



DIRECTORATE-GENERAL FOR EXTERNAL POLICIES
POLICY DEPARTMENT



**Current challenges in
the implementation of
the UN International
Convention on the
Protection of the Rights
of All Migrant Workers
and Members of Their
Families**

DROI



DIRECTORATE-GENERAL FOR EXTERNAL POLICIES OF THE UNION

DIRECTORATE B

POLICY DEPARTMENT

STUDY

**CURRENT CHALLENGES IN THE IMPLEMENTATION OF THE
UN INTERNATIONAL CONVENTION ON THE PROTECTION
OF THE RIGHTS OF ALL MIGRANT WORKERS AND
MEMBERS OF THEIR FAMILIES**

Abstract

Analysis of the reasons submitted by EU Member States preventing them from ratifying the International Convention for the Rights of Migrant Workers and Members of Their Families (ICRMW) demonstrates that there are no insurmountable barriers to ratification and that the decision on ratification is largely driven by political choice rather than by an objective legal scrutiny. This briefing paper clearly shows that most of the rights enshrined in the ICRMW are already recognised in EU legislation or in other international instruments ratified by EU Member States. The ICRMW clearly distinguishes between the rights of regular and irregular migrants in great detail and is the only Human Rights Convention that does so.

The EU legislative approach to labour migration policies has tended to classify migrants into particular 'categories' resulting in diverse sets of rules and rights for different groups. The EU aims to adopt a balanced approach in its migration policy that is in line with the general objective of the Convention of favouring legal migration and reducing irregular movements. The briefing paper shows that the ratification of the Convention, which is primarily a human rights instrument aiming at protecting the fundamental rights of all migrants, could help the EU and its Member States to ensure holistic and long-term sustainable migration governance based on taking into consideration the needs of countries of origin, destination and transit as well as the rights of the individuals involved in the migration process.

This study was requested by the European Parliament's Subcommittee on Human Rights.

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EXECUTIVE SUMMARY

This study was commissioned by the European Parliament to the International Organization for Migration in order to identify the reasons preventing EU Member States from ratifying the International Convention for the Rights of Migrant Workers and Members of Their Families (ICRMW) and assess the prospective challenges of its implementation in the EU region.

Despite the decrease in the number of births at the EU level⁽¹⁾, the population continues to grow in the majority of European countries and migration is a crucial determinant of this development. In 2010, it contributed at a rate of 62% to the total demographic growth. This data alone shows that the immigration in the EU of third-country nationals is a phenomenon that cannot be ignored and that has a significant both demographic and economic impact in the region⁽²⁾.

The approach adopted by the EU to deal with this phenomenon, in both its internal and external dimension, is mainly centred on regulating migration, by managing legal migration and preventing or eliminating irregular movements. While an important set of rights has been recognised to migrants in a regular situation, and particularly to long-term residents, much less attention has been paid to the fundamental rights of migrants who enter or stay illegally in the territory of EU Member States. The ICRMW covers the rights of both migrants in regular and irregular situations. Nonetheless, despite the main focus of EU policies on the rights of regular migrants, the analysis conducted in this study clearly shows that most of the rights enshrined in the ICRMW are already recognised in the EU legislation or in other international instruments ratified by Member States. In addition the ICRMW clearly distinguishes between the rights of regular and irregular migrants in great detail and is the only Human Rights Convention that does so. Consequently, there are no objective, insurmountable barriers to the ratification of the Convention and the decision on ratification will most likely be driven by a political choice rather than by an objective legal scrutiny.

Many of the obstacles evoked by Member States are based on a number of misconceptions on the scope and purposes of this instrument. The Convention reflects the effort to find a careful balance between controlling migration, by favouring legal migration and reducing irregular movements, and protecting migrant workers and members of their families throughout the whole migration process. This main objective, which is clearly reflected in a number of provisions (particularly in Part VI), seems to be neglected by EU Member States; thus a better knowledge of the Convention's general purpose may represent the first step towards an effective promotion of its ratification. To reach the objective of ratification, additional efforts should also be put in disseminating the underlying ideas and philosophy of the ICRMW to the general public while fostering a more balanced portrayal of issues relating to migration in the EU region.

It is clear, however, that given the level of development of the role of the EU in the area of migration, which is now also well reflected in the development of the EU legislation, progress on ratification cannot realistically be made without the adoption of a clear stance by EU Institutions in favour of ratification.

Finally, the ratification of the Convention would also have a positive impact on the external dimension of EU migration policies. In the recent international debate linking migration and development, which will culminate in this year's High Level Dialogue on Migration and Development, the role of recognising and ensuring the protection of the human rights of migrants has been fully acknowledged. The

¹ M. Marcu, *Population grows in twenty EU Member States*, Eurostat 38/2011, Figure 3. Accessible at: http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-11-038/EN/KS-SF-11-038-EN.PDF.

² E. Macdonald and R. Cholewinski, *The Migration workers Convention in Europe*, UNESCO, 2007, p. 29.

ratification of the ICRMW would help articulate measures, policies and actions, also with regard to the relations of the EU with third countries, capable of ensuring that migrant movements benefit all the actors involved.

1. OVERVIEW OF ICRMW CONTENT AND IMPLEMENTATION

1.1 Brief history of the adoption of the Convention

During the 20th century a few international conventions were adopted to address and regulate migration for employment through various international agreements, but it was not until after the economic downturn in the 1970s that the international community recognized that a new instrument was needed to deal with the protection of all migrant workers, including irregular migrant workers, who were often subject to abuse and discrimination⁽³⁾. The first instrument attempting to address these specific issues was the ILO Convention N°143⁽⁴⁾ of 1975, which contains provisions on the prevention of irregular migration and clandestine movements, as well as rights aimed at protecting migrant workers from exploitation at work⁽⁵⁾. Around the same time as the adoption of the ILO convention, a campaign for a human rights instrument started and a working group chaired by Mexico and Morocco was created to draw up the standards that would eventually become the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (hereinafter ICRMW or the Convention). The ICRMW was adopted by the UN General Assembly on 18 December 1990 and after thirteen years and twenty ratifications it came into force in 2003.

1.2 Main provisions of the Convention

The ICRMW is a comprehensive instrument that covers the entire migration process from the recruitment and departure in the State of origin, migrant rights during transit, as well as during the time in the State of destination and upon return (Article 1(2)). It consists of nine parts: Parts I and II set out, *inter alia*, the definitions and a general non-discrimination clause which adds “nationality”, “conviction”, “age”, “marital status, birth or other status” and “economic position” as prohibited grounds for discrimination to the non-exhaustive list of protected grounds set out in the previous core human rights instruments⁽⁶⁾. This was done in order to reflect the common grounds on which migrant workers often experience discrimination. Part III provides for the rights of general application i.e. those applying to all migrant workers and members of their families irrespective of their status. Part IV stipulates rights granted specifically to those in a regular situation. Part V concerns rights of specific categories of migrant workers. Part VI sets out the obligations of States on cooperation and the promotion of sound, equitable, humane and lawful conditions of migration. The remaining parts (VII-IX) deal with the application, general provisions and potential restrictions to the ICRMW.

The underlying purpose of the ICRMW is the recognition that all migrant workers, both in regular and in irregular situation, are first and foremost human beings entitled to the enjoyment of fundamental rights without discrimination. The Convention does not present a new set of rights but largely restates the standards provided for by the International Bill of Human Rights⁽⁷⁾ such as the right to life (Article 6, ICCPR), the right to be free from torture (Article 7, ICCPR), and the right to freedom of thought,

³ See for example International Labour Organization (ILO), Migration for Employment Convention, 1939 (No. 66) (withdrawn), ILO, Inspection of Emigrants Convention, 1926 (No. 21) (shelved), ILO, Migration for Employment Convention (revised), 1949 (No. 97), ILO Migrant Workers (Supplementary Provisions) Convention, 1975, (No. 143).

⁴ ILO, Migrant Workers (Supplementary Provisions) Convention.

⁵ Cholewinski, R., ‘International Labour Migration’, in P. Opeskin, R. Perruchoud, J. Redpath-Cross (eds.), *Foundations of International Migration Law*, CUP, Cambridge, 2012, p. 288.

⁶ Article 1 states that no distinction shall be made in relation to the rights in the ICRMW based on ‘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.’

⁷ The “International Bill of Human Rights” consists of the Universal Declaration of Human Rights (UDHR, 1948), the International Covenant on Civil and Political Rights (ICCPR, 1966) with its two Optional Protocols and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966).

conscience and religion (Article 18, ICCPR) and it expands on rights and entitlements which are already fully or partially covered by previous instruments. The approach has a similar rationale to the underlying arguments in favour of developing specific international law in relation to women, children and persons with disabilities⁽⁸⁾ to codify and elaborate on the specificities of application of international human rights law to these vulnerable categories.

Many of the rights thus have a particular “migrant focus,” elaborating on existing rights which are of concern for migrant workers and their families. One new feature of the ICRMW is that it provides a broad definition of a migrant worker focusing on the engagement in a “remunerated activity” including individuals in the country of origin who are in preparation of taking up a remunerated activity in a country where they are not nationals, those who are already working in such a country, and those who are no longer working but are still in a country of which they are not nationals or are returning to their country of origin⁽⁹⁾. In addition, the ICRMW provides definitions of specific categories of migrant workers such as “seasonal workers”, “project-tied workers” as well as a definition of “members of the family” who also enjoy rights under the Convention⁽¹⁰⁾. Moreover, the ICRMW covers certain categories of migrant workers such as “frontier workers” and “self-employed persons”, which are excluded under the migrant-specific ILO conventions⁽¹¹⁾. Importantly, the Convention aims to promote effective protection, for instance by several provisions on ensuring migrants’ access to legal remedies, thus bridging the gap between legal provisions and *de facto* enjoyment of rights.

Hereafter, some of the most important civil and political rights provided for by the ICRMW are listed. The specific migrant-focus of the relevant provisions of the ICRMW is also highlighted. States have an option to introduce reservations to the incompatible ICRMW provisions at the time of signature, ratification or accession. For a more extensive list of the rights and obligations provided for by the Convention, please see the comparative table on the rights for regular and irregular migrants in the annex of this paper:

- **Freedom of movement⁽¹²⁾**: Article 8 of the ICRMW states that all migrant workers and their families have the right to leave any State as well as to return and stay in their State of origin. These rights are particularly important for migrant workers. However, the wording used in the relevant provisions of the Convention is standard and does not show a specific migrant-focus. Article 39 is more specific in that it provides regular migrant workers and their families with the right to move freely and choose residence in the State of employment. These articles can be restricted if such restrictions are provided for by law, necessary to protect national security, public order, health, morals, or the rights and freedoms of others, and if they are consistent with the other rights in the Convention⁽¹³⁾. Note also that, according to Article 79 of the ICRMW, nothing in

⁸ See the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979), the Convention on the Rights of Children (CRC, 1989), the Convention on the Rights of Persons with Disabilities (CRPD, 2006).

⁹ Article 2(1) ‘The term “migrant worker” refers to 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.’

¹⁰ See Article 2(2) for the specific groups of migrant workers; Article 4 defines “members of the family” as ‘persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned.’

¹¹ Migration for Employment Convention (Revised), 1949 (No. 97) Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)

¹² Also provided for by Article 12 ICCPR. See also Article 2 of Protocol 4 to the European Convention on Human Rights (ECHR, 1950).

¹³ Article 8, Article 39(2) ICRMW.

the Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families.

- **Right to liberty and security:** Restated in Article 16(4) is the principle that no one should be arbitrarily arrested or detained and any deprivation of liberty must be carried out in accordance with procedures established by law⁽¹⁴⁾. This provision also refers to the case of arbitrary collective detention that may happen to migrant workers, particularly in case of discriminatory measures targeting a specific national group. Articles 16 and 17 provide for the rights and guarantees surrounding arrest and any restrictions of liberty, including administrative detention of migrants. For example, migrant workers and members of their families who are arrested shall be informed at the time of arrest, as far as possible in a language they understand, of the reasons for their arrest and they shall be promptly informed in a language they understand of any charges against them⁽¹⁵⁾. Many of the rights included in article 16 and 17 do not add any new obligations on States but simply restates obligations already enshrined in instruments such as ICCPR and the ECHR. For example, the migrant worker or a member of his or her family has a right to challenge the legality of the detention before a court⁽¹⁶⁾, as well as the right to compensation in case of an unlawful arrest or detention⁽¹⁷⁾. As to the rights and safeguards during detention, migrant workers and member of their families should be treated with humanity and respect for their dignity and for their cultural identity⁽¹⁸⁾; accused persons should be kept in separate detention facilities from convicted persons⁽¹⁹⁾; and juveniles should be separated from adults⁽²⁰⁾. More interestingly, the same Article also recognizes that migrant workers who are detained in a State of transit or in a State of employment for violation of provisions relating to migration shall be held separately from convicted persons or persons detained pending trial⁽²¹⁾. However, States have to comply with this obligation only “in so far as practical”. Migrant workers and members of their families also enjoy the same rights as nationals during any form of detention under Article 17(7). Furthermore, in relation to the right to security, all migrant workers and their families are, under Article 16(2), entitled to protection by the State from violence, physical injury, threats and intimidation by public officials or by private individuals, groups or institutions. As this article extends to private individuals and groups, it can be interpreted that it includes protection against xenophobic acts against migrant workers and their families.
- **Consular protection:** For the first time, in relation to all migrant workers and members of their families, the ICRMW explicitly protects the right to seek assistance and protection from the consular or diplomatic authorities⁽²²⁾. Article 23 of the ICRMW sets out the right to seek assistance in the event of expulsion; and Article 16(7) recognizes the rights surrounding arrest and detention, stating that consular and diplomatic authorities should be informed of the migrant worker’s arrest and detention, if the migrant workers so request, without delay, and the migrant worker and his or her family have the right to communicate with these authorities without delay.

¹⁴ Also provided for by Article 9. See also Article 5 ECHR. Linked closely with this right is the right to life as well as the right to be free from torture, degrading and inhumane treatment provided by Articles 9 and 10 ICRMW as well by Articles 6 and 7 ICCPR.

¹⁵ Article 16(5).

¹⁶ Article 16(8).

¹⁷ Article 16(9).

¹⁸ Article 17(1).

¹⁹ Article 17(2).

²⁰ Article 17(4).

²¹ Article 17(3).

- **Protection of identity documents:** One of the more convention-specific rights is provided by Article 21, which protects migrant workers against unauthorized confiscation or destruction of personal documents. It states that it is prohibited for anyone to destroy the passport or equivalent document of a migrant worker or a member of his or her family. Additionally, that no one is allowed to confiscate or destroy documents authorizing entry to or staying in the State, or residence or work permits unless it is done by a public official duly authorized by law and provides a detailed receipt of the confiscation to be given to the person.
- **Rights surrounding expulsion:** Several rights surrounding expulsion can be found in the previous human rights instruments⁽²³⁾ however, for the first time, Article 22 the ICRMW explicitly sets out the procedural guarantees for all migrant workers and members of their family, which includes *inter alia* the right to an individual assessment of the case, for a decision of expulsion to be taken by a competent authority in accordance with the law and communicated in a language understandable to the migrant worker, the right to submit reasons against the expulsion, and the right to have the opportunity to settle any claims for wages or entitlements before or after departure. Article 56 sets out provisions applicable only to migrant workers and members of their families in a regular situation, adding that the expulsion should not be for the purpose of depriving the migrant worker or his or her family of their rights arising out of the authorization of residence and the work permit. In addition, Article 56(3), using a non-binding wording, advises that humanitarian consideration should be taken into account during the assessment of an expulsion together with the length of time that the migrant worker has lived in the State of employment.
- **Right to be informed:** All migrant workers and members of their families have a right to be informed free of charge, upon request, and in a language they understand about their rights under the Convention as well as conditions of their admission and the obligations in order to comply with the administrative formalities of the State⁽²⁴⁾. Migrant workers and members of their families that are in a regular situation have the right to be fully informed, at the latest by the time of admission, of all conditions applicable to their admission and particularly those concerning their stay, the remunerated activities that they may engage in, and of the requirements they must satisfy in the State of employment and the authority to whom they must address themselves for any modification of those conditions. A similar provision for regular migrant workers is found in Article 2 of the ILO Convention N° 97.
- **Family reunification:** The ICRMW recognizes the importance of families for migrant workers and Article 44 provides that States Parties shall take measures to facilitate the reunification of migrant workers and his or her family⁽²⁵⁾. However, the provision limits the States' obligation to pursue such measures only in so far as "they deem appropriate" and they "fall within their competency". Moreover, note that this article only applies to migrant workers in a regular situation.

²² General provisions on the rights to consular assistance are set out in Article 36 of the Vienna Convention on Consular Relations (1963).

²³ See, *inter alia*, Articles 13 ICCPR and Article 32 of the Convention and Protocol relating to the Status of Refugees (1951/1967), which lays down procedural standards surrounding expulsion; See Article 3 CAT, Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPED, 2006), Article 33 of the Refugee Convention as well as Article 1 of Protocol 7 ECHR for the principle of *non-refoulement*.

²⁴ Article 33 ICRMW.

²⁵ Provisions on the facilitation of family reunification can also be found in Article 13 ILO Convention No.143 and Article 10 CRC.

In relation to economic, social and cultural rights, the ICRMW recognizes several of the fundamental rights already recognized in other core treaties. However, it is worth noting that the ones provided for all migrant workers and their families are generally of a more narrow scope compared to the ones granted to those in a regular situation, as well as to the interpretation provided to these rights by other treaty based bodies.

- **The right to health:** Article 28 of the Convention states that all migrant workers and members of their families have the right to receive emergency health in equality with nationals. This right is more restrictive than the right to health provided for by Article 12 of the International Covenant of Economic, Social and Cultural Rights (hereinafter ICESCR) under which, according to its Committee, '[s]tates 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'⁽²⁶⁾. Articles 43 and 45 of the ICRMW provide regular migrant workers and members of their families with the right to equality with nationals in accessing social and health services, however only in so far as the requirements for participation in the respective schemes are met.
- **The right to education:** Article 30 affirms that the children of migrant workers, irrespective of their migratory status, have a right to access free primary and secondary education in equality with nationals⁽²⁷⁾. Migrant workers in a regular situation have the right to access educational institutions, as well as vocational training and guidance to the same extent as nationals⁽²⁸⁾. The members of the family of the migrant worker enjoy equality with nationals in accessing educational institutions, as well as vocational training and guidance, provided the admission requirements and conditions for participation are met⁽²⁹⁾.

The ICRMW has included provisions aimed at protecting the migrant workers' link with their respective States of origin. For example, Article 31 requires States Parties to ensure respect for the cultural identity of migrant workers and members of their families and shall not prevent them from maintaining their cultural links with their State of origin. In relation to children of migrant workers with a regular status, Article 45(3) asks that State Parties attempt to facilitate the teaching of their mother tongue and culture. Regular migrant workers and their families also have a right to participate in public affairs of their State of origin and to vote and be elected in elections of that State⁽³⁰⁾.

Another indispensable feature of the Convention is its focus on labour rights for migrant workers, building on existing standards provided for by the ICESCR and the ILO conventions, as well as setting out a few unique provisions.

- **The principle of equality at work:** Article 25 of the ICRMW protects the right to equal treatment with nationals at work for all migrant workers and members of their families in terms of conditions of work including, overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment, and minimum age of employment⁽³¹⁾. Similar provisions are included in the ILO Conventions N° 97 and N°143. In relation to social security in the State of

²⁶ Committee on economic, social and cultural rights (CESCR), General Comment No. 14, The right to the highest attainable standard of health, 11 August 2000, , UN doc. E/C.12/2000/4 (2000), para. 34.

²⁷ CMW, General Comment No. 1, para 57. This right is also more limited than, for example, the right to education under CRC, which entitles all unaccompanied and separated minors to 'have equal access to formal and informal education, including vocational training at all levels' (CRC, General Comment No. 6, paras 40-41).

²⁸ Article 43 ICRMW.

²⁹ Article 45 ICRMW.

³⁰ Article 41 ICRMW.

³¹ Article 25(1)(a) and (b) ICRMW.

employment, all migrant workers and members of their families enjoy, under Article 27, the same treatment granted to nationals, however only in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. Regular migrant workers are provided with additional rights under Article 54 in relation to protection against dismissal, unemployment benefits, and alternative employment in the event of loss of work.

- **Rights related to trade unions and other associations:** Under Article 26, all migrant workers and members of their families have the right to *join* and *seek the assistance* of trade unions and associations that have been established according to law. This right is more restrictive than the approach taken by ILO, which has declared freedom of association to be a fundamental principle⁽³²⁾ and, in its Convention on the Freedom of Association and Protection of the Right to Organise, recognizes that “[w]orkers and employers, without distinction whatsoever, shall have the right to *establish* and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation’⁽³³⁾. Under ICRMW, the right to *form* a trade union or association only applies to migrant workers and members of their families in regular situations⁽³⁴⁾.
- **Transfer of earnings:** The ICRMW acknowledges the importance of remittances for migrant workers and their families and Article 32 states that all migrant workers have the right to transfer their earnings and savings using a means that is in accordance with the applicable legislation of the States concerned. More specifically for regular migrant workers, Article 47 states that they have the right to transfer their earnings and savings, in particular those funds necessary to support their families, from the State of employment to their State of origin or any other State. This article also requires the relevant States to facilitate such transfers.

1.3 Brief considerations on the implementation of the Convention in States Parties

At the time of writing, 46 States had ratified the ICRMW but only about half of the States Parties³⁵ had submitted an initial report to the Committee of Migrant Workers (hereinafter CMW), which makes it difficult to assess the implementation of the ICRMW worldwide. Nonetheless, some positive developments and common issues can be derived from the Concluding Observations of the CMW, which are published following the dialogues with the various States Parties during the sessions. One positive trend that can be observed is that most of the States Parties are developing and adopting legislative measures, public policies, strategies, and national action plans and programmes on many areas relevant to the implementation of the Convention⁽³⁶⁾. For example, several of the States Parties have now adopted measures related to migration in general, for example they adopted a migration

³² Article 2(a) of the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998) and Article 2 of the ILO Freedom of Association and Protection of the Right to Organise Convention (No. 87).

³³ Article 2 ILO Convention No. 87 (1948) (emphasis added).

³⁴ Article 26 is rather restrictive compared to the approach by ILO, which has stated that Freedom of Association is a fundamental principle at work under Article 2(a) of the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up(1998). Article 2 ILO Convention No. 87 follows and states that ‘Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation’.

³⁵ Albania, Algeria, Argentina, Azerbaijan, Bolivia, Bosnia and Herzegovina, Burkina Faso, Chile, Colombia, Ecuador, Egypt, El Salvador, Guatemala, Kyrgyzstan, Mali, Mexico, Morocco, Paraguay, Philippines, Rwanda, Sri Lanka, Syrian Arab Republic, Senegal, Tajikistan, Uruguay.

³⁶ See, *inter alia*, the CMW Concluding Observations on Bosnia and Herzegovina, 26 September 2012, UN Doc. CMW/C/BIH/CO/2, on Azerbaijan, 26 April 2013, UN Doc. CMW/C/AZE/CO/2, on Argentina, 28 September 2011, UN Doc. CMW/C/ARG/CO/1, and on Rwanda, 10 October 2012, UN Doc. CMW/C/RWA/CO/1.

law⁽³⁷⁾, recognising a number of rights to both regular and irregular migrants⁽³⁸⁾, or measures relating to labour migration⁽³⁹⁾, including the adoption of a definition of migrant worker which is in line with the one provided in the Convention⁽⁴⁰⁾. Other relevant actions adopted by States Parties include measures aimed to: regularise irregular migrants⁽⁴¹⁾ prevent and punish trafficking⁽⁴²⁾, as well as discrimination, racism and xenophobia, including legislative measures to shift the burden of proof on the defendant when the claimant has established a *prima facie* case⁽⁴³⁾. In addition, the Committee welcomes bilateral or multilateral agreements between the States Parties and other States related to the protection of the rights of migrant workers⁽⁴⁴⁾. Finally, some best practices which the Committee has observed are actions relating to the protection of the States Parties' migrant workers who are working abroad or planning on doing so, e.g. establishing migration centres for potential migrant workers⁽⁴⁵⁾, raising awareness and access to information⁽⁴⁶⁾, as well as protecting the rights of and providing assistance for migrant workers abroad⁽⁴⁷⁾.

Although many positive developments can be observed in relation to the implementation of the ICRMW in most of the States Parties, there are a few concerns that are often raised by the CMW:

- The first issue mentioned in most Concluding Observations is the problem of receiving **data** on migration and the data it does receive is rarely disaggregated appropriately⁽⁴⁸⁾. Recurrently, the State Parties supply general statistics on migrants in their territory but fail to provide information and indicators on their access to basic services, accurate data on the number of irregular migrant workers and member of their families in the territory of the States Party, and the number of their own nationals abroad⁽⁴⁹⁾.
- A second concern raised in many of the Concluding Observations is that there is often a **lack of training of and information on the Convention** and its provisions among public officials, *inter alia*, judges, prosecutors, police officers, immigration officials, labour inspectors, social workers and other agents of the State who deal with migrant workers and members of their families, as

³⁷ CMW, Concluding Observations on Argentina, UN Doc. CMW/C/ARG/CO/1, para. 5 (a) and on Rwanda, UN Doc. CMW/C/RWA/CO/1, para. 4 (a).

³⁸ *Ibid.*, UN Doc. CMW/C/ARG/CO/1, para. 5 (a),

³⁹ See e.g. CMW, Concluding Observations on Sri Lanka, 19 October 2009, UN Doc. CMW/C/LKA/CO/1, para. 7, on Rwanda UN Doc. CMW/C/RWA/CO/1, para. 4 (b), on Tajikistan, 16 May 2012, UN Doc. CMW/C/TJK/CO/1, paras 5 (b), (d), 6 and 7.

⁴⁰ CMW Concluding Observations on Argentina, UN Doc. CMW/C/ARG/CO/1, para. 5 (b).

⁴¹ *Ibid.*, para. 6 (a).

⁴² See e.g. CMW Concluding Observations on Bosnia and Herzegovina, UN Doc. CMW/C/BIH/CO/2, para. 4, on Paraguay, 16 May 2012, UN Doc. CMW/C/PRY/CO/1, para. 7, on Tajikistan, UN Doc. CMW/C/TJK/CO/1, para. 5, on Argentina, UN Doc. CMW/C/ARG/CO/1, para. 5.

⁴³ *Ibid.* UN Doc. CMW/C/ARG/CO/1, para. 6

⁴⁴ See e.g. CMW Concluding Observations on Rwanda, UN Doc. CMW/C/RWA/CO/1, para. 4, on Paraguay, UN Doc. CMW/C/PRY/CO/1, para. 8, on Tajikistan, UN Doc. CMW/C/TJK/CO/1, para. 7, on Chile, 28 September 2011, UN Doc. CMW/C/CHL/CO/1, on Guatemala, 18 October 2011, UN Doc. CMW/C/GTM/CO/1, para. 7.

⁴⁵ See e.g. CMW Concluding Observations on Rwanda, UN Doc. CMW/C/RWA/CO/1, para. 4, on Tajikistan, UN Doc. CMW/C/TJK/CO/1, para. 6.

⁴⁶ See e.g. CMW Concluding Observations on Paraguay, UN Doc. CMW/C/PRY/CO/1, para. 9, on Rwanda, UN Doc. CMW/C/RWA/CO/1, para. 4.

⁴⁷ See e.g. *ibid.*, UN Doc. CMW/C/PRY/CO/1, paras. 5-6 and 10 and on Guatemala UN Doc. CMW/C/GTM/CO/1, para. 7.

⁴⁸ See the CMW, Concluding Observations on Azerbaijan, UN Doc. CMW/C/AZE/CO/R.2, para 14, on Paraguay, UN Doc. CMW/C/PRY/CO/1, para. 20, on Argentina, UN Doc. CMW/C/ARG/CO/1, para. 13, on Albania, UN Doc. CMW/C/ALB/CO/1, para. 15, on Senegal, 10 December 2010, UN Doc. CMW/C/SEN/CO/1, para. 12

⁴⁹ See the CMW, Concluding Observations on Rwanda, UN Doc. CMW/C/RWA/CO/1, para. 13, on Argentina, UN Doc. CMW/C/ARG/CO/1, para. 13, on Chile, UN Doc. CMW/C/CHL/CO/1, para. 16, on Paraguay, UN Doc. CMW/C/PRY/CO/1, para. 20.

well as information available to migrant workers⁽⁵⁰⁾. The lack of awareness on the Convention seriously undermines its effective implementation.

- The third main concern that is commonly identified in the Concluding Observations is that migrant workers and members of their families who are victims of discrimination often face obstacles when trying to exercise their **right to an effective remedy** in the States Parties⁽⁵¹⁾. This is an essential right for migrant workers and members of their families who want to file complaints and obtain an effective redress in the courts in the event that their rights under the Convention have been violated. Such right also expressly recognized by Article 83 of the Convention.

⁵⁰ See CMW, Concluding Observations on Rwanda, UN Doc. CMW/C/RWA/CO/1, para. 15, on Sri Lanka,, UN Doc. CMW/C/LKA/CO/1, para. 23, on Azerbaijan, , UN Doc. CMW/C/AZE/CO/R.2, para. 16 on Tajikistan, UN Doc. CMW/C/TJK/CO/1, para. 19.

⁵¹ See CMW, Concluding Observations on Paraguay, 17 April 2012, UN Doc. CMW/C/PRY/CO/1, para. 24, on Tajikistan, 16 May 2012, UN Doc. CMW/C/TJK/CO/1, para. 23 on Rwanda 10 October 2012, UN Doc. CMW/C/RWA/CO/1, para. 17, and on Mexico 6 April 2011, UN Doc. CMW/C/MEX/CO/2, para. 25.

2. REVIEW OF THE EU POLICY ON LEGAL MIGRATION AND ITS IMPACT ON THIRD COUNTRIES

2.1 Treaty Provisions - A Common Area of Justice, Freedom and Security

To date, while Member States retain exclusive competence to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed, 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 is a matter of shared competence⁽⁵²⁾ between the EU and its Member States and has given rise to an important body of EU legislation on labour immigration. The Treaty of Lisbon⁽⁵³⁾ that entered into force on 1 December 2009 introduced important changes in the “area of freedom, security and justice” greatly extending the fields covered by ordinary legislative procedure and qualified majority voting, including to the issue of legal migration, thus establishing the European Parliament as co-legislator.

2.2 EU *acquis* and fundamental rights

With the entry into force of the Treaty of Lisbon, the European Charter of Fundamental Rights (hereinafter EU Charter)⁽⁵⁴⁾ was given legally binding status. Its provisions now apply to legal acts of the institutions as well as to Member States when implementing Union law⁽⁵⁵⁾. Many of the fundamental rights enshrined in the EU Charter are also common to the ICRMW⁽⁵⁶⁾. Both adopt a similar approach with differentiated rights according to the regular/irregular status of migrants. The EU Charter makes a distinction between EU citizens, regular migrants and irregular migrants, with a significant number of rights applied to ‘everyone’ in the EU irrespective of the legal status of their presence. Similarly the ICRMW clearly distinguishes between rights granted to all migrant workers and those only granted to migrant workers in a regular situation.

There are some important differences in the rights afforded by the EU Charter and the ICRMW as follows:

- The right to fair and just working conditions (Article 31 EU Charter and Articles 25.1 a and 70. ICRMW): The ICRMW includes a more specific provision, stipulating that remuneration, conditions of work and terms of employment should be equal to those granted to nationals for all migrants whereas the EU Charter merely states “every worker has the right to working conditions which respect his or her health, safety and dignity”;
- The right to social security (Article 27 ICRMW, Article 34.2 EU Charter): While the ICRMW provides qualified access to social security rights for all migrant workers and members of their families on the same grounds as nationals⁽⁵⁷⁾, the EU Charter limits social security entitlement to those ‘residing and moving legally within the EU’.

⁵² Article 79 of the Treaty on the Functioning of the European Union (TFEU), in connection with Article 4(2)(j) TFEU.

⁵³ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007.

⁵⁴ Charter of Fundamental Rights of the European Union, OJ C 83, 30.3.2010, p. 389

⁵⁵ See Article 51 of the Charter of Fundamental rights

⁵⁶ For a detailed analysis of the common provisions of the EU Charter and the ICRMW see OHCHR – Regional Office for Europe, *Migrant workers’ rights in Europe*, 2011, p. 29-31. Retrieved from: <http://www.europe.ohchr.org/EN/Publications/Pages/publications.aspx>.

⁵⁷ Article 27 ICRMW specifies that all workers have access to social security ‘in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties’.

- Protection of the family (Article 33 EU Charter, Article 44 ICRMW): The EU Charter does not expressly recognise the right to family unity, although it encompasses the right to respect for family life (Article 7 EU Charter)⁽⁵⁸⁾, the right to found a family (Article 9 EU Charter), and to legal, social and economic protection of the family (Article 33 EU Charter). It should be noted that the right to family unity, as provided for in the ICRMW, does not entail an obligation to provide family reunification but only the obligation for States to take measures *that they deem appropriate and that fall within their competence to facilitate* family reunification;
- Right to health (Article 35 EU Charter, Article 28 ICRMW): The EU Charter provides a broader right to healthcare for irregular migrants than the ICRMW. The EU Charter stipulates that *everyone* has the right of access to preventive health care and medical treatment under the conditions established by national laws and practices. The ICRMW only grants the right to emergency medical care to all (regular and irregular) migrant workers and their families. Regular migrants and their families are covered by additional provisions (Articles 43.1 and 45.1 ICRMW) granting the same access to social and health services as nationals, provided that the requirements for participation in the respective schemes are met;
- Non-discrimination (Article 21 EU Charter, Article 7 ICRMW): Both the ICRMW and the EU Charter protect against discrimination on the grounds of sex, race, colour, ethnic or social origin, language, religion or belief/conviction, political or any other opinion, property, birth and age. Both also include provisions against discrimination on the basis of nationality although the EU Charter (Article 21(2)) limits this to the scope of application of the Treaty establishing the European Community and of the Treaty on European Union and therefore to EU citizens⁽⁵⁹⁾. The ICRMW also includes among the grounds for discrimination 'marital status, birth or other status' which may apply to the regular or irregular status in the country. Nonetheless, both instruments recognise the possibility for States to limit certain rights to nationals or migrants in a regular situation;
- Right to vote (Article 40 EU Charter, Article 42 ICRMW): The right to vote and stand in municipal elections contained in the EU Charter only applies to EU citizens. Provisions contained in the ICRMW call for States of employment to facilitate participation of regular migrants and their families in decisions concerning local communities (Article 42(2)) and recognise the political rights but only in so far as the 'State, in the exercise of its sovereignty, grants them such rights' (Article 42(3));
- Right to leave/right to free movement (Article 45 EU Charter, Article 8 ICRMW): The ICRMW explicitly recognises that all migrant workers and their families 'shall be free to leave any State, including their State of origin' (Article 8). The EU Charter does not address the issue of right to leave. The EU Charter recognises that EU citizens have the right to move and reside freely within the EU, while third country nationals may be granted this right.

In its Strategy for the effective implementation of the Charter of Fundamental Rights⁽⁶⁰⁾, the European Commission committed to drawing up annual reports on the application of the EU Charter. Subsequently, a first report was released in 2011 reviewing the progress in its effective

⁵⁸ The right to respect for family right is also protected by Article 8 of the European Convention on Human Rights (ECHR). The European Court of Human Rights has interpreted this right as encompassing a right to family reunification, particularly to the benefit of children left behind. See, for instance, ECtHR, *Sen v. the Netherlands*, application No. 31465/96, judgment 21 December 2001, ECtHR, *Tuquabo Tekele v Netherlands*, application No. 60665/00, judgment 1 December 2005 and ECtHR, *Osman v. Denmark*, application No. 38058/09, judgment 14 June 2011. It is worth noting that, according to its Article 52, as far as the Charter provides for the same rights as those protected by the ECHR, the scope and the meaning of such rights should be the same as those of the ECHR, as they have been interpreted by the ECtHR. The right to family reunification should, thus, be considered as implicitly recognized in the Charter.

⁵⁹ OHCHR – Regional Office for Europe, *Migrant workers' rights in Europe*, p.31.

implementation⁽⁶¹⁾. In the 2011 report, migrants and protection of their rights were only referenced in the description of the role of the European Parliament in upholding fundamental rights of refugees and beneficiaries of subsidiary protection in the EU (amendment to the Qualification Directive⁽⁶²⁾) and migrant workers (extending social rights in the Single Permit Directive⁽⁶³⁾). Additionally, the EC's efforts on combating xenophobia and racism were mentioned, as well as its focus on equal treatment in the European Agenda for Integration of Third-Country Nationals⁽⁶⁴⁾ released in 2011.

The report covering the application of the EU Charter in 2012⁽⁶⁵⁾ draws attention to the European Court of Justice's control of compliance of EU acts with the Charter. The report highlights the CJEU judgment annulling a Council implementing decision on surveillance of the external sea borders of the EU⁽⁶⁶⁾ and notes the impact of CJEU rulings on the development of new legislation, including on negotiations of the 'Dublin II' regulation⁽⁶⁷⁾. The report notes that to date national courts in the EU Member States have made most frequent reference to the EU Charter in the area of immigration and asylum. However, these reports fall short of providing in-depth analysis of the application of the EU Charter as it relates to migrant workers' rights. The European Parliament might consider inviting the Commission to address the question of the respect of migrants' rights more thoroughly in its annual reports on the implementation of the EU Charter.

2.3 Current priorities – The Stockholm Programme

The Stockholm Programme⁽⁶⁸⁾ adopted in 2009 sets out the EU political and legislative priorities for the **area of justice, freedom and security** for the period 2010-14. The Stockholm Programme aims to achieve a 'forward looking and comprehensive European migration policy' and, like the ICRMW, sets out to improve regulation of migratory movements while guaranteeing a set of fundamental rights. It reiterates the objective, already present in the Tampere conclusions⁽⁶⁹⁾, of ensuring '*fair treatment of third country nationals who reside legally on the territory of its Member States*' and of '*granting them rights and obligations comparable to those of EU citizens*'. However, on the rights of irregular migrants the Stockholm Programme remains silent. This omission and the perceived focus on measures to

⁶⁰ European Commission, *Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union*, COM(2010) 573 final, 19 October 2010.

⁶¹ European Commission, *2011 Report on the Application of the EU Charter of Fundamental Rights*, COM(2012) 169 final, 16 April 2012.

⁶² Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted OJ L 304, 30 September 2004.

⁶³ Directive 2011/98/EU Directive 2011/98/EU. of 29 April 2004, minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ,OJ L 343, 23 December 2011. Notably, Article 12 of the Directive provides for the right to equal treatment on e.g. working conditions (salary, dismissal, safety and wellbeing at work), tax benefits, social security and public housing.

⁶⁴ European Commission, *European Agenda for Integration of Third-Country Nationals*, COM(2011) 455 final, 20 July 2011.

⁶⁵ European Commission, *2012 Report on the Application of the EU Charter of Fundamental Rights*, COM(2013) 271 final, 8 May 2013.

⁶⁶ CJEU, Case C-355/10, *European Parliament v. Council of EU*, 5 September 2012, quoted in European Commission, *2012 Report on the Application of the EU Charter of Fundamental Rights*, p.10.

⁶⁷ CJEU, joined Cases C-411/10 and C-493/10, *N.S. v Secretary of State for the Home Department and M.E. e.a. v Refugee Applications Commissioner*, 21.12.2011, quoted in European Commission, *2012 Report on the Application of the EU Charter of Fundamental Rights*, p.11.

⁶⁸ European Council (2010/C 115/01), *The Stockholm Programme — An open and secure Europe serving and protecting citizens*, OJ C 115, 4 May 2010.

⁶⁹ Presidency Conclusions, Tampere European Council, 15-16 October 1999, Bulletin EU 10-1999.

control immigration have been widely criticized by human rights groups⁽⁷⁰⁾. In this context the ICRMW, widely recognized as the most comprehensive international treaty in the field of migration and human rights, can offer useful guidance to the EU when addressing the challenge of achieving balanced approach that guarantees fair treatment and respect for fundamental rights as well as management of migration in line with State interests.

2.4 Internal migration policy and its external impact

The EU legislative approach to labour migration policies has tended to classify migrants into particular 'categories' resulting in diverse sets of rules and rights for different groups (e.g. highly skilled workers, students and researchers, seasonal workers, inter-corporate transferees, etc.). As a result a hierarchy of rights can be detected in EU legislation on labour immigration, where rights are granted not only according to the regular/irregular status of migrants but according to the migrants' skills/perceived economic contribution to the EU⁽⁷¹⁾. This section will focus on those provisions of EU legislation on labour immigration that are most relevant to the scope of the ICRMW with only limited attention to conditions of entry or permission to stay and emphasis on provisions pertaining to the rights of migrants.

The **Long-Term Residence Directive**⁽⁷²⁾ (2003) includes several provisions pertaining to the rights accorded to holders of long term resident status that fall within the scope of the ICRMW. Under Article 11 of the Directive, EU long-term residents enjoy the same treatment and rights as nationals in certain areas, including: access to employment; education and training; qualified access to social security (at least core benefits), and freedom of association. The Article also opens possibilities for Member States to restrict equal treatment in line with national procedures. Here again Article 45 of the ICRMW is more generous in scope (applicable to *all* regular migrants) and extent (fewer restrictions on equal treatment with nationals). However it should be noted that under the terms of the Directive, Member States may also grant access to additional benefits in these areas; or grant equal treatment in others (Article 11(5)).

The **Family Reunification Directive**⁽⁷³⁾ (2003) provides that all non-EU nationals with a residence permit valid for one year or more and who have the genuine option of long term residence have the right to be joined by their spouse and minor dependent children. This provision goes beyond the related article of the ICRMW (Article 44) which does not entail an obligation to provide family reunification but only the obligation for States to take measures *that they deem appropriate and that fall within their competence to facilitate* family reunification. The Family Reunification Directive also recognises the rights of the sponsor's family members to access to education, employment and vocational training on the same terms as the person they have joined (Article 14). While Member States are afforded considerable discretion in their application of these provisions in accordance with national legislation, the judgment of the European Court of Justice in Case C-540/03 *European Parliament v. Council of the European Union*, clearly requires EU States to apply the Directive's rules in a manner consistent with the protection of fundamental rights, notably regarding family life and the principle of the best interests of the child. The rights provisions of the Directive do not go so far as those of the

⁷⁰ For examples see commentary by Amnesty International and Migrants Rights Network. S. Carrera and E. Guild, 'Undocumented migrants and the Stockholm Programme', in S. Carrera and M. Merlino (eds.) *Assessing EU Policy on Irregular Immigration under the Stockholm Programme*, CEPS Papers, Centre for European Policy Studies, Brussels, 2010, p.6.

⁷¹ M., De Somer, *Trends and gaps in the academic literature on EU labour migration policies*, CEPS Papers, Centre for European Policy Studies, Brussels, 2013, p.4.

⁷² Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16, 23 January 2004, p. 44-53.

⁷³ Council Directive 2003/86/EC reunification of 22 September 2003 on the right to family reunification, OJ L 251, 3 October 2003.

ICRMW (Article 45) which state that family members of regular migrant workers shall enjoy equality *with nationals* in relation to access to education, vocational training, social and health services and access to cultural life.

The Blue Card Directive⁽⁷⁴⁾ (2009) concerning highly skilled migrants guarantees significant rights, including a number of traditional rights and benefits afforded to EU citizens. It allows high-skilled migrant workers with a job offer to work in an EU country for a maximum of four years, with possibility of renewal. The Directive grants more favourable provisions on movement than the Long-Term Residents Directive. The Blue Card holder can move to another EU Member State after 18 months, although only if they receive a job offer in the second EU Member State and re-apply for a Blue Card there. Furthermore the Directive affords significant discretion to Member States to reduce the scope of Blue Card holders to move to another EU Member State (Articles 8(2), 9, 13 18, 19). Blue Card holders are offered generous terms for family reunification (going beyond provisions of the Family Reunification Directive), and right to work is granted to family members without delay. The Directive provides for equal treatment with nationals in relation to: working conditions; freedom of association; education, training and recognition of qualifications; social security provisions; public housing and free access to the entire territory of the Member State, including the right to leave and re-enter (Article 14). Similar provisions for equality of treatment with nationals are provided to all regular migrants in the ICRMW.

The Single Permit Directive⁽⁷⁵⁾ (2011) was the first new legislation in the area of legal migration to be adopted under the ordinary legislative procedure following the entry into force of the Treaty of Lisbon. It defines a common set of rights awarded to non-EU workers and other third-country nationals *legally residing* in an EU Member State (with the exception of refugees and beneficiaries of international protection, long-term and permanent residents, Blue Card holders, seasonal workers, posted workers and intra-corporate transferees). The Directive provides for equal treatment with nationals of Member States in eight areas: working conditions (pay, dismissal, health and safety); freedom of association and trade union membership; education and vocational training; recognition of qualifications; social security⁽⁷⁶⁾; tax benefits; access to goods and services – including procedures for obtaining housing – and advice services offered by employment offices. The provisions are similar to those covered in Part IV of the ICRMW. However, the Directive allows the Member States possibilities to limit the equal treatment provisions in a number of situations.

In addition to the aforementioned Directives the EU is currently negotiating three further Directives in the area of legal immigration with relevance to the provisions of the ICRMW covering intra-corporate transferees, seasonal workers and students and researchers. In 2010 the Commission proposed a **Directive on Intra-Corporate Transferees⁽⁷⁷⁾** with the aim of creating an attractive EU scheme harmonising the conditions for entry, stay and intra-EU mobility of third-country national workers (managers, specialists and graduate trainees) being posted by a group or undertaking based outside the EU to an entity of the same group based on the EU territory. The proposal also sets out the rights for

⁷⁴ Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155/17, 18 June 2009.

⁷⁵ Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011, OJ L 343/1, 23 December 2011. Notably, Article 12 of the Directive provides for the right to equal treatment on e.g. working conditions (salary, dismissal, safety and wellbeing at work), tax benefits, social security and public housing

⁷⁶ Branches of social security, as defined in Regulation (EC) No 883/2004: sickness benefits; maternity and equivalent paternity benefits; invalidity benefits; old-age benefits; survivors' benefits; benefits in respect of accidents at work and occupational diseases; death grants; unemployment benefits; pre-retirement benefits; family benefits.

⁷⁷ European Commission, *Proposal for a Directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer*, COM (2010) 378 final, 17 July 2010.

this specific category of migrant and their family members. Negotiation of the proposal between the Council and European Parliament is ongoing.

Negotiations of the **Seasonal Workers Directive**⁽⁷⁸⁾ also began in 2010 and are still ongoing. The proposal aims to regulate the entry and residence of third-country nationals in the EU for the purpose of seasonal employment and to define certain of their rights. The Commission proposal seeks to grant equal treatment with nationals as regards working conditions and social security rights. In addition, the Directive would cover the right to adequate housing. Given the temporary status of Seasonal Workers, rights are not conferred to family members residing in a third country and family reunification falls outside the scope of the Directive. The ICRMW also includes specific provisions on seasonal workers. It provides a very broad definition of seasonal worker⁽⁷⁹⁾ and extends the rights attributed to regular migrant workers under Part IV of the ICRMW in so far as they can be attributed to seasonal workers, taking into account that they are present in the relevant State only for part of the year (Article 59).

The Commission has recently (25 March 2013) presented a proposal for new rules for the entry and residence of third country national **students and researchers** as well as for school pupils, trainees, volunteers and au pairs⁽⁸⁰⁾. The proposal is to recast and merge the existing students and researchers Directives. With the Proposal, the Commission is suggesting changes in the rights afforded to these categories of migrants (including increased access to the labour market and job-seeking) in line with the provisions of the Single Permit Directive. More favourable rights are specifically granted to third-country national researchers, with more favourable provisions for family admission, as well as access to the labour market by family members, and their intra-EU mobility. While the ICRMW does not apply to students or trainees (Article 3), researchers and au pairs would fall under its scope.

Very few provisions contained in EU legislation address the rights of irregular migrants. The **Return Directive** ⁽⁸¹⁾ refers to the protection of fundamental rights in the Preamble and in Article 1, as well as to procedural safeguards (Articles 12-14), and to standards for detention conditions (Articles 16 and 17). Although highly controversial, the Return Directive does offer some protection for irregular migrants including the right to appeal or seek review of return decisions (Article 13) and the right to essential health care and, in the case of children, to access education while removal is pending (Article 14). Many of these protections are also covered in Articles 22 and 56 of the ICRMW, which provide a number of safeguards in case of expulsion to all migrants or migrants in a regular situation respectively, including protection against collective expulsion. It should be noted that collective expulsion is also explicitly prohibited in Article 19 of the EU Charter.

The **Employers Sanction Directive**⁽⁸²⁾ establishes minimum standards across the EU on sanctions and measures against employers of irregularly-staying third-country nationals. It provides for measures to enforce payment of any outstanding remuneration (Article 6) and for the right to access complaint mechanisms (Article 13). The ICRMW also provides for sanctions against employers (Article 68) and

⁷⁸ European Commission, *Proposal for a Directive of the Parliament of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment*, COM(2010) 379 final, 13 July 2010.

⁷⁹ ICRMW Article 2 (b).

⁸⁰ European Commission, *Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training, voluntary service and au pairing*, COM(2013) 151 final, 13 July 2010.

⁸¹ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98, 24 December 2008.

⁸² Directive 2009/52/EC of the European Parliament and of the Council of 18 July 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ L 168/24, 30 June 2009.

underlines that migrant workers rights' should not be undermined by measures taken to eliminate employment of irregular migrants.

EU legislation on labour immigration contains important provisions in the areas covered by the scope of the ICRMW to uphold the rights of migrant workers. However Member States retain significant discretion when it comes to translating EU Directives into national law and in determining the extent and scope of rights afforded to regular migrant workers. Member State discretion is even greater when determining the rights of irregular migrants who largely fall outside of the scope of current EU legislation.

2.5 EU policy on integration of third-country nationals

The Treaty of Lisbon provided a reinforced legal basis for common policy development on immigrant integration at the EU level. Article 79(4) of the Treaty on the Functioning of the EU (TFEU) states measures may be established 'to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States'. In this light, a new European Agenda for the Integration of Third-Country Nationals issued by the European Commission in 2011 affirmed in line with the general spirit of ICRMW that 'Europe needs a positive attitude towards diversity and strong guarantees for fundamental rights and equal treatment, building on the mutual respect of different cultures and traditions'⁽⁸³⁾. The respect of universal values and fundamental human rights is enshrined in the TFEU. Among the concrete recommendations to the Member States, the Agenda proposes to step up efforts to fight discrimination and strengthen measures to implement in practice the principle of equal treatment, but also to remove obstacles to migrants' political participation.

2.6 The external dimension of EU labour migration policy

The Global Approach has served as the EU's strategic policy framework for its relations with third countries in the field of migration since 2005. In 2011, the European Commission published a Communication on the renewed 'Global Approach to Migration and Mobility'⁽⁸⁴⁾ (GAMM). With the new Global Approach, the EU seeks to become more strategic and more efficient, developing stronger links between related EU policy areas. Facilitating (temporary and circular) mobility of third country nationals not only into the EU, but also inter- and intra-regionally outside the EU, was given important priority as reflected in the addition of mobility in the title of the policy. The GAMM is structured around four pillars: organizing and facilitating legal migration and mobility; preventing and reducing irregular migration and trafficking in human beings; promoting international protection and enhancing the external dimension of asylum policy [*new pillar*]; and maximizing the development impact of migration and mobility. The GAMM seeks to be migrant-centred, taking the needs of the individuals concerned into consideration and empowering them [*new terminology*]. It calls for the human rights of migrants to be respected and strengthened as a cross-cutting issue across the four pillars and in sending, receiving and transit countries [*new emphasis*].

The renewed GAMM states that dialogues on migration and mobility at the regional and bilateral levels should be standardized as the drivers for the Global Approach and based on high-level and senior

⁸³ European Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *European Agenda for the Integration of Third-country Nationals*, COM (2011) 455 final, 20 July 2011.

⁸⁴ European Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The Global Approach to Migration and Mobility*, COM(2011) 743 final, 18 November 2011.

officials' meetings, action plans, cooperation instruments, and monitoring as relevant [*new terminology*]. The GAMM is to be implemented with priority countries through two partnership frameworks: Mobility Partnerships and Common Agenda on Migration and Mobility (CAMM). The ICRMW also gives prominence to cooperation among states for the promotion of sound, equitable, humane and lawful conditions for international migration (Part VI of the ICRMW) and promotes a balanced approach with attention to "labour needs and resources, but also to the social, economic, cultural and other needs of migrant workers and members of their families involved, as well as to the consequences of such migration for the communities concerned" (Article 64(2)). The ICRMW also contains relevant provisions relating to the EU priority preventing irregular migration in Articles 68 and 69 which call on States to collaborate to detect and eliminate irregular movements and employment of migrant workers.

Although the GAMM aims to adopt a balanced approach to migration issues, it has been criticised for focusing too heavily on security concerns and control measures and for adopting a utilitarian approach that treats migrants as short-term disposable labour⁽⁸⁵⁾. One factor frequently cited as contributing to the dominance of Member State interests in the external dimensions of EU labour migration policies is the complex division of competences between the EU and its Member States, with Member States retaining exclusive competence over important tools for cooperation with third countries (e.g. access to labour markets, skills recognition, integration policies)⁽⁸⁶⁾. Furthermore, EU cooperation on the external dimension of migration policy is structured through non-binding instruments (Mobility Partnerships, Common Agendas, and dialogues) which are based on voluntary participation of Member States. To succeed these EU-based tools must demonstrate an added value above and beyond bilateral approaches and advance the (mutual) interests of the various participating states. Implementation of the GAMM is therefore dependent on the will of Member States to engage in EU-led cooperation with third countries. Against this backdrop and given the diverse interests of EU Member States it has been challenging to develop a comprehensive and coherent implementation of GAMM priorities at EU level. The first biennial progress report on the implementation of the GAMM, shortly to be published by the European Commission, should throw further light on these issues and should include an assessment of the GAMM's performance on migrants rights.

Tensions between the supranational and intergovernmental approaches are also reflected in the implementing tools of the GAMM as the experience of Mobility Partnerships has shown. The Stockholm Programme identifies Mobility Partnerships 'as the main strategic, comprehensive and long-term cooperation framework for migration management with third countries, adding value to existing bilateral frameworks'⁽⁸⁷⁾. Mobility Partnerships provide a common set of commitments based on the GAMM pillars and respect for the protection of human rights⁽⁸⁸⁾. They offer third countries an EU support package for capacity building and cooperation as well as for visa facilitation, and require the negotiation of an EU readmission agreement. In its 2009 evaluation of the Mobility Partnerships, the European Commission concluded that Mobility Partnerships have had 'a positive impact on deepening the relationship between the EU and the corresponding partner country'. However, the evaluation also points to key weaknesses in the approach taken so far namely: failure of EU Member States to agree on clear strategic priorities beyond the importance of addressing 'illegal' migration; and failure to adopt a coordinated approach or to adequately integrate Mobility Partnerships in priority setting and aid programming, with the European Commission acknowledging that 'the partnerships risk being a

⁸⁵ M. De Somer, *Trends and gaps in the academic literature on EU labour migration policies*, p. 12.

⁸⁶ Ibid.

⁸⁷ The Stockholm Programme, Chapter 6.1.1, p. 28 (2010/C 115/01).

⁸⁸ European Commission Staff Working Document, *Mobility Partnerships as a tool of the Global Approach to Migration*. SEC(2009) 1240 final, 18 September 2009.

collation of new and already planned activities'⁽⁸⁹⁾. The Commission's evaluation did not provide an assessment of the mobility partnerships implementation of a migrant-centred approach or shed light on the impact of mobility partnerships on the rights of migrants.

It is clear that initiatives under the Mobility Partnerships addressing irregular migration and border management have tended to dominate, while only limited attention has been paid to legal migration, portability of rights, or skills recognition⁹⁰. In a number of cases Member States have presented existing bilateral agreements for legal migration as their contribution to Mobility Partnerships. Where new opportunities for legal migration have been created they have mainly been via circular or temporary migration schemes⁽⁹¹⁾. Limited mobility opportunities could lead to the rise of irregular migration, thus entrenching migrant vulnerabilities. Carrera and Sagrera have also argued that Mobility Partnerships are relatively weak instruments for the protection of migrants' rights⁽⁹²⁾ and that the soft law nature, of Mobility Partnerships excludes them from the normal EU institutional processes (oversight by the European Parliament, judicial scrutiny by the Court of Justice). As the EU Member State participation and specific contents of each Mobility Partnership vary a more detailed review of the activities and their implications for migrant workers' rights would be necessary to enable further conclusions. Several States Parties to the ICRMW are EU candidate countries, potential candidates or European Neighbourhood countries, including those with existing Mobility Partnerships: Albania, Azerbaijan, Bosnia and Herzegovina, Cape Verde, Egypt, Libya, Montenegro (signed only), Morocco, Serbia and Turkey. This may imply a possibility to strengthen the reference to the implementation of the Convention in bilateral cooperation on migration with the EU, in particular in areas with clear reference by ICRMW on provision of information and consular support and other services to migrants, as well as cooperation on prevention of clandestine movements and employment and orderly return and reintegration.

In future implementation, stronger efforts to improve the balance between the different pillars of the GAMM would be needed with particular attention to legal migration and improving its links to development. Migration has been included as a priority area for the EU's approach to Policy Coherence for Development (PCD) since 2005⁽⁹³⁾. The entry into force of the Lisbon Treaty has reinforced the EU commitment to PCD. Article 208 of the TFEU reaffirms that the EU shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries. Specific targets and indicators on the facilitation of legal migration, Mobility Partnerships, and the facilitation of circular migration are included in the Policy Coherence for Development Work Programme 2010-2013⁽⁹⁴⁾ albeit with a relatively low level of ambition. Including targets on legal migration and the migration-development nexus with greater attention to migrants' rights in the future

⁸⁹ European Commission, Staff Working Document, *Mobility Partnerships as a tool of the Global Approach to Migration*. SEC (2009) 1240 final, 18 September 2009.

⁹⁰ For some of the EC proposals on future work see European Commission. Staff Working Document, *Migration and Development accompanying the document* Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. The Global Approach to Migration and Mobility. COM (2011) 743 final, 18 November 2011.

⁹¹ Examples include circular migration schemes between Czech Republic and Georgia, Portugal and Cape Verde or France's programme for young professionals, and the German initiative to offer long term residents the possibility of extended return (up to 2 years) without losing residence rights.

⁹² S.,Carrera and R., Sagrera, *The Externalisation of the EU's Labour Immigration Policy: Towards Mobility or Insecurity Partnerships?*, CEPS Working Document No. 321, Centre for European Policy Studies, Brussels, 2009.

⁹³ European Commission Communication of 12 April 2005 - *Policy Coherence for Development - Accelerating progress towards attaining the Millennium Development Goals*, COM(2005) 134 final, 12 April 2005.

⁹⁴ European Commission Staff Working Document, *Policy Coherence for Development Work Programme 2010- 2013*, SEC(2010) 421 final, 21 April 2010.

may be one way to encourage a more balanced approach to implementation of the GAMM and focus on migrants rights in line with the spirit of the ICRMW. The EU's Agenda for Change⁽⁹⁵⁾ also emphasises the important development impact of migration policies and states that the EU should 'assist developing countries in strengthening their policies, capacities and activities in the area of migration and mobility, with a view to maximizing the development impact of the increased regional and global mobility of people' and indicates that the EU 'will support targeted efforts to fully exploit the interrelationship between migration, mobility and employment'. It would be important to ensure that these targeted efforts integrate consideration of migrant workers' rights. While the focus of PCD efforts has been on how the EU will 'address global challenges in a development-friendly manner', it would be equally important to ensure that the PCD agenda addresses the broad integration of migration issues into development policies, processes and instruments, examining coherence with the balanced approach advocated in the GAMM.

In addition, some existing instruments of the Single Market already have relevance to the third countries. The Payment Services Directive⁽⁹⁶⁾ constituting part of the EU internal market architecture regulating payment services and payment service providers to increase competition and participation in the payments industry (particularly from non-banks) thus reducing costs and to improve consumer protection by greater transparency. According to the EC, some EU Member States have already decided to extend the Directive's field among operators with presence outside the EU and working in currencies other than the euro or other EU Member State currencies. In line with Article 32 of the ICRMW, such measure could improve the access of migrants to formal financial services. In addition, from April 2011 with the Directive on Electronic Money⁽⁹⁷⁾, electronic money institutions (for example, telecom providers) may conduct other business activities, including financial transfers, with the application of the Directive remaining intra-EU.

To sum up, improved coherence would be needed not just between the various external components of EU policies, but between its internal and external approaches, including to migration management. This would also bring the overall policy approach of the EU and its Member States closer in spirit to the provisions of ICRMW enabling the focus on migrants and upholding their rights.

3. ANALYSIS OF THE REASONS FOR NON-RATIFICATION THE CONVENTION AND ASSESSMENT OF THE POSSIBLE CONSEQUENCES OF ITS IMPLEMENTATION

3.1 Introduction

Despite the variety of policy approaches on immigrant admission and stay, as well as different structural conditions in the EU Member States, it is possible to observe a number of similarities regarding the concerns on ICRMW commonly expressed by States that prevent them from ratifying the Convention. The analysis in Part 3 will focus on these common concerns, which are of a legal, financial or administrative and political nature. However, rigid categorisation has been avoided as such concerns often have a hybrid nature. The analysis is founded on States' replies on the issue of ratification of the Convention in national reports submitted during the Universal Periodic Review 1st and 2nd cycles.

⁹⁵ European Commission, Communication, *Increasing the impact of EU Development Policy: an Agenda for Change*, COM(2011) 637 final, 13 October 2011

⁹⁶ Directive 2007/64/EC of 13 November 2007 on payment services in the internal market, OJ L 319/1, 5 December 2007.

⁹⁷ Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC, OJ L 267/7, 10 October 2009.

Reference is also made to the studies carried out by OHCHR in 2011⁽⁹⁸⁾, and by UNESCO in 2007⁽⁹⁹⁾, as well as to the survey on the position of governments and civil society actors on the ratification of the ICRMW by EU Member States carried out by December 18 in collaboration with the EPRMW and published in December 2010⁽¹⁰⁰⁾.

3.2 Perceived obstacles to the ratification of the Convention

Arguments on the rights of irregular migrants under the Convention and the prevention of irregular migration

Many EU Member States consider that the Convention **does not distinguish sufficiently between the rights of regular and irregular migrants** and argue that its ratification would entail the obligation of States to grant too many rights to migrants who do not have a legal status in the country.

Part 1 of this study and the Comparative Table provided in Annex 1 demonstrate the clear distinction made by the ICRMW between the rights granted to all migrants and the rights afforded solely to migrants who are in a regular situation. For example, only regular migrants have the right to equal treatment with nationals in respect to unemployment benefits (Article 54), and to access vocational guidance and placement services (Article 43). In addition, equality of treatment with nationals is limited to documented migrants and members of their families with respect to a number of social and cultural rights, *inter alia*, access to educational institutions and services, access to vocational training and retraining facilities, and access to social and health services, all provided that the requirements for admission or participation in the relevant schemes are met (Articles 43 and 45). Furthermore, only migrant workers in a regular situation have access to housing, including social housing schemes (Article 43(d)⁽¹⁰¹⁾).

It is important to note that the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) which have been ratified by all Member States are in many respects interpreted by their respective Committees as granting broader rights to all migrants irrespective of their legal status through a stringent application of the principle of non-discrimination. For instance, as mentioned already in this paper, the Committee of Economic, Social and Cultural rights (CESCR) recognises not only the right to emergency medical care (which is the only right relating to health that the ICRMW grants to all migrant workers, including those in an irregular situation), but also the broader right to preventive, curative and palliative health care to all persons including migrants in an irregular situation⁽¹⁰²⁾. While it is true that the General Comments, by which the Committees offer an authoritative interpretation of the relevant treaties, are not binding *per se*, an application of their provisions that is not in line with such interpretation might be considered as breaching the States Parties' obligation of good faith in applying the Covenants⁽¹⁰³⁾. In addition, if States Parties apply the provisions of the Covenants differently from the guidance provided in the General Comments, they would be faced with the difficulty of proving that such difference of treatment,

⁹⁸ OHCHR – Regional Office for Europe, *Migrant workers' rights in Europe*, 2011. Retrieved from: <http://www.europe.ohchr.org/EN/Publications/Pages/publications.aspx>.

⁹⁹ Macdonald, E., and Cholewinski, R., *The Migration workers Convention in Europe*, UNESCO, 2007.

¹⁰⁰ R. Plaetevoet and M. Sidoti, *Ratification of the UN Migrant workers Convention in the European Union – Survey on the Positions of Governments and Civil Society Actors*, 18 December and EPRMW, December 2010.

¹⁰¹ For a more detailed comparison of the rights granted to one or the other category of migrants see Annex 1.

¹⁰² CESCR, *General Comment No. 14: The right to the highest attainable standard of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 11 August 2000, UN Doc. E/C.12/2000/4, para. 34.

¹⁰³ See, *mutatis mutandis*, General Comment No. 33: *The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, 5 November 2008, UN Doc. CCPR/C/GC/33, para. 15.

for example between regular and irregular migrants, is based on objective and reasonable criteria and does not breach the principle of non-discrimination.

Consequently, in light of the broad interpretation provided to the Covenants' rights by the Human Rights Committee (CCPR) and the CESCR, the obligation of States to apply the Covenants in good faith and the stringent boundaries of the principle of non-discrimination, the ratification of the ICRMW would not broaden the rights that States have already accepted to grant to every individual, including irregular migrants, under the other human rights conventions to which they are Parties. Almost all the rights protected under the Convention are already enshrined in other Core Human Rights Treaties, except for the few following rights with a specific migrant-focus: the right not to lose residence or work permit for not fulfilling a contractual obligation (Article 20.1), the right not to have identity papers confiscated or destroyed (Article 21), the right to consular protection and assistance (Article 23), the right to transfer savings and earnings (Article 32) and the right to information (Article 33)¹⁰⁴.

In addition, EU Member States are bound to respect the rights enshrined in the EU Charter when implementing EU law (Article 51 of the Charter). Many of the rights contained in the ICRMW, including those that apply to irregular migrants, are already recognised by the EU Charter to 'everyone'⁽¹⁰⁵⁾ as elaborated in Part 2. In some cases the Charter goes even beyond the scope of the rights recognised under the ICRMW. For instance, Article 35 recognises everyone's right to preventive health care and medical treatment, whereas under the ICRMW irregular migrants can only have access to emergency medical care (Article 28).

The brief comparative analysis conducted in section 2.2 above shows that the ratification of the Convention would impose few additional obligations on States compared existing obligations under the EU Charter and EU legislation in the area of labour immigration. These obligations touch mainly upon areas which would most likely not be considered as problematic by Member States or on areas (such as the one of family reunification) which leave States Parties a broad margin of discretion. One particular area that might be considered as sensitive is the right to social security that the Convention grants to *all migrants*. However, it should be noted that States have already committed to recognise this right to *everyone* by ratifying the ICESCR (Article 9).

States refer repeatedly to the high number of rights granted to irregular migrants as the main reason for not ratifying the ICRMW. However, they rarely specifically identify the rights they consider the most problematic in light of their national legislation. As a first step to overcoming this obstacle to ratification, it would be useful to ask States to specifically identify these rights and then compare their scope with the relevant national, regional and international provisions by which States are already bound. Very recently, the European Commission, in a Communication on the High Level Dialogue on Migration and Development, referred to the 'the insufficient distinction in the Convention between the economic and social rights of regular and irregular migrant workers' which would be incompatible with the EU Policy⁽¹⁰⁶⁾. However, as highlighted above, one of the most important differences between the

¹⁰⁴ The comparative table attached to the OHCHR study on the rights recognised to irregular migrants under the ICRMW and other international human rights treaties supports this argument. It is important to specify that the comparison is exclusively made between the rights recognised by an Article of the Convention, the more specific rights recognised in an Article's paragraph (such as the migrants' right in immigration detention to be kept separately from both accused and convicted persons, in so far as practical, enshrined in paragraph 3 of Article 17) are not taken into consideration. See OHCHR – Regional Office for Europe, *Migrant workers' rights in Europe*, Annex V, p. 79.

¹⁰⁵ For a detailed analysis of the common provisions of the EU Charter and the ICRMW see OHCHR – Regional Office for Europe, *Migrant workers' rights in Europe*, p. 29-31.

¹⁰⁶ European Commission, *Maximising the Development Impact of Migration - The EU contribution for the UN High-level Dialogue and next steps towards broadening the development-migration nexus*, Brussels 21 May 2013, COM(2013) 292 final, p. 6. Retrieved from:

scope of the economic and social rights recognised by the ICRMW and the EU Charter concerns the right to social security, which the Convention grants to everyone, although subject to the requirements of national legislations, and the Charter recognizes only to those who are residing and moving legally within the European Union (Article 34(2)).

Many States also argue that the Convention infringes upon States sovereignty in limiting their competence to **decide upon entry and stay of migrants**. Moreover, a number of European States are concerned about the fact that the application of the Convention may be **an incentive to irregular stay because its provisions aim to legalise the illegal workforce** or, more generally, they believe that the ratification would **counter their struggle against the irregular movement of individuals**.

The Convention fully recognises States' sovereignty in determining who is allowed to enter the State's territory. Article 79 states clearly that: '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'. Furthermore, the Convention is an instrument drafted carefully to set the general parameters for a wide range of national policy and regulatory concerns relating to migration management. The main idea underpinning this instrument is that irregular migration has a negative impact on both the States involved and the migrants; therefore, irregular channels of migration should be countered while trying to favour regular migration. This idea clearly results from Part VI of the Convention, notably from Article 68, paragraph 1, compelling States to collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation, through the adoption of measures, including the following:

- '(a) Appropriate measures against the dissemination of misleading information relating to emigration and immigration;
- (b) Measures to detect and eradicate illegal or clandestine movements of migrant workers and members of their families and to impose effective sanctions on persons, groups or entities which organize, operate or assist in organizing or operating such movements;
- (c) Measures to impose effective sanctions on persons, groups or entities which use violence, threats or intimidation against migrant workers or members of their families in an irregular situation'.

As stated above, paragraph 2 of the same Article also reflects the idea enshrined in the EU Employer Sanctions Directive (2009/52/EC). The paragraph obliges States of employment to 'take all adequate and effective measures to eliminate employment in their territory of migrant workers in an irregular situation, including, whenever appropriate, sanctions on employers of such workers'. Under Article 69 ICRMW, States shall also take measures to ensure that the irregular condition of migrant workers or members of their families in their territory does not persist. It is worth noting that this Article provides States with freedom to choose the best means to achieve the objective of curbing the employment of irregular migrants in their territory. Lastly, Article 35 ICRMW specifies that the Convention shall not be 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'.

Some States also consider that by ratifying the Convention **they would not be free to remove migrants who lose or leave the employment for which permission to enter was granted**.

As many other provisions of the Convention the Article dealing with this issue is worded in permissive and flexible terms. Article 51 provides that '[m]igrant workers who in the State of employment are not permitted freely to choose their remunerated activity shall neither be regarded as in an irregular situation nor shall they lose their authorization of residence by the mere fact of the termination of their remunerated activity prior to the expiration of their work permit'. However, the same Article also recognises the possibility for States to issue an authorisation of residence, which is expressly dependent upon the specific remunerated activity for which the migrant was admitted, in which case a migrant who lose or leave the employment before the expiration of the work permit may be removed⁽¹⁰⁷⁾. The sovereignty of States is thus fully respected.

A number of EU Member States also consider the ratification of the Convention, particularly if decided in isolation from other European States, as a possible “**pull factor**” for irregular immigration. While the clear empirical evidence on this issue is lacking due to the absence of ratification on the part of high-income immigration countries, research so far has demonstrated that most irregular migrants do not choose their destination by comparing the welfare systems of various countries⁽¹⁰⁸⁾, but they are rather attracted by the existence of labour demand.

3.2.1 Arguments of redundancy or marginal utility of the Convention

Many European Union States consider that the **rights enshrined in the Convention are protected already in other international** (other UN core human rights treaties) or **regional instruments** (mainly the European Convention on Human Rights - ECHR). According to these States, the ICRMW does not bring any significant added value, particularly given that the application of the principle of non-discrimination already obliges EU Member States not to operate any discriminatory differential treatment between EU nationals and third country nationals. A high number of States also maintain that migrant workers' rights are already sufficiently protected in national law.

The first argument may be put forward also for all the other UN human rights treaties addressing specific categories of individuals, such as the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities. The first two conventions have been ratified by all EU Member States, whereas the latter - and most recent - has been signed by most of EU States, and the European Union became party to the Convention on 23 December 2010. There are significant reasons why States have decided to adopt separate conventions to address the rights of specific categories of individuals. These reasons are based on the fact that, despite the existence of universal normative instruments, rights were not adequately being recognised and extended to vulnerable groups in practice. Such a remark is also valid with regard to the rights of migrant workers, which represent an important group at risk of being submitted to discriminatory practices and exploitation. Moreover, other international and regional human rights instruments may lack specificity on how to apply these rights to migrants in situations

¹⁰⁷ The full provision of Article 51 reads as follows: 'Migrant workers who in the State of employment are not permitted freely to choose their remunerated activity shall neither be regarded as in an irregular situation nor shall they lose their authorization of residence by the mere fact of the termination of their remunerated activity prior to the expiration of their work permit, *except where the authorization of residence is expressly dependent upon the specific remunerated activity for which they were admitted*. Such migrant workers shall have the right to seek alternative employment, participation in public work schemes and retraining during the remaining period of their authorization to work, subject to such conditions and limitations as are specified in the authorization to work' (emphasis added).

¹⁰⁸ See International Steering Committee for the Campaign for the ratification of the migrants' rights convention, *Guide on ratification – International Convention on the Protection of the rights of all migrant workers and members of their families*, p. 33, quoting R. Romero-Ortuño, 'Access to Health Care for Illegal Immigrants in the EU: Should We Be Concerned?', in *European Journal of Health Law*, 11 (3).

that are often migrant-specific⁽¹⁰⁹⁾. The constructive dialogue established between States Parties to the Convention and the Committee on Migrant Workers (CMW) may provide useful guidance to States on how to apply the standards of the Convention to the specific situation of the country concerned⁽¹¹⁰⁾.

The second argument based on the existence of a **sufficient protection of the rights of migrant workers in national law** can be confronted with the same reasoning. Rights might already be protected in national laws; however, reports on the situation of migrant workers in EU Member States⁽¹¹¹⁾ show that their rights are not always adequately protected in practice. Therefore, the ratification of the Convention and the dialogue with the CMW would help States better identify the measures that they need to adopt in order to ensure that migrants have full access to their fundamental rights. In addition, this argument could also be easily turned in favour of ratification: the fact that the rights enshrined in the Convention are protected already in national law should facilitate its ratification⁽¹¹²⁾.

3.2.2 Arguments of financial burden or administrative obstacles in case of ratification

Very few States seem to explicitly acknowledge the financial and administrative burden that the ratification of the Convention may entail⁽¹¹³⁾. However, this concern may be considered as underlying the general view expressed by States of the marginal utility of the ICRMW and thus of the costs and administrative burdens that its ratification would involve compared to its alleged limited benefits. It is undeniable that the ratification of the Convention and the actual enforcement of the rights recognised therein would carry with them both some costs - notably for law enforcement, for pursuit of due process and justice, for training of authorities and for public education⁽¹¹⁴⁾ - and the need to put in place the institutional framework and infrastructures necessary to ensure the implementation of its provisions. This is particularly true for those Member States that historically do not have much experience with immigration and would have to develop their institutional framework to effectively manage migration⁽¹¹⁵⁾.

With regard to the **financial burden** of ratification, it is important to take into consideration the relation of costs and benefits of migration management system that is centred on the respect of the human and labour rights of migrants. Both the social and financial burden of non-recognition of rights and of

¹⁰⁹ I. Slinckx, 'Migrants rights in UN human rights conventions', in P. de Guchteneire, A. Pécoud, and R. Cholewinski, (eds.), *Migration and human rights. The United Nations Convention on Migrant Workers' Rights*, Cambridge University Press and Unesco Publishing, 2009, p. 122.

¹¹⁰ On the notion of constructive dialogue see Report on the working method of human rights treaty bodies relating to the States Party reporting process, 25 May 2005, UN Doc. HRI/MC/2005/4, p. 14-18. Retrieved from: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/422/35/PDF/G0542235.pdf?OpenElement>.

¹¹¹ See the numerous reports published by the EU Fundamental Rights Agency in this respect, retrieved from: <http://fra.europa.eu/en/publications-and-resources/publications>.

¹¹² For a comparison of the national legislation of some EU Member States with the provisions of the Convention see OHCHR – Regional Office for Europe, *Migrant workers' rights in Europe*, p. 37-64.

¹¹³ See the reply of Poland to Recommendation No. 24 on the ratification of ICRMW referring to the limited level of immigration and emigration which do not require the establishment of further services as requires by the Convention. National Report of Poland, 8 March 2012, para. 106, retrieved from: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/PLSession13.aspx>. See also the position of Lithuania in R. Plaetevoet, and M. Sidoti, *Ratification of the UN Migrant workers Convention in the European Union – Survey on the Positions of Governments and Civil Society Actors*, December 18 and EPRMW, December 2010; and of France in E. Macdonald, and R. Cholewinski, *The Migration workers Convention in Europe*, Unesco, 2007, p. 58.

¹¹⁴ See International Steering Committee for the Campaign for the ratification of the migrants' rights convention, *Guide on ratification – International Convention on the Protection of the rights of all migrant workers and members of their families*, p. 33. Retrieved from: www.migrantsrights.org.

¹¹⁵ E. Macdonald and R. Cholewinski, *The Migration workers Convention in Europe*, p. 58.

tolerating discrimination and exclusion of vulnerable groups in general is ultimately far higher than the costs of administration of rights and justice⁽¹¹⁶⁾. Moreover, to date, some studies carried out in a number of countries have demonstrated that, over time, migrants contribute more through their work force and payment of taxes to host societies than what they receive as welfare benefits and services⁽¹¹⁷⁾; other recent studies have shown that in average the fiscal impact of immigration is around zero⁽¹¹⁸⁾. The fact that regular migrants, but often also irregular migrants, pay direct and indirect taxes is an important element that is too often overlooked when discussing migration policies and, notably, the access of migrants to contributory and non-contributory social security schemes.

With regard to **administrative obstacles** to ratification, it is undeniable that an effective and legally-sound management of migration can be very challenging in terms of putting in place the necessary institutions and procedures. The challenge is amplified by the complexity of national processes dealing with migration in many countries. In Germany, for example, the lack of a clear demarcation of competencies among Governmental Ministries dealing with migration and the number of authorities managing different aspects of this phenomenon represents a major challenge, which may have an impact on the decision to ratify the Convention⁽¹¹⁹⁾.

States have to cope with this highly complex issue if they want to ensure that migration has a positive impact not only on migrants, but also on Member States' societies at large. Irrespective of the ratification of ICRMW, if a State is faced with immigration or emigration, it has to put in place appropriate procedures for an effective migration management. Hence, the ratification of the Convention would represent nothing more than an incentive to adopt measures that are already necessary to prevent social tensions.

To underpin a constructive debate in the EU, further in-depth research would need to be carried out on the costs and benefits of adhering to the Convention, the fiscal impact of migration and other relevant issues⁽¹²⁰⁾.

3.2.3 Arguments of incompatibility of the provisions of the Convention with national law

A number of national law provisions may be incompatible with the ratification of the Convention. An analysis of these incompatibilities goes beyond the scope of this study. Therefore, the consideration of the issue will be limited to the formulation of few general remarks and to the provision of two examples of national legislation.

Taking a scientifically-sound position on the issue would require a detailed study of each national legislation in comparison to the Convention. Nonetheless, to date the studies conducted at the national⁽¹²¹⁾ or international⁽¹²²⁾ level have not revealed any reasons foreclosing ratification, particularly

¹¹⁶ International Steering Committee for the Campaign for the ratification of the migrants' rights convention, *Guide on ratification – International Convention on the Protection of the rights of all migrant workers and members of their families*, p. 33.

¹¹⁷ See, for instance, C. Vargas-Silva, *The Fiscal Impact of Immigration in the UK*, The migration observatory at the University of Oxford, 2013, retrieved from: <http://migrationobservatory.ox.ac.uk/briefings/fiscal-impact-immigration-uk>; IOM, *World Migration Report*, 2011, p. 28 and 29; UK Home Office, *The economic and fiscal impact of immigration: A Cross-departmental submission to the House of Lords Select Committee on Economic Affairs*, 2007; R. Münz et al., *What are the migrants' contributions to employment and growth? A European approach*, Hamburg, Hamburg Institute of International Economics, Migration Research Group, 2007.

¹¹⁸ OECD (2013), *International Migration Outlook 2013*, OECD Publishing, p. 125-184. Retrieved from: http://dx.doi.org/10.1787/migr_outlook-2013-en.

¹¹⁹ E. Macdonald and R. Cholewinski, *The Migration workers Convention in Europe*, p. 58.

¹²⁰ On the fiscal impact of migration see the findings of the OECD, *International Migration Outlook 2013*.

¹²¹ See, for instance, on ratification by Belgium, M.-Cl. Foblets, D. Vanheule and S. Loones, *La Convention internationale de l'ONU de 1990 - Conséquences juridiques d'une ratification belge : une étude exploratoire*, November 2003. Retrieved from : http://www.december18.net/sites/default/files/Ratification_belge_etude.doc. On ratification by France see Commission

because the provisions of the Convention can be the object of one or more reservations or interpretative declarations by States⁽¹²³⁾. Moreover, many of the provisions of the Convention leave to States Parties a very wide margin of discretion or are worded in non-binding terms.

The following examples can be made:

- the right to leave any country and the rights to freedom of movement under Articles 8 and 39 can be submitted to restrictions necessary to protect national security, public order, public health or morals or the rights and freedoms of others;
- under Article 43 (2), migrant workers enjoy equal treatment with nationals only so far as 'the terms of their stay, as authorized by the State of employment, meet the appropriate requirements';
- under Article 44, family reunification should be simply 'facilitated' through measures that 'States deem appropriate' and that 'fall within their competence';
- under Article 56 (1) a migrant worker in a regular situation can be expelled for reasons defined in the national legislation of that State and subject to procedural safeguards;
- the promotion of sound, equitable and human conditions of migration, under Article 64, is submitted to the respect of State sovereignty as defined in Article 79; and, finally,
- under Article 69 (2), States can 'consider' the possibility to regularise a migrant in an irregular situation 'in accordance with applicable national legislation and bilateral or multilateral agreements'.

To illustrate the type of incompatibilities that can arise between national legislation and the ICRMW and show possible ways to overcome such incompatibilities, the cases of France and the United Kingdom will be taken as examples. These countries are chosen based on the extent of information that can be found in the responses provided during the 1st and 2nd cycle of the Universal Periodic Review (UPR) and in the existing international reports, in particular the one of OHCHR⁽¹²⁴⁾ and of UNESCO⁽¹²⁵⁾ quoted above.

For France, the main obstacle to ratification seems to be Article 31 ICRMW on the right to cultural identity. This right is considered incompatible with the specific conception of the principle of equality and of unity of the French people, on the basis of which France does not recognise any specific rights to national minorities, as well as with the '*principe de laïcité*'⁽¹²⁶⁾. France was already confronted with this problem at the time of ratification of the ICCPR, particularly with regard to Article 27 on the rights of persons belonging to ethnic, religious and linguistic minorities. The problem was overcome simply by inserting an interpretative declaration on the relevant provision. Nothing would prevent France from doing the same with regard to the ICRMW. The second possible incompatibility concerns Article 47 ICRMW on the right to transfer earnings and savings⁽¹²⁷⁾. The respect of this provision would oblige France to drastically cut the taxes received by banks and the States on the amounts sent by migrants to their country of origin. Article 47 (2) provides that States 'shall take appropriate measures to facilitate such transfers'. However, the first paragraph of the same Article submits the transfer to 'procedures

nationale consultative des droits de l'homme, *Avis sur la convention internationale sur la protection des droits de tous les travailleurs migrants et des membres de leur famille*, adopted by the Plenary on 23 June 2005, para. 1, retrieved from: http://www.cncdh.fr/sites/default/files/05.06.23_avis_travailleurs_migrants.pdf.

¹²² OHCHR – Regional Office for Europe, *Migrant workers' rights in Europe*, 2011, p. 37-64.

¹²³ The Convention only expressly limits the possibility of States to make reservations to the Convention with regard to the exclusion of one whole part of the Convention or of any category of migrants (Article 88 ICRMW).

¹²⁴ OHCHR – Regional Office for Europe, *Migrant workers' rights in Europe*, p. 24.

¹²⁵ E. Macdonald, and R. Cholewinski, *The Migration workers Convention in Europe*, p. 56-57.

¹²⁶ Commission nationale consultative des droits de l'homme, *Avis sur la convention internationale sur la protection des droits de tous les travailleurs migrants et des membres de leur famille*, p. 2.

¹²⁷ OHCHR – Regional Office for Europe, *Migrant workers' rights in Europe*, p. 24.

established by applicable legislation of the State concerned and in conformity with applicable international agreements'. One could argue that 'taxes' are included among the procedures established by applicable legislation of the State which remain valid under Article 47 (1), *in fine*. In addition, France has accepted already to permit transfer of earnings and savings by ratifying the ILO Migration for Employment Convention (No. 97), Article 9 of which contains a provision comparable to Article 47 ICRMW. In any case, as it has been suggested by the French *Commission nationale consultative des droits de l'homme* in its opinion on the ratification of the Convention, France could simply insert a reservation to this provision too⁽¹²⁸⁾.

With regard to the United Kingdom a number of incompatibilities between UK legislation and the Convention do actually exist. Article 52 (3) (a) of the Convention, on freedom of employment, stipulates that time-limits to the free choice of remunerated activity for a lawfully resident migrant worker should not exceed two years. The UK policy on the basis of which the person is permitted to work only for the employer specified in their permit might be problematic in light of the relevant provision of the Convention⁽¹²⁹⁾. However, it must be pointed out that a migrant worker can apply to change employer, provided that he or she meets all the other requirements for receiving a work permit⁽¹³⁰⁾. Therefore, despite the fact that the above-mentioned restriction was considered as incompatible with the Convention in other reports, the existence if an incompatibility between the UK legislation and the ICRMW on this point might be contended . With regard to access to social benefits and, in particular, education, housing, social and health services (Article 43), and unemployment benefits (Article 54), the Convention provides for equal treatment of regular migrants with nationals. Currently, lawfully employed third-country nationals are entitled to health care and equal treatment in the access to education and to any other contributory schemes. However, they are not entitled to non-contributory benefits, such as housing or job-seekers allowance. To ratify the Convention the relevant provisions of the UK legislation should then be amended. It is important to note in this respect that the United Kingdom has already committed to grant to regular migrants the same treatment as nationals with regard to social security (including unemployment benefits) by ratifying the ILO Convention No. 97. Article 6(1)(b), in fact, provides for equal treatment of regular migrant workers with nationals in the access to social security, with the possibility, however, to 'prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds' (Article 6(b)(ii)). Lastly, a provision on automatic deportation was introduced by section 32 of the UK Borders Act 2007. This provision places a duty on the Secretary of State to make a deportation order in respect of foreign national prisoners who have been sentenced to a period of at least twelve months. This might be considered at odds with the prohibition of collective expulsion and the obligation to examine and decide each case of expulsion individually under Article 22(1) ICRMW. In case of ratification of the Convention, the provision of the UK Border Act may need to be changed. However, it is important to point out that such a provision might already be considered as contrary to other international obligations contracted by the UK; for example, the prohibition of collective expulsion enshrined in Article 4, Protocol 4 of the ECHR.

To summarize, the analysis of these few examples of possible incompatibilities of the Convention with the provisions of national laws of France and United Kingdom shows that many of these

¹²⁸ Commission nationale consultative des droits de l'homme, *Avis sur la convention internationale sur la protection des droits de tous les travailleurs migrants et des membres de leur famille*, p. 2.

¹²⁹ E. Macdonald, and R. Cholewinski, *The Migration workers Convention in Europe*, p. 56. See also Tier 2 of the Points Based System – Policy Guidance version 04/13, para. 192. Retrieved from: <http://www.ukba.homeoffice.gov.uk/sitecontent/applicationforms/pbs/tier2-guidance.pdf>.

¹³⁰ Tier 2 of the Points Based System – Policy Guidance version 04/13, para. 194. Retrieved from: <http://www.ukba.homeoffice.gov.uk/sitecontent/applicationforms/pbs/tier2-guidance.pdf>.

incompatibilities can be easily overcome by inserting a reservation to the ICRMW. In other cases, regardless to the discussion on the ratification of the Convention, the provisions of national law should anyway be amended due to their incompatibility with other obligations contracted by Member States through the ratification of other human or labour rights treaties.

1.1.1 References to the EU competence in the areas covered by the Convention and the need of a coordinated ratification at the regional level

One of the main concerns expressed by EU governments on ratification relates to **the competence of the EU in the domain covered by the Convention**. Some States refer to the need of a coordinated EU level approach to ratification, while others even consider that unilateral ratification would be unlawful in view of the EU competence in this area ⁽¹³¹⁾.

As it has been recalled above, the area of migration falls under the shared competence of the EU and Member States (Article 4 TFEU). In addition, many of the directives referred to above leave to Member States a wide margin of discretion by recognising a number of options among which Member States are free to choose. They also open the possibility to Member States to set more favourable standards for the protection of the rights of the individuals involved⁽¹³²⁾.

It is thereby clear that while the present scope of the EU competence in the area of regular and irregular labour migration covered by the ICRMW is quite broad, Member States still retain a broad competence with regard to determining the rights of irregular migrants and an important amount of discretion in the areas covered by the directives on legal migration. The responsibility for ratifying the Convention then rests primarily on Member States.

Nonetheless, given the broad competence of the EU in relation to labour migration and migration management, it would be crucial to have a united call for ratification by EU institutions. This call could be inserted in the Preamble of a relevant Directive, a possibility which was already explored during the discussion of the Single Permit Directive (Directive 2011/98/EU)⁽¹³³⁾. Further possibilities may include the use of ICRMW as a benchmark comparison in the legislative development and review process and incorporating references to good practices suggested by the CMW.

On the other hand, ratification of the ICRMW by the EU itself, for the time being, does not seem to be a practicable option. As opposed to the European Convention of Human Rights (ECHR), the UN Convention on transnational organised crimes (UNTOC) and the two Palermo protocols on trafficking and smuggling, as well as the International Convention for the rights of persons with disabilities (ICRPD), all accessed or in the process of being accessed by the EU⁽¹³⁴⁾, the ICRMW does not provide for this possibility. The question certainly requires a careful examination by both EU Institutions and relevant UN bodies. However it seems highly probable that for an accession by a regional organisation the text of the Convention should be amended or a protocol should be added specifying the modalities of such accession.

¹³¹ The French Government, referring to the *AETR* case decided by the CJEU in 1971, has contended that, given the transfer of competence to the EU in the area of migration by the Treaty of Amsterdam, France would be acting unlawfully if it unilaterally ratified the Convention. See the response received by France during the interviews carried out by UNESCO in dressing up the report for the above-mentioned study E. Macdonald, and R. Cholewinski, *The Migration workers Convention in Europe*, p. 54 and 68.

¹³² See, for instance, Article 3.5 of the Family Reunification Directive, Article 15 of the Employer Sanctions Directive, Article 4.1 of the Return Directive or Article 13 of the Single Permit Directive.

¹³³ OHCHR – Regional Office for Europe, *Migrant workers' rights in Europe*, p. 16.

¹³⁴ The UNTOC and the Palermo Protocols have been approved by the EU between 2004 and 2006. The ICRPD was accessed by the EU in 2010. The ratification of the ECHR is in process. All five Conventions provides for a possibility of accession for a regional organization or for the EU specifically.

In order for the EU to take a clear stance on the ratification of the Convention, it would also help to reassure the relevant EU Institutions on the compatibility of the provisions of the Convention with the EU legislation on immigration. For example, it was already recalled above that the Commission, while recognising that EU instruments provide far-reaching protection for both regular and irregular migrants that are often broader than those provided by the Convention, also believes that a fundamental obstacle to ratification is represented by the insufficient distinction in the Convention between the economic and social rights of regular and irregular migrant workers that is allegedly not in line with national and EU policies¹³⁵. The comparative analysis of the provisions of the Convention with the EU Charter has shown that very few and minor differences exist with regard to the protection of rights of irregular migrants, notably concerning the access to social security (see sections 2.2. and 3.2.1. above).

A more comprehensive study of the compatibility of the Convention with EU law and national legislation, as well as of implementation practices may help persuade both Member States and EU Institutions of the value of the Convention and may provide an opportunity for further approximation of legislation and practices in the spirit of the Convention with a view to facilitating accession by Member States.

¹³⁵ European Commission, *Maximising the Development Impact of Migration - The EU contribution for the UN High-level Dialogue and next steps towards broadening the development-migration nexus*, Brussels, 21 May 2013, COM(2013) 292 final, p. 6.

4. CONCLUSIONS AND RECOMMENDATIONS

The Migrant Workers Convention creates a legal framework for managing migration in a sustainable and long-term manner. It addresses some of the core issues pertaining to the modalities of migration governance including but not limited to management issues such as admission, stay and return. It thus creates a structure on which to base migration management with the individual remaining at the centre. Being a thematic human rights instrument focusing on a particular group of persons, it aims to ensure that persons crossing borders remain protected with a specific focus on their possible vulnerabilities and needs.

By comparing the main concerns of Member States with the actual content of the Convention's provisions it is evident that some of these apprehensions are largely based on misconceptions in relation to its substance, general object and purpose, which need to be considered to make an accurate interpretation of the instrument and its provisions⁽¹³⁶⁾. The analysis conducted has not permitted to identify any objective and insurmountable reasons preventing ratification. Therefore barriers to ratification can essentially be attributed to a political choice.

The European Parliament has been a strong advocate in favour of ratification of the ICRMW in the EU in the past fifteen years. Most recently, in 2009, the European Parliament adopted a resolution which called on the Member States to ratify the Migrant Workers Convention⁽¹³⁷⁾, and again called on the Member States to ratify the ICRMW as part of a resolution on a Common Immigration Policy for Europe⁽¹³⁸⁾.

In light of the findings of the study and of the analysis of the possible obstacles to the ratification and challenges in the implementation of the ICRMW, the following recommendations are addressed to the European Parliament:

Recommendation 1: Take action to develop and promote objective information to the national governments and the national public in the EU Member States on the content of the ICRMW, particularly concerning the aim of the Convention to effectively manage migration by respecting and protecting migrants' rights, but also preventing irregular movements of migrants and respecting the right of each State to regulate their migration policies.

Studies have clearly shown that there is a serious lack of information about what the ICRMW actually comprises and provides for, and which obligations would put on ratifying States. As of now there is no comprehensive and comparative analysis of the compatibility of the ICRMW with both EU and national legislation and enforcement practices, and on the projected impact assessment of ratification. By considering the effective enjoyment of rights in practice, such a study may further serve as a vehicle for exchange of good practices. The EP could promote or commission the preparation of such detailed analysis.

¹³⁶ This is in line with the provision of Article 1.1 of the Vienna Convention on the Law of the Treaties which stipulates the following: '1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

¹³⁷ European Parliament, Texts adopted, Resolution on the situation of fundamental rights in the European Union 2004-2008 P6_TA(2009)0019, 14 January 2009, §158, available at

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

¹³⁸ European Parliament, Texts adopted, Resolution on a Common Immigration Policy for Europe: Principles, actions and tools (2008/2331(INI)), P6_TA(2009)0257, 22 April 2009, § 38, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2009-0257>.

Such measures may help persuade both Member States and EU Institutions of the value of the Convention, as well as provide an opportunity for further approximation of legislation and practices in the spirit of the Convention with a view to facilitating accession by Member States.

Recommendation 2: Use ICRMW as a benchmark reference of international human rights law in the process of development and review of EU legislation in the field of migration and other EU activities on migration management, including in its external dimension, as well as relevant development cooperation instruments. Good practices identified by CMW could provide further reference.

This would ensure further mainstreaming of a rights-based approach to both regular and, notably, irregular labour migration into EU internal policy on immigration and into the next Union's annual or multiannual programming. Further improved mainstreaming of migration and migrants' rights protection considerations into the development cooperation programming of the EU would also be recommended.

Recommendation 3: Pursue evidence-based advocacy in the Member States and to promote responsible communication on migration on the part of policymakers that helps instil a balanced and constructive public debate on ICMRW and migration issues in general.

Progress in the accession to the Convention or further approximation to the spirit of the Convention in the EU is subject to active support on the part of at least some Member States of high relevance in migration debate, which in turn implies the need to promote a balanced portrayal of these issues in communications with the general public. The European Parliament through its Members may play a role in pursuing these goals.

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ANNEX 1: RIGHTS GRANTED TO ALL MIGRANT WORKERS AND TO MIGRANT WORKERS IN A REGULAR SITUATION UNDER THE ICRMW

⇒ ALL MIGRANT WORKERS

Civil and political rights

Article 8 - Freedom of Movement

- Article 8.1 - the right to leave any State including the State of origin
- Article 8.2 - the right to, at any time, enter and remain in the State of origin

Article 9 - the right to life which is protected by law

Article 10 - the right not to be subject to torture or to cruel, inhuman, or degrading treatment or punishment

Article 11 - the right not to be held in slavery, servitude, or to be required to perform forced labour

Article 12 - the right to freedom of thought, conscience, and religion

Article 13 - the right to hold opinions without interference and the right to freedom of expression

Article 14 - the right to protection of the law against arbitrary or unlawful interference with one's privacy, family, home, communications, and against unlawful attacks on one's honour and reputation

Article 15 - the right not to be arbitrarily deprived of property

Article 16 - Right to Liberty

- Article 16.1 - the right to liberty and security of the person
- Article 16.2 - the right to effective protection by the State against violence
- Article 16.3 - the right not to have one's identity verified by law enforcement officials except in accordance with procedures established by law
- Article 16.4 - the right not to be subject to arbitrary arrest or detention
- Article 16.5 - the right to be informed at the time of arrest of the reasons for the arrest and any charges against them in a language that they understand
- Article 16.6 - the right to a trial within a reasonable time when arrested or detained on a criminal charge
- Article 16.7 - rights of detainees during detention:
 - for the consular authorities of his or her state of origin to be informed without delay of his or her arrest or detention and of the reasons thereof
 - to communicate with said authorities
 - to be informed of any rights derived from relevant treaties
 - to make arrangements for legal representation
- Article 16.8 - the right of a detainee to take proceedings before a court and to a free interpreter if necessary
- Article 16.9 - the enforceable right to compensation for victims of unlawful arrest or detention

Article 17 - Protection against inhumane treatment for migrant workers and members of their families who are deprived of their liberty

- Article 17.1 - the right of those who are deprived of their liberty to be treated with humanity and respect for

- their cultural identity
- Article 17.2 - the right of unconvicted migrant workers and their families to be separated from convicted persons
- Article 17.2 - the right of unconvicted juvenile persons to be separated from adults and brought as speedily as possible for adjudication
- Article 17.7 - the right of detained or imprisoned migrant workers to the same rights as nationals who are in the same situation

Article 18 - Equality before the courts and rights in the determination of any criminal charge

- Article 18.1 - the right to equality with nationals before the courts
- Article 18.1 - in the determination of any criminal charge or suit of law the right to a fair and public hearing by a competent, independent, and impartial tribunal established by law
- Article 18.2-18.6 - rights guaranteed in the determination of a criminal charge:
 - to be presumed innocent until proven guilty
 - to be informed promptly and in detail in a language they understand of the nature of the charge against them
 - to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing
 - to be tried without undue delay
 - to have legal assistance assigned to them if they do not have sufficient means to pay
 - to obtain and examine witnesses
 - to have free assistance of an interpreter if necessary
 - not to be compelled to testify against themselves
 - to have their conviction and sentence reviewed by a higher tribunal according to law
 - to compensation for the punishment suffered from a conviction that is later reversed
 - Article 19.1 - not to be held guilty of any criminal offence that did not constitute a criminal offence at the time when the offence was committed
 - Article 19.1-19.2 - to the lighter penalty if there is a difference between the punishment applicable at the time of the offence and what is applicable subsequently
- Article 18.7 - the right not to be tried or punished twice for an offence

Article 20 - Right to liberty and contractual obligations

- Article 20.1 - the right not to be imprisoned merely on the ground of failure to fulfil a contractual obligation
- Article 20.2 - the right not to be deprived of one's authorization of residence or work permit or expelled merely on the ground of failure to fulfil an obligation arising out of a work contract unless fulfilment of that obligation constitutes a condition of the authorization or permit

Article 21 - the right not to have identity, residence, or work documents confiscated or destroyed except by a public official authorized by law. Also, the right not to have one's passport or equivalent document destroyed by anyone

Article 22 - Expulsion guarantees:

- not to be subject to collective expulsion
- only to be expelled in pursuance of a decision taken by a competent authority in accordance with the law
- to have the decision communicated to them in a language they understand
- to be provided reasons for the decision except when inconsistent with national security
- the ability to submit the reasons why they should not be expelled
- compensation for an annulled decision to expel
- to have a reasonable opportunity to settle any claims for entitlements due to him or her or pending liabilities owed to others
- not to have to bear the costs of expulsion

– not to have any rights acquired in accordance with the law of a State prejudiced by the State’s decision to expel

Article 23 - the right to recourse to the protection and assistance of the consular authorities of the state of origin whenever the rights recognized in the CMW are impaired

Article 24 - the right to recognition everywhere as a person before the law

Economic, social, and cultural rights and obligations

Article 25 - the right to remuneration, conditions of work, and terms of employment not less favourable than that given to nationals

Article 26 - The right to association:

- to take part in meetings and activities of trade unions and any other legally established associations
- to freely join any such trade union or association
- to seek the aid and assistance of any such trade union or association

Article 27 - the right to equal social security guarantees as nationals

Article 28 - the right to equality with nationals in emergency medical care

Article 29 - the right of each child to a name, to registration of birth, and to a nationality

Article 30 - the right to equality with nationals in access to education

Article 31 - the right to have one’s cultural identity respected by the State, and not to be prevented from maintaining cultural links with the State of origin

Article 32 - the right to transfer earnings, savings, personal effects, and belongings upon the termination of their stay in the State of employment

Article 33 - the right to be informed of their rights arising out of the CMW, the law of the State concerned, and the conditions of their admission

Article 64 - the obligation on States to co-operate as appropriate to promote the labour, social, economic and cultural needs of migrant workers and their families

Article 65 - the obligation on States to maintain appropriate information services:

- information to employers, workers, and their organizations on policies, laws, and regulations relating to migration and employment
- information to migrant workers and their families regarding authorizations and arrangements for departure, travel, arrival, stay, and remunerated activities

Article 66 - the obligation on States to ensure that recruitment of workers for employment in another state be restricted to public bodies and bodies established by virtue of a bilateral or multilateral agreement

Article 67 - the obligation on States to co-operate as appropriate in the adoption of measures regarding the orderly return of migrant workers and their families to the State of origin

Article 81 - the rights provided in the CMW may not to be renounced, relinquished, or derogated by contract

Article 83a - the right to an effective remedy if a right provided by the CMW is violated

Article 83b - the right to have a claim of a violation reviewed and decided by a competent authority provided for by the legal system of the State

⇒ **REGULAR MIGRANT WORKERS**

Civil and political rights

Article 39 - the right to liberty of movement in the territory of the State of employment and the freedom to choose residence there

Article 41 - the right to vote and to be elected at elections of that State

Economic, social, and cultural rights and obligations

Article 37 - the right to be informed no later than the time of their admission to the State of employment of all conditions applicable to their admission and particularly those concerning their stay and the remunerated activities in which they may engage

Article 38 - the right to take temporary leaves of absence without effect upon their authorization to stay or work and the right to be informed of the terms on which such temporary absences are authorized

Article 40 - the right to form associations and trade unions in the State of employment

Article 42 - Obligations on States to consider in the establishment of institutions:

- the special needs, aspirations, and obligations of migrant workers and their families
- consulting migrant workers and their families in decisions concerning the administration of local communities

Article 43 - Equality of treatment with nationals in relation to: (see also Article 45)

- access to educational institutions and services subject to admission requirements
- access to vocational guidance and placement services
- access to vocational training and retraining facilities and institutions
- access to housing, including social housing schemes, and protection against exploitation in respect of rents (workers only)
- access to social and health services
- access to co-operatives and self-managed enterprises (workers only)
- access to and participation in cultural life

Article 44 - Family unity and reunification:

- the obligation on States to ensure the protection of the unity of the families of migrant workers
- the obligation on States to take measures that they deem appropriate to facilitate the reunification of migrant workers with their spouses and other family members

Article 46 - the right to enjoy exemption from import and export duties and taxes in respect of personal, household and employment related effects upon both initial and final departure

and return
Article 47 - the right to transfer earnings and savings to any State
Article 48 - the right to be taxed the same and have the same entitlement to deductions as nationals in similar circumstances
Article 49 - Residence and employment authorizations: <ul style="list-style-type: none">– the obligation on States to issue to migrant workers authorization of residence for at least the same period of time as their authorization to engage in remunerated activity– the right of migrant workers not to be regarded as in an irregular situation and not to lose their authorization of residence solely because of the termination of their remunerated activity prior to the expiration of their work permit– the obligation on States not to withdraw the authorization of residence for a period at least as long as they may be entitled to unemployment benefits
Article 50 - the right of family members to, upon the death of a migrant worker or the disillusion of a marriage, favorable treatment by the State in allowing them to continue to reside in that State. Also, they shall be given a reasonable period of time to depart from the State
Article 51 - the right not to be regarded as in an irregular position and not to lose their authorization of residence upon the termination of their non-chosen remunerated activity
Article 52 - the right to freely choose remunerated activity except where inconsistent with State interests as provided for by national legislation or legislation concerning recognition of occupational qualifications acquired outside its territory
Article 53.1 - the rights under Article 52 apply to migrant workers' family members
Article 53.2 - the obligation on States to consider favourably granting members of migrant workers' families priority in obtaining permission to engage in a remunerated activity over other workers who seek admission to the State
Article 54 - Dismissal rights - the right to equality of treatment with nationals in respect of: <ul style="list-style-type: none">– protection against dismissal– unemployment benefits– access to public work schemes intended to combat unemployment– access to alternative employment subject to article 52
Article 55 - the right to equality of treatment with nationals in the exercise of a remunerated activity of which permission to engage has been granted
Article 56 - Expulsion <ul style="list-style-type: none">– the right not to be expelled except for reasons defined in the national legislation of the State– the right not to be expelled for the purpose of depriving one of one's rights arising out of one's residence or work permit– the right to have humanitarian considerations and the length of residence in the State of employment considered when determining whether to expel
Article 67 - the obligation on States to co-operate as appropriate to facilitate durable social and

cultural reintegration and promote adequate economic conditions for resettlement

Article 70 - the obligation on States to ensure working and living conditions not less favorable than those of nationals and aligned with the standards of fitness, safety, health and principles of human dignity

⇒ **IRREGULAR MIGRANT WORKERS**

Article 68 - the obligation on States to take measures to eliminate illegal employment of irregular migrant workers:

- take measures against the dissemination of misleading information relating to migration
- impose effective sanctions on those who organize, operate, or assist in operating illegal movement of migrant workers
- impose effective sanctions on those who use violence, threats, or intimidation against migrant workers or members of their families in an irregular situation

Article 69 - the obligation on States to, when considering the possibility of regularizing the situation of irregular migrants, take into account the circumstances of their entry, the duration of their stay, and their family situation

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