Protection of the Human Rights of Migrant Workers and Members of their Families under the UN Migrant Workers Convention as a Tool to Enhance Development in the Country of Employment

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1. Introduction

1. The subject of migration and development is often treated in the context of the contribution the process of labour migration and migrants can make to the development of countries of origin. Consequently, the focus is on ensuring the proper management of labour migration; that migrant workers move to the destination country in a lawful manner with all the necessary information at their disposal; that best use is made of migrant workers' remittances, confirmed again recently as of particular importance for the economic development of poorer countries;[1] and how the expertise and know-how gained by migrants can be used for the benefit of the development of the country of origin on their return and reintegration there.

2. However, labour migration is also an important factor for the development of countries of employment, whether these are developed countries in the context of South-North migration or developing countries in the context of the increasing South-South migration. This has been recognised explicitly in recent reports on international migration as well as in the initiatives of international organizations setting out principles and guidelines governing this area. While the report of the Global Commission on International Migration (GCIM) *Migration in an Interconnected World: New directions for action*, in the chapter on "Migration and Development: Realizing the potential of human mobility", focuses largely on the impact of migration on growth, development and poverty reduction in countries of origin, it also observes that

> international migration contributes to the development of countries of destination by filling gaps in the labour market, by providing essential skills and by bringing social, cultural and intellectual dynamism to the societies that migrants have joined.[2]

3. A fuller assessment of the impact of immigration generally on destination countries was conducted by the International Labour Office in its report *Towards a Fair Deal for Migrant Workers in the Global Economy*, in preparation for the discussion on migrant workers at the June 2004 International Labour Conference. This assessment identifies a number of benefits, such as rejuvenation of populations, and net economic benefits by meeting general labour market shortages, helping to prevent inflation, supplying particular skills that are in high demand, and providing incentives for capital

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[1] World Bank, *Global Economic Prospects 2006: Economic Implications of Remittances and Migration* (Washington, DC: International Bank for Reconstruction and Development/World Bank, November 2005).

[2] *Migration in an Interconnected World: New directions for action*, Report of the Global Commission on International Migration (GCIM, October 2005) at p. 23, para. 1.

accumulation.[3] But the report also cites research that immigration can depress the wages of local workers, although this mainly affects those in low-skilled occupations.[4] While concerns exist in many countries of employment, particularly in Europe, that migrants may become a burden on the social welfare system, the findings discussed in the report would appear to indicate that such concerns are largely unjustified, particularly in those countries where a considerable majority of migrants are of working age with the result that their presence usually constitutes a fiscal benefit overall.[5] The social consequences of immigration on destination countries can also be positive, particularly when immigration transforms societies and major world cities into vibrant and culturally diverse milieu, but there are also negative consequences in terms of social stratification and segmentation of the labour market.[6] These effects are often exacerbated by the presence of large numbers of irregular migrants.[7] Therefore, concerted action to reduce irregular migration is particularly important in mitigating some of the negative social consequences of immigration generally, although, as discussed below, such action should also comprise safeguards to protect the rights of those irregular migrants already present in the country of employment. Moreover, as the report pointedly observes, the positive and negative effects of immigration on countries of employment should not necessarily be taken as a given and that "integration policies, as well as social and economic conditions, determine the final consequences of migration".[8]

4. Two non-binding processes have recently led to the preparation and adoption of principles and guidelines concerning migration and development. In response to the plan of action for migrant workers adopted by a resolution of the International Labour Conference in June 2004,[9] the International Labour Office prepared a Draft ILO Multilateral Framework on Labour Migration, which was endorsed recently at a Tripartite Meeting of Experts. This document, in the Introduction, recognizes that

> Labour migration can have many beneficial elements for those countries which send and receive migrant workers, as well as for the workers themselves. It can assist both origin and destination countries in economic growth and development.[10]

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[3] International Labour Conference, 92nd Session, 2004, Report VI, *Towards a Fair Deal for Migrant Workers in the Global Economy* (Geneva: International Labour Office, 2004) at pp. 30 and 31, paras. 104 and 108.

[4] *Ibid* at p. 32, para. 109.

[5] *Ibid* at pp. 35-36, paras. 116-119.

[6] *Ibid* at p. 36, paras. 120-121.

[7] *Ibid* at p. 120, para. 400: "Large numbers of irregular migrants create significant problems, both for the migrants themselves and for the host countries. … [Migrants in irregular status] may … represent unfair competition for regular workers, provoking resentment and thus endangering social cohesion. In the worst cases they end up staffing the underground economy and become involved in criminal activities".

[8] *Ibid* at p. 36, para. 120.

[9] International Labour Conference, Provisional Record, 92nd Session, Geneva 2004, *Sixth item on the agenda: Migrant workers*, at p. 22 (Resolution concerning a fair deal for migrant workers in a global economy).

[10] ILO, Tripartite Meeting of Experts on the ILO Multilateral Framework on Labour Migration, 31 October – 2 November 2005, *Draft ILO Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration*, Doc. TMMFLM/2005/D.9, at p. 3, para. 2. The Draft Multilateral Framework is scheduled for adoption by the ILO Governing Body in March 2006.

The Draft ILO Multilateral Framework devotes a whole section to the subject of migration and development where the following principle is advanced: "The contribution of labour migration to employment, economic growth, development [and the alleviation of poverty] should be recognized and maximized for the benefit of both origin and destination countries".[11] With a view to giving effect to this principle, the Draft ILO Multilateral Framework lists a number of guidelines that should be given due consideration, including four guidelines of particular relevance to the development of the country of employment.

- integrating and mainstreaming labour migration in employment, labour market and development policy;
- expanding analyses of the contribution of labour migration and migrant workers to the economies of destination countries, including employment creation, capital formation, social security coverage and social welfare;
- promoting the positive role of labour migration in advancing or deepening regional integration;
- promoting and providing incentives for enterprise creation and development, including transnational business initiatives and micro-enterprise development by men and women migrant workers in origin and destination countries.[12]

5. Another recent non-binding document also recognises the value of migration to the development of countries of employment. The International Agenda for Migration Management (IAMM)[13] is the product of the Berne Initiative, a State-owned consultative process facilitated by the International Organization for Migration (IOM), which sets out common understandings and effective practices for a planned, balanced and comprehensive approach to the management of migration, including labour migration. In the section on Migration and Development, the IAMM advocates that "[p]roperly managed, international migration can contribute to the development of both countries of origin and destination".[14] The IAMM also lists a number of effective practices with regard to cooperation in migration and development, which all have relevance to the development of countries of employment.[15]

6. The understandings of development, as referred to in the GCIM's report, the ILO Draft Multilateral Framework and the IAMM, clearly go beyond economic development and

[11] *Ibid* at p. 26, Principle 15. The wording in parenthesis is the only change to this principle as originally presented by the International Labour Office.
[12] *Ibid* at p. 27, Guidelines 15.1-15.4.
[13] *International Agenda for Migration Management*, Berne, 16-17 December 2004 (IOM / Swiss Federal Office for Migration, 2005).
[14] *Ibid* at p. 58.
[15] *Ibid* at pp. 58-59: Consultations between countries of origin and destination on approaches to migration and development that are mutually beneficial; Consideration of the close interrelationship between migration and development during the formulation of national development and regional integration policies with a view towards achieving sustained economic growth and sustainable development; Promotion of inter-departmental, national and international policy coherence and coordination, including between development policies and migration policies; Development of migration strategies taking into account possibilities for reducing poverty, improving living and working conditions, creating employment and developing training; Development of partnerships to promote the development potential of migration between and among States as well as other relevant stakeholders.

resonate in the definition of development found in the UN General Assembly's 1986 Declaration on the Right to Development:

> [D]evelopment is a *comprehensive economic, social, cultural and political process*, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.[16]

7. Furthermore, the Declaration underlines that "[t]he human person is the central subject of development and should be the active participant and beneficiary of the right to development",[17] thus reinforcing the belief that sustainable development can only occur through respect for and protection of human rights. Indeed, these two notions are indivisible. It is difficult therefore to envisage how the labour migration process can enhance development in both countries of origin and destination in the absence of adequate respect for and protection of the rights of all migrant workers and their families during the whole migration continuum of departure, travel and return. The link between labour migration, development and human rights is articulated eloquently in the most recent General Assembly resolution on International migration and development:

> *Realizing* the benefits that international migration can bring to migrants, their families, the receiving countries and their communities of origin and the need for countries of origin, transit and destination to ensure that migrants, including migrant workers, are not subject to exploitation of any kind and the need to ensure that the human rights and dignity of all migrants and their families, in particular of women migrant workers, are respected and protected.[18]

8. This paper discusses how the signature, ratification and effective implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW)[19] can be used as a tool to enhance development in the country of employment. The paper addresses three areas: (1) protection of the rights of migrant workers and their families as a means of enhancing their integration in the country of employment and thus their contribution to the host community; (2) protection of the rights of irregular migrants with a view to reducing the negative effects of irregular migration on the country of employment; and (3) the role of inter-State cooperation in enhancing development in the country of employment, as outlined in Part VI of the ICMW on the promotion of sound, equitable, humane and lawful conditions in connection with international migration.

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[16] UN G.A. Res. 41/128 of 4 December 1986, Preamble, second recital. Emphasis added.
[17] *Ibid*, Article 2(1). The notion that the human person is the central subject of development is reiterated in the Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 25 June 1993, UN Doc. A/CONF. 157/24, para. 10. See also http://www.ohchr.org/english/law/vienna.htm.
[18] UN G.A. Res. 59/241 of 22 December 2004.
[19] UN G.A. Res. 45/158 of 18 December 1990, http://www.ohchr.org/english/law/cmw.htm. To date, 34 countries have ratified the Convention: Algeria, Azerbaijan, Belize, Bolivia, Bosnia-Herzegovina, Burkina Faso, Cape Verde, Chile, Colombia, Ecuador, Egypt, El Salvador, Ghana, Guatemala, Guinea, Guyana, Honduras, Kyrgyzstan, Libya, Mali, Mexico, Morocco, Nicaragua, Peru, Philippines, Senegal, Seychelles, Sri Lanka, Syria, Tajikistan, Timor-Leste, Turkey, Uganda, and Uruguay. A further 15 countries have signed the Convention: Argentina, Bangladesh, Benin, Cambodia, Comoros, Gabon, Guinea-Bissau, Indonesia, Lesotho, Liberia, Paraguay, Sao Tome and Principe, Serbia and Montenegro, Sierra Leone, and Togo. The Convention entered into force on 1 July 2003.

9. Throughout this discussion, it is important to recall, as underlined by the Special Rapporteur on the human rights of non-citizens, that the human rights of all migrant workers and members of their families are protected by the other core human rights treaties,[20] which make few distinctions between citizens and non-citizens, including those in an irregular situation:

> Based on a review of international human rights law, the Special Rapporteur has concluded that all persons should by virtue of their essential humanity enjoy all human rights unless exceptional distinctions, for example, between citizens and non-citizens, serve a legitimate State objective and are proportional to the achievement of that objective.[21]

The unequivocal application of the principle of equal treatment and non-discrimination in these treaties with regard to the enjoyment by all migrants of their human rights is particularly important given the considerably higher ratification record of these instruments as compared to the ICMW and when analysing the more limited content of some of the rights protected by the ICMW, especially trade union rights, the right to health and the right to adequate housing.

2. Protecting migrant workers and their families and enhancing development through integration

10. The realisation of the effective protection of the rights of migrant workers and their families is essential to their successful integration in the host society and also assists in their successful reintegration in the society of their country of origin on their return. Migrant workers and their families who are integrated in the host society are in a far better position to contribute to the sustainable development of the country of employment through their own employment and their social, cultural and political participation in accordance with the broader understanding of development discussed above.

11. In keeping with Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) ("right of everyone to the enjoyment of just and favourable conditions of work") and the universal scope of international labour standards, as confirmed by numerous ILO Conventions applicable to persons in their working environment, Article 25 ICMW stipulates that all migrant workers, regardless of legal

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[20] International Covenant on Civil and Political Rights (ICCPR) (UN G.A. Res. 2200A (XXI) of 16 December 1966), International Covenant on Economic, Social and Cultural Rights (ICESCR) (UN G.A. Res. 2200A (XXI) of 16 December 1966), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (UN G.A. 2106 (XX) of 21 December 1965), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (UN G.A. 34/180 of 18 December 1979), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (G.A. Res. 39/46 of 10 December 1984), Convention on the Rights of the Child (CRC) (G.A. 44/25 of 20 November 1989). See http://www.ohchr.org/english/law/index.htm.

[21] UN, ESCOR, CHR, Sub-Commission on the Promotion and Protection of Human Rights, 55th Session, Item 5 of the Provisional Agenda, *The rights of non-citizens*, Final report of the Special Rapporteur, Mr. David Weissbrodt, submitted in accordance with Sub-Commission decision 2000/103, Commission resolution 2000/104 and Economic and Social Council decision 2000/283, Doc. E/CN.4/Sub.2/2003/23 (26 May 2003) at p. 2 (Executive Summary). See also Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation No. 30: Discrimination Against Non-Citizens: 1/10/2004* (http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/e3980a673769e229c1256f8d0057cd3d?Opendocument), paras. 2 and 3.

status, are to be afforded equal treatment in respect of remuneration, other conditions of work and other terms of employment.[22] While Article 54(1) in Part IV of the ICMW, which is confined in its application to regular migrant workers, affords them equal treatment with nationals in respect of protection against dismissal and unemployment benefits, these entitlements are not really additional because protection against dismissal is explicitly covered by the reference to equal treatment in respect of the "termination of the employment relationship" in Article 25 ICMW whereas access to unemployment benefits is implicitly encompassed by Article 27(1) ICMW on social security. Indeed, Article 54 ICMW underlines that it is without prejudice to the rights provided for in Articles 25 and 27 ICMW.[23]

12. The protection of all migrant workers in their working environment is strengthened in the ICMW by the confirmation of their right to equality with nationals before the courts and tribunals,[24] (although free legal assistance is only provided in respect of criminal proceedings to those who have insufficient means to pay),[25] and the right to organise given that these are both means by which migrant workers can realise their employment rights in practice. However, trade union rights is one area where the ICMW, on a literal reading, makes an incorrect distinction between the rights of regular and irregular migrant workers *to form* their own trade unions. Part III of the Convention only speaks of the right *to join* existing trade unions,[26] while Part IV grants the right *to form* trade unions to regular migrant workers.[27] This position does not conform to the recognised universal rights to form and join trade unions in the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR, which apply to everyone without distinction,[28] or the right to organise in ILO Convention No. 87 of 1948 on Freedom of Association and Protection of the Right to Organise.[29] Indeed, the ILO Committee on Freedom of Association, mandated by the ILO Constitution to hear complaints against all ILO Member States regardless of whether they have ratified Convention No. 87 given the fundamental character of freedom of association and the right to organise,[30] has

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[22] The provision defines "other conditions of work" as "overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and any other conditions of work which, according to national law and practice, are covered by these terms" and "other terms of employment" as "minimum age of employment, restriction on home work and any other matters which, according to national law and practice, are considered a term of employment". See also Article 6(1)(a)(i) of ILO Convention No. 97 concerning Migration for Employment (Revised) (Geneva, 1 July 1949; entry into force 22 January 1952; ratified by 43 States), which, however, is only applicable to migrant workers in a regular situation.

[23] See R. Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (Oxford: Clarendon Press, 1997) at p. 160.

[24] Article 18(1) ICMW.

[25] Article 18(3(d) ICMW.

[26] Article 26(1)(b) ICMW.

[27] Article 49(1) ICMW.

[28] See respectively Article 22 ICCPR and Article 8 ICESCR.

[29] San Francisco, 9 July 1948; entry into force 4 July 1950; ratified by 144 States. Article 2 of Convention No. 87 is unequivocal in this regard: "Workers and employers, *without distinction whatsoever*, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization". Emphasis added.

[30] See also the ILO Declaration on Fundamental Principles and Rights at Work, adopted by the International Labour Conference at its 86th Session in June 1998, which underlines that freedom of

confirmed recently in two cases that this right is applicable to irregular migrant workers.[31]

13. While it would appear better in practice for irregular migrant workers to join existing national trade unions rather than to form their own unions because of the greater influence established unions can exert on employers and government and while there are also strong arguments for such unions to unionise irregular migrant workers in the interests of all their members, some of the sectors in which irregular migrant workers are employed, such as domestic work, are largely comprised of non-nationals, or agriculture, where they have little or no union representation[32] with the result that the clear recognition of a right *to form* trade unions for irregular migrant workers is particularly important. It is to be hoped that the Migrant Workers Committee, in issuing Concluding Observations to States parties and eventually in a General Comment, clarifies this apparent anomaly regarding trade union rights in the ICMW in accordance with the unambiguous position on this question in general international human rights and international labour law. In this regard, in relation to those States parties that have accepted the higher international standards, the Committee would need to apply Article 81 ICMW, which provides that "[n]othing in the present Convention shall affect more favourable rights or freedoms granted to migrant workers and members of their families by virtue of: (a) the law or practice of a State Party; or (b) any bilateral or multilateral treaty in force for the State Party concerned".

14. The effective access of all migrant workers and their families to social rights is critical in preventing their marginalisation and social exclusion in the host society, thus assisting their integration and enhancing development in the country of employment. Part III of the ICMW underlines the application of the principle of non-discrimination and equal treatment between nationals and all migrant workers and their families regardless of their legal status in respect of access to basic social rights, such as rights to social security, (subject however to the fulfilment of requirements in applicable national legislation, bilateral and multilateral treaties), emergency medical care, and access to education.[33] The importance of securing these rights and other social rights to irregular migrant workers and their families with a view to reducing the adverse impact of irregular migration on the social development of the country of employment is considered in the section below.

15. Part IV grants more extensive social rights to regular migrant workers and their families on equal terms with nationals, such as the right of access to housing, including social housing schemes, and equal access to social and health services.[34] Importantly,

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association is one of the fundamental rights principles that must be respected, promoted and realised by all Member States even if they have not ratified the Convention in question.

[31] See Case No. 2121 (23 March 2001), Complaint presented by the General Union of Workers of Spain (UGT); ILO, Committee on Freedom of Association, *Report No. 327*, Vol. LXXXV, 2002, Series B, No. 1, para. 561 and Case No. 227 (18 October 2002), Complaint presented by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM); ILO, Committee on Freedom of Association, Report No. 332, Vol. LXXXVI, 2003, Series B, No. 3. Both reports are available from http://webfusion.ilo.org/public/db/standards/normes/libsynd/index.cfm?hdroff=1.

[32] See *Towards a Fair Deal for Migrant Workers in the Global Economy*, n. 3 above, p. 52, para. 161, which observes that "less than 10 per cent of the world's hired farm workers [are] represented by unions".

[33] Articles 27, 28 and 30 ICMW respectively.

[34] Articles 43(1)(d) and (e) ICMW respectively.

Part IV also obliges States parties to take measures to facilitate the reunion with the migrant worker of close family members.[35] While the ICMW does not appear to impose a hard and fast obligation on States parties to admit family members, explicit policies preventing family reunion irrespective of a migrant worker's length of stay, such as those practiced by governments in some countries of employment, would clearly contravene this provision. Moreover, as confirmed by other human rights bodies, such as the European Court of Human Rights and the Human Rights Committee, restrictions on family reunion and thus the right to respect for family and private life, in the context of admission to the territory or expulsion, can only be justified pursuant to a legitimate State objective and through proportionate means.[36]

16. The ICMW, in Article 31, guarantees all migrant workers and members of their families a right to respect for their cultural identity and to maintain cultural links with their country of origin. States parties may take appropriate measures to assist and encourage efforts in this regard. The ability of migrant workers and their families to preserve and develop their cultural identity in the country of employment is not only important for their self-worth and individual development but can also be a source of cultural enrichment to the country of employment, provided of course that culture is not considered a static notion but as an evolving concept which can encompass and value diversity. Maintenance and enhancement of migrants' cultural identity also has advantages in terms of the economy because of the trade and business links that can be fostered on the basis of the retention and development of cultural and social links established between migrants in destination countries and their compatriots in the country of origin. This right is further elaborated in Part IV of the ICMW in respect of lawfully resident migrant workers and their families, where States parties are required to endeavour to facilitate, in collaboration with countries of origin whenever appropriate, the teaching of the mother tongue and culture to the children of migrant workers.[37] It should be emphasized, however, that these provisions cannot be opposed on the grounds that their application risks marginalizing migrants or creating migrant ghettos in countries of employment because they are balanced by provisions affording migrants equal treatment with nationals in respect of access to and participation in the cultural life of the country of employment and requiring States parties to pursue policies aimed at ensuring

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[35] Article 44(2) ICMW ("spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as … their minor dependent unmarried children"). Article 44(3) ICMW requires States of employment to favourably consider granting equal treatment to other family members on humanitarian grounds.

[36] Regarding admission, see the judgments of the European Court of Human Rights under Article 8 ECHR protecting the right to respect for family and private life in *Tuquabo-Tekle* v. *Netherlands* (Application No. 60665/00, Eur. Ct. H.R., judgment of 1 December 2005, http://www.echr.coe.int/echr) and *Şen* v. *Netherlands* (Application No. 31465/96, Eur. Ct. H.R., judgment of 21 December 2001, available in French only from the Court's website at http://www.echr.coe.int/echr). Regarding expulsion, see *Boultif* v. *Switzerland* (Eur. Ct. H.R., judgment of 2 August 2001) and the view of the Human Rights Committee in *Madafferi* v. *Australia* (Communication 1011/2001, 26 August 2004, Doc. CCPR/C/81/D/1011/2001, para. 9.8) under Article 17 ICCPR prohibiting arbitrary or unlawful interference with one's privacy, family, home and correspondence. See also the views of the European Social Committee in examining the reports of States parties under Article 19(6) of European Social Charter (Turin, 18 October 1961; *European Treaty Series* (*ETS*) No. 35; entered into force 26 February 1965; ratified by 27 States) and the Revised Social Charter (Strasbourg, 3 May 1996; *ETS* No. 163; entered into force 1 July 1999; ratified by 21 States).

[37] Article 45(3) ICMW.

the integration of children in the local school system, particularly in respect of teaching them the local language.[38]

17. Enjoyment of political rights is one of the few exceptions made by general international human rights law between citizens and non-citizens. For example, the ICCPR explicitly confines these rights to citizens.[39] However, the evolving law and practice today in some countries, particularly in Europe, is to grant these rights, defined normally as the rights to vote and stand as a candidate in elections at the municipal or local level, to foreigners after they have lawfully resided in the country for a certain period of time. Indeed, the Council of Europe has adopted a Convention on the Participation of Foreigners in Public Life at the Local Level,[40] to date ratified mainly by the Nordic countries, which requires States parties to grant the right to vote and to stand for election in local authority elections to foreign nationals after five years of lawful and habitual residence.[41] Moreover, in the enlarged European Union (EU) of 25 Member States, EU citizens residing in other Member States have the right to vote and to stand as a candidate in municipal elections as well as in elections to the European Parliament.[42] In keeping with such developments, the ICMW stipulates, though somewhat tentatively, in Article 42(3) that "[m]igrant workers may enjoy political rights in the State of employment if that State, in the exercise of its sovereignty, grants them such rights".[43] While this provision essentially defers to States of employment on the question of political rights, it should be read with the other sub-paragraphs of Article 42 ICMW, which impose obligations on all States parties in the labour migration process to consider the establishment of procedures and institutions where account can be taken of migrant workers' special needs, aspirations and obligations, and on States of employment to facilitate, in accordance with national legislation, the consultation or participation of migrants in decisions concerning the life and administration of local communities, which may of course extend to affording them some voting rights.[44] This forward-looking approach is clearly supportive of a deeper and more meaningful understanding of the integration of migrants in the society of the country of employment. It is strongly arguable that the political development of a country requires all persons resident and integrated in that society and affected by its decisions to be empowered to contribute to such decisions. However, migrant workers and their families are often excluded from important decisions affecting their welfare. In this regard, the explicit reference in the ICMW to the right to form associations in addition to trade unions for the promotion and

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[38] Articles 45(1)(d) and 45(2) ICMW respectively.

[39] Article 25 ICCPR. See also Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant: 11/04/86* (http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/bc561aa81bc5d86ec12563ed004aaa1b?Opendocument), para. 2 and *CERD General Recommendation No. 30: Discrimination Against Non-Citizens*, n. 21 above, para. 3.

[40] *ETS* No. 144; Strasbourg, 5 February 1992; entry into force 1 May 1997; ratified by 8 States (Albania, Denmark, Finland, Iceland, Italy, Netherlands, Norway, Sweden).

[41] *Ibid*, Article 6(1). In accordance with Article 1(1) of the Convention, however, Albania and Italy have made declarations that they are not applying this provision.

[42] Article 19 of the Treaty Establishing the European Community (available from the Eur-Lex website at http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/pdf/12002E_EN.pdf).

[43] In contrast, Article 41 ICMW stipulates that migrant workers shall have "the right to participate in the public affairs of their State of origin and to vote and to be elected at elections of that State, in accordance with its legislation," and the States concerned are obliged to facilitate the exercise of these rights.

[44] Articles 42(1) and (2) ICMW respectively.

protection of the wider interests of migrant workers and their families, such as their economic, social, cultural and other interests, is important,[45] although, as noted earlier, it is unfortunate and also inconsistent with general human rights law and international labour standards that this right is limited to regular migrants. The ICMW and the Committee on Migrant Workers can therefore play an important role in encouraging States parties to give migrant communities and Diaspora associations a more extensive and concrete role in the actual formulation of State migration policies, which can only have a positive impact on the overall development of countries of employment.

18. The rights in Articles 24 and 29 ICMW, which provide respectively that "[e]very migrant worker and every member of his or her family shall have the right to recognition everywhere as a person before the law" and that "[e]ach child of a migrant worker shall have the right to a name, to registration of birth and to a nationality", are particularly important for the participation of migrants as members of the political and social community of a country of employment. The value of these rights was confirmed in September 2005 by the Inter-American Court of Human Rights, which ruled that the discriminatory application of nationality and birth registration laws in respect of children born in the territory of the country concerned but whose parents possessed irregular immigration status, contravened the American Convention on Human Rights by rendering such children stateless and thus unable to access these rights as well as other important rights, such as the right to education and equal protection of the law.[46]

19. The broader accepted understanding of development as a social, cultural and political process, and not merely an economic process, is of particular significance when addressing the position of temporary migrant workers. One of the consequences of globalisation in the world of work has been an increase in the availability of temporary and flexible jobs, which in many developing countries are being filled by regular and, increasingly, irregular migrant workers.[47] Clear temptations exist therefore on the part of governments and employers to treat such temporary migrant workers as only economic men and women, and, in particular, to limit their social and cultural rights. Restrictions on the access of temporary workers to important rights, such as family reunion, vocational training and certain social security benefits (especially non-contributory benefits) are increasingly justified on the basis of their length of stay in the country of employment. The adverse effects of denying these rights and thus also integration opportunities to temporary migrants in the country of employment, however, are arguably evident today in the much higher unemployment rate among non-nationals and their

[45] Article 40(1) ICMW.

[46] *Yean and Bosico* v. *Dominican Republic*, Inter-American Ct. H.R., judgment of 8 September 2005, Series C No. 130, http://www.corteidh.or.cr/seriecpdf/seriec_130_esp.pdf (available in Spanish only). With regard to the latter provision, the American Convention on Human Rights (San José, Costa Rica, 22 November 1969; O.A.S.Treaty Series No. 36; entry into force 18 July 1978. ratified by 25 States) is phrased in stronger language, stating, in Article 20(1), that "[e]very person has a right to a nationality" and, in Article 21(2), that "[e]very person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality".

[47] P. Taran and E. Geronimi, *Globalization, Labour and Migration: Protection is Paramount*, Perspectives on Labour Migration 3E (Geneva: International Labour Office, 2003) at p. 4. This paper is available from the ILO's web pages at http://www.ilo.org/public/english/protection/migrant/download/pom/pom3e.pdf.

children in most countries of western Europe (with the exception of Greece and Italy),[48] which to a certain extent is a legacy of past temporary labour migration programmes that did not devote sufficient attention (if indeed any attention at all) to social integration. While Part V of the ICMW permits States parties to limit some rights in respect of certain categories of temporary migrant workers (e.g. seasonal, specified employment and project-tied labour migrants),[49] including family reunion, generally-speaking it does not support making differentiations between migrant workers on the basis of the length of time they spend in the country. This position is also supported in the Draft ILO Multilateral Framework on Labour Migration. In Section V on the Protection of migrant workers, the Draft Framework underlines that "[a]ll international labour standards apply to migrant workers, unless otherwise stated".[50] The Draft Framework stipulates further that, in formulating national law and policies concerning the protection of migrant workers, governments should be guided by the underlying principles of ILO Conventions Nos. 97 and 143 and their accompanying Recommendations Nos. 86 and 151, "particularly those concerning equality of treatment between nationals and migrant workers in a regular situation and minimum standards of protection for all migrant workers". The principles contained in the ICMW should also be taken into account.[51] Importantly, one of the guidelines to be given due consideration in this section is "ensuring that restrictions on the rights of temporary migrant workers do not exceed relevant international standards".[52] It is perhaps telling, however, that the wording in the original version drafted by the International Labour Office was stronger and recommended the removal of "unwarranted restrictions on the rights of temporary migrant workers".[53]

3. Protecting the rights of irregular migrant workers and enhancing development by minimising the abuses connected with irregular labour migration movements

20. While the phenomenon of irregular labour migration is considered to be undesirable for the migrants themselves and for all countries involved in the international labour migration process, its implications are considerably more complex than they would

[48] OECD, *Trends in International Migration: SOPEMI 2004* (Paris: OECD, 2005), at p. 62. In 2003, the unemployment rate of foreigners was likely to be at least double that of nationals in countries such as Netherlands, Belgium, Denmark, Norway, Sweden and France, and was even greater for nationals from non-EU or non-OECD countries. *Ibid* at pp. 62-63.

[49] E.g. see Article 59(1) ICMW in respect of seasonal migrant workers: "Seasonal workers … shall be entitled to the rights provided for in part IV that can be applied to them by reason of their presence and work in the territory of the State of employment and that are compatible with their status in that State as seasonal workers, taking into account the fact that they are present in that State for only part of the year". However, there are no instructions to States parties to expressly limit certain rights to seasonal migrant workers as indeed there are in respect of other categories of temporary migrant workers, such as project-tied workers and specified-employment workers (as well as members of their families) (Articles 61 and 62 ICMW).

[50] Draft ILO Multilateral Framework on Labour Migration, n. 10 above, at p. 10, Principle 9(a).

[51] *Ibid*, Principle 9(b). Where the Conventions in question have been ratified, however, this Principle underlines that "they should be fully implemented".

[52] *Ibid*, at p. 11, Guideline 9.7.

[53] ILO, Tripartite Meeting of Experts on the ILO Multilateral Framework on Labour Migration, 31 October – 2 November 2005, *Draft ILO Multilateral Framework on Labour Migration*, Doc. TMMFLM/2005, at p.11, Guideline 9.7.

appear at first glance.[54] Irregular migration for employment is objectionable for a number of reasons, although these reasons are not always advanced in the same order of importance. First and foremost, from a human rights standpoint, irregular migrants are often exploited on their way to and when they arrive in the country of employment. In particular, those who enter clandestinely are highly prone to abuse by traffickers, smugglers, employment intermediaries or recruitment agents as well as employers, although it is commonly recognised that many irregular migrants arrive lawfully and then overstay the period of validity of their visas and/or residence permits.[55] Secondly, the presence of large groups of irregular migrants in a country with no real prospect of integration seriously risks their marginalization in the host society and is hardly conducive to social cohesion and hence the development of the country of employment. Thirdly, the presence of irregular migrants undermines the wages and working conditions of the domestic labour force (i.e. national workers and lawfully resident migrant workers) because it permits employers to maintain wages at low levels and to preserve employment sectors or businesses, which would otherwise struggle to compete.[56] Fourthly, the existence in a precarious employment situation of large numbers of irregular migrant workers, who are at risk of expulsion from the country of employment in times of a downturn in the economy, may well affect adversely relations between countries of employment and countries of origin.

21. On the other hand, irregular migration is perceived to have its advantages from a purely economic point of view. Firstly, given the lower wages paid to irregular migrant workers and the avoidance by employers of the payment of social security contributions, it enables certain sectors of the economy to compete in the global market,[57] although this advantage needs to be offset against the longer-term disadvantages of the continued operation of inefficient businesses in the economy and the loss of tax revenues to the State. It is unsurprising, therefore, that most irregular migrants find themselves in lower-skilled jobs in labour intensive sectors, such as agriculture, construction and services, where there is severe competition in the globalised economy, and which consequently seek out cheaper workers. Nationals are generally unwilling to perform such jobs because they are low-paid, difficult, degrading or dangerous as well as being considered of a low social status with the result that employers turn to migrant labour. Secondly, given the flexible nature of many of these jobs, sometimes requiring only a few days or even hours of work at a time,[58] irregular migrants are considered to comprise the ideal flexible labour

[54] The two paragraphs below rehearse a number of arguments in an article written in the European Union context on "EU Law and Policy on Irregular Migration: The Need for Convergence on the Admission of Third-Country Nationals for Employment" in P. Shah and W. Menski, (eds), *Migration, Diasporas and Legal Systems in Europe* (Cavendish, forthcoming).

[55] That many irregular migrants are in fact "overstayers", who entered in a legal manner, rather begs the question why such significant resources are being expended in some countries and regions, particularly in the EU, on strengthening borders, and for which the prevention of irregular migration constitutes an important rationale.

[56] Cf. B. Ghosh, *Huddled Masses and Uncertain Shores: Insights into Irregular Migration* (The Hague: Martinus Nijhoff, 1998) at pp. 150-151.

[57] A number of these arguments are discussed by Taran and Geronimi, n. 47 above, at pp. 5-6.

[58] Felicity Lawrence (*The Guardian* newspaper correspondent for consumer affairs) speaking at the Trade Union Congress (TUC) Conference on 'Migrant Workers – could we do more in Britain?', 14 July 2003, in relation to the use of such short-term irregular migrant labour in the food processing industry in the UK in order to meet supermarket demands.

force. Thirdly, in times of downturn in the economy, migrant workers in an unauthorised situation, can be apprehended and returned to their countries of origin or third countries. Governments, however, often turn a blind eye to the presence of this group in their labour force when it is perceived as being clearly beneficial to the economy.[59] The absence of workplace inspections and the taking of half-hearted enforcement measures in many countries provide considerable credibility to this hypothesis.

22. The ICMW takes a clear and principled human rights approach to the problem of irregular migration. Irregular migration is to be discouraged and prevented because of the serious human problems it engenders, but not at the expense of those migrant workers and their families who have already moved in an unauthorised manner and are resident in the country of employment. The Preamble to the ICMW is enlightening on this point:

> Bearing in mind that the human problems involved in migration are even more serious in the case of irregular migration and convinced therefore that appropriate action should be encouraged in order to prevent and eliminate clandestine movements and trafficking in migrant workers, while at the same time assuring the protection of their fundamental human rights.[60]

Moreover, the ICMW considers that protecting the human rights of irregular migrants and affording regular migrants a number of additional rights is an integral aspect of preventing irregular migration on the basis that such an approach deters employers from hiring irregular migrants in the first place:

> Considering also that recourse to the employment of migrant workers who are in an irregular situation will be discouraged if the fundamental human rights of all migrant workers are more widely recognized and, moreover, that granting certain additional rights to migrant workers and members of their families in a regular situation will encourage all migrants and employers to respect and comply with the laws and procedures established by the States concerned.[61]

23. Preventing and reducing irregular migration constitute important objectives in Part VI of the ICMW on the promotion of sound, equitable and lawful conditions in connection with international labour migration. Article 68(1) ICMW obliges States Parties, including transit States, to "collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation". The role of inter-State cooperation in fostering development in countries of employment is discussed in more detail in the section below. The measures foreseen in Article 68 ICMW include the adoption of appropriate safeguards against the dissemination of misleading information relating to immigration and emigration; measures to detect and

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[59] See Taran and Geronimi, n. 47 above, at p. 6: "The practices of many States of tolerating the presence of migrant workers in irregular status to meet labour needs in certain sectors of the market constitutes a de facto employment policy in which part of the work force becomes a variable which can be reduced or even eliminated (in theory) in periods of economic downturn, through exercise by States of their prerogative to expel foreigners from their territory. In effect, by the same manner that migration policy can be utilized to satisfy labour market needs with foreign labour, deportation or expulsion can be utilized to regulate and even force the return to countries of origin of this temporary labour". See also P. Taran, "Globalization, Migration and Exploitation: Irregular Migrants and Fundamental Rights at Work", speaking at the Platform for International Cooperation on Undocumented Migrants (PICUM)'s International Conference on Undocumented Workers, 'How far do we want to go?', European Parliament, Brussels, 26 May 2003.

[60] Preamble, Recital 12 ICMW.

[61] Preamble, Recital 14 ICMW.

eradicate illegal or clandestine movements; and the imposition of sanctions on persons, groups or entities who organise, operate or assist in such movements (such as smugglers and traffickers), including sanctions on employers.[62] The existence of these preventive measures, therefore, dispels the myth sometimes perpetuated about the ICMW that it encourages irregular migration by granting additional rights to irregular migrants.[63]

24. Part III affords the whole range of human rights (civil and political rights and economic, social and cultural rights) to all migrant workers and members of their families regardless of their legal status in the State party concerned. As noted above, the application of employment rights, including trade union rights, to all migrant workers without distinction is underpinned in general international human rights law, the international labour standards of the ILO, and the protection of human rights at the regional level. In September 2003, the Inter-American Court of Human Rights, in response to a request by Mexico, issued an Advisory Opinion on the juridical condition and rights of undocumented migrants confirming in unequivocal language that the legal status of workers is irrelevant, particularly when protections in the workplace are concerned.[64]

25. Moreover, the express recognition in the ICMW that other social rights in this instrument are applicable to all migrants regardless of legal status is particularly important given that these rights are frequently denied to irregular migrant workers and their families or significantly restricted in the laws of many industrialized countries on the grounds of protecting the social welfare system from abusive claims by this group of persons. However, given that many irregular migrants are actually in employment and often are working in the country without their families, it is questionable how effective such measures can be in deterring their unauthorized stay and subsequent irregular entry. Indeed, as discussed above in connection with the Preamble to the ICMW, an important secondary objective of protecting the rights of irregular migrants is to deter their illegal employment and related abuses. Leaving aside therefore the argument that complete denial of or imposing severe restrictions on the social rights of irregular migrants constitute serious human rights violations, objectively-speaking, human rights' safeguards are likely to be more effective than the former measures in deterring irregular migration.

26. However, the protection of the rights of irregular migrant workers and their families and particularly their social rights under the ICMW is deficient for two reasons. Firstly, while it is of significant symbolic importance that the ICMW accentuates in an explicit manner that important social rights, such as rights to social security, health care and education, are applicable to irregular migrants, the scope of some of these rights in the ICMW appears narrower than corresponding rights afforded to all persons, including those without legal status, in general international human rights law as interpreted by the competent treaty bodies. One important example is the right to emergency medical care in Article 28 ICMW, which emphasizes also that "emergency medical care shall not be refused [to migrant workers and members of their families] by reason of any irregularity

[62] Articles 68(1)(a), (b) and (c), and Article 68(2) ICMW respectively.
[63] See also UNESCO, Information Kit, *United Nations Convention on Migrants' Rights* (Paris: UNESCO, 2003) at p. 4.
[64] See Inter-American Ct. H.R., Advisory Opinion OC-18/03 of 17 September 2003, Series A No. 18 (http://www.corteidh.or.cr/serieapdf_ing/seriea_18_ing.pdf).

with regard to stay or employment". This right, however, is limited, particularly if "emergency medical care" is defined narrowly to encompass, for example, hospital treatment and not doctor's visits or preventive care.[65] Consequently, the content of the right in Article 28 ICMW is not in conformity with the holistic understanding of the right to health under Article 12(1) ICESCR, as interpreted by the Committee on Economic, Social and Cultural Rights (ESC Committee) in General Comment No. 14, which is also grounded in the principle of non-discrimination.[66]

27. This approach is also supported at the regional human rights level by the importance attached to access to health care under the European Social Charter (and Revised Charter) of the Council of Europe. Even though the Appendix to the Charter limits its application to migrants who are nationals of Contracting Parties and lawfully resident in the territory of another Contracting Party, the European Committee of Social Rights, which monitors the implementation of the (Revised) Charter in Council of Europe member States, has applied its provisions to irregular migrants. In a complaint against France under the Additional Protocol to the European Charter Providing for a System of Collective Complaints,[67] the Committee found that restrictions on the access of children to health care is a violation of Article 17 of the (Revised) Charter concerned with the right of children and young persons to protection and assistance.[68] The Committee justified its departure from the plain text of the (Revised) Charter through the following powerful reasoning.

> 29. [T]he Charter must be interpreted so as to give life and meaning to fundamental social rights. It follows inter alia that restrictions on rights are to be read restrictively, i.e. understood in such a manner as to preserve intact the essence of the right and to achieve the overall purpose of the Charter.
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> 30. As concerns the present complaint, the Committee has to decide how the restriction in the Appendix ought to be read given the primary purpose of the Charter as defined above. The restriction attaches to a wide variety of social rights in Articles 1-17 and impacts on them differently. In the circumstances of this particular case, it treads on a right of fundamental importance to the individual since it is connected to the right to life itself and goes to the very dignity of the human being. Furthermore, the restriction in this instance impacts adversely on children who are exposed to the risk of no medical treatment.

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[65] See S. Da Lomba, "Fundamental Social Rights for Irregular Migrants: The Right to Health Care in France and England" in B. Bogusz *et al.*, (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Leiden: Martinus Nijhoff, 2004) 363-386 at p. 379, who argues that the right to health care in Article 28 ICMW "remains imperfect as it is confined to access to emergency medical care, thus failing to secure that irregular migrants benefit from disease prevention measures such as early diagnosis and medical follow-up".

[66] UN, ESCOR, ESC Committee, 22nd Session, Geneva, 25 April – 12 May 2000, *General Comment No. 14 (2000). The right to the highest attainable standard of health*, UN Doc. E/C.12/2000/4 (11 August 2000), para. 38: "In particular, States are under the obligation to *respect* the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy…".

[67] Strasbourg, 9 November 1995, *ETS* No. 158; entered into force 1 July 1998; ratified by 11 States parties.

[68] Complaint No. 14/2003, *International Federation of Human Rights (FIDH)* v. *France* http://www.coe.int/T/E/Human_Rights/Esc/4_Collective_complaints/List_of_collective_complaints/RC14_on_merits.pdf, paras. 33-37.

> 31. Human dignity is the fundamental value and indeed the core of positive European human rights law – whether under the European Social Charter or under the European Convention of Human Rights and health care is a prerequisite for the preservation of human dignity.
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> 32. The Committee holds that legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter.[69]

28. In interpreting the right to health care under the ICMW, the Migrant Workers Committee will therefore be on firmer ground if it applies the more holistic notion of the right to health, as found in the ICESCR, and only considers the narrower obligation in Article 28 ICMW in circumstance where resources for health care in a particular State party (country of employment or transit country) are inadequate to meet the full health needs of both national and migrant populations.[70]

29. Another substantive omission in the ICMW relates to housing rights, which are limited to regular migrants in Article 43(1)(d) ICMW concerned with the right of access to housing and Article 70 ICMW, which places States parties under an obligation to take measures "to ensure that working and living conditions of migrant workers and members of their families in a regular situation are in keeping with the standards of fitness, safety, health and principles of human dignity". It is revealing that an earlier draft of this provision applied to all migrant workers and their families, including irregular migrants.[71] While an entitlement to some housing provision might be deduced from Article 64 ICMW, which contains the general obligation on States parties to "consult and cooperate with a view to promoting sound, equitable and humane conditions in connection with the international migration of workers and members of their families", it is doubtful whether this obligation can aspire to the ESC Committee's understanding of the right to adequate housing under Article 11(1) ICESCR in its General Comment No. 4, which views the content of this right more broadly than the mere provision of shelter in the sense of a roof over one's head or shelter as a commodity.[72]

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[69] *Ibid*, paras. 29-32. In May 2005, the Council of Europe's executive organ, the Committee of Ministers, adopted a Resolution, which "takes note of the circular DHOS/DSS/DGAS No. 141 of 16 March 2005 on the implementation of urgent care delivered to foreigners resident in France in an illegal manner and non beneficiaries of State Medical Assistance". See Committee of Ministers Resolution ResChS(2005)6 – Collective complaint No. 14/2003 by the International Federation of Human Rights Leagues (FIDH) against France (4 May 2005), http://wcd.coe.int/rsi/common/renderers/source_file.jsp?id=856639&SourceFile=1.

[70] The ESC Committee has underlined that the duty of Contracting parties under the ICESCR "to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant…." (Article 2(1) ICESCR) is of immediate application and that each Contracting party must satisfy the rights contained in the ICESCR at least to a basic level of enjoyment unless it can demonstrate, taking account of any assistance available from the international community, that it does not possess the resources to fulfil even such a minimum obligation. UN, ESCOR, ESC Committee, 5th Session, *General Comment 3, The Nature of States Parties Obligations (Art. 2, para. 1 of the Covenant)*, UN Doc. E/1991/23 (1991), paras. 2, 13.

[71] See Cholewinski, n. 23 above, at p. 170, citing from *Report of the Open-ended Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families*, Doc. A/C.3/43/7 (17 October 1988) at p. 32, paras. 151-152.

[72] UN, ESCOR, ESC Committee, 6th Session, *General Comment 4, The right to adequate housing (Art. 11(1) of the Covenant)*, UN Doc. E/1992/23 (1991), para. 7: "[The right to adequate housing] should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by

30. The second deficiency concerns the absence of specific measures in the ICMW to ensure that irregular migrants can access their rights in practice. At the time of the adoption of the ICMW, Professor Linda Bosniak wrote that irregular migrants "present human rights law with an especially hard case".[73] Irregular migrants face a combination of legal and practical obstacles in accessing their rights. The following obstacles have been identified in the European context. Legal obstacles include: the invalidity of employment contracts involving irregular migrants; the denial of trade union rights as discussed above; the imposition of formal obligations on public officials to denounce irregular migrants to the immigration authorities; measures criminalizing irregular migration, both at the national and regional level; and the unavailability of legal aid before employment tribunals. Practical obstacles include limited access of irregular migrants to the health care system in view of the absence of information about their rights as well as the onerous bureaucratic conditions imposed on such access, and difficulties in the provision of adequate schooling to the children of irregular migrants despite the existence of compulsory education requirements in most countries.[74]

31. In October 2005, the NGO, Platform for International Cooperation on Undocumented Migrants (PICUM), published a report on *Ten Ways to Protect Undocumented Migrant Workers*, which advances ten recommendations how civil society (NGOs, trade unions and other organisations) can take action to protect the rights of irregular migrant workers.[75] Some of these recommendations are connected with enabling irregular migrant workers to enjoy specific rights, such as their employment rights, access to courts and tribunals and the right to organise. Particular emphasis is placed on the collection of concrete data about irregular migrant workers and the provision of information to them about their rights. With regard to this last point, the report observes that "[a] central element in protecting undocumented workers is to inform them of the rights that they have and how to exercise them".[76] Therefore, Article 33 ICMW, which is located in Part III of the ICMW, is particularly important because it imposes extensive obligations on States parties (States of employment, transit and origin) to provide information to *all* migrant workers and members of their families concerning their rights arising out of the ICMW as well as "the conditions of their admission, their rights and obligations under the law and practice of the State concerned and such other matters as will enable them to

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merely having a roof over one's head or views shelter exclusively as a commodity … [but]… should be seen as the right to live somewhere in security, peace and dignity".

[73] L.S. Bosniak, "Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention" (1991) 25 *International Migration Review* 737 at p. 765. See also the slightly revised version of this article in *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, n. 65 above, 311-341.

[74] R. Cholewinski, *Study on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights*, European Committee on Migration (CDMG), 48th Meeting, Strasbourg 24-26 November 2004, Doc. CDMG (2004) 29.

[75] PICUM, *Ten Ways to Protect Undocumented Migrant Workers* (Brussels: PICUM, October 2005). The ten recommendations are as follows: acknowledge the social and economic presence of undocumented migrants; prioritize data collection; involve (local) NGOs in conducting research and making policies; mainstream undocumented migrants in integration policies and in the (European) Social Inclusion Strategy; invest in workplace inspections; safeguard the right to equality before the law; safeguard the right to organize; regularize undocumented migrants; open up the debate on the future of the low wage sector; ratify the ICMW.

[76] *Ibid* at p. 33.

comply with administrative or other formalities in that State".[77] In monitoring the implementation of the reports of States parties under the ICMW, it is important that the Migrant Workers Committee devotes particular attention to how the rights of irregular migrant workers and members of their families are protected in practice and the information that is made available about their rights to all migrant workers and their families, including irregular migrants.

32. One of PICUM's recommendations to protect irregular migrant workers is to regularise their situation in the country of employment. The ICMW does not prohibit the adoption of such measures at the national level. On the one hand, Article 35 ICMW stipulates that the application of Part III to irregular migrants is not tantamount to implying regularisation of their situation or any right to such regularisation. On the other hand, Part VI places States parties under an obligation, where there are irregular migrants present in their territory, to take appropriate measures to ensure that such a situation does not persist and instructs States parties considering regularisation of irregular migrants to take account of certain factors, such as the circumstances of their entry, the duration of their stay in the country of employment and other relevant considerations, particularly those relating to the family situation.[78] While an acknowledged and frequently cited disadvantage of regularisation programmes is their potential to encourage further irregular movements, regularisation nonetheless constitutes a valid response, particularly in those situations where migrants are in gainful employment or cannot be returned for legal, humanitarian or practical reasons. Moreover, the prolonged presence of a marginalized and disadvantaged group in the territory can only be detrimental to social cohesion and the economic and social development prospects of the country of employment:

> There are several reasons as to why regularization is good not only for undocumented workers, but for society at large. Having a large group of people working in an informal economy undermines the economy as a whole. Regularizing undocumented workers is a way of combating the informal economy while at the same time improving the lives of these workers. Furthermore, regularization creates more visibility of the target group that social policies are meant to protect but who, because of their irregular status, are denied this protection.[79]

33. Therefore, the Migrant Workers Committee should elicit information from States parties, particularly employment and transit countries, about the measures taken or envisaged to regularise irregular migrant populations on their territories with a view to drawing up best practices regarding the application of such measures for the benefit of both migrants and the development of the countries concerned.

[77] Articles 33(1)(a) and (b) ICMW respectively. Although this information is only to be provided to migrants upon request, it is to be free of charge and, as far as it is possible, in a language they understand.
[78] Article 69(2) ICMW.
[79] *Ten Ways to Protect Undocumented Migrant Workers*, n. 75 above, at p. 102.

4. Role of inter-State consultation and cooperation in enhancing development in the country of employment through the promotion of sound, equitable, humane and lawful conditions in connection with international labour migration

34. Inter-governmental consultation and cooperation on migration is increasing at the global and regional levels.[80] Given the apparent preference of many governments for engaging in regional and global consultative and cooperative processes on labour migration, which also encompass issues relating to the protection of migrant workers, rather than proceeding to accept normative legally binding instruments, such as the ICMW, the question arises whether such instruments are no longer pertinent in view of the emerging new forms of governance on migration at the inter-State level. However, this is another misconception about the ICMW, which needs to be dispelled. While the ICMW establishes a principled framework for the protection of the human rights of all migrant workers and their families irrespective of their status, it also acknowledges in numerous places and particularly in Part VI that such a human rights framework cannot be effectively applied without consultation and cooperation between States, which involves not only inter-State consultation and cooperation at the bilateral, regional and multilateral level but also government consultation and cooperation with pertinent stakeholders, such as employers, trade unions and other organisations. In this way, therefore, consultative and cooperative processes on labour migration and acceptance of legally binding standards on the protection of the rights of all migrant workers and their families should be viewed as mutually reinforcing, with the potential to benefit both migrants and the States concerned. Moreover, consultation and cooperation between States parties under the ICMW is of particular relevance for enhancing the sustainable development of both countries of origin and employment.

35. Part VI on the promotion of sound, equitable, humane and lawful conditions in connection with international labour migration is the principal section in the ICMW addressing inter-State consultation and cooperation. Importantly, in conformity with the broader conception of development discussed in the Introduction above, the general obligation of States parties in Article 64(1) ICMW to consult and cooperate in promoting the aforementioned conditions, requires "due regard … [to] be paid not only to labour needs and resources, but also to the social, economic, cultural and other needs of migrant workers and members of their families involved, as well as to the consequences of such migration for the communities concerned".[81]

36. Part VI also discusses consultation and cooperation between States parties in respect of the following areas:

- Consultation, exchange of information and cooperation between the competent authorities of States parties involved in the international migration of workers and members of their families (Article 65(1)(b));

[80] For an overview of inter-State cooperation in Europe and Central Asia, Africa, Asia, the Americas and at the global level, see Berne Initiative and IOM, *Interstate Cooperation and Migration* (Geneva / Berne: IOM / Federal Office for Migration, 2005). For more information, see also the IOM web site at http://www.iom.int/iomwebsite/servlet/com.crosssystems.iom.official.servlet.ServletPrepareSearchOfficialText.

[81] Article 64(2) ICMW.

- Cooperation in the adoption of measures regarding the orderly return of migrant workers and members of their families to the State of origin when they decide to return or their authorization of residence or employment expires or when they are in the State of employment in an irregular situation (Article 67(1));
- Cooperation with a view to promoting adequate economic conditions for the resettlement of regular migrant workers and to facilitating their durable social and cultural reintegration in the State of origin (Article 67(2)).

37. The ICMW also attaches considerable importance to the role of bilateral, regional and multilateral arrangements and agreements, particularly in the context of furthering the rights of migrant workers and members of their families.[82] Indeed, as noted earlier, if bilateral and other multilateral instruments in force for the State party concerned grant more favourable rights and freedoms to migrants, such instruments must be respected.[83] Bilateral agreements are also referred to in other parts of the ICMW, with the objective of broadening the categories of protected migrants or augmenting rights. The definitions of self-employed migrant workers or dependant relatives of migrant workers in the ICMW can effectively be extended by virtue of bilateral agreements.[84] Similarly, the important obligations imposed on States of employment in Article 50 ICMW to consider affording family members an authorization to stay in the country after the death of a migrant worker or, if this is not possible, a reasonable time to settle their affairs before departure are subject to the more favourable provisions in bilateral agreements.[85] However, in a few instances, the ICMW also refers to bilateral agreements in the context of limiting rights. For example, access to employment for migrant workers can be limited for up to a period of five years in pursuance of policies granting priority to nationals or persons assimilated to them for these purposes by virtue of bilateral or multilateral agreements or national legislation.[86] Similarly, provisions instructing States parties to consider granting family members of migrant workers or seasonal workers, who have worked in the State of employment for a significant period of time, priority access to the labour market over other workers seeking admission are expressly subject to applicable bilateral and multilateral agreements.[87] Finally, as is common to other multilateral instruments concerned with the right of migrant workers to social security on a basis of equality with nationals, such as the social security agreements adopted under the auspices of the ILO or the Council of Europe,[88] the ICMW recognises that the social security rights of migrants

[82] Preamble, Recital 6 ICMW.
[83] Article 81(1) ICMW.
[84] Articles 2(h) and 4 ICMW respectively.
[85] Article 50(3) ICMW.
[86] Article 52(3)(b) ICMW.
[87] Articles 53(2) and 59(2) ICMW respectively.
[88] See in particular ILO (Equality of Treatment) Social Security Convention No. 118 (Geneva, 28 June 1962; entry into force 25 April 1964; ratified by 37 States) and Maintenance of Social Security Rights Convention No. 157 (Geneva, 21 June 1982; entry into force 11 September 1986; ratified by 3 States). For relevant Council of Europe instruments, see European Code of Social Security (Strasbourg, 16 April 1964; *ETS* No. 48; entry into force 17 March 1968; ratified by 20 States), European Code of Social Security (Revised) (Rome, 6 November 1990; *ETS* No. 139; not in force) and the European Convention on Social Security (Paris, 14 December 1972; *ETS* No. 78; 1 March 1977; ratified by 8 States).

cannot be adequately protected without further inter-State cooperation on the bilateral level.

38. The ICMW also addresses the cooperation of governments with other organisations, which is of particular relevance to the right of information discussed in the previous section. Article 33(1) ICMW stipulates that the obligation to disseminate information can be undertaken through "employers, trade unions, or other appropriate bodies and institutions". Moreover, as discussed earlier in the context of the integration of regular migrant workers and their fuller political participation in the State of employment, Article 42(2) ICMW requires such countries to "facilitate, in accordance with their national legislation, the consultation or participation of migrant workers and members of their families in decisions concerning the life and administration of local communities".

5. Conclusion

39. The positive contribution that migrant workers and their families can make to the economic, social, cultural and political development of countries of employment receives relatively little attention in contrast to the extensive discussion on the impact of international labour migration on development in countries of origin. Therefore, by increasing awareness of the importance of the protection of the rights of all migrant workers and their families to the former process in terms of their integration, preventing the marginalisation and social exclusion of irregular migrants in particular and underscoring the place of inter-State cooperation and dialogue in helping to safeguard these rights and in promoting *inter alia* sound, equitable, humane and lawful conditions for international labour migration, the ICMW should be considered as an integral element in the multifaceted discourse on migration and development. Furthermore, the increased attention devoted during the Day of General Discussion to the role migrant workers and their families play in the development of countries of employment and the importance of the protection of their human rights in this regard will also assist in highlighting the central place of human rights in the sustainable development of all countries in the labour migration process.