ending up in Belgium, where he claimed asylum. Belgium submitted a request for Greece to take charge of his claim pursuant to the regulations. Before the Grand Chamber M.S.S alleged both Greece and Belgium has breached his human rights, namely Article 3 and 13 (right to an effective remedy). The Grand Chamber acknowledged that States forming the external borders of the EU had to shoulder the burden of an increased numbers of migrants, but that situation could not absolve them of obligations under Article 3. The Court noted that various reports by international bodies and NGO's confirmed that the systematic placement of asylum seekers in detention without informing them of the reasons was a widespread practice of the Greek authorities. International organizations also collected

the issue was a return of Sri Lankan national from the UK to Germany, from where his return to Sri Lanka would be at risk, the ECtHR said that the mere fact that Germany is a member of CoE is not enough as an argument and the factual situation and national laws have also to be examined.

In *Saadi v. Italy*, the UK intervening tried to argue that as Article 2 ECHR protects the right to life of all citizens, it is the exception to Article 3 (while non-deportation of a terrorist would violate Article 2). The ECtHR has however firmly confirmed the absolute character of the Article 3.

In the *Sufi and Elmi v. UK* case (June 2011) the Court acknowledged that a sufficient level of intensity of violence in the country in general amounted to risk under Article 3 (re-confirmation of *N.A. v. UK* case).

The right to liberty and security (Article 5)

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
    a. the lawful detention of a person after conviction by a competent court;
    b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
    c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

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consistent testimony of brutality by the Greek authorities, and about the unsanitary conditions and overcrowding in the detention centre next to Athens international airport. Whilst Article 3 did not generally oblige Member States to secure for refugees a certain standard of living, the Court held in the light of the evidence that the situation in which *M.S.S* lived was particularly serious.

See: http://jcwi.wordpress.com/2011/01/28/m-s-s-v-belgium-greece-case-note/

This has been particularly significant judgement taken that only in 2008 in *K.R.S. v. UK* the court ruled the opposite saying, that it must be presumed that Greece will comply with its obligations in respect of returnees (the case of risk of an Iranian being returned from the UK to Greece, where he was at risk of return to Iran).

d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 5 has been applied while violation has been found in cases of foreigner detention (*Amuur v. France*, *Saadi v. UK*, *Chahal v. UK*, *Čonka v. Belgium*). Specific case law has been developed in relation to detention of minors (*Mubilanzila v. Belgium*, *Rahimi v. Greece*, *Muskhadzhiyeva and Others v. Belgium*).

The right to respect for private and family life (Article 8)

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 8 ECHR entails (a) negative obligations of the state not to interfere in the private and family life (can be in case of removal from the state territory) and (b) positive obligations: to make all the necessary positive arrangement s to guarantee its effectiveness (e.g. to authorise access to the territory for family reunification). Next to the existence of family or private life and an interference thereof, proportionality also has to be checked (as to the legality, legitimate aim and fair balance of it in the current case).

This Article has been often invoked before the Court, when a foreign national spent most or all of his life in the host country, has no ties in his country of origin and his return would thus be in breach with his private or family life. The notion of private life is deemed broader then family life including the right to intimacy, personal integrity, social life of a person (*Sissoyeva v. Latvia*). Article 8 can also enable stay of foreign parent of a child, where specifically the best interests of the child are being taken into account (*Nunez v. Norway* 2011).

This Article might also be used as an argument for regularization of irregular foreigners. So far in the case law, it was always only about people in regular situation.

In several cases it has been ruled that expulsion of an alien would give rise to a violation of Article 8 (*Moustaquim v. Belgium*, *Beldjoudi v. France*, *Boultif v. Switzerland*).

A controversial case in this area is the *Üner v. Netherlands* judgement (2006)[79] that alleviated some basic principles from the *Boultif* case as "guiding criteria" to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued. These criteria entail

[79] In *Üner v. Netherlands* the Court ruled no violation of Article 8. It was a case of a Turkish national who moved to the Netherlands in the age of 12 with his mother and brothers to join their father. He was convicted of serious crimes for seven years of imprisonment and expulsion order for 10 years. He had a partner, two small children, neither him or the family members spoke Turkish. During his prison term he did different requalification courses. The Court ruled that his children were so small, so able to adapt to changes and could still go to live with their father in Turkey and return regularly back thanks to their Dutch nationality and so the applicants expulsion has been proportionate to the legitimate aim of the Netherlands.

– the nature and seriousness of the offence committed by the applicant;
– the length of the applicant's stay in the country from which he or she is to be expelled;
– the time elapsed since the offence was committed and the applicant's conduct during that period;
– the nationalities of the various persons concerned;
– the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
– whether the spouse knew about the offence at the time when he or she entered into a family relationship;
– whether there are children of the marriage, and if so, their age; and
– the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled.

and the Court explicitly added two criteria which may already have been implicit in those identified in *Boultif*:

– the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
– the solidity of social, cultural and family ties with the host country and with the country of destination.

In the joint dissenting opinion of judges Costa, Zupančič and Türmen to the *Üner v. Netherlands* case, the judges underlined that foreigners legally residing in a country should be granted the same fair treatment and a legal status as close as possible to that accorded to nationals. They also recalled the principle that long-term immigrants shall protected from expulsion (CoE Parliamentary Assembly Recommendation 1504(2001)).

By applying the "Boultif criteria" it seems to them as there has been a violation of Article 8. Moreover they point to a "double punishment" or discriminatory punishment of a foreign national, as the expulsion for ten years has only be imposed on the applicant four years after the crime had been committed. They find this as more severe penalty as a term of imprisonment, if not more severe.

In 2008 in *Maslov v. Austria*, the ECtHR ruled that 10-year exclusion order of a juvenile offender from Bulgaria was not necessary in a democratic society. The Court took into

account the young age at which the applicant had committed the offences and the existence of his main family ties being in Austria and found a violation of Article 8 in this case.

Prohibition of collective expulsion (Article 4 of the Protocol 4)

> Collective expulsion of aliens is prohibited.

Article 4 of the Protocol 4 of the ECHR forbids collective expulsion. Violation thereof was found in *Čonka v. Belgium* (2002), when Belgian authorities expelled a group of Slovakian nationals of Roma origin after a false convocation to the authorities.

Protocol 7 (1984) provides for procedural guarantees against expulsion of foreigners (Šturma et al. 2006: 112-113).

The right to fair procedure (Article 6)

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
    a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
    b. to have adequate time and facilities for the preparation of his defence;
    c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

The Articles 6 and 13 are protecting procedural rights. Case law considers that art 6 does not apply to migration of asylum cases because it is neither civil law nor criminal cases, which are the prerequisites in para 1 of the provision (*Maaouia v. France*, 1996).

Right to an effective remedy (**Article 13)**

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

This provision means that in case of invoked violation of a substantial right, domestic courts must give an opportunity for effective remedy. Article 13 is broader in scope then Article 6 ECHR, as it covers any authority, whereas the Article 6 only applies to a judge. The effectivity of the remedy must entail sufficient procedural guarantees, suspensive effect of the remedy and the national authorities have to analyze the substance of the complaint (full and ex nunc examination of the case[80]).

Regarding the suspensive character, the need for effective remedy requires, at least, the possibility of stopping the execution of measures which may be contrary to the Convention.[81]

In *Diallo v. Czech Republic* (2011) the Court unanimously found a violation of Article 13 taken in conjunction with Article 3 on account of the fact that none of the domestic authorities had examined the merits of the applicants' arguable claim under Article 3 and there had been no remedies with automatic suspensive effect available to them to challenge the decision not to grant them asylum and to expel them.

80 *NA v. United Kingdom* 2008, para 112
81 Jabari, para 50 and Gebremedhin, para 66

3.4.2. The European Social Charter

The European Social Charter (ESC) was first adopted in 1961 and revised in 1996. It complements the ECHR by offering further guarantees of economic and social human rights, although the two versions differ in scope. Five EU Member States are not party to the ESC and nine have not ratified the revised ESC, but all EU Member States have ratified at least one of the two.[82] While individual complaints are not permitted, an additional protocol entitles social partners and NGOs to lodge collective complaints of Charter violations in states which have ratified or accepted it. From a procedural point of view, if the Committee of Social Rights considers a complaint admissible it sends a report to the concerned parties and to the Committee of Ministers. Building on the report, the Committee of Ministers then adopts a resolution which can recommend the state resolve the conflict with the Charter. The scope of the ESC is limited: its Appendix extends its application to "foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned". In principle, this wording excludes migrants in an irregular situation from the application of the social rights enshrined in the Charter (FRA 2011: 23-24).

3.4.3. Council of Europe bodies

Committee of Ministers (CM)

In 2011, the Committee of Ministers (CM) of the Council of Europe (CoE) adopted a proposal of the Secretary General (SG) on a "Framework for CoE work on migration issues – 2011-2013" to strengthen the impact of CoE activities in this field. Of particular interest is the decision to focus on the Human Rights dimension of asylum and irregular

[82] All EU Member States except Bulgaria, Estonia, Lithuania, Romania and Slovenia are party to the European Social Charter. The following nine EU Member States are not party to the revised European Social Charter: Czech Republic, Denmark, Germany, Greece, Latvia, Luxembourg, Poland, Spain and the United Kingdom.

migration. The CM plans to draft a Recommendation on criminal aspects of irregular migration and, possibly, Guidelines on conditions of detention of asylum seekers and irregular migrants will be produced.

Migration Co-ordination and Co-operation Division

Within the CoE's intergovernmental sector a new Migration Co-ordination and Co-operation Division has been set up to provide a new impetus to its work on migration. The aim is not to create more standards, but to promote and assist member states in implementing existing standards, *inter alia*, by the means of targeted bilateral co-operation programmes, legislative review and simplification of procedures or human rights training of national authorities. The Division will, in particular, focus on (a) integration of migrants; (b) the human rights dimension of asylum and return procedures; and (c) integration of internally displaced persons. Within these areas, a further need for standard setting activities was identified with regard to the detention and holding of migrants and asylum seekers (including alternatives to detention), language learning by migrants, the "criminalisation" and victimisation of irregular migrants as well as the situation of vulnerable people. In order to increase the visibility of the CoE work on this issue, a migration website will be launched in March 2012. Furthermore, a handbook on guidelines on large-scale arrivals of asylum seekers and migrants for "frontline states" will be produced.

Committee on Migration, Refugees and Displaced Persons

The Committee on Migration, Refugees and Displaced Persons of the Parliamentary Assembly of the Council of Europe currently focuses its work around three major poles of activity, namely (a) strengthening the protection of rights of migrants, refugees, asylum seekers, and displaced persons; (b) promoting integration, dialogue, understanding and respect of migrant communities in their host societies; and (c) promoting solutions for protracted displacement of IDPs. In order for the activities of the Committee to have an impact and relevance, the Committee has agreed to establish three Sub-Committees dealing with the priority issues of (a) detention; (b) integration;

and (c) co-operation with non-European countries of origin and transit. NGOs are clearly mentioned as key partners of the Committee and AI has established a close collaboration. The Committee will continue its work including field visits on large-scale arrival of irregular migrants, asylum seekers and refugees on Europe's southern shores and its inquiry into who is responsible for the about 2,000 "boat people" who perished in the Mediterranean in 2011. It will, *inter alia*, draft a "Guide for Parliamentarians on visiting places of detention for irregular migrants and asylum seekers" as well as Resolutions and Recommendations on the issues of IDPs, Roma, trafficking, and integration of migrants/ integration tests.

Commissioner for Human Rights

The present CoE Commissioner for Human Rights (CHR)[83] has been highlighting restrictive policies towards immigrants, refugees and asylum seekers as well as laws and practices giving rise to discrimination. Alongside monitoring the Human Rights situation in CoE member states, he regularly publishes human rights comments and issue papers on this issue and addresses recommendations.

European Committee for the Prevention of Torture

The European Committee for the Prevention of Torture (CPT) monitors the situation of people in detention, including irregular migrants and asylum seekers, through periodic or *ad hoc* county visits. The visit reports, government responses, public statements and general reports are published and indicate the CPT's recommendations.

European Committee against Racism and Intolerance

The European Committee against Racism and Intolerance (ECRI) carries on country-by-country monitoring of the law and practice on combating racism, racial discrimination,

83 Thomas Hammarberg until the end of March 2012 followed by Niels Muižnieks

xenophobia, anti-Semitism and intolerance. It will also produce a general policy recommendation on employment.

European Committee on Social Rights (ECSR)

The European Committee on Social Rights (ECSR) reports on the implementation of the (revised) European Social Charter and considers Collective Complaints, including on the rights of migrants and asylum seekers according the complaints submitted. The Committee pays particular attention to the issues of the right to work for refugees and asylum seekers.

The ECSR concluded in *FIDH v. France* that legislation or practice which denies entitlement to medical assistance, regardless of legal status in the country, was contrary to the ESC. The Committee stressed that healthcare is a prerequisite for the preservation of human dignity, which is a fundamental value in European human rights law. Furthermore, in *Defence for Children International v. the Netherlands*,[84]the European Committee on Social Rights pointed out that the right to shelter is directly linked to the rights to life, social protection and respect for the child's human dignity and best interests. The Committee considered the general principle of *the best interests of the child*, as recognised in Article 3 of the CRC, as a binding principle under the ESC. The Committee next considered that "the right to shelter is closely connected to the right to life and is crucial for the respect of every person's human dignity." The Committee concluded that: "states parties are required, under Article 31(2) of the revised Charter, to provide adequate shelter to **children unlawfully present in their territory** for as long as they are in their jurisdiction" (the Fundamental Rights Agency 2011: 24).

Congress of Local and Regional Authorities

The Congress of Local and Regional Authorities works on the issue of integration and participation of migrants, in order to help local and regional authorities to implement relevant standards on a daily basis.

84 ECSR, Defence for Children International v. the Netherlands, Complaint No. 47/2008, 27 October 2009.

Council of Europe's Development Bank

The Council of Europe's Development Bank (CEB) can provide financial assistance and support concrete "bankable" projects concerning migrants, refugees and IDPs.

3.5. Conclusions

As we have seen in this Chapter, there are very few universal international instruments on migration nowadays. Those in force are very limited in scope, either addressing a specific issue such as human trafficking, labour migrants or refugees or not being universally ratified, which is the case for example of the ILO Conventions or the CMW itself.

The UN general human rights instruments are currently the most important ones for the protection of rights of irregular migrants – especially in light of the UN Treaty mechanisms general comments and opinions, which often explicitly extend the instruments to migrants in irregular situation. The Council of Europe framework developed through the ECtHR case law an extensive migrant rights protection, although their rights are not specifically covered in the ECHR.

All this protection provided in international law should be thus translated to the national legislation of EU Member States.

4. THE RIGHS OF IRREGULAR MIGRANTS IN EU LEGISLATION

"…man solle in Zukunft zwischen den
Ausländern unterscheiden, die uns nützen und jenen,
die uns nur ausnützen."
Günter Beckstein, Die Zeit[85]

Irregular migrants are amongst the most vulnerable groups in the European Union as their insecure legal status favours their exposure to human rights violations and inhuman treatment.[86] Their vulnerability is particularly sensitive in the current period of economic unrest and recession across the Union where solidarity, welfare and the well-being of populations are increasingly in conflict. Their insecurity is further exacerbated in a phase where 'anti-immigration', nationalistic and extreme-right discourses and policies (Carrera and Perkins 2011: 1). As it will be further analyzed in this chapter, the EU policies with regards to irregular migration are repressive, preventative, criminal and surveillance-oriented. Undocumented migrants are being treated as if they were not legitimate beneficiaries of fundamental rights and the lack of legal status detracts them from entitlement to protection policies (Carrera and Perkins 2011: 2).

In the European Union we are dealing with a complex multi-level structure of the legislation as profoundly described for example by Boeles et al. (2009: 35). They identify the following legal spheres: (1) National legislation of EU Member States, (2) EU legislation (including the primary and secondary legislation), (3) Council of Europe treaties (including the jurisdiction of the European Court of Human Rights), (4) UN treaties (including the treaty monitoring mechanisms), (5) Bilateral and multilateral treaties concluded between EU Member States and third countries.

[85] „*We need to distinguish between people who will do us good and those who take advantage of us*" Günter Beckstein, the former Bavarian State minister of the Interior, Die Zeit 2000, cited in: Menz 2011: 32, Hentges 2000

[86] European Union Agency for Fundamental Rights (2011), Fundamental Rights: Challenges and Achievements in 2010, Annual Report, Vienna, 34 in: Carrera and Perkins (2011: 1)

The European Union builds for several years its common policy in migration and asylum. Generally speaking, the EU is willing to ensure free movement of people, services, goods and capital on its territory.[87] This policy can be very often seen in contrast with the fear of third country immigration and efforts to protect the EU from asylum seekers, family members and other immigrants' arrivals. Regarding irregular migration, the EC/EU has dealt with it in various ways since its emergence, using the legally binding and often also soft non-binding measures. The "fight against" irregular migration has been on top of the Justice and Home Affairs agenda, most of the time associated with the notion of security thread. In general, the EU has no comprehensive policy on irregular migration so far. It has always been focused on security measures rather than on the rights of migrants that also need to be protected.

Unlike the sense and philosophy of the CMW, the EU focuses still first of all on migration flows regulation. It has a well-developed system rights protection for the internal mobility of EU nationals. Social rights of legally residing third country nationals are not an important topic for the EU, not even mentioning the rights of undocumented migrants (Cholewinski, McDonald 2007: 75, 77).

> Art 26(2) of the TFEU:
> The internal market shall comprise an area without internal frontiers in which the **free movement of** goods, **persons**, services and capital is ensured in accordance with the provisions of the Treaties.

This policy can be very often seen in contrast with the fear of third country immigration and efforts to protect the EU from asylum seekers, family members and other immigrants' arrivals.

The EU policies on migration focus a way too much on criminalization of migrants and border protection. The various research studies quoted by Carrera & Merlino (2009:33) have showed the counterproductive effects that criminal penalties have on social

[87] Art 26(2) of the TFEU: The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.

inclusion and access to human rights of migrants. Criminalization of migrants but also criminalization of solidarity with migrants increases the vulnerability, insecurity and marginalization of undocumented migrants. The results of the research are however not fully acknowledged on the EU policy level.

Regarding irregular migration, the EC/EU has dealt with it in various ways since its emergence, using the legally binding and often also soft non-binding measures. Cholewinski (2004: 162-3) identifies the failure of the EU to adopt positive measures that would contain rights in its policy on irregular migration.

Generally, the European *acquis* provides for equal treatment with third country nationals residing legally on the Member states territory. Rights and obligations comparable with EU citizens shall be applying to them (Tampere Conclusions, 1999, part III. Equal treatment for third country nationals, point 18).

Unlike the sense and philosophy of the CMW, the EU focuses still first of all on migration flows regulation. It has a well-developed system rights protection for the internal mobility of EU nationals. Social rights of legally residing third country nationals are not an important topic for the EU, not even mentioning the rights of undocumented migrants (Cholewinski, MacDonald 2007: 75, 77).

4.1. Primary sources of EU legislation

Looking at migration related legislation, it is necessary to realize that how the legislation is worded very much depends on the specific legislative procedure used while adopting the laws.[88] Since Amsterdam, migration belongs to shared competence of the European Union. Shared policies in the EU mean, that Member States can influence the area with their own laws unless the EU has not done so already.

[88] The further systematic description of the evolution is based on a course by Philippe de Bruycker: Institutional Framework of the European Immigration and Asylum Policy, Odysseus Network Summer School 2011

The need to respect fundamental rights does not require the existence of secondary EU law. According to the case law of the CJEU, Member States must respect fundamental rights wherever "national legislation falls within the field of application of Community law"[89] (FRA 2011: 24).

4.1.1. EU law evolution in the migration field

Before Maastricht and Amsterdam

In 1974 an Action Programme in Favour of Migrant Workers and Their Families has been proposed by the Commission. In this proposal, the Commission highlighted also the difficult situation of clandestine migrants and their vulnerability to exploitation (Cholewinski 2004: 164). In 1976 the Commission has even proposed a Directive aiming at combating illegal migration and illegal employment, that was according to Cholewinski (2004: 165) very comprehensive and balanced including rights of irregular migrants protection. However, the Directive has not been pursued by the Council (Cholewinski 2004: 166). There have not been similar proposal since then and it is clear that the earlier policy proposals by the Commission have been generally speaking more in favor of migrant protection and rights safeguarding.

In 1985 the Agreement of Schengen has been concluded. The Schengen Information System (SIS) enables contracting states to prevent undesired foreigners from entering the common territories (Boeles 2009: 42). The Schengen Agreement is even expanded to non-EU countries (Norway, Iceland and Switzerland).

In 1986 The Single Act (amending the TEC) had as its objective to create internal market without internal border controls. But it did not provide for any competences or details

89 CJEU, C-299/95, Kremzow, 29 May 1997, paragraph 15.

on its implementation. As a consequence, its implementation went through (a) the Community method (ordinary legislative procedure, so called co-decision procedure) and (b) an intergovernmental cooperation (in this case the EU institutions, including the CJEU, do not apply). Within this procedure the Schengen Agreement has been adopted.

After Maastricht

By the 1993 *Maastricht Treaty* (amending the TEC), a third pillar has been created. The third pillar (*Title IV "combating unauthorized immigration, residence and work by nationals of third countries on the territory of Member States*") incorporated visa, migration and asylum issues, border control, justice and police cooperation and within this scope still the intergovernmental method has been used. Because of the need for unanimity decisions, it was very difficult to adopt legislation within this method and only common actions and positions could have been adopted. In this period, several international conventions have been adopted, but some of them have still not been ratified by all the MSs, so they are not effective. De Bruycker sees this phase useful only for the mere fact, that national officials got used to meeting with their counterparts in Brussels and started realizing a possibility of cooperation on the EU level in this area.

Cholewinski (2004: 167) criticizes measures taken in this regime as not focusing on rights of migrants. On the contrary, in 1994 the *Commissions Communication to the Council and the EP on Immigration and Asylum Policies* (COM (1994) 23 final) entailed a rights based approach towards irregular migration and moreover, it recommended the CMW ratification (Cholewinski 2004: 168).

After Amsterdam

A crucial one has been the decision to create the Title IV in the Part III of the European Communities Treaty in 1997 – the so-called Amsterdam Treaty[90] (Cholewinski,

[90] The Title IV encompasses the free movement of persons, checks at external borders, asylum, immigration and protection for the rights of nationals of non-member countries and the judicial cooperation in criminal matters. Treaty of Amsterdam, amending the Treaty on European Union, the

McDonald 2007: 67). The Amsterdam Treaty in 1997 brought in the term "Freedom, Security and Justice" and the "Justice and Home Affairs" were transferred from the third to the first pillar. Although this transfer has been made, the Community method has still not been fully applicable and a special institutional framework[91] has been used in the area of immigration, asylum and civil judicial cooperation, whereas the criminal judicial and police cooperation remained part of the third pillar. Under this arrangement it was still extremely difficult to negotiate legislation within the asylum and migration areas. At least, it was already possible to adopt Directives and Regulations and also the CJEU became fully competent in these issues.

The Council was then empowered to adopt common measures concerning "illegal immigration and illegal residence, including repatriation of illegal residents" (Article 63(3)(b) of the consolidated Treaty). Since Amsterdam, migration belongs to shared competence of the European Union. Some countries claim, that it still needs to be clarified which competences belong to the EU and which of that of the MSs (Hungary, government position, December18: 2010).

The *Treaty of Nice* in 2001 opened for a Community method for the asylum policy.

European law in general provides for equal treatment with third country nationals that are in a regular situation.[92] The Green Paper on economic migration[93] notes that workers from third countries should have the same treatment as EU citizens, especially regarding basic economic and social rights, before they can gain the status of permanent residents. It is also important to briefly mention the Dublin Convention (the Dublin Convention in 1990 on the attribution of responsibility for dealing with asylum requests, it entered into force in 1997) that has later been replaced by a Council Regulation (Dublin II) under which there should not be asylum requests doubling – asylum seekers

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treaties establishint the European Communities and certain related acts, 2 October 1997, available at http://eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html#0001010001.

91 For example, in the Council there was still unanimity needed to make decisions and the role of the European Parliament was still limited only to give asingle consultation.

92 Same rights and duties are supposed to be applicable to immigrants as are to EU citizens. Tampere Conclusions, 1999, part III., 18.

93 In January 2005, COM(2004) 811 final, 10. http://eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004_0811en01.pdf

shall ask for asylum in the first state of embarkation in the EU and may be returned to that country once found out during the asylum seeking procedure.

The VIS (visa information system) works as a database of all short term visa applications to the EU that shall prevent rejected applicants in one EU MS to apply in another Member State. Regarding the irregular migrants in the EU, returning of migrants to countries of origin is on the top of the EU agenda. In order to secure this process EU Member States and later EC/EU itself signed numerous readmission agreements with third countries and further on, readmission clauses have been inserted into broader EC external agreements reaching to very different levels of cooperation (Peers 2004: 197-198, 205).

After the Lisbon Treaty

The Lisbon Treaty i.a. strengthens the position of the European Parliament when it is granted real legislative power. The co-decision procedure, renamed as "regular legislative procedure", has been broadened for several new areas, including immigration. Together with the entry into force of the Treaty on Functioning of the European Union (TFEU, the Lisbon treaty)[94] in December 2009, the Charter of Fundamental Rights of the European Union (2007/C 303/01, 14.12.2007) has been given binding legal effect for the EU equal to the Treaties. The legally binding nature of the Charter shall secure that human rights will be in the heart of the EU policies.

Additionally, as highlighted by Boeles (2009: 36) the Treaty of Lisbon has also added a protocol to the EU treaty according to which the EU will accede to the ECHR.[95] This opens a new phase in European integration in fundamental rights prohibition (Carrera and Parkins 2011: 1). The Lisbon Treaty also further expanded the jurisdiction of the European Court of Justice (Carrera & Merlino 2009: 2). The European Court of Justice became bound by the decisions of the European Court of Human Rights even when

[94] Treaty of Lisbon, amending the Treaty on European Union and the Treaty establishing the European Community, 3 December 2007.

[95] Protocol No. 8 relating to Article 6 (2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

interpreting the EU Charter. Every further step in the development of human rights protection taken by the European Court of Human Rights automatically becomes part of the EU law. Moreover, it made the European Court of Human Rights competent to review acts of EU institutions, bodies and agencies for the respect of the Convention. The EU citizens gained more legal protection as they are able to take their complaints to the European Court of Human Rights if the European Court of Justice rules against their favour.

Generally, the European *acquis* provides for equal treatment with third country nationals residing legally on the Member states territory. Rights and obligations comparable with EU citizens shall be applying to them (Tampere Conclusions, 1999, part III. Equal treatment for third country nationals, point 18). Importantly, discrimination on grounds of nationality is prohibited within the EU (TFEU: Part II. Non-discrimination and the citizenship of the EU, Art. 18).

The Lisbon treaty amended the TFEU regarding the competences in the field of migration. The legal basis for the relevant issues is now safeguarded in the Title V. "Area of Freedom, Security and Justice" in articles 67-80. Article 79 TFEU deals specifically with the legal basis and competences of the Union in the area of migration.

> Article 79 TFEU:
>
> 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:
>
> (a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification;
>
> (b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States;
>
> (c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;
>
> (d) combating trafficking in persons, in particular women and children.

The rights of third country nationals obviously extend only to the ones staying legally in the EU territory and the competences with regard to irregular migration shall explicitly

tackle removal or repatriation. There is thus no legal basis explicitly mentioning the rights of irregular migrants in the Treaties.

4.1.2. The Charter of Fundamental Rights of the EU

The Charter of Fundamental Rights of the European Union signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the European Council meeting in Nice on 7 December 2000 became a legally binding document with the Treaty of Lisbon in 2009.

> *The European Union Charter of Fundamental Rights sets out in a single text, for the first time in the European Union's history, the whole range of civil, political, economic and social rights of European citizens and all persons resident in the EU. These rights are divided into six sections: Dignity, Freedoms, Equality, Solidarity, Citizens' rights, Justice. They are based, in particular, on the fundamental rights and freedoms recognised by the European Convention on Human Rights, the constitutional traditions of the EU Member States, the Council of Europe's Social Charter, the Community Charter of Fundamental Social Rights of Workers and other international conventions to which the European Union or its Member States are parties.*[96]

It has to be noted here that the rights contained in the European Charter of Fundamental Rights have been already in force before and in this case they were only given a written and formally binding nature. It though does not mean that they were not in force before that (Gil-Bazo 2011). Those basic human rights were legally binding before thanks to the sources of law recognized by the European Court of Justice. The EU law has to be interpreted in line with the principles as it has been argued by the CJEU in several cases like *Stauder* (29/69), *Nold* (4/73), *Rutili (36/75), Orkem* (*374/87)* or *Unibet* (Gil-Bazo 2011).

96 European Parliament website http://www.europarl.europa.eu/charter/default_en.htm

All rights covered by the Charter apply also to irregular migrants, unless it is specifically stated the contrary. A limited number of provisions contained in the Charter are restricted to citizens or lawful residents only. These concern, amongst others, consular protection (Article 46) and certain political rights (Articles 39 and 40) as well as social security benefits (Article 34(2)), freedom of movement (Article 45) and access to the labour market (Article 15). The Charter restricts certain rights and principles which are granted to everyone according to "national laws and practices." This is for example, the case of Article 34 on social security and social assistance[97] and of Article 35 on healthcare (FRA 2011: 24).

> *Article 52*
> *Scope of guaranteed rights*
> *1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.*
> *2. Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.*
> *3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.*

EU MSs therefore can in their legislations limit the rights contained in the CMW. According to the last paragraph of the quoted article, the Charter guarantees minimum standards of protection but at the same time it allows the EU law to provide for higher standards (De Schutter 2007).

The rights, freedoms and principles contained in the Charter have same legal value as Treaties (Article 6(1) TEU). The most important provisions in the Charter are those in relation to dignity (that applies to everyone); equality (applies to everyone and specifically to men and women, children, elderly, persons with disabilities); solidarity

[97] 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.

(the rights given to workers, everyone, children, young people, families, everyone residing and moving legally within the EU) and justice (that applies to everyone).

Regarding labour rights, Art. 15 of the Charter covers the right to work, Article 12 the right to form and join trade unions, Article 31 fair and just working conditions. Additionally Article 14 includes the right to education and access to training and Article 35 Charter access to preventative health care and to medical treatment, although that can be restricted by conditions in national laws (Merlino, Parkin 2011: 2).

Article 47 Charter provides for the right to an effective remedy and to a fair trial. According to Merlino and Parkin (2011: 2) these rights should be central to preventing violations of irregular migrants' wider fundamental rights.

Most of the rights contained in the CMW, Part III. are also secured by the European Charter. It is obvious that the CMW uses sometimes migrant-specific formulations or extensions of the generally recognized rights. For example, it focuses specifically on remittances or in case of social security it upholds the necessity to examine the possibility to reimburse migrant workers the amount of contributions made by them with respect to social benefits so that the equal treatment with nationals would be secured (Art 27).

The scope of the Charter is to be determined according to Article 51.

> Article 51
> Scope
> 1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.
> 2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.

It seeks to establish clearly that the Charter applies primarily to the institutions and bodies of the Union, in compliance with the principle of subsidiarity. This provision is in keeping with Article 6(2) of the Treaty on European Union, which requires the Union to

respect fundamental rights, and with the mandate issued by Cologne European Council. The term "institutions" is enshrined in the EC Treaty, Article 7 of which lists the institutions. The term "body" is commonly used to refer to all the authorities set up by the Treaties or by secondary legislation (see Article 286(1) of the Treaty establishing the European Community).

As regards the Member States, it follows unambiguously from the case law of the Court of Justice that the requirement to respect fundamental rights defined in a Union context is only binding on the Member States when they act in the context of Community/EU law (judgment of 13 July 1989, Case 5/88 *Wachauf* [1989] ECR 2609; judgment of 18 June 1991, *ERT* [1991] ECR I-2925). The Court of Justice recently confirmed this case law in the following terms: "In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules..." (judgment of 13 April 2000, Case C-292/97, paragraph 37 of the grounds). Of course this principle, as enshrined in this Charter, applies to the central authorities as well as to regional or local bodies, and to public organizations, when they are implementing Union law.

Paragraph 2 confirms that the Charter may not have the effect of extending the competences and tasks which the Treaties confer on the Community and the Union. Explicit mention is made here of the logical consequences of the principle of subsidiarity and of the fact that the Union only has those powers which have been conferred upon it. The fundamental rights as guaranteed in the Union do not have any effect other than in the context of the powers determined by the Treaty.

The effect of this explanation of Article 51 could be, that the Charter extends to irregular migrants in the EU only when it comes to implementation of the EU law. In implementing the Return directive, the Charter-based rights should apply to irregular migrants in all stages of the process. Otherwise, irregular migrants not being covered by any EU legislation could not benefit from the rights protection under the Charter. In the end, this issue is purely theoretical and will not have any important impact in practice, as there are other human rights protection safeguards stemming from international and customary law.

There is still however the "implementation gap" of fundamental rights constituting one of the remaining unfinished tasks for Europe (Carrera and Parkins 2011: 1). The legally binding nature of the EU Charter, while not creating new Union competences and respecting the principle of subsidiarity, creates new responsibilities for the authorities at Member State level when implementing EU law and policies (Carrera and Parkins 2011: 3).

4.2. Secondary Legislation

Several EU Directives have recently shaped the European immigration policy. The Directives, however, do usually set the minimum standards of protection, that in some cases lower the human rights standards of migrants in the Member States. This is very much due to the system of adoption of the legal documents as discussed above (in 3.2.1 Evolution of legislation).

The EU secondary legislation in the field of migration is very control, surveillance and criminalization oriented, especially when it comes to irregular migrants. With regards to irregular migration, the most important legal instruments include the Return Directive, Directive on criminalization of facilitation of entry and residence and criminalization of illegal employment.

4.2.1. Legal migration channels

The EU has created, especially intensively in the last ten years, various channels for legal migration. These are however not so easy to be accessed by a wider number of third country nationals. The EU legislation has through different Directives and Regulations created several types of migrants with various rights. This part will briefly describe the main "groups" of migrants under EU law.

It is important to note that the Directives have been transposed in most of the cases differently; implementation of some provisions in some Member states is more than questionable. Nearly all Member states have also parallel own systems and statuses (for example national long-term residence status).

From the EU measures related to legal migration described below show a clear inclination of the EU policies to attract "economically useful migrants" (Menz 2011: 116). The main statuses legally residing third country nationals in the EU can have, are the following:

1. ***TCN Family Member of Union Citizen***

This status is based on the Directive 2004/38/EC. TCN family members enjoy (as Union citizens) equal treatment with the host Member State nationals within the scope of Treaty.

2. ***TCN Family Member Joining Legally-Resident TCN***

The Family Reunification Directive (2003/86/EC) provides for admission of family members of legally staying third country nationals (1 year or longer) and is one of the major channels for migrants to enter legally the EU. They are entitled, in same way as sponsor, to access to education, access to employment/self-employed activity, access to vocational guidance and training.

3. ***TCN Long-Term Resident***

The Directive on long-term residence 2003/109/EC provides for a status, which gives the migrants equal treatment with nationals in specified social and economic areas, equal treatment in same areas and under same conditions and it imposes some additional restrictions on employment. The status can be obtained after five years of legal residence in the Member state.

4. ***TCN as Highly Qualified Employee***

The Blue Card holders (based on the Blue-Card Directive (2009/50/EC)) have labour market access, the possibility of residence in other Member States for purpose of highly-qualified employment. They enjoy equal treatment with nationals of Member State issuing Blue Card in relation to specific social and economic areas. This Directive tries to fill in the EU objective to "…*increase its competitiveness and economic growth and to help tackling the demographic problems resulting from the ageing population*" as announced by Jacques Barrot, head of the Directorate-General Justice Freedom and Security in June 2009 (Menz 2011: vi). This shows the emphasis that the EU puts on attracting highly skilled labour.

5. TCN Student, Exchange Pupil, Unpaid Trainee, Voluntary Service

According to Directive 2004/114/EC, students are entitled to be employed and may be entitled to exercise self-employed activity under certain conditions.

6. TCN Scientific Researchers

The Directive 2005/71/EC provides for the possibility of teaching in the EU, equal treatment with nationals in certain areas and mobility between Member States.

7. TCN Corporate Transferees

This Proposal COM (2010)378 on Intra-corporate transferees entails the terms and conditions of employment applicable to posted workers. It provides for equal treatment with nationals in specified social and economic areas, favourable conditions for family reunification and the entitlement to work in all entities belonging to the same group.

8. TCN Seasonal Workers

The proposal from 2010 of the Seasonal Workers Directive (COM(2010) 379 final) so far contains the entitlement to working conditions applicable to seasonal work and equal

treatment with host Member State nationals in at least a number of social and economic areas.

9. TCN Workers Legally Residing in a Member State

The Single Permit Directive 2011/98/EU has been adopted in December 2011 and entails the rights of migrant workers in the EU that do not fall in the scope of the other migration or asylum related instruments. This directive was initially aiming at becoming a framework directive for all the statuses of migrants in the EU. Finally migrants residing under other legislations have been excluded from the scope of the Directive. It now only fills the gaps for those that do not fall under another status in the EU legislation. It provides for the right to equal treatment with nationals with regard to specified social and economic rights. And the Directive is only applicable to those staying legally on the EU territory.

4.2.2. Non-discrimination of third-country nationals

Rights-based approach to migrants can be found in the EU legislation relating to legally staying third country nationals, such as the Long-term residence Directive (2003/109/EC), The Racial Equality (2000/43/EC)[98] or the Employment Equality Directive (2000/78/EC).

The non-discrimination guarantees of the Racial Equality Directive also apply to migrants in an irregular situation. They prohibit differentiated treatment among them when this is based on race or ethnic origin. The directive, however, does not apply to differences of treatment based on nationality and is without prejudice to any treatment which arises from the legal status of third-country nationals (FRA 2011: 25).

[98] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L 180/24. See Recital 13 and Article 3(2).

4.2.3. Irregular migration

There are much more EU instruments dealing with the rights of asylum seekers and refugees and legal migrants then those that extend to irregular migrants. Among the few important instruments are the Employer Sanctions Directive, the Return Directive, the Directive on Victims of Human Trafficking and the Facilitation Directive.

Employer Sanctions Directive (2009/52/EC)[99]

The Employer Sanctions Directive is the first hard law at EU level in the migration domain that includes criminal sanctions under the first pillar scope (Carrera & Merlino 2009: 5). The deadline for transposition by the Member States was 20 July 2011. It sets common minimum standards on sanctions and measures to be applied by the EU member states to employers infringing the prohibition of "employment of illegally staying third country nationals (TCNs)". The Directive defines an illegally staying TCN as "a third-country national present on the territory of a Member State, who does not fulfil or no longer fulfils the conditions for stay or residence in that Member State". As summarized by Carrera & Merlino (2009: 6) illegal employment is transformed into a criminal offence when committed intentionally and falls under the circumstances enshrined in Art. 9. In case of non-compliance with several administrative obligations, financial and criminal sanctions will apply to employers.

The Employers Sanctions Directive explicitly provides for the rights of migrant workers in an irregular situation to claim outstanding remuneration resulting from illegal employment or to lodge complaints against employers.

Analysis of this Directive has shown that the use of criminal law in this case may have counterproductive effects on employment and working conditions. The Directive might have the effect that employers would be dissuaded from hiring TCNs for fear of being

[99] Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 on providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ 2009 L 168/24.

sanctioned and by this, all employment of TCN workers would be penalized (CHALLENGE project in Carrera & Merlino 2009: 19).

The Directive on the Protection of Victims of Trafficking in Human Beings 2004/81/EC

There has been recently adopted a new Directive on combating human trafficking and victims protection (2011/36/EU). Both directives provide for basic assistance where insufficient resources; for special needs, safety and protection, translation and interpretation or legal aid. They also provide for access to programmes and schemes aimed at recovery of normal social life.

The protection provided for the trafficking victims is however only temporary and connected to the victims cooperation in the criminal proceedings against the perpetrators.

The Facilitation Directive[100]

The Facilitation Directive imposes on states the duty to penalise those who, for financial gain, intentionally assist an irregular migrant to enter and/or reside in the EU. This provision is similar to the duty to criminalise certain acts set forth in the Palermo Protocol on Smuggling.[101] If landlords who rent a flat to migrants in an irregular situation are punished, migrants will have difficulties in finding a place to stay and may end up in exploitative housing conditions (FRA 2011: 25).

This Directive can be seen as part of the EU migrants' criminalization policy. Although not criminalizing the migrants themselves in this case, criminalization of others linked to them has a direct damaging effect on irregular migrants.

[100] Council Directive 2002/90/EC of of 28 November 2002 on defining the facilitation of unauthorised entry, transit and residence, OJ 2002 L 328/17.

[101] See in particular Article 6 of the UN General Assembly, Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000.

Other related EU legislation includes the Resolution on the creation of an early warning system for the transmission of information on illegal immigration and facilitator networks (1999) and the Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third country nationals.

The Return Directive (2008/115/EC)[102]

The Return Directive establishes common standards for the return of third-country nationals staying irregularly in the territory of EU Member States. It clearly shows the commonly shared official position at the EU level, according to which "illegality" justifies expulsion (Carrera & Merlino 2009: 21). The Directive aims at providing minimum standards and procedures at the EU level for the return of immigrants staying irregularly on the territory of a member state (i.e. who do not or no longer fulfil the conditions of entry as set out in Art. 5 of the Schengen Borders Code (the stays not exceeding three months) or other conditions of entry, stay or residence.

The Return Directive provides for minimum safeguards pending return. Article 14 lists some minimum entitlements for migrants in an irregular situation who have been given a period to leave the country on their own initiative or whose removal has been postponed by the authorities. Thus, the rights of persons in return proceedings, but who have not yet been removed, clearly fall within the scope of Union law, which must be transposed and implemented in accordance with the provisions of the Charter (FRA 2011: 25).

The Directive defines illegal stay in its Article 3(2) as "the presence of a third-country national on the territory of a Member State who does not fulfil the conditions of entry, stay or residence". The Directive establishes a procedure leading to the rumination of the irregular stay and the consequent expulsion of the irregular migrant, consisting first of a return decision and second of a removal order, or the two decisions together (Carrera & Merlino 2009: 6). Article 7 of the Directive promotes voluntary departure 7-30 days that can however be prolonged or shortened.

102 The Directive was to be implemented by 24 December 2010.

Article 6(4) allows member states to grant an autonomous residence permit or another sort of authorization to an irregular immigrant conferring a right of stay for compassionate, humanitarian or other reasons (Carrera & Merlino 2009: 7).

The Directive also deals with detention for the purpose of removal that may only be imposed if no less coercive measures can be applied effectively. It is though no obligation to detain irregular migrants and the states are free to choose alternatives. The detention can be of maximum 6 months with a possibility to prolong this period up to 18 months and judicial review of the detention order must be in place.

The Article 10 of the Return Directive provides for special rules for the return and removal of unaccompanied minors. A child can only be returned to a family member, a nominated guardian or adequate reception facilities in the state of return. The best interests of the child shall be taken into consideration (the CRC is cited in the preamble of the Directive) as well as respect for family life (as based in Article 8 ECHR) (Carrera & Merlino 2009: 8).

Although there are no explicit rights for irregular migrants contained in any EU Secondary legislation, the Return Directive has recently been used as a tool by the CJEU to protect irregular migrants. As examples can serve the *Kadzoev* case or the *Aeordzi v. Italy* case, in which the CJEU condemned Italian law criminalizing irregularity. The Directive provides for some safeguards that can be to some extent compared to the wording of the CMW. Guild (2009 in Carrera & Merlino 2009: 22) on the other hand claims that the common standards embedded in the Directive and other instruments do not prevent risks of human rights violations.

The Return directive provides for certain safeguards in case of pending removal (for TCNs who cannot temporarily be removed). Member states are obliged to respect the principle of family unity, ensure emergency health care and essential treatment of illness, access to basic education for minors and special needs of vulnerable people (Article 14(1)) (Baldaccini 2009: 12).

Regarding the procedural guarantees, according to Baldaccini (2009: 12-13) they were considerably watered down during the negotiations; especially the suspense effect of appeals has been excluded. There is though mandatory legal aid to irregular migrants who have no resources (Article 13 (3)(4)).

Baldaccini concludes that "measures, such as prolonged pre-removal detention and a ban on re-entering the EU have attracted the strongest criticism, including from other regions in the world, which generate substantial migration to Europe and whose development depends to a variable degree on migrants' remittances. The worldwide protests over the "shameful Directive" have highlighted that, with respect to migration, the EU is pursuing a policy that is expedient and short-sighted, criminalizes people who contribute to the well-being of the European society and weakens the Union's standing on human rights."

"Without a common policy governing the admission of migrants in place, [the EU] has agreed on common standards and procedures for returning those residing irregularly in the territory of Member States. Overall the Directive on Return, which was adopted in December 2008, falls short of a principled policy on the return of migrants, which fully respects their dignity and human rights (Anneliese Baldaccini (2009))."

According to Article 6 of the Return Directive, Member states have to decide whether to grant irregular immigrants a residence permit or send them back home to their country of origin. There are various options for Member states not to issue a return decision, to grant a permit of stay, i.a. for compassionate or humanitarian reasons, but these are all "may" clauses and thus left to Member states discretion. Otherwise the situations of legal limbo occur. Unfortunately nothing in the legal framework can prevent having people kept in limbo for an indefinite time period, and there is lack of obligation to provide for adequate recourses to meet basic needs while proceedings are pending (See more on this in Chapter 4.7. on Regularisations). The EU Return Directive has been a disappointment for the civil society, according to Baldaccini (2009: 17) it failed to provide for minimum standards of proportionality, fairness and humanity.

The situation is somewhat unclear as regards rights of undetected migrants who have not been issued a return decision.

4.2.4. The social policy

In some cases the EU social policy shall also extend to irregular migrants. The social policy measures to combat exclusion and to protect the rights of workers envisaged in Article 151 and 152 TFEU are not, expressly restricted to nationals or lawfully staying third-country nationals. The 1989 Directive on Safety and Health at Work[103] defines 'worker' as 'any person employed by an employer' without restricting it to regular workers.

4.3. Soft measures

The Migration-development nexus

In 1998 the EU came with the idea making the development aid dependent on visa questions and readmission and the objective has been expressed as to help reduce the influx of asylum seekers and immigrants into the EU. By contrast the Commission Communication[104] from 2000 talks about the need for a proactive immigration policy (Chetail 2008: 194) by opening up channels for economic immigration for both skilled and unskilled workers and to establish partnership with countries of origin. Unfortunately this Communication received only little support. An example of a partnership agreement could be the 2000 Cotonou Agreement between the EU and the African, Caribbean and Pacific Group of States.

Again, in the 2002 Seville Conclusions[105] some member states proposed making development aid dependent on third countries effort to combat irregular migration, which has been rejected. But finally it was stated that "insufficient cooperation" by a

[103] Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ 1989 L 183/1

[104] COM (2000) 757 final, 22 November 2000, 13

[105] European Council, Presidency Conclusions (Seville Conclusions), 21/22 June 2002, Doc. 13463/02

third country in combating illegal immigration could "hamper the establishment of closer relations" between the country and the EU (Chetail 2008: 197).

In a December 2002 Communication[106], the Commission stated that migration is not to be seen only as a problem, but also as an essentially positive phenomenon. The Commission acknowledged that it is necessary to move from a "more development for less migration" approach to one of "better managing migration for more development" (Chetail 2008: 199). The Commission outlined for that purpose four concrete actions: Facilitate the remittances of migrant workers, encourage the contribution of diasporas to the socio-economic development of their country of origin, promote circular migration through adequate forms of temporary migration, and mitigate the negative effects of brain drain.

Although there has been described a shift in the rhetoric of the EU, Chetail argues that the practice remained more traditional (2008: 199) and as the method was changing in time, the ultimate objective remained the same (2008: 202). In 2005 the European Council adopted the Global Approach to Migration, where it speaks about comprehensive and balanced policy addressing all aspects of migration through a genuine partnership with third countries.

Migration control is generally being shifted from the destination to emigration countries and the burden of development from states to migrants themselves (Chetail 2008: 213). Low skilled migration has the largest potential to reduce the depth and severity of poverty in communities of origin[107] and according to Harris (2002: 130) the biggest failure of the "north" has been so far consistently denying the right to work to the willing and eager workers of the developing countries.

In 2007 the European Commission Policy Plan on Legal Migration focused on very limited and selected categories of migrants (skilled workers, seasonal workers, intra-corporate transferees and remunerated trainees).

106 COM (2002) 703 final, 3 December 2002

107 International Migration and Development – Report of the Secretary-General (note 4), 13

EU soft measures with specific regards to irregular migration

The European Council adopts every 5 years an action plan/programme. Although these are not legally binding, the next years of EU policies are often driven exactly by the Council soft measures. The latest ones were the Tampere Programme, the Hague Programme and most recently the Stockholm Programme.

The Tampere Programme

The Tampere Programme as a result of the Tampere Council on 15-16 October 1999 stressed in its Conclusions the need for a fair treatment of third country nationals, including the '*enhancement of non-discrimination in economic, social and cultural life'* and the development of measures against racism and xenophobia. The Tampere Programme has often been recalled as the "Tampere promise" to ensure "*fair treatment*" of third country nationals and fight racism and xenophobia.

The Hague Programme

The Hague Programme, adopted at the European Council of 4 and 5 November 2004, set out 10 priorities for the Union with a view to strengthening the area of freedom, security and justice in the next five years. One of the 10 priorities was to *define a balanced approach to migration*. The Commission intended to come up with a new, balanced approach to dealing with legal and irregular immigration, involving *'fighting illegal immigration and the trafficking of human beings, especially women and children'*. The Hague Programme also envisaged to focus on the proper management of migration flows and to foster greater cooperation with third countries in all fields, including the *readmission and return of migrants*.

There is a clear shift from Tampere to the Hague Programme in much more focus on repressive measures and in using a language such as "combating illegal immigration" rather than discrimination or fostering the rights of migrants.

The European Pact on Immigration and Asylum

In the second half of 2008, during the French Presidency the European Pact on Immigration and Asylum has been adopted. The Pact was not another 5-year programme but rather an action initiated by the French president Nicolas Sarkozy for political reasons. It has been widely criticized, predominantly because of its narrow vision of the rights of third country nationals in the EU. With regard to *irregular migrants* it was in principle held that they are in any case *supposed to leave the territory* of the EU (Carrera & Merlino 2009: 3).

The Stockholm Programme

The current EU policy in the field of migration is governed by the Stockholm programme that placed "*the fight against illegal immigration*" at the top of the political agenda (Carrera & Parkins 2011: 1). The Stockholm Programme focused nearly exclusively on the European citizens in terms of access to rights. To lesser extent it also applies to "legally residing third country nationals". The European Commission identified four main policy areas for common action: Illegal employments, policy on removal and control in accordance with the law and human dignity, regularisation and unaccompanied minors entering the territory illegally.

Although these are soft law instruments, they have had tremendous effect on EU legislation in the last ten years. We can see an unfortunate shift from a rights-based approach towards more repressive one, perceiving irregular immigration mainly as a threat and not dealing with access to human rights of irregular migrants.

4.4. CJEU

The CJEU (the Court of Justice of the European Union) shall ensure that the interpretation and application of the Treaties is accordance with the EU law. The most important general principles that have been constructed by the CJEU are the human rights, proportionality, sound administration, legal certainty, fairness, equity and procedural rights (Gil-Bazo 2011).

The Lisbon Treaty amending the TEU and TFEU gave also the legally binding status of a "third treaty", the Charter on Human Rights of the EU. This is now another binding source for the CJEU. This codification thus only means putting already established standards on paper and not creating any new standards. Unlike the ECHR, the CJEU is not a specialized court, it is first of all interpreting EU law. In some specific cases, human rights have been observed by the CJEU (*Stauder 29/ 69, Nold 4/73, Rutili 36/75, Orkem 374/87, Unibet C-432/05*).

The CJEU also uses other international and regional human rights treaties for inspiration and for argumentation and in this way, various human rights became parts of European acquis (Boeles 2009: 36). The Lisbon Treaty now brought for a specific provision, under which the EU can become a party to the ECHR.

4.5. Bi/multilateral agreements with third countries

Another important element of the EU migration policy are the bi/multilateral agreements, mainly the EU neighbourhood policy, Association agreements, Cooperation agreements and Readmission agreements. The readmission agreements often enlarge the scope of international law, which obliges states to readmit its own nationals. Those agreements often extend the personal scope to persons who transited through the third country and also facilitate the procedure of readmission. It is considered as one of the important cornerstones of the EU policy combatting irregular migration.

Since 1999, the Council has given the green light to the European Commission to enter into negotiations on multilateral readmission agreements with the following governments: Albania, Algeria, China, Hong Kong, Macao, Morocco, Pakistan, Russia, Sri Lanka, Turkey, Ukraine; expanding it in 2006 for Bosnia and Herzegovina, Montenegro, Serbia and Macedonia (Carrera & Merlino 2009: 22). On the bilateral level, in 2009 there were 116 countries with which the EU member states have concluded agreements linked to readmission (Carrera & Merlino 2009: 23).

4.6. Free movement of persons and third country nationals in the EU

"A Brazilian chicken that arrived to Spain has more rights to move across the EU than a Brazilian wife of a Spanish national."[108]

One of the main freedoms on which the EU is founded is the free movement of persons. This freedom is fully implemented for EU citizens (excluding thus those that have acceded the EU and towards whose Member states transitional periods still apply). Third country nationals can be covered by the EU law in case they enjoy rights by virtue of being family members of a Community national, if their rights are covered by an international agreement of the EU and their country of origin (e.g. the Association Treaty with Turkey or Lomé Agreements) or by other regulatory source or if their rights are contained in Community Law such as the Directive on the status of third country nationals who are long-term residents (Brandl 2007: 5).

Boeles (2009: 44) identifies four exceptions from the EU categorization in the migration area.

(1) The Treaty on the European Economic Area grants free movement to citizens of Norway, Iceland and Lichtenstein (EEA 2 May 1992) and the same applies to Swiss nationals under the EC-Switzerland treaty on free movement of persons (21 June 1999)

(2) Part three, Title IV TFEU[109] - Family members of EU citizens

(3) Association and cooperation with third countries giving preferential treatment to their nationals. Eg: Association Treaty concluded with Turkey.

(4) For the 2004 and 2007 EU enlargement, the new Member States have from the beginning had their free movement restricted for a transition period. This has been subsequently dropped by several Member States, for some countries there are still restrictions until 2014 (Bulgaria, Romania).

[108] Verschueren 2011

[109] Free movement of persons, services and capital, Former Title III TEC.

Those exceptions could be further arranged upon the way they change the scope of the two basic regimes in the EU (a) and b)):

a) European citizens: free movement of workers and of nationals of the MSs – usually referred to as internal mobility[110] and freedom of movement
b) Third country nationals: immigration and freedom of movement

Those that pose Enlargement of the group a) and at the same time favorisation of some of the group b): (1), (2), (3) and those that pose certain restrictions in the group a): (4).

According to FRA (2011: 26), a broad distinction has to be made between migrants who are in return or expulsion procedures and those who live undetected in the Union. Union law regulates at least in basic form the standards of treatment for persons who have been issued a return decision. As long as these persons are not removed, they must be treated in accordance with their fundamental rights. Undetected migrants are primarily subject to policies and measures developed by the EU for the purpose of combating irregular migration. They may also be covered by measures taken by the Union in other fields, for example, in relation to public health or the safety and health of workers. Whenever the Union takes steps which affect them, these must be transposed and implemented in full respect of fundamental rights (FRA 2011: 26).

4.7. Regularization under EU law

One of the factual gaps occurring today in the EU migration policy is the situation of legal limbo, in which third country nationals remain at the EU territory without any legal status. There are various ways how Member States could deal with this situation in practice.

[110] First called as „migration" today, mobility. Peo Hansen (2010b) distinguishes differences in the EU discourse on migration as the term „migration" has been used for mobility of EU Member States nationals (e.g. Italians) until 1980s, then the discourse dividend „migration" when referring to non-OECD countries and „free movement" when referring to internal mobility of EC nationals. Since the 2004 enlargement he identifies again the term "migration" to be deployed for mobility from new MSs to old MSs, explaining that migration has always got troubled connotations in contrast with mobility.

In the same time one of the conclusions of this Chapter is a missing legal basis in the Treaties for the irregular migrants human rights. Therefore it will be explored to explore whether there is a legal basis for regularisation in the EU law and consequently any harmonized rules on regularisation in the EU, as a way of gaining access to human rights.

Legal limbo situations

One of the major challenges in the EU migration policies today is the factual gap – the situation of legal limbo of non-returned or non-returnable third-country nationals in the EU territory. According to PICUM (2002: 1) most European states are characterized by a lack of a realistic migration policy and legal migration channels, a restrictive asylum procedure, an inability to deal with asylum applications within a reasonable time and a failing return policy. On the other hand, many European economic sectors are relying on underpaid clandestine workers. This clearly creates room for the situations of legal limbo.

FRA (2011: 38) has acknowledged this as one of the main problematic areas in its report on the rights of irregular migrants. The (unintended) 'creation' of irregular migrants through state procedures (e.g. status loss or withdrawal) and asylum system[111] and lack of coherent policy on non-deportable foreigners has been identified as a major problem area also by the REGINE study (Baldwin-Edwards & Kraler 2009: 63).

Additionally, some third country nationals are so-called "non-returnable", be it because of the international law principle of non-refoulement or for practical obstacles by countries of transit or origin, lack of documentation, etc. Non-EU nationals who are irregularly entering, resident or working in the Union (undocumented migrants/migrants in irregular situation) are amongst the most vulnerable groups as

111 Rejected asylum seekers not qualifying for Convention status or subsidiary protection

their insecure legal status favours their exposure to human rights violations and inhuman treatment.[112]

One of the possible solutions for the limbo situations could be regularisation (other solution being departure or removal from the territory). This part explores, what is the legal basis and possibilities for regularisations in EU law.

Regularisation in Europe

Regularisation generally refers to the process of offering migrants who are in a country irregularly the opportunity to legalise or normalise their status, whether it is on a temporary or permanent basis (CoE Assembly 2007). The legal definition of regularisation stands as *"the granting, on the part of the State, of a residence permit to a person of foreign nationality residing illegally within its territory*" (De Bruycker 2000: 1).

The REGINE study (Baldwin-Edwards & Kraler 2009) suggests that although regularisations are considered exceptional measures by virtually all governments, they are frequently used. The great majority of EU Member States currently use, or have used, some sort of regularisation measure in the recent past, although the extent to which they use regularisation as a policy tool varies greatly.[113]

Regularisation is in fact only a (necessary) treatment of the symptoms; it does not address the causes of irregular migration (PICUM 2002: 3). Regularisation basically implies that the migration policy in place has failed (De Bruycker 2012). This is most

[112] European Union Agency for Fundamental Rights (2011), Fundamental Rights: Challenges and Achievements in 2010, Annual Report, Vienna, page 34. in Carrera and Parkin (2011)

[113] The various regularisation measures used in EU Member States have been described, clustered and analyzed in different studies. The analysis of regularisation measures in EU Member States suggests that regularisation follows two distinct logics: 1) a humanitarian and rights based logic on the one hand, and (2) a non-humanitarian, regulatory and labour market oriented logic, on the other. The REGINE study (Baldwin-Edwards & Kraler 2009) describes two basic types of regularisation measures – regularisation programmes and regularisation mechanisms. The PACE Resolution (2007) identifies five regularisation programmes: Exceptional humanitarian programmes, Family reunification programmes, Permanent or continuous programmes, One-off or one-shot programmes, and Earned regularisation programmes. PICUM (2002) also describes various forms/personal scopes of regularisation campaigns. De Bruycker (2000) identifies five types of regularisation in the EU Member States: Permanent one-off, *fait accompli* or for protection, individual or collective, out of expedience or obligation, organized or informal procedure.

probably the main reason why although regularisations take place in Member states, there is a discrepancy between the political discourse and the practice responding operatively to labour market and demographic needs, while in the same time being also beneficial for human rights of migrants.

Legal basis and legislation on regularisation in EU law?

Regularisation measures are basically a matter of national laws and there are no general binding rules on the EU level. The European Union has no specific legislation on this particular issue. This part of the paper explores what legal basis would an EU policy on regularisation have and what are the measures at the EU level already today to be potentially considered as regularisation measures.

Soft law

The European Commission Communication on the links between legal and illegal migration (July 2004)[114] studied, among other issues, the impact of "regularisation procedures" and concluded that they had both positive and negative effects and that more mutual information and transparency was needed with a view to identifying and comparing the different national practices and their impact on migratory flows. It stated that *at a later stage common criteria could be drawn up leading to the development of a common approach to regularisation programmes so that wide-scale regularisation measures could be avoided or limited to exceptional situations.*

In 2006, the Council adopted a Decision establishing a mutual information mechanism[115]. The mechanism requests EU Member States to communicate to other Member States and to the Commission information concerning national measures in the areas of asylum and immigration likely to have significant impact on Member States or

114 COM (2004) 412
115 Council Decision 2006/688/EC

on the European Union as a whole (including the issue of regularisation programmes).[116]

The European Pact on Immigration and Asylum (EPIA, 2009) has stressed that "*illegal migrants shall be returned*". EPIA aims to restrict mass regularisation of undocumented migrants, to 'strengthen' EU border controls and to coordinate procedures for repatriating undocumented migrants. It explicitly mentions that regularisations are possible only on the case-by-case basis and only for humanitarian or economic reasons.[117]

There have been some discussions in EU member states with regards to fear of migrant regularisations in connection with the question, whether the CMW shall be ratified or not. Several MS claimed that signing the UN Convention would allow for regularisations of undocumented migrants and that it gives above-standard rights to them, especially with regards to family reunification (Cholewinski, McDonald 2007: 85).[118] However, Art. 35 CMW expressly precludes that the Convention implies any *"regularisation of the situation of migrant workers or members of their families who are non-documented or in an irregular situation or any right to such regularisation of their situation".* On the other hand, Article 69(2)[119] CMW gives support to regularisations if possible. The specific directions in this Article on how to deal with irregular migrants, amount to the policy choice "regularise or expel"[120] so the "fears" of MS in this regard could be interpreted as

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116 The Commission Communication on policy priorities in the fight against illegal immigration in July 2006 (COM (2006) 402) has also looked into the issue of regularisation programmes. The Commission has proposed in this communication that, in order to address the lack of sound evidence and up-to-date information, a study should be launched in 2007 on current practices, effects and impacts of regularisation measures in EU Member States.

117 This wording implies that no regularisations on a large scale shall be happening. Since the Immigration Pact has been adopted however, large-scale regularisation schemes were still going on. For example in 2010 Italy has Regularised 200 000 people in the health sector. In: Commission Staff Working Paper, Accompanying the document Communication from the Commission to the European Parliament and the Council Annual Report on Immigration and Asylum (2010), SEC(2011) 620 final: 26.

118 This has been claimed for example by Germany or Poland (December18 2010).

119 *Article 69*

1. States Parties shall, when there are migrant workers and members of their families within their territory in an irregular situation, take appropriate measures to ensure that such a situation does not persist.

2. Whenever States Parties concerned consider the possibility of regularizing the situation of such persons in accordance with applicable national legislation and bilateral or multilateral agreements, appropriate account shall be taken of the circumstances of their entry, the duration of their stay in the States of employment and other relevant considerations, in particular those relating to their family situation.

120 REGINE study final report, p. 98

justified, although not understandable, as from the human rights perspective such a policy choice should be the only one possible.[121]

The legal basis in the Treaties

In the area of freedom, security and justice there is shared competence of the EU and the Member States (Art 4(2)(j) TFEU). The EU legislation in this area represents only minimum standards and it does not prevent Member States from adopting national (or international) standards more favourable than those laid down at the EU level (MacDonald, Cholewinski 2009: 368). This extends to adopting more favourable measures in national laws or adherence to international legal instruments. Until legislation on the EU level on this issue is adopted, the issue remains in competence of Member States.

The Lisbon treaty amended the TFEU regarding the competences in the field of migration. With regards to regularisation, Article 79(1) and 79(2)(a)(c) would potentially be the legal basis for the European Union to adopt measures in this field.

> Article 79 TFEU:
>
> 1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.
>
> 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:
>
> (a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification;
>
> (b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States;
>
> (c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;
>
> (d) combating trafficking in persons, in particular women and children.

121 The initial proposal for the EU Return directive has been in a similar spirit (see below).

Article 79(1) sets the general frame for a common immigration policy to be developed at EU level. The regularisation procedures could be a part of such a policy, has the Union decided to adopt such measures at the EU level. It could be also argued that some regularisation schemes could act as *prevention of illegal immigration*, if employed at early stage of irregular stay of a third country national. Also to address the common immigration policy specified in Article 79(1) efficiently and thus avoid any legal limbo situations, regularisation measures could be employed.

In 79(2) there are two possibilities for legal basis for regularisations: (a) *the conditions of residence and standards on the issue by Member States residence permits* and (c) *unauthorised residence*. The provision under letter (c) allows the EU to tackle unauthorised residence. Thus one of the possibilities to address unauthorised residence could be employment of regularisation measures. The provision specifically mentions removal and repatriation, but these are only of demonstrative and non-exhaustive nature. Under the point (a) the Union is entitled to address the conditions of entry of residence, which would particularly be the case of granting a residence status (see the definition of regularisation above). This provision is slightly more precise in order to determine what the legal basis for regularisation would be, as it grants specifically the competence to the EU to act (grant the residence permit in order to regulate the conditions of residence).

Taken that regularisation brings about the access to rights for migrants that have been regularised, an EU competence on providing for access to rights for irregular migrants could be another potential legal basis. Carrera and Parkin (2011: 2) claim that there is currently no EU legislative measure which aims at facilitating access to rights by undocumented migrants. They explain that Article 79(2)(b) suffers of apparent lack of legal competence as a rights-based viewpoint extends only to *'legally residing third country nationals'*, which reinforces the ambivalent position that *the EU operates under the (false) premise that irregular migrants hold no rights and henceforth should remain excluded from its AFSJ*.[122]

[122] For example the Stockholm Programme discusses rights only when applied to EU citizens and (to a lesser extent) those qualified as "legally residing third country nationals." In: Carrera and Parkin (2011: 2)

Some considerations on regularisation possibilities in EU law

The EU law currently tackles only marginal cases of regularisations in the EU Member States.

The Return Directive

The main question stands whether the Return Directive[123] does preclude a situation when a person is not removed from the EU territory but is also not given any status for an unlimited period of time. This has been mentioned more explicitly in the initial proposal by the Commission.[124]

Article 6(4) of the Return Directive could be however interpreted in a way that it allows for regularisations in EU Member States. Moreover, as the other option explicitly mentioned in the Directive is to return a person, the option in Article 6(4) can well be seen as the only alternative if return is not possible.

> Article 6(4)
> Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. In that event no return decision shall be issued. Where a return decision has already been issued, it shall be withdrawn or suspended for the duration of validity of the residence permit or other authorisation offering a right to stay.

Recital 5 of the Directive states that the Directive should establish a *horizontal set of rules applicable to all third-country nationals who do not or who no longer fulfil the conditions for entry, stay or residence in a Member state*. Although the Directive is focused on return of migrants in irregular situation, by reading the Recital 5, its rules shall be applicable to irregular migrants even if not returned. This assumption is confirmed in Article 2(1) defining the scope of the Directive as applying to *to third-country nationals staying illegally on the territory of a Member State*. The human rights safeguards and

123 The Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals

124 COM(2005) 391 final

standards should thus apply to all migrants in irregular situation, including those finding themselves in situation of legal limbo.

Recital 6 fosters a *case-by-case* approach, what in this context means first of all prohibition of collective expulsion of foreigners, but it could also be extended for regularisations, that should not be carried out as mass/group actions.

The Directive itself allows for different situations when the third country national would find him/herself in a situation of legal limbo: In case of suspension of a return decision (Article 6(4)), during a period for the voluntary departure (Article 7, 8) or when removal is postponed (Article 9). The postponement of removal is foreseen for cases when the *non-refoulement* principle would be violated or when suspensory effect of the appeal is granted or in individual circumstances such as physical or mental state or lack of transport capacity or identification not allowing for the return.

Recital 12 of the Directive specifically states that *the situation of third-country nationals who are staying illegally but who cannot yet be removed should be addressed*. This specifically means that a written confirmation for any case of administrative control has to be issued as well as basic conditions of subsistence should be defined. Although explicitly wide discretion concerning the form and format of the written confirmation is confined to Member States, this obligation is still there and should be a tool to address non-returnables for the time being, thus regularizing (temporarily) the status of persons in such situations.

Article 14(2) provides for safeguards pending return obliging states to provide migrants during the voluntary departure period (Article 7) or those whose return has been postponed (Article 9) with a written confirmation. Such a confirmation could serve as a temporary regularisation tool, although its scope is very limited not only in terms of time limitation but also in terms of rights actually available for the holders of the confirmation. The principles to be ensured while return is pending (in Article 14(1)) are rather vague (family unity, emergency health care, education for minors and special rules for vulnerable persons) and there are no specific time limits. Thus practically, Member States are left with a relative degree of freedom on how to deal with persons in

a "tolerated" status. On the other hand, the Article 6(4) could be well interpreted as allowing for a regularisation. One possible interpretation of this provision would be that states do not have the choice and do not have such a wide margin of manoeuvre, but on the opposite that the Directive obliges them either to expel the person or to grant a status. That would in certain cases mean that there is an obligatory regularisation.

The Trafficking Directives

The Directive 2004/81/EC on the residence permit for victims of human trafficking[125] provides certain rights for irregular migrants that are victims of human trafficking, such as (Article 5) to inform or (Article 6) a reflection period. Article 8 provides for a residence permit for trafficking victims that is unfortunately conditional upon the collaboration of the victim with the state authorities regarding the case investigation. The Directive also provides for certain rights for those granted the residence permit and it can also be time-wise extended in the future.

The Directive 2011/36/EU on preventing human trafficking[126] is to be transposed in the Member States legislation by 2013. Article 11 of the Directive obliges states to provide assistance and support to victims of trafficking that can explicitly not be conditional on the collaboration of the victims with the police and the authorities regarding the investigation (para 3) as it is the case in the 2004/81 Directive. Although this provision does not provide for any legal status for the trafficking victim, it gives certain rights (to housing or medical care) to in some cases irregular migrants.

Family reunification Directive

Article 5(3) of the Directive on the right to family reunification[127] gives a clear possibility to Member States to allow for regularisation of family members of third country nationals staying legally in the EU territory:

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125 The Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities

126 The Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

127 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification

> Article 5(3)
> The application shall be submitted and examined when the family members are residing outside the territory of the Member State in which the sponsor resides.
> By way of derogation, a Member State may, in appropriate circumstances, accept an application submitted when the family members are already in its territory.

This clause is however a may clause, which does not oblige the Member States to accept such application for family reunification. Nevertheless, the possibility is clearly given to the Member States by this Directive.

Family reunification (case law)

There is a case law of the Court of Justice of the EU (CJEU) in relation to freedom of movement of EU citizens with implications to migrants in irregular situation. The CJEU expressed several times – with regards to the rights of EU citizens that had family members in irregular situation, that under certain circumstances and so that the rights of the EU citizens are respected – a possibility to Regularise or allow residence of an irregular third-country national. Namely for a spouse of an EU citizen (*Metock*) or for parents in irregular situation of a child that is an EU citizen (*Zambrano; Zhu and Chen*).

In the case of *Rodrigues da Silva and Hoogkamer v. The Netherlands* (Application No 50435/99) the ECtHR found violation of Article 8 in relation to a third country national residing illegally in the Netherlands. In this case the ECtHR so far acknowledged that the rights of irregular migrants in an EU country have to be respected regardless the person's status. The fact that the Netherlands did not grant a residence status to a mother of a Dutch national was in breach of the right to family life (Article 8 ECHR).

Several Member States have also expressed the fear that rules for family reunification entailed in the CMW could serve as a tool for regularisation.[128] However, after having a look at the relevant case law, it is clear that in the family reunification cases, the rights of concern by the Courts are with regards to EU nationals in the first place. There is a room for case-by-case regularisation for the family reunification purposes, but very limited to certain specific situations.

[128] MacDonald, E and Cholewinski, R (2009)

The REGINE study (2009: 63) identified the need for elaborating clear rules or guiding principles regarding the treatment of those who cannot be removed on the EU level. These are still missing at the EU level, although it is a question whether such rules would really be needed. The regularisation-like permits on the EU level entailed in the Return or Trafficking Directives do not present a tool for wider regularisation scheme, nor does the Family reunification Directive or related case law. NGOs such as PICUM are constantly calling upon the governments and the European Union to consider human rights of migrants above all other factors when contemplating the implementation of regularisation programmes. Carrera and Merlino (2009: 34-35) recommend namely *regularisation of those immigrants who cannot be returned within three months.*

But it seems that any rules on regularisation at the EU level are not likely to be expected during the upcoming years. A wider open discussion on common EU standards or rules on regularisation might in reality only stop or challenge the fact that states do regularise migrants in irregular situation inconspicuously quite often and on a large scale.

4.8. Conclusion

In the last ten years we could have witnessed a fast evolvement of EU Migration policy but also the shift towards more restrictive policies. Any mention of irregular migrants' rights is missing in the Treaties or in secondary legislation, although several EU legislative acts touch upon migrants in irregular situation. This is however more so in the context of border control, security or return. However for regularisations on a case-by-case basis we have to admit that there are already rules in place. It seems however, that Member States do interpret the specific directives differently (especially the Return Directive Article 6(4) and Family Reunification Directive Article 5(3)) and might even thus be in breach of EU law.

The EU primary law is lacking any explicit legal basis for tackling the human rights of migrants in irregular situation. This seems to be a gap in EU law that needs to be closed. Unlike international law, EU law seems to be more security oriented, keeping the human rights standards and protection as well as free movement exclusively to EU citizens and legally residing third country nationals.

5. COMPARATIVE PART: The CMW based rights in EU and international law

This part is going to analyse the rights of all migrant workers and members of their families irrespective of their status that are contained in the Part III. of the CMW and compare it with the provisions in international law binding the EU Member States. A simplified overview of the comparison can be found in the *correlation table* in Annex I. (see below). The table shows all the single CMW rights analysed in this Chapter and the most relevant international instruments with specific Articles, where the rights overlap. It also includes a basic rating (+/-/=) to show the result of the analysis of Chapter V.

Extensive criticism has been brought against the Convention claiming, that it overlaps with other fundamental human right instruments, notable the ICCPR and the ICESCR (Böhring 1988: 143, Nafziger and Bartel 1991: 771, Chetail 2010: 677). Ryan (2012: 4) argues that any overlaps of content of the CMW with other instruments are explicable in terms of the CMW´s underlying objective and scope focused specifically on migrant protection. Thanks to its objective, the Convention´s provisions go beyond other instruments.

5.1. The personal scope of the CMW

As it has been already explained in the introductory chapter, the CMW provides for a unique definition of migrant workers. Its personal scope is thus broader than that of other already mentioned instruments, focusing specifically on migrant workers. The CMW (Art. 2) defines a migrant worker as

> "a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national".[129]

[129] A number of exceptions are set out in Article 3: persons sent by international organisations and foreign states; investors; refugees and stateless persons; students and trainees; and, seafarers and

Ryan (2012: 5) contrasts the CMW´s scope with the ILO Conventions 97 (Art. 11(1)) and 143 (Art. 11(1)) that apply to „migrants of employment" or "migrant workers" as

> "persons who migrate or have migrated from one country to another with a view to being employed otherwise than on his own account".

The CMW definition does not work with the question of how and for what purpose the migrant actually arrived to the country of destination. Unlike the ILO instruments that cover only those that immigrated for the purpose of employment, the CMW covers all foreign nationals who engage in remunerated activity, without it being necessary that they have migrated for employment. It therefore includes also those that came to the country for other reasons, such as family relationship or have been already born in the country (Ryan 2012: 5).

The CMW also works with the term "remunerated activity" which is broader than "employment" as it includes also the self-employed. Ryan (2012: 5) finds this particularly important for irregular migrants, who often find themselves in other situation then regular, formal employment.

Third point on the broader scope of the CMW definition is, as pointed out by Ryan (2012: 6) the inclusion of those that were engaged in a remunerated activity in the past, regardless from their current situation.

5.2. The non-discrimination principle (Art. 1, 7 CMW)

Since the World War II, the international community has formed, mostly in Europe, wishing to secure peace in the area and it recognized that basic human rights need always to be secured. The war experience in Europe brought the countries to a common understanding of human rights for all, irrespective of their ethnic origin, race, sex,

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workers in offshore installations who are not authorised to reside and work in the state in question. (Ryan 2012:5).

language or religion that has further developed in non-discrimination clauses refusing discrimination based on other factors, like sexual orientation.

The CMW entails the non-discrimination principle in its Article 1 and 7 as follows:

> Article 1
> 1. The present Convention is applicable, except as otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.
>
> PART II
> Non-discrimination with respect to rights
> Article 7
> States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

The non-discrimination principle is a guiding principle for the whole CMW. Art 7 forms by itself Part II. of the CMW which is significant in the first place in relation to Art. 88 of the respective convention that limits the possibility of reservations to it as following:

> A State ratifying or acceding to the present Convention may not exclude the application of any Part of it, or, without prejudice to article 3, exclude any particular category of migrant workers from its application.

This means that the application of the non-discrimination principle cannot be excluded by any acceding state party.

This principle has already been also examined by the Committee on Migrant Workers. Relying upon the general principle of non-discrimination in Article 7, the Committee on Migrant Workers expressed its concern at Ecuador's (2007 and 2010) requirement that Colombian nationals produce an official certificate to show that they do not have a

criminal record (Ryan 2012: 35). In its view, this exclusive requirement risked contributing to the 'stigmatization and stereotyping' of Colombian nationals and was depicted by the Committee as a clear sign of discrimination against a particular nationality.

The non-discrimination principle has been first as such recognized in the UDHR (1948, Article 2) as:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

According to Slinkx (2009: 146) the CMW provides broader grounds for discrimination in its Art. 1 then those listed in the UDHR or in the other Conventions including discrimination grounds as conviction, nationality, age, economic position and marital status.

The right to non-discrimination and equal treatment is a corner stone of the 1966 International Covenants; the ICCPR entails this right in its Articles 2(1) and 26 and the ICESCR in its Article 2(2). The Art 2(1) ICCPR and Article 2(2) ICESCR give a rule on application of the rights contained in the Covenants: The contracting states shall

> "… undertake to respect and to ensure … the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Article 26 ICCPR gives a broader formula on general equality before the law:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Under this provision, any legal act in the state party must not be discriminatory based on the status of a person. For example a law that denies job opportunities to members of a particular religion would be evaluated in the same manner whether a member of that religion is a citizen or a non-citizen (Aleinkoff 2003: 15). Ryan (2012: 6-7) argues, that compared to the equivalent provisions in Article 2(1) ICCPR and Article 2(2) ICESCR, the CMW adds more grounds of discrimination. The Article 7 of the CMW adds non-religious convictions, ethnic origin, nationality, age, economic position and marital status to the grounds of discrimination that are enumerated in the Covenants. Among these, he recognizes the inclusion of 'nationality' is of particular significance, as it reflects the Convention's character.

However, the UN Committee on Economic, Social and Cultural Rights interpreted prohibition of discrimination on the basis of nationality in its interpretation of the Article 2(2) of the ICESR (in its General Comment No. 20). In its point 29, the Committee states that the non-discrimination ground nationality means "The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation".[130]

The Convention on Elimination of All Forms of Discrimination against Women (CEDAW) in its Article 1 prohibits any discrimination between women and men, thus discrimination based on sex. In case of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), its Article 1(1) does not list 'nationality' as a form of 'racial discrimination', which instead covers…

> '…any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin …'

The Article 1(2) ICERD also expressly states that the Convention does not address differentiation by states 'between citizens and non-citizens.' Ryan (2012: 7) argues that the inclusion of 'nationality' in Article 7 CMW distinguishes the Migrant Workers Convention from other instruments. He recognizes the advantage of the CMW in the fact

130 http://www2.ohchr.org/english/bodies/cescr/comments.htm

that many of its provisions aim at securing the equal treatment of foreign nationals. The Committee on the Elimination of Racial Discrimination gives in its CERD General Recommendation No. 30 on Discrimination against Non-citizens (2004) a special place to migrants, refugees and asylum seekers and considers that any differential treatment based on citizenship or immigration status is discriminatory (Slinkx 2009: 128).

Looking at the jurisdiction of the Council of Europe, discrimination on the grounds of "other status" has been already banned in the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. The ECHR has in its Art 14 (that always needs to be combined with another Art. of the ECHR before the ECtHR) a substantial prohibition of discrimination on various grounds, including appartenence to a national minority. Equally here, the enumeration of grounds is merely demonstrative and various other reasons have been identified in the judicature of the ECtHR.[131]

It cannot obviously be argued that prohibition of discrimination means that all migrant workers shall have the same rights as EU nationals (Vanheule et al. 2004: 316). There have been several decisions of the ECHR on this matter stating that the (legal) distinction between EU and non-EU nationals does not necessarily mean a discrimination as forbidden by the Art 14 ECHR (Vanheule et al. 2004: 316). Though making differences based on EU citizenship are deemed to be legitimate. That is not a forbidden ground of discrimination in any binding international treaty.

The Charter on Fundamental Rights of the EU prohibits discrimination in its Article 21:

> 1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
>
> 2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

It brings about completely new grounds on which discrimination is forbidden – the genetic features, disability and sexual orientation. Same as the ECHR, the Charter

131 Bobek, M., Boučková, P., Kühn, Z., Rovnost a diskriminace, Praha 2007, s. 159

prohibits discrimination based on membership of a national minority. The Charter also explicitly includes prohibition of discrimination based on nationality (21(2)), which is most probably necessary to be understood as an attempt to forego discrimination amongst the EU Member State citizens and not an attempt to promote equality of third country nationals. The Charter thus entails most of the grounds embedded in the CMW, with the exception of the above mentioned, whereas the CMW adds the ground of age and economic position.

Some of the *Anti-discrimination Directives* focus directly on this issue, while other instruments are not specifically focused on equality and non-discrimination, but still help on this way forward by its content (Bobek, Boučková, Kühn 2007: 129).

In all the international and regional key instruments can be observed the exemplarity of the enumerated grounds in the non-discrimination clauses. It is though evident that although the grounds enumeration is important, it is never exhaustive but only exemplary, so from the purely legalistic point of view, the difference might in fact not be that significant. The added value of the CMW is here more in the discourse level and in its political message, but it has no really legal added value.

5.3. Fundamental human rights protection in relation to irregular migrants

5.3.1. Freedom of movement (Art. 8 CMW)

In international law

The freedom of movement as a right cannot be found in international human rights instruments. The general concept finds its normative expression through the right to leave any country and to return to one´s country of origin (Chetail 2003: 47). Therse are entailed in Article 13(2) UDHR, 12(2) ICCPR, Art 5 ICERD, Art 10(2) CRC. The Human Rights Committee adopted in 1999 General Comment No. 27 on Freedom of Movement including interpretation of the relevant provisions of the ICCPR (Chetail 2003: 52).

The Article 12 ICCPR stands:

> 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
> 2. Everyone shall be free to leave any country, including his own.
> 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
> 4. No one shall be arbitrarily deprived of the right to enter his own country.

Art. 12 ICCPR is applicable to everyone lawfully within the territory of a state and it guarantees the liberty of movement, freedom to choose the residence and to leave any country. The term "lawfully" refers to national legal systems. According to Brandl (2007: 3) a different treatment of nationals and non-nationals is permitted in accordance with Art 12(3). The Human Rights Committee developed a rather extensive jurisprudence on the matter as introduced by Brandl (2007:7). Amongst the most important: Vidal Martins case 57/1979, Lichtesztejn case 77/1980, Nunez case 108/1981, Miguel González del Río case 263/1987, Ackla case 505/1992, Peltonen case 492/1992, Stewart case 538/1993.

The Article 8 CMW specifically states:

> 1. Migrant workers and members of their families shall be free to leave any State, including their State of origin. This right shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present part of the Convention.
> 2. Migrant workers and members of their families shall have the right at any time to enter and remain in their State of origin.

Article 8(2) CMW states that 'Migrant workers and members of their families shall have the right at any time to enter and remain in their State of origin.' In presenting the right of entry and residence in absolute terms, Article 8(2) goes beyond the equivalent Article 12 ICCPR, which provides that a person may not be 'arbitrarily deprived of the right to enter his own country' (Ryan 2012: 8).

Council of Europe jurisdiction

This right has already also been tackled in the jurisdiction of the Council of Europe and the European Court of Human Rights. The ECHR deals with all human beings, the rights contained in the ECHR and its Protocols are not limited to nationals of state parties to the Convention, so they also include "third country nationals" and "irregular migrant workers". The ECtHR refers occasionally to the principle of free movement in its judgments (Boeles 2009:116). Rights related to the freedom of movement are laid down by the Art 2 and Art 3 of the Protocol No. 4 ECHR. These contain:

e) the right to leave any country (Art 2(2))
f) the right to enter the territory of a state of which one is a national (Art. 3(2))
g) the freedom not to be expelled from ones own country (Art 3(1))
h) liberty of movement within the territory where one is "lawfully" present (Art 2(1))

According to the Explanatory Report on the Second to Fifth Protocols (H(71) 11 (1971), 40) the term "lawfully" relates to the power of states to control the entry of foreigners. Art 2 (3)(4) allows for restrictions of the freedom of movement that need to be in compliance with the principle of proportionality and the doctrine of "margin of appreciation" – a restriction must be necessary in a democratic society (Brandl, 2007: 3). Brandl (2007: 7) mentions the only few jurisprudence by the ECTHR on Arts 2(1), 3, 4 Fourth Protocol and Art 1 Seventh Protocol: *Raimondo v. Italy* 1994, *Guzzardi v. Italy* 1980, *Piermont v. France* 1995, *Baumann v. France* 2001, *Olivieira v. the Netherlands* 2002, *Čonka v. Belgium* 2002, *Denizci and others v. Cyprus* 2001. The right to free movement is also sometimes being connected to Art. 8 of the ECHR – the right to private and family life (broad interpretation of the right to leave, Boeles 2009: 120).[132]

Free movement of EU citizens and members of their families

Free movement of EU citizens and members of their families has its legal basis in the TFEU in Art. 21 and more specifically in the title IV (free movement of workers – Art. 45, freedom of establishment – Art. 49 and freedom to provide services – Art. 56). These are more detailed in the secondary EU legislation in directives and regulations and also in

132 *Iletmis v. Turkey,* No. 29871/96, para 50.

the CJEU judgments. Importantly, discrimination on grounds of nationality is prohibited within the EU (TFEU: Part II. Non-discrimination and the citizenship of the EU, Art. 18).

The Charter of Fundamental Rights of the EU entails the freedom of movement in its Art 45.

> *Article 45 Freedom of movement and of residence*
> Every citizen of the Union has the right to move and reside freely within the territory of the Member States.
> Freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State.

Boeles (2009:137) suggests that the EC Court of Justice may be guided by the Art 45 as a general principle of internal free movement. Most important CJEU judgements entail *Watson and Belmann* case 1976 regarding the requirement for EU nationals to report their presence; *Levin* case 1982, *Walrave and Koch* case 1974 and *Bosman* case 1995 regarding the question who qualifies as a worker (Brandl 2007: 10).

According to Boeles (2009:133) the ECtHR has accepted that the right to enter a country by a foreign national may be the only way to grant that foreigner other substantive rights under the Convention. It can be seen as a facilitating right for enjoyment of fundamental rights like the right to family life or to express oneself, etc.

Although there is no right to enter or to reside in a foreign country in international or European law, Boeles (2009:134) claims that the impact of the obligations contained in the instruments may de facto or de jure can be as to admittance and regularization of non-nationals to the territory of a host state. The free movement in the EU is rather conditional and executed differently for different categories of persons.

Generally the ECHR is focusing on rights, the EU on regularization. Both are however binding the EU Member States and as argued by Boeles (2009:139) this might be rather of a complementary nature then being in conflict with each other.

The legal content of the freedom of movement

According to Chetail (2003: 54) the right to leave the country is available to anyone, the legal status of aliens is irrelevant in this case. The right entails (1) a negative obligation of a state not to impede departure from its territory and (2) a positive obligation to issue travel documents. It is however not an absolute right and some restrictions, in coherence with the law are possible.

The wording of Article 8(1) CMW is in fact focusing foremost on the right to leave the country explicitly. This issue has been already tackled by the Committee on Migrant workers in several contexts. As Bernard Ryan (2012: 22) points out, the Committee relied upon Article 8 to question Ecuador's (2007) requirement that its nationals obtain an exit permit in order to leave the territory. In addition, while not referred to explicitly, Article 8 was presumably the basis for the Committee's recommendation to Egypt (2007) that women should be able to obtain passports without the approval of a husband or male relative.

5.3.2. Right to life (Art 9 CMW)

The right to life is an universal human right entailed in various international human rights instruments. It is a fundamental right of the Universal Declaration on Human rights (Article 3), further developed in Article 6 ICCPR or at the Council of Europe level in Article 2 of the ECHR. The importance of this right in the CMW is in the specific scope of the Convention.

5.3.3. Prohibition of torture, inhuman or degrading treatment (Art 10 CMW)

This provision, entailed similarly in other international legal instruments can be as well translated as the *non-refoulement* principle. "The *non-refoulement* clause aims at avoiding the danger of being subjected to torture in the country to which the individual concerned is being expelled, returned or extradited." (Slinkx 2009: 125)

The principle of *non-refoulement* is the most important principle in international refugee law. But not only in refugee law, it needs to be regarded as the fundamental norm in the

law of aliens in general (Brandl 2007: 15). It was officially enshrined in the Art 33 of the 1951 Convention relating to the Status of Refugees:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

But it is also entailed in other provisions not only in relation to refugees - in Art. 3 CAT (and in Art. 7 ICCPR, but the protection given by CAT is more extensive, so there is no need here to examine the ICCPR in this context) and in Art 3 ECHR.

The principle of *non-refoulement* guaranteed both by the Art 3 ECHR and by Art 3 CAT are absolute provisions, which must be applied without exception (Brandl 2007:15). Even if persons have commited crimes in the states where they currently stay or they are considered danger to national security or public order, they must not be refouled.

CAT

> Article 3
> 1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of beány subjected to torture.
> 2. For the purpose of determining whether there are such grounds, the kompetent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Brandl (2007: 15) recalls the Mutombo case[133] where the **Committee against Torture** expressed the view that expulsion or return of the person to Zaire in the respective circumstances would constitute a violation of Art. 3 CAT because there has been a real risk of him being detained and tortured.

The Committee Against Torture adopted a General Comment on "Conditions for Filing Complaints With Respect to Implementation of Article 3" (1997). According to Slinkx

133 Mutombo v. Switzerland, Communication No. 13/1993, U.N.Doc.A/49/44 at 45 (1994)

(2009: 128) although the text does not mention migrant workers, "it is obviously applicable to undocumented migrants to be deported".

ECHR

> Article 3 – Prohibition of torture
> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

On the first sight, the principle of *non-refoulement* is not embedded in the ECHR.

Art 3 ECHR is interpreted by the **ECtHR** in the sense that a persons´ deportation or extradition may give rise to an issue under Art 3 of the Convention, where substantial grounds have been shownd to believe that the individual concerned faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in that country contrary to Art 3 (Brandl 2007: 15).

The Court dealt with the question in various cases, where it always assessed the specific evidence given by the claimant and also by the state relating to the safety of the country where a person is to be returned. The Court decided that the claimant shall not be returned under the scope of Art 3 as the principle of *non-refoulement* in cases like *Soering v. UK* 1989, *Chahal v. UK* 1996, *Ahmed v. Austria* 1996. The reasoning of the Court has always been supported by a finding, whether there is or is not a "real risk of treatment contrary to the Art 3" in the country of origin of the person that is to be returned.

Persons that are not allowed to be returned because of the *non-refoulement* principle and are in the same time not granted a refugee status or do not enjoy any other form of protection are entitled to the so-called subsidiary protection in the respective state.[134]

EU Fundamental Rights Charter

[134] Practically the claimants are usually not recognized as refugees for formal reasons (Brandl 2007: 18).

Art 19(2) of the Charter entails the *non-refoulement* principle explicitly:

> 2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

CMW

Similarly to the ECHR, the principle of *non-refoulement* can also be deduced from the CMW. It is expressly stressing the need for the same level protection for (ir)regular migrant workers in international law and its added value is though more in stressing the right already in force again in connection with the migrant workers and members of their families.

5.3.4. Prohibition of slavery and forced labour (Art 11 CMW)

A basic human right not to be enslaved or subject to forced or compulsory labour is embedded already in international law, i.a. in Article 10(3) ICESCR, Article 8(1, 2, 3a) ICCPR, Article 6 CEDAW, Articles 11(1), 32(1), 34, 35 and 36 CRC, in Article 4 ECHR or in Article 5 of the EU Charter. The CMW includes it (as well as it is the case with other Articles in Part III.) not as a completely new right, but to put emphasis on it as migrant workers are especially vulnerable to violation of their rights in this regard.

5.3.5. Freedom of thought, conscience and religion (Art 12 CMW) and Freedom of opinion and expression (Art 13 CMW)

These rights are secured in the UDHR Articles 18 and 19. The freedom of thought, conscience and religion are embedded in Article 18 ICCPR, Article 9 ECHR or the Article 22 of the EU Charter. The freedom of opinion and expression are secured byArticle 19 ICCPR, Article 10 ECHR and Article 11 EU Charter.

Besides, the ICCPR secures in its Article 27 access to broad minority rights:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

The Human Rights Committee explained the scope of this right in its Observation No 23[135], using the specific example of migrant workers and also visitors (personnes de passage).

> 5.1. „The terms used in article 27 indicate that the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language. Those terms also indicate that the individuals designed to be protected need not be citizens of the State party."
> 5.2. „...migrant workers or even visitors in a State party are entitled not to be denied the exercise of those rights…. The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria."

Based on this explanation, human rights of migrant workers concerning the rights of minorities (including freedom of thought, conscience and religion) are in force in the European Union, as all the EU Member States are parties to the Covenant and also to the other earlier mentioned instruments. The CMW again tries to put emphasis on this specific right by including it in its Part III.

5.3.6. Prohibition of arbitrary or unlawful interference with privacy, home, correspondence and other communications (Art 14 CMW)

The human right to privacy has precedent in the United Nations Declaration of Human Rights: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Further, the Article 12 UDHR stands as:

135 CCPR General Comment No. 23: Article 27 (Rights of Minorities)

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.

This right has been translated ot Article 17 ICCPR. Other international instruments provide for similar protection specific to their particular scope (such as Art. 16 CRC).

Article 8 of the European Convention on Human Rights guarantees the right to respect for private and family life, one's home and correspondence. Article 8 is one of the most used legal bases for migrants' rights protection by the Court in Strasbourg (*for more details see 3.4.1.1.*).

The EU Charter on Fundamental Rights covers this right in its Article 7. The European Union requires all Member States to legislate to ensure that citizens have a right to privacy, through directives such as the 1995 Directive 95/46/EC on the protection of personal data. The EU Return directive provides for certain safeguards in case of pending removal. One of them states that Member States are obliged to respect the principle of family unity (Article 14(1)) (Baldaccini 2009: 12). This right is thus already well covered by international and regional law and EU acquis. The added value of the CMW in this case would lie in its migrant specific scope.

5.3.7. The right to liberty and security of persons (Art 16(1-4) CMW)

This right to liberty and security of a person emerged initially as linked to the right to life; see article 3 UDHR:

Article 3

Everyone has the right to life, liberty and security of person.

It has been further developed in Article 9 ICCPR. Article 5 ECHR provides for very detailed protection of the right to liberty and security of a person. The ECtHR has several times also used this article to protect the rights of migrants (for more details see 3.4.1.1.). Art 6 EU Charter provides for the same level of basic protection of this right.

This right is already well covered by international and regional law and EU acquis. The added value of the CMW in this case would lie in its migrant specific scope.

5.3.8. Right to liberty and security of persons, safeguards against arbitrary arrest and detention (Art 16, 17 CMW)

The provision for the right to liberty and security of the person in Article 16 of the CMW gives stronger emphasis on all migrant workers' rights in comparison to the already existing international instruments. It goes beyond Article 9 ICCPR in requiring that identity checks by state officials

> 'be carried out in accordance with procedure established by law',

and in providing for access to consular assistance and for interpreters in proceedings concerning the legality of detention (Ryan 2012: 9).

The protection from arbitrary arrest and detention and rights during detention or imprisonment are in international law secured by Article 9(2, 3, 4, 5) ICCPR and by Article 40(1) CRC, as it regards children.

The Article 10 ICCPR states:

> 1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
> 2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
> (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
> 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Compared to the general wording of the Art 10 ICCPR, the CMW takes again into consideration the specific vulnerability of migrants. Migrants are most commonly exposed to detention prior to deportation, though, to the concern of NGOs and the UNHCR, pre-admission detention for asylum-seekers and detention during the determination procedure are becoming increasingly common (Krause 2008: 335). Conditions in detention centres are often degrading, detainees are often unprotected against staff assaults, in many EU Member States, detention is ordered by the police and not subject to juridical review and in six Member States of the European Union, including the United Kingdom, predeportation detention is not legally limited in time (Hugem and Field in Krause 2008: 335).

Article 17 of the CMW requires that detention be lawful and legitimate. According to Ryan (2012: 9) it goes beyond Article 10 ICCPR in providing specifically that persons detained for violation of immigration rules

> 'shall be held, in so far as practicable, separately from convicted persons or persons detained pending trial',

and in providing that migrants should not bear the cost of detention aimed at verifying compliance with immigration law.

The Committee on Migrant Workers has to date commented on three states' failures to respect the general principle embedded in Article 17 (In Mexico (2006), Ecuador (2007) and Senegal (2010)). In the case of Mexico, this recommendation was included under the Part III without reference to a particular Article, while, in the other cases, Article 17 was referred to expressly (Ryan 2012: 32).

5.3.9. The procedural guarantees (Art 16(5-9)) and the right to fair trial (Art 18 CMW), the principle that criminal offences should not be retroactive (Art 19), the rule against imprisonment for breach of a contractual obligation (Art 20 CMW), the right to effective remedy (Art 83 CMW)

The right of equality with nationals before the courts and the right to due process are secured in the following: Article 5(a) and 6 ICERD, Articles 14(1), 16 and 24 ICCPR; Articles 12, 13, 14 CAT or Article 12(2) CRC. The EU Return Directive provides in its Article 13 for effective remedy to appeal against return related decisions, although not mandatorily before judicial authority (appeal to an administrative authority is an option for Member States). It also provides for mandatory legal aid to irregular migrants who have no resources (Article 13 (3)(4)).

The article 18 of the CMW establishes specifically for migrants the fundamental principles of procedural criminal law, as equality (of migrants with nationals) before courts, the presumption of innocence and the minimum procedural guarantees. Article 19 is very specific reiterating the principle that criminal offences should not be retroactive. Ryan (2012: 10) includes the rights contained in Articles 16, 18 and 19 CMW amongst these civil rights that are already secured in other international instruments, but are of crucial importance to migrants because of their vulnerability.

The Article 83 CMW sets out a right to an effective remedy where Convention rights or freedoms are violated.

> Article 83
> Each State Party to the present Convention undertakes:
> a. To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
> b. To ensure that any persons seeking such a remedy shall have his or her claim reviewed and decided by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
> c. To ensure that the competent authorities shall enforce such remedies when granted.

The CMW Committee on Migrant Workers several times based its remarks towards states on the position of irregular workers under Article 83. In the case of Mexico (2006), the Committee expressed its concern at a legislative provision which allowed legal proceedings to be instituted by foreign nationals only if they were legally resident.

Lack of access by irregular migrant workers to an effective remedy was also the subject of Committee recommendations to Syria (2008), in relation to its labour commissions, and Algeria (2010), in relation to the courts in general. Ryan (2012: 28) claims that the basis for these interventions by the Committee is in fact the Article 25(3) CMW (stating that irregularity may not be a ground for depriving migrant workers of equal treatment, and that 'employers shall not be relieved of any legal or contractual obligations' because of a worker's 'irregularity of stay or employment').

5.3.10. The protection from confiscation and/or destruction of ID and other documents (Art. 21 CMW)

> Article 21
>
> It shall be unlawful for anyone, other than a public official duly authorized by law, to confiscate, destroy or attempt to destroy identity documents, documents authorizing entry to or stay, residence or establishment in the national territory or work permits. No authorized confiscation of such documents shall take place without delivery of a detailed receipt. In no case shall it be permitted to destroy the passport or equivalent document of a migrant worker or a member of his or her family.

This right is an example of a new right specifically relevant to migrants, that has not been previously embedded in other international instruments (Ryan 2012: 8). This article prohibits confiscation or destruction of identity or immigration documents by anyone other than a public official acting with legal authority.

5.3.11. Protection against collective expulsion (Art. 22 CMW)

The Article 22(4) CMW provides for procedural protection against expulsion measures.

> Except where a final decision is pronounced by a judicial authority, the person concerned shall have the right to submit the reason he or she should not be expelled and to have his or her case reviewed by the competent authority, unless compelling reasons of national security require otherwise. Pending such review, the person concerned shall have the right to seek a stay of the decision of expulsion.

The ICCPR in its Article 13 focuses on expulsion proceedings of legally residing foreigners:

> An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

The Article 13 ICCPR needs to be read in light of the HRC's General Comment No. 15 (more on this document in *3.3.2.1. UN level: General Protection*).

Regarding the context of the Council of Europe, there the already embedded protection is slightly stronger than the one provided by ICCPR. The Article 4 Fourth Protocol of the ECHR as well prohibits collective expulsion of aliens. Article 1 Seventh Protocol: an alien lawfully resident in a state´s territory shall not be expelled except in pursuance of a decision reached in accordance with law and only when the procedural rights enumerated in Art. 1(1) a-c are respected. The applicant must be allowed to have his case reviewed, to submit reasons against his expulsion and to be represented for these purposes before the competent authority (Brandl, 2007: 3).

The CMW clearly goes further than the article 13 of the ICCPR or article 1 of the Protocol no. 7 of the ECHR (Vanheule et al. 2004: 303, Ryan 2012: 8), as first of all, there is a crucial difference in personal scope. Article 22 CMW extends protection to all migrant workers and their family members, irrespective of the legality of their stay. By contrast, the benefit of Article 13 ICCPR is limited to foreign nationals 'lawfully in the territory of a State Party' (Ryan 2012: 8). The same personal scope can be identified in the ECHR, where the Article 1 Seventh Protocol only applies to aliens lawfully resident in the territory.

By comparison, Article 22 CMW is also stronger in its substance: collective expulsions are prohibited, expulsion decisions are required to be in a language the individual understands, a written decision setting out the reasons for the expulsion may be

requested, and it should be possible to apply for the suspension of an expulsion while a legal challenge to it is pending (Ryan 2012: 8).

5.3.12. The right to recourse to consular or diplomatic protection (Art 23 CMW)

Article 23 of the CMW provides for the right to consular assistance…

> '…whenever the rights recognized in the present Convention are impaired.'

This is another example of a provision that can exclusively be found only in the CMW. This provision is complemented by Article 65(2), in Part VI of the Convention, which obliges contracting states to 'facilitate the provision of adequate consular and other services' to migrant workers and their families (Ryan 2012: 8).

5.3.13. Recognition as a person before the law (Art 24) and Right to information on rights (Art 33 CMW)

Article 24

> Every migrant worker and every member of his or her family shall have the right to recognition everywhere as a person before the law.

Article 33

> 1. Migrant workers and members of their families shall have the right to be informed by the State of origin, the State of employment or the State of transit as the case may be concerning:
>
> a. Their rights arising out of the present Convention;
>
> b. The conditions of their admission, their rights and obligations under the law and practice of the State concerned and such other matters as will enable them to comply with administrative or other formalities in that State.
>
> 2. States Parties shall take all measures they deem appropriate to disseminate the said information or to ensure that it is provided by employers, trade unions or other appropriate bodies or institutions. As appropriate, they shall co-operate with other States concerned.
>
> 3. Such adequate information shall be provided upon request to migrant workers and members of their families, free of charge, and, as far as possible, in a language they are able to understand.

These are both very general provisions being again specific in scope in this particular context explicitly including irregular migrants in the legal framework of individual states.

Such an explicit recognition of migrants before the law as in Article 24 CMW is unique. Although it should be normally the case, irregular migrants often suffer of a kind of "invisibility" or non-existence within the legal framework. The provision of Article 24 is thus crucial for ensuring the access of migrants to all the other rights contained in the CMW.

5.3.14. The right of a child of a migrant worker to a name, registration of birth and nationality (Art 29 CMW)

This particular right can already also be read in Article 24 ICCPR, and in Articles 3 and 7 CRC. Ryan (2012: 9) explains that although this right is already embedded in other international instruments, this right is of a particular value to migrants.

The Committee on Migrant Workers has addressed recommendations to three states based on this article concerning the registration of births. As pointed out by Ryan (2012: 26) the Committee expressed its regret that children born in Egypt (2007) to migrant workers, whether in a regular or an irregular situation, were unable to obtain birth certificates. It expressed concern at the number of children of migrants in Ecuador (2007) whose births were not registered 'either because their parents fail to register them for fear of being deported or because their registration is refused on the ground of the irregular status of one or both parents.'80 Similarly, it expressed concern at refusals by many officials in Mexico (2011) to register the births of the children of irregular migrants, notwithstanding that they were Mexican citizens by birth. Ryan further also stresses a case, where the Committee addressed the right to a nationality. Having noted that only children with a parent domiciled in Colombia (2009) were eligible for Colombian nationality, it expressed concern that some children might remain stateless as a result. It therefore recommended that the state ensure the right of all children to a

nationality, and that it proceed with its proposed accession to the 1961 UN Convention on the Reduction of Statelessness.

5.3.15. Respect for the cultural identity of migrant workers (Art 31 CMW)

The ICCPR provides in its Article 27 for broad minority rights.[136] The Human Rights Committee explained the scope of this right in its Observation No 23[137], using the specific example of migrant workers and also visitors (personnes de passage).[138] Based on this explanation, human rights of migrant workers concerning the rights of minorities (including respect for cultural identity) are in force in the European Union, as all the EU Member States are parties to the Covenant.

5.3.16. The right to information on rights (Art 33)

This is a very general and basic provision, whose fulfilment affects the possibility to effectively execute access to all the other fundamental human rights (See also Chapter 5.5. on practical access to rights). This right clearly based itself on the lack of access to information of their rights by migrants. It is in fact a specification of the right to information receive and impart information as a broader freedom of expression (Article 13 CMW) that has been analysed above. From the studied instruments the EU Charter goes a bit more specific in its Article 27 securing the right of all workers to information on laws. Other than that this Article is a very good example of how the CMW adapts

136 Art. 27 of the CCPR: In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

137 CCPR General Comment No. 23: Article 27 (Rights of Minorities)

138 General Comment No 23: 5.1.: „The terms used in article 27 indicate that the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language. Those terms also indicate that the individuals designed to be protected need not be citizens of the State party."

5.2.: „…migrant workers or even visitors in a State party are entitled not to be denied the exercise of those rights…. The existence of an ethnic, religious or linguistic minority in a given State party does not depend upon a decision by that State party but requires to be established by objective criteria."

general international human rights provisions to the specific needs of (irregular) migrant workers.

5.4. Social and economic rights protection in relation to irregular migrants

In the field of social, economic, and cultural rights, states are required to take measures to respect, protect, and fulfil these rights. The specificity of social rights lies in the usual requirements to states "*to act*" rather than the negative obligations in case of fundamental human rights "*not to interfere*". To determine whether a state has complied with its duty to respect a right is comparatively straightforward. There must have been an absence of state interference with the enjoyment of the right. But determining whether a state has taken sufficient positive measures to protect and to fulfil a right is more difficult. A researcher may then turn to statistical indicators without keeping in mind that those indicators may produce misleading results. (Coolman 2010: 185). The major documents containing this type of rights are the ICESCR (analyzed in 3.3.2 above) and the ESCh (in 3.4.2).

One of the major criticisms of the CMW has always been the overlap of its rights with other international instruments. Before looking at some of the CMW contained social and economic rights in detail, it has to be noted that although some of the rights might be similar or equal in nature to those embedded in other documents, their content is anyway always different. The general aim of the CMW is equal treatment on grounds of nationality, compared to the ICESCR whose provisions concern the substance of the right at issue (Ryan 2012: 10).

Equal treatment is however also a central principle within the ICESCR framework, including for foreign nationals. In the words of the Committee on Economic, Social and Cultural Rights:

> 'the ground of nationality should not bar access to Covenant rights' and 'the Covenant rights apply to everyone including non-nationals, such as refugees, asylum seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.'[139]

5.4.1. Prohibition of arbitrary deprivation of property (Art 15 CMW)

Property is protected by Article 1 First Protocol to the ECHR as follows:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

This is a general protection extending to all human beings in the Council of Europe countries; however the limitation in the second paragraph of this article can lead to restrictions imposed on migrants in irregular situation. Article 17 EU Charter equally protects the Right to property:

> Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

The wording of Article 15 CMW is thus important to irregular migrants, although it is not as broad as the ECHR or EU Charter, focusing on arbitrary deprivation of property:

> No migrant worker or member of his or her family shall be arbitrarily deprived of property, whether owned individually or in association with others. Where, under the legislation in force in the State of employment, the assets of a migrant worker or a member of his or her family are expropriated in whole or in part, the person concerned shall have the right to fair and adequate compensation.

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139 Committee on Economic, Social and Cultural Rights, General Comment No. 20: Nondiscrimination in economic, social and cultural rights (2009), para 30, in: Ryan 2012: 11.

Additionally this right does not appear in the ICESCR (Ryan 2012: 10), the CMW goes thus beyond the currently valid legal framework in the European Union.

5.4.2. The principle of equality of treatment in respect of remuneration and other conditions of work and terms of employment (Art 25 CMW)

Article 25(1) of the Convention provides that 'migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment' in respect of terms and conditions of employment.

Article 25(2) makes it clear that this guarantee of equal treatment applies within individual employment relationships, by providing that 'it shall not be lawful to derogate in private contracts of employment from the principle of equality of treatment'.

Article 25(3) of the Convention contains two propositions of relevance to their position – that irregularity may not be a ground for depriving migrant workers of equal treatment, and that 'employers shall not be relieved of any legal or contractual obligations' because of a worker's 'irregularity of stay or employment.'

Slinkx (2009: 147) considers the Art. 25 particularly meaningful as it guarantees the equal treatment in relation to some rights (right to receive remuneration, conditions of work, terms of employment, etc.) cannot be refused by employers by reason of any irregularity in the stay or employment of the migrant.

Generally the protection provided by the Art 25 of the CMW is also contained in the ICESCR (Article 6 and 7 that recognizes the right of "just and favourable conditions of work" for all workers; special emphasis on unfair terms of employment and access to welfare), the CEDAW and CRC (Article 32(1)) devoted their attention to the protection of the most vulnerable workers (women and children) (Slikx 2009: 147). The ILO labour standards also entail the right to fair working conditions.

Article 31 EU Charter includes the provision for fair and just working conditions, but again the limitation of the Charter by its Article 51 ("*while implementing EU law*") could be applied to exclude irregular migrants. In this case it must be upheld, that whatever the international standards in force, these rights are not respected across the EU concerning undocumented migrants. As researched by various studies in the EU (for example The Book of Solidarity (Providing Assistance to Undocumented Migrants) by PICUM in 2002-2003 or by ETUC 2006), undocumented migrants are vulnerable to exploitation, work in the worst jobs on the labour market (the so-called 3D jobs: dull, dirty and dangerous (Piore 1979: 17 in Menz 2011: 34)), are not being given a regular monthly salary or are not being covered by work insurance, etc.

Other projects held up by Carrera & Merlino (2009: 32) (UWT, CHALLENGE AND CRIMPREV projects) have showed that undocumented migration is a response to economic demands for casual work. Right-less and exploitable workforce represented by undocumented migrants is what the EU member state economies are required.

Ryan (2012: 10) points out at the different emphasis of this provision in comparison to the ICESCR. Article 25 CMW provides for equal treatment in remuneration and terms and conditions of employment, whereas Article 7 ICESCR provides for 'just and favourable conditions of work'. The CMW here stresses the equality of treatment.

The European Social Charter entered into force in 1961 and in terms of migrant workers' rights asset it provided equality of treatment with nationals on remuneration, union membership and housing benefits (Battistella 2009: 49).

This provision extends the protection for irregular migrants above the already established international standards (Ryan 2012: 12). It has been also repeatedly enforced by the Committee on Migrant Workers. It has interpreted the Convention to require that migrants have access to the protection of labour law both in theory and in practice. Ryan (2012: 27) analysed its interpretations as follows. The Committee relied specifically upon Article 25 in criticism of Egypt (2007) for an apparent requirement of reciprocity before its Labour Code applied to legally employed foreign workers. The Committee also referred to it in General Comment No. 1 (2010), when stating that

migrant domestic workers 'should enjoy treatment not less favourable than that which applies to nationals of the State of employment'. The Committee's has also called for the inclusion of migrant domestic workers within labour law in its comments on Egypt (2007) and in General Comment No. 1 (2010).

The Committee has also addressed the question of limited access to labour law protections by irregular workers based on Article 25(3) (Ryan 2012: 28). Literally it has been mentioned in the Committees recommendations towards El Salvador (2009) but it has been the basis in various other cases, where the Committee referred to Article 83 (right to effective remedy) and to the Part III. or IV. of the CMW in general.

5.4.3. The freedom of association /and to join trade unions/ (Art 26 CMW)

The right to associate entails the empowerment to exercise other human rights freely and openly. Castels and Miller (1998: 286) mark the freedom of association and assembly as unquestionable. Trade unions provide usually for special support to migrant workers.[140]

The Article 26 CMW gives the basic freedom of association to all migrant workers and their family members, adding a special emphasis on the freedom of association in trade unions. The Article 26 guarantees the right to join and take part in trade union activities:

> CMW, Article 26
>
> 1. States Parties recognize the right of migrant workers and members of their families:
>
> a. To take part in meetings and activities of trade unions and of any other associations established in accordance with law, with a view to protecting their economic, social, cultural and other interests, subject only to the rules of the organization concerned;
>
> b. To join freely any trade union and any such association as aforesaid, subject only to the rules of the organization concerned;
>
> c. To seek the aid and assistance of any trade union and of any such association as aforesaid.

[140] PICUM (2010), PICUM's Main Concerns about the Fundamental Rights of Undocumented Migrants in Europe, Brussels, 41.

> 2. No restrictions may be placed on the exercise of these rights other than those that are prescribed by law and which are necessary in a democratic society in the interests of national security, public order (ordre public) or the protection of the rights and freedoms of others.

The main focus of the Article is definitely the freedom of association in trade unions. Article 26 of the Convention (in Part III) recognises three rights for *all* migrant workers: '(a) to take part in meetings and activities of trade unions … with a view to protecting their economic, social, cultural and other interests', '(b) to join freely any trade union,' and '(c) to seek the aid and assistance of any trade union.' The general freedom of association is already embedded in different international instruments. According to Ryan (2012:10) the CMW just adds an emphasis for the irregular migrants by including it in its Part III.

Universal freedom to association, as we know it from the Universal Declaration on Human Rights (1948, Art. 20) is from the human-rights perspective supposed to be also the right of third-country migrant workers, also the irregular ones. The right to freedom of association is sometimes used *ad promiscue* with the freedom of assembly. More specifically the freedom of assembly is understood in a political context, although depending on the source the right to freedom of association may be understood to include the right to freedom of assembly. Article 11 of the European Convention on Human Rights protects the right to freedom of assembly and association, including the right to form trade unions, subject to certain restrictions that are "in accordance with law" and "necessary in a democratic society". Freedom of association in the sense of workers' right to organize and collectively bargain is, besides the Universal Declaration of Human Rights and also recognised in the International Labor Organization Conventions (The Freedom of Association and Protection of the Right to Organise Convention, 1948 and The Right to Organise and Collective Bargaining Convention, 1949) .

The right to form and join trade unions and other association is already embedded in the following provisions: Art. 5(e)(iv) ICERD, Art 8(1) ICESCR, Art. 22(1)ICCPR and Art. 14(2)(e) CEDAW. Various international instruments and actors have been involved in the past in regarding the right to association for irregular migrants. In the Communication Karakurt v. Austria (CDPR/C/74/D/965/2000, 4 April 2002) the

Human rights Committee dealt with participation in work councils for non-EU nationals (this issue would fall within the remit of the CMW). The ECtHR expressed in its judgement *Cissé v. France* 9 April 2002 that foreigners in irregular situation have the right to assembly (para 48). The European Social Charter entered into force in 1961 and in terms of migrant workers' rights asset it provided equality of treatment with nationals on remuneration, union membership and housing benefits (Battistella 2009: 49).

Ryan (2012: 13) points out that the Article 26 CMW omits the right to *form* trade unions, which is instead recognised in Article 40 (in Part IV) solely for migrant workers in a regular situation. Other international instruments thus provide for better protection of the right of irregular migrants, including the forming of trade unions (Slikx 2009: 147).

The non-recognition of the right of irregular migrant workers to form trade unions is inconsistent with Article 2 of ILO Convention 87 on the freedom of association, which provides that 'workers and employers, without distinction whatsoever, shall have the right to establish and … to join organisations of their own choosing.'[141]

Ryan also claims that the Migrant Workers Convention is also at odds with Article 22 ICCPR, which states that 'everyone shall have … the right to form and join trade unions', and with Article 8 ICESCR, which refers to 'the right of everyone to form trade unions and join the trade union of [their] choice'.[142]

The Charter of Fundamental Rights of the European Union (2007/C 303/01) entails the Freedom of assembly and of association in its Article 12.[143] It specifically mentions the right to form and to join trade unions for the protection of one's interests.

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141 The Committee on Freedom of Association has confirmed that Article 2 of ILO Convention 87 applies to *all* workers, irrespective of their immigration status: see *Spain (Case No 2121)* (23 March 2001) Report of the Committee on Freedom of Association No 327 (Vol LXXXV 2002 Series B No 1), paras 561-562 and *Republic of Korea (Case No 2620)* (18 December 2007) Report of the Committee on Freedom of Association No 353 (Vol XCII 2009 Series B No. 1), para 788. In: Ryan 2012: 13

142 The use of the term 'everyone' in these Articles implies that the regularity of stay or employment should be irrelevant to these rights: see Cholewinski (n 13) 164. See also this research, Chapter intl. law!

143 *Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.*

The basic right to association in trade unions is hence secured by the European Charter for everyone, so merely by the linguistic and rational law interpretation, it applies also to (un)documented migrant workers and members of their families. However, the CMW provides for a slightly broader scope of the right. Above all, its provisions are more specific and detailed then the Art.12 of the Charter. The CMW specifically refers to taking active part in meetings and activities of trade unions. The interests to be protected by the membership in trade unions are enumerated (as for instance economic, social and cultural ones). The CMW gives anyone a particular right freely to join any organization (subject only to the rules of the organization concerned). All those rights could be argued to be embedded in the Art.12 of the Charter, only more specifically described in the CMW.

Thus, the CMW also entails the right to seek aid and assistance of any trade union, where the person does not need to be a member. This provision clearly gives rights to migrants to look for help in trade unions; even they are not their members. In reality this will always be very problematic, as while irregular migrants try to be as invisible as possible, their membership in any association will always be very risky and in the current system adjustment, migrants are nevertheless not likely to happily use the right to associate in trade unions. But, in case of harsh human rights abuses of migrants, the help of trade unions could radically improve the working conditions of (irregular) labour migrants in Europe, although it would probably always harm those asking for the change.

The paragraph 2 of the CMW's Article 26 allows only those restrictions of these rights that would be *prescribed by law*, be *necessary in a democratic society in the interests of national security, public order or the protection of the rights and freedoms of others.* As the EU Member States commonly operate with equalling migration with security threat and irregular migration with criminal activities, even the adoption of the CMW would not secure the right to association in trade unions in the EU Member States.

A similar provision can be found in the Art.52 of the CMW (the Scope of guaranteed rights) that allows for limitations on the exercise of the rights of the Charter provided for by law and the need to protect the rights and freedoms of others. Rights recognised by the Charter which are based on the Treaty on European Union shall be exercised

under the conditions and within the limits defined by the Treaty. This also allows for the non-recognition of rights of undocumented migrants. On the other hand, the Charter only distinguishes between the rights of citizens and the rights of "everybody" that definitely should include all human beings irrespective of their status, hence also include irregular migrants.

The Committee on Migrant Workers used the provisions of this Article mainly in relation to irregular migrant workers. In the case of Albania (2010), it referred to Article 26 in criticising a legal provision specifically excluding irregular migrant workers from joining trade unions and in the case of Algeria (2010), it expressed its concern more generally that irregular workers did not 'effectively enjoy' a range of Convention rights, including the right to join trade unions in Article 26 (Ryan 2012: 29). Bernard Ryan also mentions an exceptional case, where the Committee recognized Article 26 to apply to all workers – in the statement in General Comment No. 1 (2010). He also concludes that the Committee is often rather reluctant to base its claims on Article 26, even the matter touches precisely this issue. Ryan (2012: 30) though argues that the Committees´ approach aims at avoiding the "fullest protection for irregular migrant workers".

In terms of international or regional obligations, the freedom of association in trade unions is secured even for irregular migrants in the EU. In this particular case it can thus be concluded, that the claim of no need for the EU to ratify the CMW, because the rights entailed are already in force in the European Union, is correct. The CMW is only being more precise in showing the content of the right and develops the right further. On the other hand, the CMW gives states in its Art.26, para 2 the possibility to restrict the freedom of association in trade unions if that was necessary in a democratic society in the interests of national security, public order or the protection of the rights and freedoms of others, which would not be the case if the CMW would have been ratified by the EU Member States.

Besides all this, in the national practice, such rights for irregular migrants are not in force in the European Union today. Migrants, not even those in a regular situation, are not being informed sufficiently about their rights. The right to association needs a certain degree of activity of the actors themselves and the necessary information about

this possibility is not in place today. In the case of undocumented migrants, their practical freedom of association is basically unthinkable in the EU Member States today. When irregular migrants organize in any way in Europe, it certainly makes them visible and vulnerable to administrative sanctions, but also to expulsion and deportation.

5.4.4. The right to social security (Art 27 CMW)

> Article 27 CMW
> 1. With respect to social security, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. The competent authorities of the State of origin and the State of employment can at any time establish the necessary arrangements to determine the modalities of application of this norm.
> 2. Where the applicable legislation does not allow migrant workers and members of their families a benefit, the States concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances.

Article 27 CMW provides for equal treatment in matters of social security, whereas Article 9 ICESCR sets out 'the right of everyone to social security' (Ryan 2012:10). The CMW leaves the right to social security open to states to incorporate further conditions into their laws (Vanheule et al. 2004: 313). According to Vanheule et al. (2004: 315) this provision lacks direct effect, because it in the end only entails an obligation to examine everyone's case.

Article 27 CMW was already also mentioned by the Committee on Migrant Workers in the case of Algeria (2010) among the rights which irregular migrant workers did not 'effectively enjoy' (Ryan 2012: 31).

Looking into the current legislation of one Member State as an example, a study of Vanheule et al. (2004) can be very useful, as they have been studying the CMW in relation to a possible ratification of the CMW by Belgium. In the case of Belgium (Vanheule et al. 2004: 314) this right is not in place for irregular migrants. As mentioned

by Vanheule et al. (2004: 314-315) it was argued by the ECtHR in case of *Gaygusuz v. Austria* that there was a breach of Art 14 in conjunction with Art 1 of the Protocol No. 1 of the ECHR (the right to property) – the violation of right of a foreign national to access to social security (but he was in regular situation). Belgium also claims as one of the major obstacles of ratification the Art 27 of the CMW that provides for a refund of contributions made by migrant workers which is contrary to the Belgian social security system that is based on the principle of solidarity (December18 2010). The accession to the CMW would certainly in some Member States lead to necessary changes of their legislation.

5.4.5. The right to urgent medical health care (Art 28 CMW)

Article 28 of the CMW provides for the right to urgent medical health care. It explicitly states that emergency medical care shall not be refused based on the irregular status of the person in need:

> Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment.

It must be noted that the CMW does for all the migrants and members of their families the right to urgent, emergency medical health care not a broader right to (for example preventative) health care as contained in other international instruments already in force in the EU Member States. The CMW itself does provide for a broader right to health care but only for migrants that are documented or in a regular situation.[144]

The International Covenant on Economic, Social and Cultural Rights (ICESCR) entails the right to "the enjoyment of the highest attainable standard of physical and mental health"

[144] Under its Article 43 regular migrant workers shall enjoy equality of treatment with nationals of the state of employment in relation to access to social and health services, provided that the requirements for participation in the respective schemes are met.

in its Article 12. This Article specifically mentions the steps to be taken by States Parties to achieve the full realization of this right as follows:

> (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
>
> (b) The improvement of all aspects of environmental and industrial hygiene;
>
> (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
>
> (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Under the provision 12(2)(d) there is clearly the urgent medical health care secured.

The Committee on Social and Cultural Rights verbally included illegal immigrants to the Covenants scope in the General Comment No 14 on The Right to the highest attainable standard of health (2000) as affirmed by Slinkx (2009: 127):

> „…States are under the obligation to *respect* the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services."

In the same time, the General Comment No 14 mentions basic principles in its paragraph 12: availability, accessibility, acceptability, and quality.

Based on this it can be argued that the ICESCR goes beyond the provision of the CMW regarding irregular migrants and provides for even broader scope of health care for everyone.
The fact that Article 28 CMW does not recognize extended access to health services to all migrant workers is, according to Ryan (2012: 14), contrary to the provision in Article 12 ICESCR for "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health".

On the other hand, the significant asset of this provision of the CMW is, as argued by Ryan (2012: 10) by its strong emphasis on equal treatment with nationals. Article 28 provides for equal treatment in respect of medical care which is urgently needed in serious cases, whereas Article 12 ICESCR articulates 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.

What can be additionally derived from other international instruments? The ICERD prohibits racial discrimination explicitly in the enjoyment of "the right to public health, medical care, social security and social services" in its Article 5(e)(iv). The Articles 11 and 12 of the CEDAW forbid discrimination against women in the field of access to health care services and also secure equality of men and women regarding the protection of health. The highest attainable standard of health for children is protected by the Article 24(1) of the CRC. Any of these might be interpreted as including the right to urgent medical health care but might also be not.

The EU Charter of fundamental rights reserves some of its rights only to „everyone residing and moving legally within the European Union" as it is the case for access to social security and social assistance in Article 34. The Article 35, on the opposite stands: "Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices."

This again seems that the EU legislation itself provides for even a broader right then the CMW. On the other hand, it could be questioned whether access to preventative health care does actually not include access to urgent medical health care.

Looking at the instruments of the Council of Europe, the European Convention on Human Rights does in its wording not entail any right to health care as it does not most of the other social rights. However, various rights have been already found secured by the ECHR as is evident from the case law. According to Brigit Toebes (2004) various health-related issues have been addressed within the framework of civil and political rights, including the rights to life, privacy, family life, and the right to a fair trial. She gives an example in the case of *López Ostra v. Spain,* where the right to family life (article 8 ECHR) was considered to embrace a right to protection from environmental health

threats.[145] This does however not explicitly show the presence of the right to medical health care for irregular migrants.

The right to protection of health is also entailed in Article 11 of the (revised) European Social Charter. This does however again not specifically mention urgent medical health care for everyone.

In 2007 a final report of the "Access to Health Care for Undocumented Migrants" project[146] showed that there is a requirement in the EU to provide documentation proving the ability of migrants to cover their hospital expenses, which was identified as one of the main obstacles faced by migrants. The second obstacle appeared to be the lack of information about migrants´ right to health care, third the duty to denounce of hospital administrators in some states and the lack of translators and cultural mediators in hospitals.

There is an unquestionable added value by the CMW as it extends the protection for irregular migrants above the already established international standards with regard to urgent medical care (Ryan 2012: 12). The Committee called for Ecuador (2007) to comply with Article 28, because of evidence that 'in practice migrant workers in irregular situation and members of their families face difficulties in accessing the public health system.' and it also called for Azerbaijan (2009) to comply with Articles 28 and 30, because of reports that irregular migrants and their family members did not have access to medical care in practice, and that the children of irregular migrants had difficulty obtaining access to education (Ryan 2012: 31). Article 28 was also mentioned by the Committee in the case of Algeria (2010) among the rights which irregular migrant workers did not 'effectively enjoy'.

In the EU, Article 168 TFEU highlights that a "high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities." Action by the EU "shall complement national policies" and "be directed towards improving public health, preventing physical and mental illness and diseases, and

145 *López Ostra v. Spain*, 9 December 1994, A.303C (1995).

146 The project was led by PICUM and funded by the DG fro Employment, Social Affairs and Equal Opportunities; cited in Carrera and Merlino, 2009: 26.

obviating sources of danger to physical and mental health." Measures taken to pursue such public health objectives are not barred by the status of the persons to whom these are addressed (FRA 2011: 25). The EU Return directive provides for certain safeguards in case of pending removal. One of them states that Member States are obliged to ensure emergency health care and essential treatment of illness (Article 14(1)) (Baldaccini 2009: 12). So there should be in theory at least some level of health protection for irregular migrants at the EU level.

5.4.6. Access to education on the basis of equality of treatment (Art 30 CMW)

The right to education is provided in several international legal instruments: UDHR Article 26, CRC Article 28(1), ICESCR Article 13(1, 2), ICERD Art. 5(e)(v), in ECHR Article 2 of its First Protocol and in Article 14 EU Charter.

Regarding one good practice example in Belgium, the access to education for children of irregular immigrants is secured, as has been noted by the Human Rights Committee in 1998 (CCPR/C/79/Add.99). This however again is not the case in all the EU Member States today. The discrepancy between the rights secured in international (and often also national) law and practice has been recognized by the PICUM project "Fighting Discrimination-based Violence against Undocumented Children" (2008, in Carrera & Merlino 2009: 28). Such obstacles are for example the need to show a residence permit, fear of detection, lack of financial means (for books or transport), language problems or discrimination. Often, the children do not receive a diploma in the end of their studies and there is also the obligation to denounce irregular children in some Member States.[147]

The EU Return directive provides for certain safeguards in case of pending removal. One of them states that Member States are obliged to ensure access to basic education for minors (Article 14(1)) (Baldaccini 2009: 12).

[147] Germany, in: Book of Solidarity (Providing Assistance to Undocumented Migrants) project, PICUM, in: Carrera and Merlino 2009: 29

Article 30 CMW sets out the right of a child of a migrant worker to equality of access to education, and expressly precludes the irregularity of a parent's residence or employment, or of the child's own residence, from being a reason for denying a child access to schooling. Article 30 provides for equal access to schooling by migrants' children, as compared to the more general "right of everyone to education" in Article 13 ICESCR. This provision extends the protection for irregular migrants above the already established international standards (Ryan 2012: 12).

Article 30 has also already been used as an argument by the Committee on Migrant Workers, when it called for compliance by Egypt (2007) with it, because of its concern that 'the children of undocumented migrant workers do not have access to the schooling system, whether public or private' (Ryan 2012: 31).

5.4.7. The right to transfer earnings, savings and personal property abroad when the period of residence comes to an end (Art 32 CMW)

This right does not appear in the ICESCR (Ryan 2012: 10) as it is very migrant-specific. With regards to this provision, another very important added value of the CMW can be identified.

5.5. Practical access to rights in EU Member States

Regarding the overall situation of human rights standards of undocumented migrants in Europe it must be highlighted that there are practical obstacles to their enjoyment even if the rights can be identified in various instruments. Noll (2010: 243) argues, that irregular migrants, whose physical presence is a tangible reality, is nevertheless incapable of appearing jurisdictionally. This very much coincides with the claims of Hannah Arendt and Peo Hansen, describing the situation of irregular migrants as finding themselves completely outside any legal framework (See Chapter 1.1.).

To verify the actual access to rights and to the judicial systems by irregular migrants, thorough analysis of national laws would be necessary. This has not been the aim of the current research. It can be though noted that various research in this topic has underpinned that undocumented migrants are in general excluded from social rights (Council of Europe report 2005, Carrera & Merlino 2009: 24). Migrants, not even those in a regular situation, are often not being sufficiently informed about their rights.

Spain is the only EU member state, where all migrants (regardless to their migratory status) have access to basic social rights (Council of Europe 2008). On the opposite, in Germany and Italy for example an approach driven by criminalisation of irregular migration can be observed. In Germany, irregular immigration is considered a criminal offence and public authorities and practitioners (doctors and teachers) have a duty to denounce irregular residents to the competent authorities. These regulations interfere with the right of access to medical care and education, which German law recognises for irregular migrants (Council of Europe 2008, Carrera & Merlino 2009: 25).

EU and the Member States are still using the term "illegal" instead of irregular or undocumented, and criminalization of migrants, irregularity and solidarity with migrants is not rare. Carrera and Merlino (2009: 34-35) suggest very specific recommendation, namely: regularization of those immigrants who cannot be returned within three months, dealing with applications for the renewal of work permits in a timely manner, ensuring access to lawful employment and appeal rights (obligation for MSs), facilitating issue of labour permits. Last but not least they propose that there should be a directive establishing a common set of rights of all migrant workers in the EU, ensuring i.a. equal pay for equal work, decent working conditions and collective organization. These recommendations clearly show, where still the gaps and weaknesses of EU policies are, especially in terms of practical access to rights.

6. CONCLUSIONS

6.1 Human rights of irregular migrants in the EU

First partial question: *What human rights are the irregular migrants entitled to in the EU, based on international and European legal instruments*?

In this research, international and EU legal framework with regards to irregular migrants rights have been analysed. The emergence and origins of the CMW have been described and its provisions compared one by one to the existing legal framework in the EU.

In Chapter 1.2 Hypothesis and research questions three partial questions have been put forward. The first research question that was posed in Chapter I stands: *What human rights are the irregular migrants entitled to in the EU, based on international and European legal instruments*? This has been thoroughly analysed in Chapters 3 and 4 that explored the human rights of irregular migrants in the international and European legal framework.

In general, most of the basic international human rights instruments extend to "all human beings" regardless their status, so irregular migrants are covered by them. Thus rights covered by the ICCPR and ICESCR as well as ECHR do apply also to migrants in irregular situation. The EU Member States have all signed and ratified these instruments and the reservations and declarations they use do not exclude irregular migrants from its scope.

6.2 The claimed redundancy of the CMW

Second partial question: *Is the CMW indeed redundant and unnecessary in the legislative framework of the European Union or is it rather complementary with regard to the international and European law?*

The second question goes in the first place towards the examination of the EU Member States claims of redundancy or un-necessity of the CMW to complement the existing legal framework. Up until today any EU Member State has so far signed or ratified the CMW. Support for the CMW on the political level in the EU is very low and it is clear that the main obstacles to ratification of the Convention are of political nature. The Convention is regarded very negatively by the governments and is generally ignored, which, together with media and public scepticism, it does not create a suitable environment for its advocacy. Chapter 2 of the research has gone through the main gathered arguments of EU Member States why not to adhere to the CMW.

The claim that other human right treaties provide for adequate protection has been uprooted by the analysis collected in Chapter 5. and explained in detail further in Chapter 6.3. The claims of limitation of states sovereignty by the CMW or that the CMW gives above-standard rights to irregular migrants have proven to be rather politically motivated than based on a real legal analysis. The same applies to claims that ratification is an EU shared competence or that there is insufficient distinction between regular and irregular migrant workers in the CMW

The EU MSs contestments of the CMW are rather vague and not legally precise in nature. This study has clearly shown that there was no legal basis for the MSs claims. Carrera and Merlino (2009: 34) have called the EU to put forward strategies for promoting the ratification of the CMW.

Chapter 5 has provided for a detailed analysis of the provisions that the CMW grants to migrants in irregular situation. Some articles have been given more attention as for their importance or complicated nature – especially in the cases of the social rights, where the obligation of a state to act is much wider than in the other cases.

6.3 CMW additional rights to irregular migrants

Third partial question: *And does it give any additional rights to irregular migrants?*

The main research question posed in this research was, whether irregular migrants do enjoy the rights contained in the UN Migrant Workers Convention in the European Union today. More specifically the third partial question on whether there are some additional rights contained in the CMW goes exactly for finding this answer.

Most of the fundamental human rights are already entailed in EU legislation in most cases owing to international human rights law applicable in EU Member States. There are however several rights that are not covered in the EU nor under European neither international, law.

Some specific rights recognized to migrants in an irregular situation exclusively by the CMW (which are not covered by other international human rights instruments), namely: the protection from confiscation and damage of identification documents (Art.21) or the right to consular protection and assistance (Art.23). However these three specific rights spelled out in the CMW could be seen as declensions of more general human rights provisions (Committee on Migrant Workers 2011: 7).

Other provisions in CMW enjoy stronger migration context, such as Article 22 (broader scope, stricter conditions for expulsion), freedom of movement Article 8, Articles 16 and 17. The same applies to Article 24 CMW that provides for explicit recognition of migrants before the law. Although this should be practically the case in all EU Member States, irregular migrants often suffer of a kind of "invisibility" or non-existence within the legal framework. The provision of Article 24 is thus crucial for ensuring the access of migrants to all the other rights contained in the CMW. In the same spirit, Article 33 CMW on access to information on rights is a clear example of a (irregular) migrant specific provision.

With regards to social rights in CMW there is emphasis added on equal treatment with nationals plus there are some completely new rights: the right not to be arbitrarily deprived of property (Art 15) and the right to transfer earnings, savings and personal property abroad when the period of residence comes to an end (Art 32). CMW certainly extends protection above the already established international standards with the following provisions: Article 25 on equal treatment in employment, Article 28 on

emergency medical care, and Article 30 on the schooling of children (Ryan 2012: 12). CMW uses sometimes migrant-specific formulations or extensions of the generally recognized rights. For example it focuses specifically on remittances or in case of social security it upholds the necessity to examine the possibility to reimburse migrant workers the amount of contributions made by them with respect to social benefits so that the equal treatment with nationals would be secured (Art 27). Articles 25 and 27 (social security) are basically of the most important social rights for migrants.

The CMW does in some cases secure only for lower standards. For example, the right to access to housing is in the CMW given only to migrants that are documented or in a regular situation (Article 43, Part IV). This right is however stipulated for all persons in the UDHR (Article 25) and in the ICESCR (Article 11). Also Article 26 CMW (freedom of association in trade unions) in fact lowers the standard of protection compared to other international instruments. On the other hand, such a lack of protection would not have in fact have the effect of lowering the standards as always the more favourable provisions prevail.

Most of the migrant specific provisions of other international instruments apply only to lawfully resident aliens, which is being extended to irregular migrants in the CMW (like in case of Art 22 collective expulsion prohibition). The CMW gives clearly the protection to vulnerable migrant groups like children, which is not the case of the ECHR – which does not provide for sufficient protection in many cases. Although the Convention contains measures on equal treatment, according to some scholars, it does not sufficiently tackle the specific protection of women. Yet, women are more likely to work in irregular sectors than men. For example as domestic workers, women are the more vulnerable to exploitation and abuse (Martin, Abimourchad 2008: 7). This issue is however being tackled by other international instruments, like CEDAW or the ILO Convention on Domestic Workers that has been agreed in June 2011.

6.4 The added value of CMW ratification in the EU

Fourth partial question: *What would be the added value of the ratification of the CMW and would it be beneficial?*

Next to the added value described in Chapter 6.3 on the specific provisions providing for over-standard rights protection, the CMW ratification would be beneficial also in other terms. Even where the CMW is substantively similar to other instruments, some of the rights set out in Part III are likely to be of particular value to migrants and their family members, simply because they may be in a weaker social or legal position. A good example is the provision in Article 29 stating that '*each child of a migrant worker shall have the right to a name, to registration of birth and to a nationality'* (Ryan 2012: 9).

The CMW allows for a mechanism receiving individual complaints (Article 77(2) CMW; see Chapter 2.4.). Such an individual right to address the Committee could emerge under the CMW in one of the countries that have signed and ratified the CMW in the future. For the purpose of this research examining the gaps in rights between the CMW standards and the current situation in the EU, this would be a point, where the migrants in the EU have fewer rights then could possibly have under the CMW – meaning the lack of access to international jurisdiction with an individual complaint.

In case of accession of the EU Member States to the CMW another important question remains, what other impacts (next to the enhancement of (ir)regular migrant workers' rights) would that have. First of all the ratification would be a politically important gesture as states would acknowledge the need for protection of migrant workers and members of their families. This would be an important political act sending a clear message to right wing, racist and xenophobic movements across Europe. A second advantage of more a technical nature would be the unification and harmonisation of terminology in the EU that nowadays causes many difficulties with different national concepts and terms used.

There is a clear need for opening legal migration channels in the EU to contribute to securing the rights of irregular migrants. The EU Lisbon strategy stressed the importance of labour migration so that Europe can become the "most competitive region" (Menz 2011: x). In Europe we need more pragmatic and liberal policies towards migrants, not only to the workforce, but also to refugees, asylum seekers or family

members of third country nationals living in the EU. To such a more humane approach the ratification of the CMW would certainly contribute.

The thorough examination of the EU acquis in the migration field has also shown that the rights of irregular migrants explicitly as such are not part of any EU policy or legal measures. Already the legal basis in the TFEU (Lisbon Treaty) in Articles 67-80 disregards this issue completely. An instrument such as the CMW would be thus highly needed for political but also legal and human rights reasons. Although the CMW does not explicitly allow for regularisations, ratification of the Convention could foster the already existing paths to regularisation of irregular migrants' status as analysed in Chapter 4.7.

Generally both sending and receiving states benefit from migration for employment purposes (Aleinkoff 2003: 23). The CMW constitutes the broadest normative framework in international law for the protection of the rights of migrant workers and members of their families, and guidance for States on how to develop labour migration policies while respecting the human rights of migrants. One of the Convention's key values is making explicit that the set of fundamental rights contained in the Universal Declaration of Human Rights, the International Covenants and other core international human rights instruments, also need to be articulated in national law for all migrant workers and members of their families, in order to ensure that these rights are indeed applied universally (Committee on Migrant Workers 2011: 6).

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