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UNESCO MIGRATION STUDIES

THE MIGRANT WORKERS CONVENTION IN EUROPE

Obstacles to the Ratification of
the International Convention on the
Protection of the Rights of All Migrant
Workers and Members of their Families:
EU/EEA Perspectives

Euan MacDonald • Ryszard Cholewinski

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of the International Convention on the Protection
of the Rights of All Migrant Workers and Members of
their Families: EU/EEA Perspectives**

**Euan MacDonald
Ryszard Cholewinski**

UNESCO migration studies 1

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Executive Summary

BACKGROUND

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) entered into force on 1 July 2003, some 13 years after it had been formally opened for ratification in 1990. It has, however, attracted very little in the way of support from states: the recent ratifications by Argentina and Albania, in 2007, have increased the number of States Parties to a mere 37 – a figure that is, by some considerable distance, the lowest of any of the instruments viewed by the Office of the High Commissioner for Human Rights as “core” human rights treaties. This lack of success becomes all the more apparent upon consideration of the fact that not one major migrant receiving state is among the parties to the Convention. The purpose of this report is to analyse the reasons behind non-ratification in one of the most developed migrant-receiving regions in the world: the European Economic Area, which includes the 27 Member States of the European Union and Liechtenstein, Iceland and Norway.

The main body of this report presents the findings of a series of detailed, UNESCO-commissioned reports into the situation of the ICRMW in a number of countries in the region: France, Germany, Italy, Poland, Spain, the United Kingdom and Norway. The reports were based upon semi-structured interviews carried out with major migration stakeholders in each country, including, *inter alia*, government officials from both central and regional authorities, members of other political parties, and representatives of civil society (i.e., relevant NGOs and trade unions), on such issues as general awareness of the Convention, the nature and extent of any political or parliamentary activity carried out regarding it, and the main obstacles to ratification. The summary and analysis of the findings of these studies takes up Parts I-IV. Part V goes on to examine in some detail the situation regarding the ICRMW within the highly developed legal and political system of the European Union, while Part VI presents a set of recommendations for future action with a view to increasing support for, and ultimately ratifications of, the Convention.

RAISING AWARENESS

Parts I and II provide some general background to the issues involved, by outlining briefly the content and drafting history of the ICRMW, and the basic migration trends in the seven countries under consideration. Part III draws together and analyses the findings of the country studies on one issue that has been identified as a significant barrier to ratification: the low levels of awareness of the Convention, both within political elites and the public more generally. While lack of awareness was raised as a problem in each of the individual country studies, it was nonetheless evident that in two, namely the UK and France, successful civil society action has done much to alleviate this problem. In both cases the actors involved did not each attempt to campaign individually, but instead pooled resources in order to achieve a stronger and more sustained campaign. The civil society networks in both of these countries was structured around “coalitions for ratification”, made up of prominent NGOs and trades unions, which then combined various different activities, such as the organisation of conferences, leafleting campaigns, petitions, etc., in order to both inform the public and put pressure on politicians to act. Italy has followed a similar, if less developed, model of civil society action, as has to a certain degree, Spain, although here this action has been in large degree limited to the Catalan region. By contrast, in Norway, Poland and Germany, there has been little or no significant civil society action in terms of the ICRMW, and the levels of awareness of the Convention in these countries are correspondingly low.

Importantly, the report also finds that there is a high degree of correlation between the extent and success of the civil society awareness-raising campaigns, and the levels of political party endorsement of the ICRMW. In the UK and France, a number of significant political parties have made ratification a central policy goal, perhaps most strikingly, in terms of the former, the third largest party in the country, the Liberal Democrats. In both, the Green Parties have also officially endorsed the Convention, while in Italy the far-left parliamentary grouping has adopted a positive stance, as have the Spanish leftist group the United Left [*Izquierda Unida*], which includes both Greens and Communists. No significant political party in Poland, Norway or Germany has endorsed the Convention in any way. The trend is clear: in those countries that have some level of political awareness of the existence and content of the ICRMW, its cause is generally supported by those on the centre- to far- left of the political spectrum; this holds, however, only for minority parties, as those with ambitions to govern tend to follow the centre-right in claiming that ratification of the Convention is either undesirable or unnecessary. Those politicians who have been forthcoming in their support when in opposition have tended to be considerably more reticent when actually in power.

Similarly, the report finds a high degree of correlation between relatively successful civil society campaigns and parliamentary activity in the countries analysed here. In both the UK and France, a number of parliamentary questions have been tabled on the issue of the ICRMW; moreover, in the UK, Liberal Democrat MPs have tabled motions calling for ratification, which attracted (an admittedly small amount of) cross-party support, whereas in France the Economic and Social Council [*Conseil économique et social*] and the National Commission for Human Rights [*Commission Nationale Consultative des Droits de l'Homme*] have both issued opinions recommending ratification. There have also been a number of questions before the

Spanish Parliament on this issue, although in this regard by far the more striking progress has been made at the regional level, where the Catalan Parliament has adopted a number of resolutions urging ratification. It is worth recalling at this point that the civil society network campaigning to raise awareness in Spain was strongly focused in this region. Also in this regard, as early as 1992 the Tuscan regional assembly in Italy adopted a resolution urging ratification of the ICRMW, largely as a result of concerted NGO lobbying in the region. Neither of these regional initiatives has had a significant effect on the views of the respective national Parliaments, however. Lastly, it is again noteworthy that there has been little or no parliamentary activity in respect of the Convention in Norway, Poland or Germany.

The report makes three general observations regarding the issue of raising awareness of the ICRMW. The first is that, incredibly, it seems that there remain, in some cases, serious problems of accessibility to the ICRMW as a result of the simple and easily remediable problem that, more than fifteen years after it was opened for ratification, the text of the Convention has not yet been accurately and authoritatively translated into a number of languages. This issue arose in both Poland and Italy, and also was highlighted by another report on the same topic in Hungary. It is difficult to overstate the importance of rectifying this issue, particularly in the context of what remains, in effect, a little-known human rights treaty struggling for support. Secondly, it is clear that simply raising awareness of the existence of the ICRMW is insufficient: more must be done to familiarise both public and political elites with the content of the Convention, particularly since, as the following section makes clear, a number of prevalent objections to it are based upon simple misconceptions (or misrepresentations) of the substance of certain provisions. Thirdly, however, one major finding of the report is that awareness-raising alone cannot dispel a number of important obstacles to ratification, as these are founded, not upon misunderstandings, but rather scepticism over the necessity of the Convention and to the effect on migration that it may have. Mere knowledge of Convention provisions here is insufficient; rather, a hard task of persuasion remains to be accomplished. Both types of obstacle are dealt with in more detail in the next section.

OBSTACLES TO RATIFICATION

Part IV of the report considers the specific obstacles to ratification of the ICRMW in the seven EU/EEA countries analysed here. These are divided into three different categories: legal; financial/ administrative; and political. The first and third categories are further divided into those perceived obstacles that are general, that is, shared by all under consideration here; and those that are particular to specific countries. These categorisations are, of course, in large degree artificial, in that any given obstacle may have elements of each of the three categories; nonetheless, the distinction remains useful for analytical purposes, and it is worth noting that those general obstacles that are predominantly “legal” in character and those that are predominantly “political” map fairly nicely onto the distinction noted above, between simple “misconceptions”, and areas in which much persuasive argument remains to be made.

The general legal obstacles, which fall squarely into the “misconception” category of perceived obstacles to ratification of the ICRMW are, essentially, twofold: firstly, the common claim that the ICRMW would limit the sovereign rights of states to decide upon who can enter their territory and for how long they can remain; and, secondly, the equally ubiquitous fear that the Convention would provide for a robust right of family reunification to all migrant workers present in a regular situation in the territory of a state. Neither of these objections, however, stands up to a close reading of the text of the Convention: regarding the former, for example, Article 79 provides that “[n]othing 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”; whereas state’s responsibilities in terms of family reunification under Article 44 are limited to taking such measures “as they deem appropriate to facilitate the reunification of migrant workers with their spouses... as well with their minor dependent unmarried children”. In language as heavily qualified as this, leaving such a wide discretion open to states, it is difficult to see any obligation of any sort, let alone one that could present a serious obstacle to ratification.

The report then goes on to detail a number of minor legal obstacles that are particular to specific states. While the law of all seven of the states analysed for the purposes of this report is in large degree already in conformity with the provisions of the ICCPR, each would be required to alter its legislation, usually in some fairly minor manner, in order to comply with its obligations after ratification. None of these, however, appear to pose serious obstacles to ratification: even in those situations in which states are unwilling to introduce the necessary amendments to domestic legal norms, many of these difficulties could be overcome by making a reservation to the incompatible Convention provision at the time of ratification. In any event, in a number of countries, most notably Italy and Spain, many of the provisions of national law that are incompatible with the Convention are already the subject of challenges before the relevant Constitutional Courts, and may thus be removed in the near future.

Despite the fact that administrative and financial issues have often featured in the academic literature as key obstacles to ratification of the ICRMW, in almost none of the individual country studies carried out for the purposes of this report did these emerge as being of genuine significance; and this despite the fact that, for example, neither Poland nor Norway has had much experience historically with immigration, and both lack the highly developed regulatory institutional framework that the Convention seems to suppose; while the gap between legislated and practically enjoyed rights in Italy provides a stark illustration of what the costs involved in effective implementation might be for some. The only exception in this regard is provided by France, which was unique among those studied here in citing the Convention’s financial provisions as a major obstacle to ratification, and in particular the Article 47 obligation to “take appropriate measures to facilitate” the transfer of remittances by migrants to their countries of origin. Again here, the language in which the “obligation” is couched is decidedly less than restrictive; however, the French Government appears to believe that the current banking practice in the country of charging high fees to make such transfers would be in violation of this provision. Again, however, a reservation would, if necessary, suffice to overcome this difficulty.

If, then, as the individual reports indicate, it can be concluded that there are no insurmountable, or even major, legal, financial or administrative barriers to ratification of the ICRMW in the countries analysed for the purposes of this study, they are equally clear and unanimous in the view that the real obstacles facing the Convention are political in nature. Here, by far the most important are the “general” political obstacles – those viewed as such by most or all of the countries studied for the purposes of this report. As noted above, these cannot be as easily dismissed as mere “misconceptions” as can the general legal obstacles; rather, in-depth and sustained analyses will be required if the necessary task of persuasion is to be successful.

There are three such obstacles that emerge from the individual country studies: firstly, that the ICRMW is entirely superfluous in the context of international human rights law; secondly, and relatedly, that the rights it prescribes are already largely guaranteed, on paper at least, by national laws and the international norms to which the states concerned are party; and thirdly (and perhaps slightly incoherently, when read in the light of the previous two) that the Convention endows irregular migrants with too many rights, and as a result would hinder both processes of social integration and the struggle against irregular movements of people. These three objections appear to be perhaps the most common general objections to the ICRMW from the governments of EU/EEA states, if the findings of the individual country reports presented here can be at all extrapolated to the other countries of the region; and each represents a real challenge to the prospects of ratification of the Convention.

THE EU CONTEXT

One of the findings that emerged strongly from all of the individual country studies was that, despite the currently relatively bleak outlook for the ICRMW in each of the states, the adoption of a positive stance on the issue by the European Union could have a major influence in changing this; hardly surprising, given the transfer of competence over immigration and asylum matters to Community institutions by the Treaty of Amsterdam, which entered into force in May 1999, and the EU’s strong commitment to use these new powers in the European Council’s Conclusions for creating the “area of freedom, security and justice” adopted at the Tampere Summit in October 1999. Thus, Part V of the report looks in some detail at the current situation regarding the ICRMW within EU law and institutions.

Progress in terms of developing a common immigration law and policy has been significantly slower than for asylum within the EU, although the Commission now plans to introduce five more specific directives dealing with economic migration in the next three years: two in 2007 (on admission of highly-skilled workers and on a general framework on the status of all persons admitted for the purposes of employment); one in 2008 (on seasonal workers); and the remaining two in 2009 (on intra-corporate transferees and remunerated trainees). Of the nine instruments that have been adopted in this field to date, by far the most important are the Directive on the right to family reunification and the Directive concerning the status of third-country nationals who are long term residents. The first provides that

all third-country nationals with a residence permit valid for one year or more, and who have “reasonable prospects of obtaining the right of permanent residence” have the right to bring their spouse and minor dependent children; in doing so, it clearly not only complies with but goes some distance beyond the very weak reunification obligation contained in Article 44 of the ICRMW. On the other hand, however, the Directive falls short of the Convention’s standards on social rights to be afforded to those who enter under family reunification provisions: whereas the latter grants a fairly robust set of rights to be afforded on an equal basis with nationals, the former only grants those family members that are admitted access to similar social benefits to the extent that these are enjoyed by the sponsor.

The second, the Long-Term Residents Directive, largely falls outside the scope of the ICRMW, concerned as it is with the conditions under which migrants who have resided legally for a particular length of time in an EU Member State should be granted the right to a secure residence status. However, the Directive also contains a number of provisions that lay down the rights to which those accorded long-term resident status are entitled. Most important here is the equal treatment provision contained in Article 11, which provides that long-term residents shall be afforded treatment equal to nationals of the host state in relation, *inter alia*, to access to employment, vocational training, social security and tax benefits, and to freedom of association; a set of rights that compares rather badly to the equivalent provision in the ICRMW. It is, moreover, worth noting that Article 11(4) of the Directive immediately allows Member States to restrict equal treatment to certain largely undefined “core benefits”. Most importantly, however, the relevant provision in the ICRMW applies to *all* migrants in a regular situation; the clear implication of the Long-Term Residents Directive, by proclaiming these rights as a benefit of that status, is that those migrants who do not fall under its terms are not entitled to these rights, at least to the same extent, regardless of the regularity of their stay. In this context, it is hard to see how the draft General Framework Directive on the legal status of third-country nationals lawfully admitted for employment in EU Member States, which the European Commission plans to advance in September 2007, can afford more generous rights than those granted to third-country nationals who are long-term residents.

The Tampere Conclusions, like the ICRMW, envisage a dual approach to the regulation of migration: the “fair treatment of third country nationals” on the one hand, and the “management of migration flows” on the other. In terms of the ICRMW, however, the structural bias is clear: four out of its six substantive sections deal with the rights of migrants, and only one with the regulation of migration flows themselves. In general, however, the basic logic that has to date driven Community legislative action in the construction of the common migration policy has been structured in the opposite manner, with considerably more attention being paid to the regulation of migration flows, both regular and irregular, than with the rights of those that constitute them. While this does not, of itself, create human rights violations, the practical relegation of rights discourse in this field to a status below that of the technical regulation of labour markets or national security will almost inevitably lead to policies and laws that conflict with the provisions laid down in the ICRMW. This can be seen most clearly in two areas in which the developing EU common migration policy and

the Convention diverge: on the principle of equal treatment between migrants and nationals; and on the treatment of irregular migrants.

As noted above, the Long-Term Residents Directive allows states to limit the principle of equality of treatment with nationals, a principle central to the logic of the ICRMW, not only to one particular, privileged legal status (long-term residence), but also to an undefined, but undoubtedly truncated, notion of certain “core” social benefits. In doing so, EU law leaves little or no conceptual space at all for the social rights of other regular, non-EU migrants – not to mention those that the ICRMW insists should be enjoyed by all, regardless of status. In terms of the rights of irregular migrants, EU legislation in this field has to date been largely devoid of substance: the Tampere Conclusions adopted an explicitly security-based approach to irregular migration, proclaiming that “[t]he European Council is determined to tackle at its source illegal immigration, especially by combating those who engage in trafficking in human beings and economic exploitation of migrants”. It was expected at the time, however, that this legitimate aim would be complemented by measures designed to protect the human rights of the irregular migrants concerned; this, however, has not materialised.

Even where migrants’ rights have been mentioned in Community documents, there has, by and large, been little recognition that *human* rights are involved; rather, the dominant image is one of migrant-as-consumer, and the justification of the rights that are to be granted remains most often an economic one. Perhaps most strikingly in this regard, the proposed General Framework Directive for 2007, which will lay out the basic rights to which non-EU migrant workers are entitled to within the Union (and which will thus go some way to addressing the ambiguities created by the Long-Term Residents Directive over the rights available to regular workers who do not qualify for the more privileged status) will, it seems, decline to deal in any manner whatsoever with what rights – if any – must be made available within the EU even to those who enter or remain irregularly. The refusal to confront this issue alone puts EU law at odds with the human rights philosophy underpinning the ICRMW.

This part of the report concludes with examination of the support for the ICRMW within European institutions. The earliest manifestation of this was in a Commission Communication of 1994, which explicitly recognised the importance of a rights-based approach in the construction of a credible and effective migration policy, particularly in terms of restricting irregular migration, and which called upon Member States to ratify the ICRMW as a means of giving practical expression to this goal. This, however, has not proved as significant as it might have, in that none of the Member States have followed the course of action recommended; moreover, it represents the one and only time that the Commission has engaged in any serious manner with the ICRMW. Indeed, more recent remarks by Commissioners suggest that the Commission has since adopted a negative approach to the Convention.

Two other significant, if less important, institutions have, however, provided more recent and sustained support of the Convention: the European Parliament, in 1998, endorsed

ratification, a position that it has reiterated on several occasions since; and the European Economic and Social Committee adopted, in 2004, an own-initiative opinion in which it comes down strongly in favour of ratification. The European Union thus not only has the potential to play a crucial positive role in encouraging ratifications of the ICRMW; it also boasts by far the highest level of sustained institutional support for the Convention of any polity in the region. If this constitutes grounds for renewed optimism, however, it must be approached with great caution: those bodies that have come down in favour of ratification (the Parliament and the EESC) can play only a very limited role in the enactment of measures in this field, while those with the real law- and policy-making powers (the Commission and the Council) clearly remain less than convinced of the benefits that the ICRMW could bring to the developing common migration policy. The proposed General Framework Directive is key here: the period in which the EU negotiates and lays down the rights of all regular migrant workers present on its territory could be crucial in defining the future attitudes towards the ICRMW within Community institutions; and these, in turn, will have a major impact on the prospects for ratification of the Convention within individual Member States.

RECOMMENDATIONS

The report concludes in Part VI with a brief summary of the findings outlined above, and with the following twelve recommendations in terms of encouraging ratification of the ICRMW amongst EU/EEA countries:

Recommendation 1: That efforts be focused, in full cooperation and collaboration with both the European Parliament and the European Economic and Social Committee, on ensuring that the ICRMW has a major influence on the developing Community legislation on migration.

Recommendation 2: That particular and urgent attention is paid in this regard to the ongoing drafting process of the proposed EU General Framework Directive on the rights of regular migrants, and to subsequent negotiations in the Council on the text of the proposed measure.

Recommendation 3: That detailed analyses of the compatibility of current and proposed Community legislation in this field with the provisions of the ICRMW, paying particular attention to the rights of irregular migrants within the EU, are commissioned and publicised.

Recommendation 4: That, in terms of national politics, efforts be focused to promote ratification of the ICRMW on those major EU Member States, such as the UK and France, in which civil society campaigns have been most effective, with a view to encouraging them to take on a leadership role within the EU.

Recommendation 5: That steps be taken to commission, or otherwise ensure the existence and availability of, full, accurate and authoritative translations of the text of the ICRMW in all of the official languages of EU/EEA countries.

Recommendation 6: That the establishment of national civil society coalitions in favour of ratification of the ICRMW, following the model established in the UK and France, ensuring the participation both of major migrant and human rights NGOs and relevant trade unions, be encouraged.

Recommendation 7: That steps be taken to commission or encourage detailed comparative analyses of national legislations with the provisions of the ICRMW, in order that awareness not only of the content, but also of the implications of ratification, of the Convention increases.

Recommendation 8: That academic studies into the “added value” of the ICRMW be commissioned or encouraged, both in terms of its place in the system of international human rights norms, and its translation into the highly developed human rights legislation in the various national contexts of the region.

Recommendation 9: That similar studies into the broad catalogue of rights afforded by the ICRMW to all migrants, regardless of status, and in particular to the likely effect that this would have on preventing or reducing irregular migration, be commissioned or encouraged.

Recommendation 10: That steps be taken to ensure that such studies, either those already existing or those carried out in the future, are given as high a profile as possible within public and political debates on the issue of migration.

Recommendation 11: That more be done to promote the ICRMW among the public more generally, in particular through regular interventions in the popular media, in order to promote the principle that all migrants are entitled to basic human rights, including, importantly, core economic and social rights.

Recommendation 12: That a synthesis and synopsis of the ICRMW, capable of being displayed on a single page, be developed and made available in all official languages of the EU/EEA region, containing both the general core of rights to which every migrant is entitled, and details on where to seek further information.

Part 1: Introduction

I.I BACKGROUND AND METHOD

Conceived of in the 1970s, drafted in the 1980s, and opened for ratification in the 1990s,¹ the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) finally entered into force on 1 July 2003, following ratifications by El Salvador, Guatemala and Mali. Despite the fact that it is viewed by the Office of the High Commissioner for Human Rights as one of the seven “core” international human rights treaties, to date it boasts only 37 States Parties; by some distance the lowest ratification level of any instrument in this category.² This lack of support for the ICRMW from the international community of states becomes even more striking upon consideration of the fact that not one single major labour receiving country has yet ratified it. The primary purpose of this report is to analyse the reasons for this in one of the most developed migration receiving regions in the world: the European Economic Area (EEA).³

It is difficult to overstate the potential impact that ratification by the EU/EEA countries could have for the perception and chances for success of the ICRMW globally. Not only does it represent one of the most important labour-receiving regions in the world, it also constitutes one of the most powerful negotiating blocs in international relations, from which other states often take their lead. In this regard, a successful campaign for ratifica-

1. Paraphrasing A. Pécoud and P. de Guchteneire, “Migration, human rights and the United Nations: an investigation into the low ratification record of the UN Migrant Workers Convention”, Global Commission on International Migration, *Global Migration Perspectives No. 3* (Oct. 2004) p. 9; <http://www.gcim.org/gmp/Global%20Migration%20Perspectives%20No%203.pdf>.
2. The other six are the International Covenant on Civil and Political Rights (ICCPR – 160 Parties); the International Covenant on Economic, Social and Cultural Rights (ICESCR – 156 Parties); the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD – 173 Parties); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW – 185 Parties); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT – 144 Parties); and the Convention on the Rights of the Child (CRC – 193 Parties). See <http://www.ohchr.org/english/bodies/docs/status.pdf>.
3. The EEA comprises, as of 1 January 2007, 30 states: the 27 EU Members (Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, the Netherlands, United Kingdom) and Norway, Iceland and Lichtenstein.

tion among the countries of this region could have very significant knock-on effects in both sending and receiving countries alike.⁴ With this in mind, the need for an analysis of the factors impeding ratification in the various national contexts is readily evident.

To this end, UNESCO commissioned a series of detailed reports into the prospects for and obstacles to ratification of the Convention in seven EU/EEA countries: France, Germany, Italy, Poland, Spain, the United Kingdom and Norway. These were chosen in order to give as broad and diverse a view as possible of the issues involved, representing as they do not merely all geographical areas of the EU/EEA, but also the four largest EU Member States, the major economic players in the region, certain migration “hotspots” at the Union’s frontiers, one newly acceded Member (Poland), and, in Norway, one state that has chosen to engage in the project of European integration outside the context of the EU itself, but within that of the European Economic Area (EEA). The reports themselves were based upon a series of semi-structured interviews with major migration stakeholders in each country, including, *inter alia*, government officials from both central and regional authorities, members of other political parties, and representatives of civil society (i.e., relevant NGOs and trade unions). It is important to emphasise at this point, then, that the findings presented here are primarily based upon the *perceptions* of the principal actors involved of what constitute the main obstacles to and prospects for ratification in each of the states under consideration; they are not the result of in-depth legal, economic or political analyses of what ratification would *in fact* involve. Indeed, as will become clear, such studies are, in the main, conspicuous only in their absence.

The basic framework within which the interviews were carried out was structured in the following manner: general questions concerning the level of awareness, both within political circles and the wider public, of the ICRMW and its provisions; the nature of any parliamentary activity regarding its potential ratification, and any studies carried out to inform such activity; and the specific legal, administrative and political obstacles to ratification in each country. The potential role of EU institutions in encouraging ratifications was also a major feature. This report presents and summarises the findings of the specific country reports, analyses them in their broader regional context, and proceeds to formulate some recommendations for how ratification may be best encouraged in the future.

As noted above, none of the states considered here have ratified the ICRMW; all, however, have ratified all six of the other core human rights treaties.⁵ These are not states, then, that are in any way inexperienced with or hostile to international human rights

4. This point, of setting an example, has been made forcefully by, for example, the French National Consultative Commission on Human Rights [*Commission Nationale Consultative des Droits de l’Homme*] in its Opinion of 23 June 2005 [*Avis sur la convention internationale sur la protection des droits de tous les travailleurs migrants et des membres de leur famille*], in which it calls for the French Government to ratify the ICRMW. The Opinion is available in its French original at <http://www.commission-droits-homme.fr/bin/Travaux/AffichageAvis.cfm?IDAVIS=748&iClasse=1>.

5. See <http://www.ohchr.org/english/bodies/docs/status.pdf>.

instruments,⁶ or the UN system in international law more generally.⁷ Nonetheless, as will become readily evident, ratification simply does not appear to be on the agenda for any of the states analysed for the purposes of this report; indeed, it is no exaggeration to say that the reactions to the Convention generally fall on a scale ranging from relaxed indifference to overt hostility – and that these have been relatively sustained positions, despite the normal changes in the political make-up of the Governments involved. Left or right, in power or in opposition, it seems that for few if any of the major political parties in the states under consideration here does ratification appear as an urgent, or even important, policy goal (and it is worth noting, in this regard, that the country reports were carried out around the time of major elections in most of the countries involved, providing the opportunity to examine any changes in policy that followed from changes in government). The reasons for this are many and varied: some can be traced to the politics of the drafting process; others to the content of the Convention itself, and others still to the particularities of the various national contexts. In what remains of this introductory section, each of these will be briefly considered in turn, in order to provide some context for the detailed synopsis and analysis of the individual country reports that follows.

I.2 BACKGROUND TO THE CONVENTION

Drafting a human rights instrument of comprehensive and universal scope is rarely a straightforward matter, and the ICRMW was certainly no exception in this regard. One of the earliest noteworthy elements was the essential marginalisation of the UN body with a clear constitutional mandate for the elaboration of universal standards in the field of labour migration, namely the International Labour Organization (ILO).⁸ In many respects, the ICRMW has its roots in the dissatisfaction of many, particularly developing and migrant-sending countries, both with previous ILO efforts in this field (notably the Migrant Workers (Supplementary Provisions) Convention 1975 (No. 143)) and with the manner in which that Organization functioned more generally. In terms of the former, it

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6. These are factors that have hampered ratification in other regions of the world. See generally the earlier report in this series by R. Iredale and N. Piper, “Identification of the Obstacles to the Signing and Ratification of the UN Convention on the Protection of the Rights of All Migrant Workers: The Asia-Pacific Perspective”, *UNESCO Series of Country Reports on the Ratification of the UN Convention on Migrants* (Oct. 2003) (http://portal.unesco.org/shs/en/file_download.php/09ea2df029c0f73876051ce2648028dfasia_pacific_full_report.pdf) at, e.g., p. 34, discussing obstacles to ratification in Malaysia.
 7. This was one of the general political obstacles identified by Pécoud and de Guchteneire, loc. cit. n. 1, at p. 4.
 8. See the Preamble to the Constitution of the ILO, Recital 2, which states that the Organization is established with a view to securing, *inter alia*, the “protection of the interests of workers when employed in countries other than their own”; and this competence is explicitly recalled in the Preamble to the ICRMW, Recital 4. See also R. Böhning, “The ILO and the New UN Convention on Migrant Workers: The Past and Future”, 25 *International Migration Review* (1991) 698-709, at p. 700.

was felt that Convention No. 143 would lead to a significant drop in foreign exchange remittances for sending countries from nationals employed illegally abroad; whilst the ILO itself was viewed as being structured in favour of developed countries, and too open to the influence of trade unions.⁹ More generally, UN conventions allow for a greater degree of flexibility than do those elaborated under the auspices of the ILO, as the former allow for ratifying states to insert reservations on certain provisions, whilst the latter do not.¹⁰

While, then, for some of those involved in the drafting process, “[t]he complexity of the migration phenomenon, its political explosiveness and the UN tradition in the field of human rights explain the interest of the United Nations General Assembly in the issue”,¹¹ it equally seems to be the case that here, as with other international instruments, it was “not so much the concern of proponents of international humanitarian law as the constellation of political power relationships”¹² which led to the choice of a UN rather than an ILO Convention for the comprehensive protection of migrant workers.

The main driving forces behind the formulation of a UN Convention on this issue were Mexico and Morocco, both major sending countries keen to protect the rights of their nationals abroad, and to maintain and develop their ability to send their nationals for employment abroad. Their actions led to the adoption of General Assembly Resolution 34/172 of 1979, which in turn led to the establishment of the Open-ended Working Group that, over the course of the next decade, would draft the ICRMW.¹³ Many developed countries, however, expressed a strong preference for remaining within the framework of the ILO; thus, the drafting process of the ICRMW divided states right from its very inception (even although the ILO did ultimately still play a significant role in the formulation of the Convention).

These differences became apparent when the Mexican Chairman of the Working Group, presented, in 1981, a first draft of the instrument: many Western governments viewed it as simply a “blank cheque for continued illegal migration”.¹⁴ The Open-ended Working Group’s own report on the proposal noted that “... the text would tend to encourage illegal trafficking in labour or, at least, ... make it very difficult for States to take effective measures

9. Böhning, loc. cit. n. 8.

10. Pécoud and de Guchteneire, loc. cit. n. 1, at p. 5.

11. J. Lönnroth, “The International Convention on the Rights of All Migrant Workers and Members of the Families in the Context of International Migration Policies”, 25 *International Migration Review* (1991) 710-736, at p. 711. It is worth noting that Lönnroth was actively involved in the drafting process from the beginning to the end, first as a participant in, and then as Vice-President of, the Working Group charged with the task of elaborating the Convention.

12. Böhning, loc. cit. n. 8, at p. 698. It seems clear that the author here is using the term “international humanitarian law” in a broader sense than it is today understood within public international law.

13. These processes are documented in detail in Lönnroth, loc. cit. n. 11, at pp. 713-716, and in Böhning, loc. cit. n. 8, at pp. 699-704. The drafting process is also summarised in the OHCHR Fact Sheet No. 24 on the ICRMW, at pp 2-3 (<http://www.unhcr.ch/html/menu6/2/fs24.htm>).

14. Böhning, *ibid.*, at p. 701.

against such trafficking”.¹⁵ This led, however, to an interesting development, particularly from the point of view of the present report: a combined grouping of Mediterranean and Scandinavian (MESCA) countries took a leading role in the proceedings of the Working Group: among them Spain, Italy and, at a slightly later stage, Norway.¹⁶ Their main goals were to combat irregular immigration¹⁷ by discouraging employers from engaging undocumented workers, whilst also acknowledging that certain basic rights must be afforded to all, regardless of legal status; and it is these considerations that account, in large part, for the structure of the Convention as it was eventually adopted.¹⁸

It is surprising, then, that even those European states most central to the elaboration of the Convention have not, more than fifteen years after its formal adoption, yet ratified it – and this report provides the opportunity to examine in detail the reasons behind this failure in three of those most directly involved. It is surely, however, in part testament to the divisiveness of the subject-matter and of the process of its development. Moreover, it is worth noting that some in the industrialized world, in particular Germany and the US, had signalled that they would be unable to ratify the Convention on many occasions during the drafting process; and that no sooner had the UN General Assembly formally adopted the text of the Convention than Australia, Japan and Oman made declarations to the same effect.¹⁹ The portents of success for the ICRMW have thus been decidedly less than auspicious since its very inception.

I.3 STRUCTURE AND CONTENT OF THE CONVENTION

This is not, however, to suggest that the Convention is not, in itself, potentially an extremely important instrument in the struggle to protect the human rights of migrant workers and members of their families, particularly as, in an increasingly globalised and interdependent world, more and more people are choosing to cross borders, both with and without authorization, in search of work. The Convention follows firmly the pattern for international human rights treaties established by other instruments such as the ICERD, the CEDAW, the CAT and the CRC; that is, it takes the rights contained in the two treaties of general scope, the ICCPR and the ICESCR, and codifies and specifies them in relation to a particularly vulnerable group of persons or a specific theme. This

15. UN General Assembly, *Measures to Improve the Situation and the Human Rights and Dignity of All Migrant Workers*, UN Doc. A/36/378, Annex XII, p. 3; quoted in Böhning, *ibid.*

16. In addition, the MESCA group of countries included Greece, Portugal and Sweden. France also participated in the deliberations of the group, but retained an independent position. See Lönnroth, *loc. cit.* n. 11, at p. 731.

17. The terms “irregular” and “undocumented” migrants are used interchangeably throughout this report to refer to all those who cross international borders without going through the necessary legal procedures, or those whose permission to remain in the country of residence is no longer valid.

18. Böhning, *loc. cit.* n. 8, at p. 702.

19. *Ibid.*, at p. 706, n. 5.

formal similarity, however, belies a crucial difference in practice: whereas the ICERD, CEDAW and CRC have all attracted a high rate of ratification (higher, indeed, than either of the two general Conventions),²⁰ the acceptance rate of the ICRMW stands at roughly 20-25% of these.

As noted above, the complex structure of the ICRMW is testament to the competing interests that it is intended to balance: not merely those of sending and receiving states, but also of the rights of individual migrants with those of individual states to control the entry of non-nationals to their territories. The Convention consists of a lengthy Preamble and 93 Articles, with the latter being subdivided into 9 different Parts. The first Part provides a general definition of the terms and concepts used,²¹ while Part II – consisting only of Article 7 – provides that the rights in the Convention are to be made available to all migrants without discrimination. The main body of the rights provided is set out in Parts III and IV, the former laying down the rights that all migrant workers, regardless of the legality of their presence on the territory of a state, must enjoy,²² while the latter provides for some further rights for lawfully resident migrants.²³ Part V specifies additional rights for workers in particular categories of employment;²⁴ Part VI contains provisions relating to international cooperation and coordination in the management of legal migration and the prevention or reduction of irregular movements;²⁵ and Part VII deals with the application of the Convention, including the establishment of a Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (hereafter Committee on Migrant Workers), charged with overseeing the implementation of the Convention.²⁶ Lastly, Parts VIII²⁷ and IX,²⁸ on general and final provisions, contain important provisions on, *inter alia*, the principle of national sovereignty, the renunciation of rights, and reservations.²⁹

20. See *supra*, n. 2.

21. ICRMW, Arts. 1-6.

22. Arts. 8-35.

23. Arts. 36-56.

24. Arts. 57-63.

25. Arts. 64-71.

26. Arts. 72-78.

27. Arts. 79-84.

28. Arts. 85-93.

29. More detailed analysis of the provisions of the Convention can be found in, e.g., R. Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (Oxford: Clarendon Press, 1997) ch. 4; and L.S. Bosniak, "Human Rights, State Sovereignty, and the Protection of Undocumented Migrants under the International Migrant Workers Convention", 25 *International Migration Review* (1991) 737-770. For a comparative analysis of the provisions of the ICRMW with those of other major international human rights instruments, see J.A.R. Nafziger and B.C. Bartel, "The Migrant Workers Convention: Its Place in Human Rights Law", 25 *International Migration Review* (1991) 771-799.

It is worth flagging at this early stage some of the substantive elements of the Convention, in order to provide a degree of background for the discussion of perceived legal, administrative and political obstacles to ratification in each of the states under consideration that follows. Part III, which deals with the rights of all migrant workers regardless of their legal status, is perhaps the most controversial section of the entire instrument. Articles 8-24 lay down a set of civil and political rights, many of which are directly lifted from other international instruments, and few of which will be sources of disagreement: the rights to life;³⁰ to privacy;³¹ freedom of expression;³² freedom of conscience;³³ freedom from torture,³⁴ slavery³⁵ or arbitrary arrest and detention;³⁶ equality before the law,³⁷ consular protection,³⁸ and so on. One other provision that is worth noting in this regard, however, is Article 22(1), which bans collective expulsions: each decision to remove a migrant must be taken on an individual, case-by-case basis, and the relevant procedural criteria are laid out in the remaining paragraphs of Article 22. Article 22 is broader in scope than other provisions of international human rights law (e.g. Article 13 of the ICCPR), which limit the application of procedural safeguards against expulsion to lawfully resident migrants. Articles 25 to 35, however, are significantly more problematic in the eyes of destination countries, as they explicitly accord to all migrants a range of economic and social rights, such as the right to equal remuneration with nationals;³⁹ to join trade unions;⁴⁰ to urgent medical care;⁴¹ to education for their children;⁴² and to respect for their cultural identity.⁴³ Article 27, on social security rights, also provides for equality of treatment with nationals, but only insofar as the migrants “fulfil the requirements provided for by the applicable legislation of that State”. Despite the explicit recognition in the ICRMW that all migrants, irrespective of their legal status, are entitled to economic and social rights, in principle these rights are already provided to them by the ICESCR and, according to the views of the body responsible for monitoring the application of that instrument in States Parties (the Committee on Economic, Social and Cultural Rights), in more generous terms than those accorded by the ICRMW. For example, the Committee has interpreted the right of everyone to “the enjoyment of the highest attainable standard of physical and mental health” in Article 12 of the ICESCR as encompassing a holistic notion of health

30. ICRMW, Art. 9.
 31. Art. 14.
 32. Art. 13.
 33. Art. 12.
 34. Art. 10.
 35. Art. 11.
 36. Art. 16.
 37. Art. 18.
 38. Art. 23.
 39. Art. 25.
 40. Art. 26.
 41. Art. 28.
 42. Art. 30.
 43. Art. 31.

care going beyond emergency medical treatment, which is applicable to all, including non-citizens with irregular status.⁴⁴

Part IV contains the rights that must be granted only to migrant workers in a documented or regular situation, in addition to those set forth in the previous section. These include the freedom to move within the territory and to choose residence;⁴⁵ the right to form associations and trade unions;⁴⁶ and the right to participate in public life, and to vote and stand in elections in their state of origin.⁴⁷ Other important provisions concern equal treatment to that accorded to nationals in respect of access to, *inter alia*, educational institutions, vocational guidance, social housing schemes, social and health services (“provided that the requirements for participation in the respective schemes are met”);⁴⁸ and respect for the family unit, in that states are “obliged” to “take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses” and dependent minor children.⁴⁹ It is also worth noting here that States Parties are required to adopt measures to “facilitate” the transfer of remittances.⁵⁰

Provisions that have proved controversial in this Part of the Convention include Article 51, which states that any migrant worker who leaves his/her employment before the work permit expires shall not on that basis alone be considered in an irregular situation, and nor shall s/he automatically lose his/her right to residence, unless such had been made conditional on the specific employment from the outset; and Article 54, which provides for equality of treatment with nationals with respect to, *inter alia*, protection against dismissal and unemployment benefits.

Part VI of the Convention obliges states, as appropriate, to “consult and co-operate with a view to promoting sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families”.⁵¹ Of particular note here is Article 68, which obliges states to collaborate with a view to preventing illegal or clandestine movements of people, and the employment of such people in the host state, and to adopt measures to punish those who organise or facilitate such movements, who employ such people, or who use violence, threats or intimidation against them. Also important is Article 69, which provides that states will take the appropriate measures, where there are irregular migrant workers on their territories, to ensure that this situation does

44. UN, ECOSOC, CESCR, 22nd Session, *General Comment 14 on the right to the highest attainable standard of health: Article 12 ICESCR* (adopted on 11 Aug. 2000), UN Doc. E/C.12/2004/5, para. 34; [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/40d009901358b0e2c1256915005090be?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/40d009901358b0e2c1256915005090be?Opendocument).

45. Art. 39.

46. Art. 40.

47. Art. 41.

48. Art. 43.

49. Art. 44.

50. Art. 47.

51. Art. 64.

not persist. Paragraph 2 of this Article provides that, where regularisation is considered as a means of discharging this obligation, factors such as the circumstances of entry, duration of stay and family situation should be taken into account.

Part VII deals with the application of the Convention, and in particular with the establishment, competences and functioning of the Committee on Migrant Workers. In common with the other core international human rights instruments, Article 73 lays down a reporting requirement: all States Parties must report to the Committee on the measures taken to implement the Convention one year after ratification, and every five years thereafter; the Committee will then respond to the report with comments and recommendations in the form of Concluding Observations. To date, seven initial reports have been submitted (from Bolivia, Ecuador, Egypt, El Salvador, Mali, Mexico, and Syria), and the Committee has issued two Concluding Observations (Mali and Mexico). Article 76 also establishes a procedure, if ten states declare agreement thereto, whereby one State Party may submit a communication to the Committee if it considers that another Party is failing to abide by its obligations (although both states must have agreed to the process before such a communication can be made). Similarly, Article 77 establishes an individual complaint procedure, to come into effect once ten states have declared their consent, and only for those states that have done so. To date, no state party has accepted the inter-state or individual complaint mechanism.

Parts VIII and IX, on general and final provisions respectively, contain a number of important provisions. Article 79, for example, states both explicitly and clearly the extent to which the basic principle of state sovereignty in terms of regulating entry to the territory is retained and respected by the Convention: “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”.⁵² Article 82 provides that none of the rights laid down by the Convention can be renounced by their beneficiaries, while Article 83 obliges states to provide effective remedies for those whose rights have been violated. Lastly, Article 91 acknowledges the possibility that states may lodge reservations to specific obligations when ratifying, although any that is “incompatible with the object and purpose” of the Convention will not be permitted.

The ICRMW, then, is a lengthy and comprehensive instrument that mirrors the complexity of the phenomenon it seeks to regulate. It contains a wide array of rights for migrant workers, including not only civil and political, but also economic, social and some cultural rights, as well as rights of specific interest to migrant workers such as the right to transfer their earnings and savings.⁵³ It also establishes a broad range of obligations on states, some very weak and others considerably stronger, and deals with issues of international cooperation and coordination alongside purely national concerns. It also places some considerable burdens on States Parties, not merely in terms of actual implementa-

52. For a critique of the limitations imposed by the still-dominant role of sovereignty in the Convention, particularly in terms of protection for irregular migrants, see generally Bosniak, *loc. cit.* n. 29.

53. Arts. 32 and 47.

tion of its provisions, but also through the verification of that implementation, through the reporting mechanisms of the Committee on Migrant Workers. One almost inevitable aspect of such an instrument is that the obstacles to its ratification will often vary widely from country to country; indeed, the complexity of the document itself has been cited as one of the reasons that it has, to date, been relatively unsuccessful when compared with ratifications of the other core international human rights treaties.⁵⁴ In order to better understand the ways in which various obstacles appear in different settings, however, it is necessary to look, briefly, at the national contexts in which they arise.

I.4 AIMS AND STRUCTURE OF THE REPORT

As noted at the outset, the general aim of this report is to present the findings of the individual country studies for the reasons for non-ratification, and the prospects for ratification, of the ICRMW in EU/EEA countries, and, on that basis, to formulate a set of recommendations as to how best to encourage the states of the region to become parties to the Convention. To this end, the report is structured in the following manner. The next part (Part 2) presents a brief sketch of the migration contexts in the various states under consideration, in order to provide some perspective and background to the perceived obstacles to ratification in each. Part 3 examines the issue of the awareness of the Convention, at the levels of government, parliament and civil society, and in the public more generally, and outlines the steps that have been and are being taken in order to increase this, as it in itself is often cited as one reason for its low acceptance rate among states. Part 4 then presents the perceived barriers in more detail, looking in turn at legal, administrative/ financial, and political obstacles to ratification.

The existence of the European Union, by far the most developed supranational polity of modern times, introduces a new and important variable to the issue of ratification of the ICRMW that simply is not present, to the same degree at least, in any other part of the world; and, as will become clear, the majority of those interviewed in the course of the individual studies felt that it could have a crucial role to play in changing attitudes and gaining acceptance of the Convention. Part 5 of this report is thus dedicated to an analysis of the potential role of the EU in this area, both in terms of its past and current legislative programmes, and the manner in which the ICRMW has been addressed by Union institutions politically. The final section, Part 6, presents the findings and formulates a set of recommendations on how the campaign for ratification might best proceed in the future.

54. See Pécoud and de Guchteneire, *loc. cit.* n. 1, at p. 12.

Part 2: National Contexts

2.1 INTRODUCTION

The EEA, as a regional bloc, is still experiencing significant population growth – of some 1.97 million in 2003 and 1.8 million in 2005, for example – despite the fact that in just under half of what are now the 30 EEA states, the number of deaths exceeded that of births in both of the aforementioned years.⁵⁵ In 2005, immigration accounted for 85% of the region's total net population growth, and was the sole reason for a net growth in a number of states.⁵⁶ This alone is testament to the importance of extra-regional inward flows to the region; to the extent that many countries that were until recently net exporters of labour have become, in the last fifteen years or so, major receiving states. Also of importance here, however, are the EU/EEA intra-regional movements, particularly since the accession of the ten new Member States of the European Union on 1 May 2004.⁵⁷ Migration, therefore, is, quite simply, a phenomenon that no-one in the region can afford to ignore, for either economic or demographic reasons.

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55. *World Migration 2005: Costs and Benefits of International Migration* (Geneva: IOM, 2005) p. 141. The figure of 1.97 million includes not only the then (2003) 28 EEA states (the 25 EU Members plus Norway, Liechtenstein and Iceland), but also Switzerland. For the 2005 statistics, including those showing that the two newest members of the EU/EEA, Bulgaria and Romania (who joined in January 2007) also experienced significant net native population decreases, see R. Münz, "Europe: Population and Migration in 2005", *Migration Information Source* (June 2006); <http://www.migrationinformation.org/Feature/display.cfm?ID=402>.
56. Münz, *ibid.* The states that owed their net population growth entirely to immigration in 2005 were Austria, the Czech Republic, Italy, and Slovenia. For more detailed information on migration patterns in the 25 EU Member States in 2005, see the European Commission Communication on the *Demographic Future of Europe – From Challenge to Opportunity* (COM (2006) 571, 12 Oct. 2006).
57. *World Migration 2005*, *op. cit.* n. 55, at pp. 145-146. The east-west intra-regional flows for the moment are most pronounced into Ireland, Sweden and the UK, as these were the first states that opened their labour markets to migrants from the newly acceded countries in Central and Eastern Europe. Since 1 May 2006, Finland, Greece, Italy, Portugal and Spain, have also lifted the transitional arrangements relating to free movement of nationals from the new Member States for the purpose of employment. Other Member States of the former EU15, such as Denmark and the Netherlands, have liberalized significantly their rules concerning access to their labour markets for nationals from the new EU Member States.

The states under consideration in this report are all situated in a relatively small geographical area; they all have similar democratic political systems and possess market economies; six of the seven are commonly viewed as belonging to “western” Europe; and the seventh, Poland, is a Member of the European Union (as are all of the others, with the exception of Norway). These factors might suggest a relatively homogenous set of obstacles for non-ratification, with each being equally applicable to all of the states concerned. Such a conclusion, however, would be far too hasty: while there undoubtedly are major degrees of overlap in the concerns that the individual reports bring to light, there are also some significant differences between each country’s standpoint on the issue of ratification. Many of these can be traced to the particular historical and actual migration contexts in the states involved; the purpose of this section is to provide a sketch of these.

2.2 FRANCE

France has long been a country of immigration. By the outbreak of the First World War, as many as 1.5 million foreigners had come to work in the country, many of whom established themselves there permanently. Together with their descendants, these migrants account for the entire French aggregate population growth from 1850-1914.⁵⁸ This trend accelerated in the decades following the Second World War, during which France, like many Western industrialised nations, witnessed spectacular economic growth. The oil crisis of 1973, however, brought this to an end, since which time migration, both in terms of the control of incomers and the integration of those already present, has increasingly appeared as a problem to be controlled rather than a phenomenon to be encouraged. That this remains the case today is made clear by the recent controversy over the wearing of headscarves and other ostentatious religious symbols in schools.⁵⁹

The decades since then have been marked by ups and downs in the numbers of migrants entering into French territory, with the rise in popularity of the far Right leading to the enactment of some restrictive immigration laws, particularly during the early nineties. However, by 1997, this trend had begun to change again, and France remains today an important country of immigration in the EEA. In 2005, for example, it had the fourth highest net migration level of all states in the region, totalling some 103,000 people.⁶⁰ The main reason for immigration into France remains family reunification, accounting for around 70% of all non-EEA incomers, and 33% of entries from within the region. Unsurprisingly, given past colonial ties, Algerians and Moroccans are among the most sizeable groups of immigrants, although numbers from Turkey and Southeast Asia are also increasing.⁶¹

58. See R. Kastoryano and J. Crowley, “Multicultural Policies and Modes of Citizenship: France: Paris City Profile” (Oct. 1999); <http://www.unesco.org/most/p97parijs.doc>.

59. See K. Hamilton and P. Simon, “The Challenge of French Diversity”, *Migration Information Source* (Nov. 2004); <http://www.migrationinformation.org/Profiles/display.cfm?ID=266>.

60. See R. Münz, “Europe: Population and Migration in 2005”, loc. cit. n. 55.

61. Hamilton and Simon, loc. cit. n. 59.

As with other countries in the region, irregular immigration is also on the rise, with the phenomenon of the *sans papiers* attracting much attention from academics and the media alike. The French policy of integration, often synonymous here with assimilation and closely linked to the principles of the “indivisibility” and “unity” of the French people and the consequent refusal to officially recognise national or ethnic minorities in French territory, also serves to structure the debate in a distinctive manner in this regard. One important consequence of this policy, in terms of international human rights law generally, is the rejection by successive Governments of the applicability of the notion of “group” or minority cultural rights in France. However, as with all of the countries under consideration here, France is a party to all of the core international human rights treaties, with the exception of the ICRMW. In terms of other migrant-specific international instruments, it is a party to both the European Convention on the Legal Status of Migrant Workers (ECMW) and to ILO Convention No. 97 concerning Migration for Employment (Revised), but it has not ratified Convention No. 143 concerning Migration in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers.

2.3 GERMANY

Prior to World War II, Germany was essentially a country of emigration. However, it soon became clear that the massive reconstruction projects necessary in the aftermath of the conflict had created a need for a considerable increase in the labour force, particularly as women, who could have done much to ease the labour shortage, were still not encouraged to participate at this stage. In order to fill the need for labour, the Government concluded a number of bilateral agreements with Italy, Portugal, Turkey, Spain and the former Yugoslavia, which led to the recruitment of around 3-4 million workers in the period leading up to the oil crisis. Although labour immigration did continue after this date, it was at a much reduced rate, with a focus generally on the selective admission of highly-skilled workers, and seasonal and short-term contractual employment.

Nonetheless, the immigrant population has steadily increased over the past few decades: amounting to only 1.2% of the total population in 1960, it had risen to a level of 9% in 1997, and it has stayed at around that level since.⁶² In 2003, Germany had one of the highest net migration levels in the EEA, at around 166,000,⁶³ although this figure had fallen to 66,000 by 2005.⁶⁴ The majority of migrants in Germany come from other European states (79.8%), of whom around a quarter are EU nationals. The single most important grouping are Turks, followed by those from the former Yugoslavia, then Italians,

62. *Bundeszentrale für politische Bildung (2004): Datenreport 2004. Bonn: Bundeszentrale für politische Bildung.* [Federal Agency for Civic Education (2004), Data Report 2004. Bonn: Federal Agency for Civic Education].

63. *World Migration 2005*, op. cit. n. 55, at p. 141.

64. Münz, loc. cit. n. 55.

Greeks and Poles.⁶⁵ It was only in 1998, however, that the German Government officially recognised the empirical fact that it had become a country of immigration.⁶⁶

In terms of irregular migration, estimates today put the figure at around one million, although the exact figure, as always, is impossible to ascertain. There is a broad consensus that such migrants exist, and that they live and work in exploitative conditions;⁶⁷ however, the general public perception of this situation appears to be largely that it is a problem for the individual migrants themselves, and not indicative of a larger, social or structural issue. The labour market has long been highly regulated in Germany, and the ideal of the Rule of Law is generally held in very high esteem; and this, coupled with the high unemployment rates, particularly since reunification in 1990, has created a climate in which irregular migrants are viewed with suspicion or even hostility. These attitudes are largely reflected in the German stance on the ICRMW.

Lastly, it is worth noting that the institutional situation in Germany regarding the ICRMW is also extremely complex. Not only is responsibility for migration shared across a number of Ministries at the federal level, it is also to some degree devolved to the various *Länder*, or state authorities. This can perhaps account, in part at least, for the apparent reticence of the German Government to commit itself to any international obligations in the sphere of the protection of migrant workers: besides non-ratification of the ICRMW, it is not a party to ILO Convention No. 143, and has only signed, but not ratified, the ECMW (and this as far back as 1977).⁶⁸ Indeed, the only international agreement that it has committed itself to in this field is ILO Convention No. 97, which, as noted above, only applies to lawfully resident migrant workers.

2.4 ITALY

By contrast, Italy has an extremely impressive record in terms of international instruments regulating migrant workers, having ratified both ILO Conventions Nos. 97 and 143 and the ECMW. Against this background, however, the fact of non-ratification of the ICRMW becomes even more striking, particularly upon consideration of the fact that Italy, as a member of the MESCA group, was one of the states most involved in the drafting process of the Convention. However, at that stage, and, indeed, throughout the 1980s, Italy remained what it had long been: a country of emigration, with some 26 million nationals departing for America, Australia, and other European countries between

65. Federal Commissioner for Migration, Refugees and Integration, ed., *Data, Facts, Trends 2004* (Berlin, 2005).

66. On this, see generally C. Joppke, "Why Liberal States Accept Unwanted Immigration", 50 *World Politics* (1998) 266-293, at pp. 284, 287.

67. N. Cyrus, *Human Trafficking for Labour Exploitation in Germany: Special Action Program to Combat Forced Labour* (ILO: Geneva, 2005).

68. See <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=093&CM=8&DF=&CL=ENG>.

1876 and 1976.⁶⁹ Consequently, its ratification of the ILO conventions had the principal goal of protecting Italian citizens abroad, not foreigners on Italian soil.

This is clearly no longer the case: while, in 1990, there were less than half a million documented migrants in Italy, by 1998 this figure had more than doubled.⁷⁰ In 2003, Italy had the second highest net migration level of any state in the EEA, at 338,000.⁷¹ In 2006, 170,000 entries for employment were authorised, 120,000 for salaried work or self-employment and 50,000 for seasonal work. The largest of the inward flows (35.8% of all documented migrants) originates in Eastern Europe, with Poland and Romania the most important countries of origin, although almost a quarter of immigrants come from Africa, and in particular from Morocco, Tunisia and Senegal.⁷² Documented migrants tend to seek to establish themselves in the wealthier north of the country, while those in an irregular situation look to the more agricultural south.⁷³

Irregular migration is a dominant feature of the social landscape in Italy, which represents well the dangers of the expanding informal sector in developed countries, driven by the need for cheap and “flexible” workers in the labour market. A recent report by Médecins Sans Frontières (MSF) into working conditions for immigrants in the Italian agricultural sector found that, out of 770 interviewees, 23.4% were asylum seekers (without permission to work), 18.9% had residence permits for work other than the type they were performing, and 51.4% had no residence permit at all. None had the proper contract provided for by Italian law for the type of work that they were performing.⁷⁴

The MSF report further observed that the conditions in which a majority of those surveyed live did not even correspond to the UNHCR minimum standards for emergency camps. 40% lived in abandoned buildings, 36% in overcrowded dwellings, 50% lacked running water, 30% lacked electricity, and 42% lacked basic sanitation. Of 770 interviewees, only 41 could be declared as being “in good health”, despite the fact that they were all around 30 years of age.⁷⁵ In order to try to address the problem of irregular migration, the Italian Government has initiated fairly frequent regularisation processes; the most recent of which, in 2003, led to 705,000 applications from irregular migrants, of whom 689,000 were granted residence and work permits – making this the largest mass regularisation programme in Europe to date.⁷⁶ Such programmes, however, are often flawed, in that they require the employer to present the request for regularisation; often,

69. *World Migration 2005*, op. cit. n. 55, at p. 77.

70. *Dossier Statistico Immigrazione 2003* [Dossier of Immigration Statistics], pp. 45-46.

71. Münz, loc. cit. n. 55.

72. *Dossier Statistico Immigrazione 2005* [Dossier of Immigration Statistics], p. 46.

73. *Ibid.*, at pp. 50-54.

74. MSF, *I Frutti dell'ipocrisia. Storia di chi l'agricoltura la fa. Di nascosto* [The Fruits of Hypocrisy: The Story of Agriculture's Hidden Workers] (Rome: MSE, 2005).

75. *Ibid.*, at pp. 3-4.

76. *World Migration 2005*, op. cit. n. 55, at p. 147.

employers are keen to maintain their relations with their workers on an “informal” basis because of the advantages this brings in terms of flexibility and cost reduction.

2.5 NORWAY

In some ways similar to both Italy and Germany, Norway was, until 1945, a country of emigration – second only to Ireland in Europe in terms of emigrants per head of population. However, particularly towards the end of the 1960s, a combination of a booming economy and a population shortage meant that the country began to encourage the admission of immigrant workers, particularly from Morocco, the former Yugoslavia, Turkey and Pakistan. In 1975, however, in line with the stops on immigration imposed in other parts of western Europe, the Government introduced a moratorium on immigration, since which time Norway has gained a reputation for having a generous and welcoming asylum programme, but not a particularly developed immigration programme, excepting perhaps in its shipping and oil industries, and seasonal employment (agriculture and forestry).

Inward labour migration did begin again in the 1990s, but has been very heavily regulated, with quotas for highly skilled workers and specialised visa programmes for seasonal workers, au pairs, musicians, and others. Some of the programmes have been less than successful: in 2001, for example, the Government decided on an annual quota of 5,000 permits for skilled professionals to fill gaps in the Norwegian labour market; however, for 2006, only 1,382 of these had been taken up by 30 September 2006 and only 1,223 permits for skilled work were issued in 2005. At 1 January 2005, there were some 365,000 documented immigrants in Norway, which constitutes around 8% of the total population – a not insignificant figure, and one that has trebled since 1980.⁷⁷ Of these, 68% are of non-Western (i.e., Eastern European, Asian, African, South and Central American, or Turkish) origin. In 2004, 74% of all work permits were issued to nationals of the ten new EU Member States.

Irregular immigration has, historically, been less of a problem for Norway than for most of the other states under consideration here. The geographical location of the country alone acts as a significant deterrent to irregular movements of persons, and the high levels of social transparency makes it difficult for any undocumented migrant to remain in the longer term. Moreover, without a National Identification Number, access to the health and education systems is simply not available. In the last decade, however, primarily due to the opening of borders with EU Member States under the Schengen Accords, the numbers of undocumented migrants entering into Norwegian territory has risen: in 2004 alone, the police expelled 5,956 such people. As always, exact figures are not available; however, police estimates put the number of irregular migrants in the Greater Oslo area alone at some

77. See respectively *International Migration 2005-2006: SOPEMI Report for Norway* (Ministry of Labour and Social Inclusion, Dec. 2006) and Information from the Norwegian Central Statistical Office, July 2005.

20,000.⁷⁸ Another cause for concern is the recent increase in trafficked women, mostly from Eastern Europe, for prostitution.

As with Italy, Norway has an impressive ratification record in terms of international instruments on migrant workers' rights: on top of the six core human rights treaties, it too is a party to both ILO Conventions Nos. 97 and 143, and the ECMW. Implementation of these standards seems, however, to be at a much higher level here than in Italy, although the task is undoubtedly made easier by the very limited scale of immigration compared to the latter. Italy, unlike Norway, is both accessible and located at the Union's borders; implementation of high standards of protection is always likely to be much more challenging in that situation. In general, Norway has little experience in enacting and monitoring migration legislation, and does not have very developed institutions in this regard. It provides very high standards of protection, largely on an equal basis to its nationals, for those in a regular situation on its territory; and it maintains these by strict regulation and limitation of entry.

2.6 POLAND

As one would expect, migration patterns in Poland have altered significantly since the fall of Communism and the subsequent transition to democratic government. Until 1989, Poland was a fairly typical sending state, although leaving the country was hardly straightforward under the Communist regime; since then, however, and particularly since its accession to the EU, it has been transformed into both a sending and a receiving state. This being said, however, it is still the case that more people are leaving than are coming in – and this makes Poland unique of the countries under consideration here as the only one to maintain in the recent past a negative net migration level.⁷⁹ In 2004, the ratio of emigrants to immigrants was still greater than 2:1.

Moreover, the absolute numbers involved are fairly small in comparison to other states in the region. To take the statistics from 2004, according to the Central Statistical Office [*Główny Urząd Statystyczny*], those recorded leaving totalled 19,000, whereas those entering Polish territory numbered just 9,000.⁸⁰ Irregular immigration does exist, with some estimates putting the figure at between 300,000 to 500,000;⁸¹ this, however, does not seem sufficient to make migration a topic of concern in the country at large, as, in the electoral campaigns of August 2005, both Parliamentary and Presidential, the question of

78. See the official website of the Norwegian Police Force, at www.politi.no.

79. *World Migration 2005*, op. cit. n. 55.

80. It should be noted that data from the Central Statistical Office is often heavily criticised as underestimated, but they are believed to be indicative of a general trend nonetheless. Moreover, the *World Migration 2005*, op. cit. n. 55, bears out the claim that, in absolute terms, migrant flows both in and out of Poland are comparatively very small in terms of other countries in the region.

81. K. Iglicka, O. Olszewska, A. Stachurski, and J. Żurawska, "Dylematy polityki migracyjnej Polski" [Dilemmas of Polish Migration Policy], *Centre for Migration Research Working Papers* (2005) p. 46 (<http://www.migracje.uw.edu.pl/obm/pix/058.pdf>).

migration simply did not surface. Again unusually for the region, nor is it a subject that seems to excite much interest from the media. Unique amongst the countries analysed for this study, and surely in a small minority within the EEA more generally, it seems that migration, in Poland, remained very much a non-issue until very recently, when the large scale labour migration of Polish nationals to the UK and Ireland since EU enlargement in May 2004 has raised concerns amongst politicians, employers (who are finding it harder to fill jobs) and the public at large.⁸²

Lastly, and perhaps unsurprisingly, given that migration has not been a concern for Poland until very recently, it has not ratified either of the two specific ILO instruments protecting migrant workers or the ECMW.

2.7 SPAIN

Much like Italy, Spain has seen itself transformed in recent years from being a typical sending country into a net receiver; indeed, the transformation here has been if anything more dramatic. Between 1960 and 1979, almost 2 million Spaniards emigrated to what is now the EU;⁸³ and even after accession, Spaniards continued to move to other EU countries where levels of earnings were generally higher.⁸⁴ Given this context, it is not surprising that Spain ratified the two Conventions protecting migrant workers in a regular situation, namely ILO Convention No. 97 and the ECMW, in 1967 and 1980 respectively. As late as 1998, documented foreigners represented no more than 1.6% of the total registered population; by 1 January 2005, that figure had increased significantly to 8.4%.⁸⁵ In 2003, Spain had the highest net migration level of all EEA countries – in absolute numbers, some 594,000 people.⁸⁶ The largest national groupings are Moroccans (13.7%), Ecuadorians (13.2%), Romanians (8.5%) and Colombians (7.3%).

Such a rapid growth in such a short period of time has inevitably brought with it heated political debate on the best way to manage the influx, in terms of balancing the often competing interests of human rights, state sovereignty and the needs of the labour market, in

82. J. Dempsey, "Polish Labor Is Scarce as Workers Go West", *New York Times*, 19 Nov. 2006. Between 1 May 2004, the date of Poland's accession to the EU, and 31 December 2006, 358,200 applications by Polish nationals under the Worker Registration Scheme in the UK were approved. See UK Home Office, Department for Work and Pensions, HM Revenue and Customs and Communities and Local Government, *Accession Monitoring Report: May 2004 – December 2006*, 27 Feb. 2007 (<http://www.ind.homeoffice.gov.uk/6353/aboutus/accessionmonitoringreport10.pdf>) at p. 11 (Table 3).

83. *World Migration 2005*, op. cit. n. 55, at p. 77.

84. *Ibid.*, at p. 146.

85. "Avance del Padrón Municipal a 1 de enero de 2005. Datos Provisionales", *Instituto Nacional de Estadística de España* [Spanish National Statistics Institute], 2005; <http://www.ine.es/prensa/np370.pdf>.

86. *World Migration 2005*, op. cit. n. 55. In 2005, it had the third highest level of the then 25 EU Member States, behind Ireland and Cyprus. See Münz, loc. cit. n. 55.

a country with little experience in the field. The debate has been further complicated by the fact that, in Spain, the number of undocumented migrants often exceeds that of those in a regular situation. Indeed, more than half of the EEA's irregular migrants, estimated at some 3 million in 1998, are thought to be concentrated in France, Italy and Spain.⁸⁷ As in Italy, successive Spanish Governments have responded to this problem by means of periodic regularisation processes: three since 2000 (in 2000, 2002 and 2005), the last of which attracted approximately 700,000 applications in the three months that it lasted.⁸⁸ This in turn has led to the heavy politicisation of the migration debate in the country, and a growing sense of unease, to which a series of restrictions and limitations to what had been a relatively liberal and progressive immigration law in 2000 stand testament.⁸⁹ Indeed, the ruling centre-right Party, the *Partido Popular*, had shown real signs of uneasiness towards the law, even opposing it in Parliament when the time came, and wasted no time in passing certain restrictions to it, in particular the right of undocumented migrants to organise, when it won an absolute majority in elections later the same year.⁹⁰

One last point worth noting as regards the institutional framework in Spain is that it has devolved a significant degree of power to regional parliaments within its borders. Although these bodies do not have any competence to make immigration law, they can – and do – formulate proposals for the national Parliament to consider in this regard. While these are often of limited significance politically in the short term, as the national Parliament is not even legally obliged to consider them, let alone act upon them, they can provide an indicator of political feeling throughout the country, and can also serve to increase political pressure to act in the appropriate context.

2.8 UNITED KINGDOM

The United Kingdom has one of the most open policies towards economic migration in the region, and this, combined with low unemployment levels and continued high demand for labour, has led to a significant increase in immigration into the country since 2000. Migration is encouraged at all skills levels; and, as a result, the number of work permits issued increased from 54,000 in 1997 to 153,000 in 2003. The Highly Skilled Migrant Programme (HSMP), initiated in 2002, had led to over 6,000 successful applications by June 2004; it is worth comparing the experience of Norway in its attempts

87. Ibid., at p. 78.

88. See generally J. Arango and M. Jachimowicz 'Regularizing Immigrants in Spain: A New Approach', *Migration Information Source* (2005); <http://www.migrationinformation.org/Feature/display.cfm?ID=331>.

89. The first reform of the law, which was billed as one of the most advanced and progressive on the subject in the EU, was entitled *Ley Orgánica 4/2000 sobre derechos y libertades de los extranjeros en España y su integración social* [Law 4/2000 of 11 Jan. 2000 on the Rights and Freedoms of Foreigners in Spain, and their Social Integration].

90. Law 8/2000 of 22 Dec. 2000, amending law 4/2000, loc. cit. n. 89.

to attract skilled workers in this regard. Quotas for lower-skilled and temporary jobs have also seen major increases, from around 5,000 available places in 1996 to roughly 45,000 places in 2003 and 2004, although these have been reduced since EU enlargement in May 2004 because the UK Government is of the view that many of these jobs will be filled by nationals from the new EU Member States. There is, however, evidence to suggest that irregular immigration and unauthorised employment have also been on the increase in recent years.

One key recent development was the decision to open up the labour market to nationals of the eight EU accession states from Central and Eastern Europe from 1 May 2004 onwards. Government figures show that 232,000 nationals of these countries registered their employment in the fourteen months leading up to July 2005. This, it should be noted, was considerably more than expected; Government predictions had suggested that somewhere in the region of 15,000 people per year would migrate to the UK from the new Member States looking for work;⁹¹ a recent report, however, has put the cumulative total figure at 579,000 persons, who registered on the Worker Registration Scheme between 1 May 2004 and 31 December 2006, rising to over 600,000 when family members and dependents are taken into consideration. The figures it provided indicate, however, that these migrants do not represent any significant burden on the national welfare system.⁹²

Nonetheless, there can be no doubt that public opinion on the issue of labour migration in the UK is deeply split, particularly in terms of economic and social rights granted to migrants. In this regard, the debates surrounding EU accession are significant in two respects: firstly, in terms of the 2004 wave of accession, the controversy over opening up the labour market to nationals of the new Central and Eastern European Members was diffused by the Government's decision not to allow them any access to social security benefits. Secondly, in the wake of the much higher numbers of migrants than expected and the public concerns these have generated, in October 2006 the Government announced its decision to limit severely the right to work of Bulgarian and Romanian nationals, who became Union citizens on 1 January 2007.⁹³ However, other events have increased public sympathy for the plight of migrant workers in the UK, and none more so than the tragic events in Morecambe Bay of February 2004, in which 21 undocumented cockle pickers were drowned by a dangerous tide, and which ultimately led to the passing of the Gangmasters Licensing Act 2004. This act has done little, however, to remove the impression that the UK's record is very positive on regular labour migration, but considerably less so in terms of its treatment of irregular migrants; one further indication of this is that the only specifically migrant-related international instrument to which the UK is a party is ILO Convention No. 97, which does not apply to irregular migrant workers.

91. "‘Nearly 600,000’ New EU Migrants", *BBC News* (22 Aug. 2004); http://news.bbc.co.uk/1/hi/uk_politics/5273356.stm.

92. *Accession Monitoring Report: May 2004 – December 2006*, loc. cit. n. 82, at pp. 1, 2 and 12 (Table 5).

93. "Reid outlines new EU work curbs", *BBC News* (24 Oct. 2006); http://news.bbc.co.uk/1/hi/uk_politics/6076410.stm.

Part 3: Awareness of the Convention

3.1 GENERAL CONSIDERATIONS

Given such a wide variety of national contexts in relation to migration issues in the EU/EEA region, it is perhaps not surprising that levels of awareness of the ICRMW also vary from country to country. This being said, however, it is also the case that, in almost all of those states reviewed for the purposes of this report, a lack of awareness was cited as one of the primary obstacles to ratification. Only in the UK, and to a lesser extent in France, could there be said to be a relatively high level of awareness of the existence of the Convention and an understanding of its content, due to an active civil society campaign that has led both to political parties becoming involved and to some significant, if tentative, activity in their respective Parliaments. At the other end of the scale are Germany and Poland, in neither of which does ratification appear to be on the agenda at all, even of those NGOs most directly involved with protecting migrants' rights. Many such organisations in Germany, for example, simply refused to be interviewed for the purposes of the country report on the grounds that they knew nothing of the Convention, but were not prepared to go on record with that admission.

The other three states examined fall somewhere between these points, with perhaps Italy, again thanks to a more highly developed civil society campaign, showing the highest levels of awareness, followed by Spain and then Norway, where, even though there are some individuals with expert knowledge of the Convention and the issues that it raises, this has not been translated into a wider base, either in political circles or those of civil society. In Spain, for example, there is almost no awareness of the Opinion of the European Economic and Social Committee (EESC) that recommended that Member States ratify the ICRMW, despite the fact that the rapporteur to the Committee on this issue was Luis Miguel Pariza, a representative of one of the largest Spanish trade unions. There is also a concern in many countries that those with a detailed knowledge of the Convention are not specialists in national immigration law, and vice versa.

There are a number of general points to be raised concerning the levels of awareness in the countries under consideration here. The first is that, incredibly, it seems that there

remain, in some cases, serious problems of accessibility to the ICRMW as a result of the simple and easily remediable problem that, more than fifteen years after it was opened for ratifications, the text of the Convention has not yet been accurately and authoritatively translated into a number of languages. This issue was raised, for example, in Poland, where the only publicly available version of the instrument in the national language can be found on the website of the December 18 organisation,⁹⁴ so named after the date of adoption of the ICRMW (18 December 1990), which lobbies for migrants' rights throughout Europe; serious doubts, however, have been raised over the quality of this translation. Similarly, in Italy, the task of providing a comprehensive version of the text of the agreement in Italian was taken up by the NGO *Casa dei Diritti Sociali*, as the official version was left incomplete. It is worth noting that this issue has been raised in other EEA countries, such as Hungary.⁹⁵ It is difficult to overstate the importance of rectifying this situation, particularly in the context of the campaign to increase ratifications of an important, yet struggling and little-known international human rights instrument. The lack of accurate and authoritative translations into the various languages of the region means that, in those states where this is absent, the number of people capable of engaging with and promoting the ICRMW on any in-depth and sustained basis is drastically curtailed, with obvious consequences for the levels of awareness of the Convention in that country.

The second general point that can be made, linked to the first, is that while raising awareness of the very existence of the Convention is undoubtedly a crucial first step in any attempt to encourage ratification, this must go hand in hand with efforts to promote and disseminate a fuller understanding of its content. As will become clear, a number of the perceived obstacles to ratification in the countries of the region are based upon misconceptions (or misrepresentations) of what the provisions of the Convention actually contain or entail. It is worth noting, in this regard, the general dearth of detailed national studies from academics, think tanks, researchers or NGOs analysing what the

94. See <http://www.december18.net>.

95. See Z.H.A. Zayonchkovskaya *et al*, "The Protection of the Rights of Migrants Workers in the Countries of Central and Eastern Europe and the CIS and Perspectives of Joining the 1990 UN Convention", *UNESCO Series of Country Reports on the Ratification of the UN Convention on Migrants* (1 July 2004) (<http://unesdoc.unesco.org/images/0013/001395/139533E.pdf>) at p. 13.

legal, economic or social effects of the Convention might be if ratified and implemented, even in those countries in which general levels of awareness are relatively high.⁹⁶

The third general point that can be made, again linked to the other two, is that raising awareness of both the existence and the content of the ICRMW may alone be insufficient to realise the general goal of encouraging ratification, as both rely on the self-evidence of certain propositions as soon as people have been made aware of them. As the individual country reports make clear, however, there remain a number of arguments that have yet to be made persuasively; and there is a regrettable tendency in much literature on the subject to subsume these under the general heading of “awareness raising”, assuming that, like obvious misconceptions of the Convention’s provisions, simply knowing the facts of the instrument will be sufficient to persuade all to the contrary. There are three major points that can be understood as falling into this category, all of which are of particular importance for the prospects for ratification. The first concerns the common claim that the ICRMW opposes the phenomenon of irregular migration: certainly, that such an *aim* is part of its overall goal is beyond doubt. However, to move from this to a dismissal of the perception that the Convention will in fact *encourage* such irregular movements is a simple *non-sequitur*. Pécoud and de Guchteneire, for example, deal with this point by noting that it is “...frequently assumed that the Convention encourages undocumented migration by granting rights to undocumented migrants; but... [it] explicitly fosters the fight against irregular migration”,⁹⁷ while Piper and Iredale suggest that “there is little understanding that the Convention... actually (1) encourages the control of clandestine migratory movements and (2) does not touch upon the rights of States’ to establish criteria governing admission of migrant workers”.⁹⁸

96. Moreover, a number of those that have been prepared are not readily publicly available. Some of those that are include R. Baratta, “La Convenzione sui diritti dei migranti e la normativa italiana sull’immigrazione” [The Convention on Migrants’ Rights and Italian Immigration Law] (2003) (<http://www.december18.net/web/docpapers/doc1517.doc>); K. Speiss, *Die Wanderarbeitnehmerkonvention der Vereinten Nationen. Ein Instrument zur Stärkung der Rechte von Migrantinnen und Migranten in Deutschland* [UN Migrant Workers Convention. An Instrument to Strengthen the Rights of Migrants in Germany] (Deutsches Institut für Menschenrechte: Berlin, 2007) http://files.institut-fuer-menschenrechte.de/437/Studie_Wanderarbeiterkonvention_2007.pdf. Beyond the countries under consideration for the purposes of this report, it is worth mentioning the recent study by D. Vanheule, M-C. Foblets, S. Loones, and S. Bouckaert, “The Significance of the UN Migrant Workers’ Convention of 18 December 1990 in the Event of Ratification by Belgium”, 6 *European Journal of Migration and Law* (2005) 285-321; and there is a more general review of regional and international migrant workers’ rights instruments and their effects on policy in Ireland in the joint report by the Irish Human Rights Commission and the National Consultative Committee on Racism and Interculturalism, entitled *Safeguarding the Rights of Migrant Workers and their Families: A Review of EU and International Standards: Implications for Policy in Ireland* (April 2004) (http://www.ihrc.ie/_fileupload/downloads/NCCRIxxx.pdf), which concludes with a call to the Irish Government to ratify the ICRMW (at p. 49). It is also worth noting, in this regard, the recent study on the Convention from an EU perspective by M. Barral, “The United Nations Convention on Migrant’s rights, a Luxury for the European Union?”, *Notre Europe: Policy Paper No. 24* (2006) (http://www.notre-europe.eu/uploads/tx_publication/Policypaper24-en-droitdesmigrants.pdf).

97. Pécoud and de Guchteneire, loc. cit. n. 1, at pp. 11-12.

98. Piper and Iredale, loc. cit. n. 6, at p. 49.

These arguments move too quickly, and conflate two different points, as the Piper and Iredale quote amply demonstrates. While simply raising awareness of the content of Article 79 of the Convention may well be sufficient to quell fears of limitations on state sovereignty to decide on numbers and conditions for entry, the same cannot be said of its ability to help in addressing irregular migration, which, as all of the reports for this study – and, indeed, all of the studies in this UNESCO series – show is a proposition that is not really taken seriously by the governing elites of receiving states anywhere in the world. This latter argument, instead, is one that clearly still has to be both made and won if it is to be at all convincing. The same can, unfortunately, be said of two other claims of crucial importance to the success of the ICRMW: that the most effective way to protect the human rights of vulnerable migrants is through a dedicated international convention that codifies and specifies the rights that should be granted to them; and, of particular importance in terms of the states under consideration in this study, that ratification, with the administrative and financial burdens that this would entail, is still an urgent task *even where national law already provides substantially all of the protections that the Convention seeks to guarantee*. In both of these claims, as with that pertaining to the struggle against irregular migration, a significant task of persuasion remains to be accomplished; none can be reduced to mere “misconceptions”.

3.2 RAISING AWARENESS: THE ROLE OF CIVIL SOCIETY

In those societies, such as the UK and France, in which a relatively high degree of awareness of the existence and the content of the Convention has been achieved, the role of civil society, and in particular NGOs and trade unions, in bringing this about has been crucial. Moreover, in both cases the actors involved did not each attempt to campaign individually, but instead pooled resources in order to achieve a stronger and more sustained campaign. The first moves in this regard in the UK were made by the trades unions: as early as 1995, the Trades Union Congress (TUC) passed a resolution calling for ratification of the ICRMW by the EU Member States.⁹⁹ However, momentum on this issue did not really begin to build up until around the time of the entry into force of the Convention in 2003, starting with a conference entitled “Migrant Workers: Who Benefits?”, held by the UK office of the United Nations Association (UNA-UK) in London in December of 2002, at which the keynote address focused on the ICRMW. The conference concluded with a call for the formulation of a “coalition for ratification”, which was subsequently set up and met at various points during the following two years. The coalition was made up of several significant NGOs and trade unions, among them Anti-Slavery International, the Joint Council for the Welfare of Immigrants (JCWI), Kalaayan, Oxfam GB; and the TUC, the Transport and General Workers Union and UNISON (the largest private- and public-sector workers’ unions respectively).

99. Interview with Nick Clark, International Office, TUC, 7 September 2005.

The efforts of the coalition, which included organising conferences¹⁰⁰ and participation in a session of the European Social Forum, resulted in significant attention being paid to the Convention by political parties and in Parliament. Its activities ceased in 2005. This was due in part to personnel reasons; the employee of UNA-UK who had organised the meetings of the coalition left the organisation at that time, which illustrates well the importance of committed individuals to such campaigns, and suggests how crucial broad access to the Convention through the provision of accurate translations of its text could prove to be in countries where such is not yet available. However, it was also felt that, with the goal of bringing the Convention into mainstream political discourse largely achieved, the continued role of the coalition became less clear.

The history of the promotion of the ICRMW in France has followed a largely similar trajectory. Basically unknown throughout the 1990s, the entry into force of the Convention provided a catalyst for civil society action that had hitherto been absent. The French campaign has essentially proceeded in two steps. Perhaps the opening initiative was that of the Economic and Social Council [*Conseil économique et social* - CES], a constitutional assembly made up of representatives of all of the major social and economic sectors of French society, which recommended, in October 2003, that France should ratify the ICRMW;¹⁰¹ this Opinion, however, is non-binding and almost entirely unknown; it was completely ignored by the Government. It was not until March 2004, when the NGO *Agir Ici* began, with others, campaigning in earnest on this issue that the Government was forced to turn its attention to the Convention.

The *Agir Ici* campaign focused on raising levels of awareness of the ICRMW in Government circles, not on the public more generally. Also involved in the campaign were a number of other important NGOs such as GISTI [*Groupe d'information et de soutien des immigrés*], the most important migrants' rights NGO in France; CIMADE [*Service oecuménique d'entraide*], a Protestant organisation with an interest in migration issues; and the LDH [*Ligue des droits de l'Homme*], amongst many others, including trade unions and other lobby groups. The campaign resulted in four meetings with the French Government, twelve newspaper articles, one press release, a "week of mobilisation", and forty regional events staged throughout the country. In the process, some 70,000 documents were distributed, with the participation of 21,200 citizens.

The *Agir Ici* campaign lasted until October 2004, at which point a loose grouping was formed, very similar to the coalition for ratification in the UK, under the decidedly similar title of *Collectif pour la ratification*. This group was created and operated under the supervision of GISTI and the ATMF [*Association des Travailleurs Maghrébins de France*], and aims to broaden the scope of the original campaign by raising awareness not just in specialised areas of government and civil society, but also among the French public in

100. Such as the conference, organised in 2003 by the TUC and the JCWI, entitled "Migrant Workers' Rights – Could We Do More in Britain?".

101. CES, Avis adopté par le Conseil économique et social au cours de sa séance du mercredi 29 octobre 2003 sur "les défis de l'immigration future" (Oct. 2003); <http://www.ces.fr/rapport/docdon/03102922.PDF>.

general. One indicator of the degree of success that it had achieved was given in June 2005, when the National Commission for Human Rights [*Commission Nationale Consultative des Droits de l'Homme - CNCDH*], an important body comprising Government representatives, MPs, NGOs, trade unions and experts, delivered an Opinion recommending ratification,¹⁰² which led in turn to the launch of a Government consultation process to examine the implications of ratification. However, there have also been some differences with the UK process, of which the relatively passive stance of the major French trade unions is perhaps the most noteworthy.¹⁰³

Italy too has followed this pattern somewhat, albeit with a lesser degree of success. The Italian Committee for Migrants' Rights [*Comitato italiano per i diritti dei migranti*] was formed in December 2002, with the main goal of promoting the ICRMW and encouraging its ratification in Italy. The Committee counts among its members Italian-based offices of international organizations, such as the International Organization for Migration (IOM) and the ILO, and an impressive array of national civil society actors, including the FCEI [*Federazione delle Chiese Evangeliche*], *Caritas*, and *Casa dei Diritti Sociali*; and also three major trade unions: CGIL [*Confederazione Generale Italiana del Lavoro*], CISL [*Confederazione Italiana Sindacati dei Lavoratori*], and UIL [*Unione Italiana del Lavoro*] – all three of which have declared ratification as a major plank of their respective political platforms.¹⁰⁴ The Committee has made some progress, particularly in terms of organising conferences on the issue of the ICRMW; however, it has been criticised by certain of its own members for a perceived lack of activity, and it seems that the impressive array of different bodies it encapsulates has in many ways been more of a hindrance than a help in the furtherance of its goals, as the heterogeneous composition of the body creates many debates and disagreements in terms of deciding upon and coordinating action.¹⁰⁵ The FCEI has taken further action on its own, deciding to include a call for ratification in all of its official documents. As early as 1991, this NGO wrote to then Prime Minister Andreotti to request ratification; the response they received was that the process had been “initiated” – and it has remained at this stage since.

We may conclude from the above cases that the input of civil society actors, and in particular NGOs and trade unions, is absolutely essential for raising awareness levels about the ICRMW. This conclusion is only confirmed, albeit in the negative, upon consideration of the other states included in this report. Spain, for example, has a much less

102. *Avis sur la convention internationale sur la protection des droits de tous les travailleurs migrants et des membres de leur famille* (23 June 2005); <http://www.commission-droits-homme.fr/bin/Travaux/AffichageAvis.cfm?IDAVIS=748&classe=1>.

103. Trade unions have supported both the *Agir Ici* campaign and the activities of the *Collectif pour la ratification*, and UNSA [*Union nationale des syndicats autonomes*] did approve the Opinion of the CES in 2003 (*supra* n. 101); however, they have for the most part not been directly involved in campaigning themselves.

104. See, for example, <http://www.uil.it/immigrazione/workshop-bruxelles.htm>.

105. One example of this is provided by the Committee's attempt to create some television publicity to promote ratification. The plan was to put together an advert, to be prepared by Media Communications students and broadcast by the national broadcaster RAI. No agreement could be reached, however, on the various proposals from different Committee members, and the opportunity was missed.

developed awareness promotion campaign, although it too has a civil society network, *La Xarxa*, which contains NGOs, trade unions and immigrants' associations. Most of these, however, are Catalan, and both the focus and the fruits of the campaign, though important, have been largely concerned with that region.¹⁰⁶ In the countries with the lowest levels of awareness, Norway, Germany and Poland, there is almost no civil society activity at all in this regard. In Norway, only one NGO, the MiRA Resource Centre, has petitioned the Government for ratification (and even then on only one occasion);¹⁰⁷ in Germany, such organisations seek only to use the Convention as a means of opening up a wider debate on immigration issues, having no hope of ratification itself;¹⁰⁸ and in Poland there was not a single civil society organisation that had engaged in any activities relating to the Convention. Moreover, in none of these countries have trade unions shown any interest whatsoever in the Convention.

3.3 POLITICAL PARTIES

There is in large degree a direct relation between the extent and success of the civil society awareness-raising campaigns, and the levels of political party endorsement of the ICRMW and parliamentary activity in this regard. In the UK, for example, two parties have officially incorporated the Convention into their political manifestos: the Liberal Democrats, the third largest party in the country, at their Party Conference in 2004, adopted a resolution on asylum and immigration that included a commitment to ratification; and the manifesto of the Green Party contains a similar pledge. The Greens have no seats in the House of Commons, but do have some support across the country, having 2 Members of the Scottish Parliament, and 2 Members of the European Parliament (MEPs).

The Greens are also the party to have given the strongest support to the Convention in France, launching two petitions for ratification in 2005. The only other party to officially endorse the Convention has been the Communist Party, which has declared that the issue of

106. It is worth noting that Amnesty International Spain is the only other NGO actively involved in this field, promoting the Convention at the national level; it has, for example, petitioned the Government for ratification in each report on immigration and asylum since 2001.

107. In 2001, the Norwegian NGO forum for human rights organisations recommended only that the Government support the work of the UN Special Rapporteur on the human rights of migrants, stating that "even though Norway has not ratified the Convention, it must still support improvements in the protection of migrants' rights". This indicates a clear willingness, even among NGOs specialised in the field, to work towards the protection of migrants outside the context of the Convention itself.

108. This is even the position of *Komitee für Grundrechte und Demokratie* (Committee for Basic Rights and Democracy), which was asked by December 18 to publicise the Convention in Germany. The KGD did begin a leafleting campaign, and delivered a 1600-signature petition to the Government; however, it has acknowledged that even then it never had ratification as a goal, but merely the hope of opening debates on the issues raised by the Convention.

ratification is of central importance to the Party.¹⁰⁹ While there has been no official interest from the French Socialist Party, some of its members have raised the issue of ratification in Parliament on an individual basis. In Italy, only the far-left grouping have adopted a positive stance in this regard, but they do not have a significantly powerful voice, while in Spain the leftist coalition group, the United Left [*Izquierda Unida*], which includes both Greens and Communists, had a manifesto commitment to this effect. No significant political party in Poland, Norway or Germany has endorsed the Convention in any way.

The trend is clear: in those countries that have some level of political awareness of the existence and content of the ICRMW, its cause is generally supported by those on the centre- to far- left of the political spectrum. This holds true, however, only as regards minority parties; those with a chance of governing tend to follow the centre-right in asserting that ratification is either unnecessary or undesirable. This was brought out perhaps most clearly in the Spanish context: in November 2003, just a few months before coming to power, the then Spokeswoman for the opposition Socialist Party, María Teresa Fernández de la Vega (now Deputy Leader of the Government) and one other Socialist MP urged the Government of the day to ratify the ICRMW, on the grounds that the rights of migrant workers were not yet sufficiently well protected, and that ratification would in fact discourage irregular movements of people;¹¹⁰ since coming to power in March 2003, however, the Party has not as yet formulated any clear stance on the issue. One member, an immigration official since the election, suggested when interviewed for the Spanish country report that the Government was content to keep its immigration policy “in line with the spirit” of the ICRMW; the Coordinator of the Work Team for Refugees and Immigrants of Amnesty International Spain, however, was of the opinion that Government policy was firmly against ratification, stating that, in a June 2005 meeting with the Secretary of State for Immigration, who was generally positive about other international instruments, the negative response with regard to the Convention was “clear and immediate”.

3.4 PARLIAMENTARY ACTIVITY

The most important parliamentary activity in terms of the ICRMW has, to date, largely been limited to questions posed by opposition or backbench members of parliament, which have in turn forced the governments of the day to formulate and defend their perceptions of what the obstacles to ratification of the Convention actually are; none of these, however, have as yet prompted full blown parliamentary debates on the issues involved. Moreover, there has been little to no activity in this regard in Poland, Norway

109. See the Press Release by the Communist Member of Parliament Guichard, issued on 18 December 2004, in which he called, in the name of his Party, for French ratification of the ICRMW; *Communiqué de Presse, 18 décembre, journée internationale des migrants*, “La France doit ratifier la Convention”.

110. See *Congreso, Serie D, Núm. 636*, pp. 11-12 (9 Dec. 2003).

or Germany; only one question has been raised, in the last of the three, and that as far back as 1999.¹¹¹

Again, it is in the UK that there has been the most activity in this regard, the issue of ratifying the Convention having been raised in at least five written questions put to Government ministers,¹¹² and having been cited in speeches on various different topics on at least six occasions, since early 2002.¹¹³ It is interesting to note that five of the six written questions actually came from Labour backbenchers, which confirms, albeit in slightly nuanced form, the conclusion reached above with regard to political party support for the Convention more generally. Here, as there, it is clearly primarily centre-left MPs that are concerned with the promotion and ratification of the ICRMW; however, the majority of those who have tabled questions on the subject in the UK Parliament have been members of the ruling Party. It seems that, while centre-left or left-wing parties of government are reluctant to officially endorse the Convention, their members, particularly those not directly involved with executive tasks, are on occasion prepared to raise the issue of ratification in their personal capacity as individual MPs.

It is also important to note here that a Liberal Democrat MP has twice introduced a motion before the UK lower house of parliament, the House of Commons, calling for ratification of the Convention; the votes in favour that it received, although small in absolute terms,¹¹⁴ on both occasions did display a significant element of cross-party support. Again here, however, the figures confirm the general conclusion that it is from the political left that the ICRMW receives the vast majority of its parliamentary support; in each motion, the vast majority of those in favour were from either the Labour or the Liberal Democrat Parties, and only attracted the support of a single MP from the traditionally centre-right parties.¹¹⁵

111. Question by Member of Parliament Petra Pau (PDS), 14/1181, 1999.

112. Written questions asking the Government about its policy in terms of the ICRMW have been tabled by Jenny Tonge MP (Liberal Democrat) on 9 January 2002; Vernon Calder MP (Labour) on 4 February 2002; Lynne Jones MP (Labour) on 16 December 2003; and Michael Wills MP (Labour) on 20 January 2004, and then again on the 24th of the same month.

113. The occasions on which the ICRMW has been cited in Parliamentary debates are as follows: by Lord Hylton (independent) on 13 March 2002, in the context of a debate on the trafficking of children; by Tom Brake MP (Liberal Democrat) and Oona King MP (Labour) on 14 October 2004, in a debate on slavery; by David Taylor MP (Labour) on 10 November 2004, in a discussion on migrant remittances; by Chris McCafferty MP (Labour) on 9 March 2005, in a debate on the abuse of identification documents; and by the Earl of Sandwich (independent) on 7 July 2005, again in the context of a debate on slavery.

114. The first motion was laid before the House on 14 October 2004, and the second three months later, in a different parliamentary session, on 20 December. Of 646 MPs, the first motion won the support of 46, the second 57.

115. The breakdown of the support was as follows: for the first motion, 23 Labour, 19 Liberal Democrat, 2 Plaid Cymru, 1 Respect Party, and 1 Ulster Unionist. Of these, only the last is traditionally viewed as a party of the right. The pattern of support for the December motion was essentially the same: 33 Labour, 21 Liberal Democrats, 1 Plaid Cymru, 1 Scottish Nationalist, and 1 Conservative.

Staying with the UK, the issue of the ICRMW was also raised in a House of Commons Select Committee report of June 2004, entitled *Migration and Development: How to Make Migration Work for Poverty Reduction*.¹¹⁶ The Committee's report did not accept that the Government had made a sufficiently good case in proceedings before it for its refusal to ratify the Convention, and invited it to explain further;¹¹⁷ it is this that has forced the Government to give its clearest statement to date of the reasons behind its policy of non-ratification (see Part 4 below).

Important parliamentary activity in France includes the initiatives, already mentioned above, by the CES in 2003¹¹⁸ and the CNCDH in 2005,¹¹⁹ the latter of which was considerably more successful in terms of eliciting a governmental reaction; on 30 August 2005, the Ministry for Foreign Affairs responded that, although certain elements of the Convention raised technical difficulties, a governmental consultation process would be launched before beginning discussions with European partners.¹²⁰ There have also been a number of questions addressed to the French Parliament calling for ratification, frequently citing France's role and reputation as a world leader in the field of human rights.¹²¹ Again, similarly to the situation in the UK, questions in this regard have also been raised by backbench members of the centre-left Socialists in their capacities as individual Members of Parliament,¹²² even although the Party itself, as a potential party of government, has refused to officially endorse ratification of the Convention.

There have also been a number of questions tabled before the Spanish National Parliament calling for ratification of the ICRMW, or requesting clarification of the Government's position; aside from the proposal from the now-ruling Socialist Party in 2003, mentioned above,¹²³ the issue was raised in 1999 by – unusually – a member of the CiU [*Convergència I Unió*], the Catalan Conservative Party.¹²⁴ It is important to note in this regard, however, that once again this was a personal initiative, and not Party-led, resulting mainly from pressure from a variety of Catalan NGOs (*La Xarxa*, it will be recalled, the most active

116. House of Commons Select Committee on International Development, *Migration and Development: How to Make Migration Work for Poverty Reduction*, Vol. I (2003–2004) HC Papers 79; <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmintdev/79/79.pdf>.

117. *Ibid.*, at para. 68.

118. See *supra* n. 101.

119. *Supra* n. 102.

120. Réponse du Ministre des Affaires étrangères aux avis de la CNCDH (30 Aug. 2005); <http://www.commission-droits-homme.fr/bin/InfoGeneFr/affichageDepeche.cfm?ildDepeche=159>.

121. See, for example, Written Question No. 10658 of 29 January 2004, tabled before the *Sénat* by the Senator Robert Bret (Communist); and Question No. 08265 of 13 October 2005, also before the *Sénat*, from Senator Alima Boumediene-Thiery (Green).

122. See Question No. 39884, tabled by Paulette Guincharde-Kunstler (Socialist) of 25 May 2004, and Question No. 57336, tabled by Martine Lignière-Cassou (Socialist) of 8 February 2005.

123. See *supra* n. 110, and accompanying text.

124. See the question tabled by Carles Campuzano on 9 July 1999, *Boletín Oficial de las Cortes, 9 de Julio de 1999, Serie D. Núm. 461 (184)*.

Spanish NGO in this field, is based there). Perhaps more important in this context, however, is the Resolution passed by the Catalan Regional Parliament of 2003 urging Spanish ratification of the ICRMW,¹²⁵ which, although not binding in any way and largely ignored by the national Government, was nonetheless surprising in that it gained the support of all parties in the regional assembly, including the conservative *Partido Popular* that was in power at the time at the national level. The Catalan Parliament renewed this Resolution in June 2004;¹²⁶ this time, however, bearing testament to the rapidly increasing politicisation of the immigration debate in Spain, it did not attract the support of any right-wing party in the Assembly. Again, however, despite the change in government at the national level from right to left in the intervening years, their efforts in this regard did not succeed in eliciting action, or even a response, from the new ruling party.

Although many of those interviewed in the course of the Spanish country report expressed the opinion that the actions of the Catalan Parliament are largely due to the efforts of committed individuals rather than any official support from the political parties that they belonged to, it seems likely that the fact that the region has been the main location and focus of the civil society awareness raising campaign, headed by *La Xarxa*, will have been a factor in encouraging such a positive attitude to the Convention in the regional body. This is certainly also the case of the Tuscan Regional Assembly in Italy, which, as early as 1992, approved a motion requesting the national Government to ratify the ICRMW. This move was in large part down to the efforts of a group of faith-based NGOs in the region, who had combined to form a think-tank and pressure group on the issue. As in the Spanish context, however, this initiative had no real effect in terms of promoting Italian accession to the Convention.¹²⁷

There has thus been some significant, if not major, parliamentary activity regarding the ICRMW in many of the countries under consideration here, particularly in the years immediately prior to and following its entry into force in 2003. It further seems to be the case that there is a direct correlation between the success of the civil society awareness-raising campaigns, and the degree to which the Convention has become a feature of parliamentary discussion, with the UK and France at one end of the scale, and Norway, Poland and Germany at the other. The Spanish example also provides some evidence of the same point in microcosm; where the civil society campaign has been focused upon a particular region, by far the most important parliamentary activity on this issue has been carried out in the Assembly of that region. Overall, however, the most that has been achieved by any of these efforts is to force governments to formulate clearly their reasons for non-ratification; it is to a consideration of these that the report now turns.

125. *Resolució 1850/VI, 22 April 2003, Butlletí Oficial del Parlament de Catalunya, 6 maig 2003, Núm. 423.*

126. *Butlletí Oficial del Parlament de Catalunya, 27 juliol 2004, Núm. 87.*

127. It is worth noting in this regard that the Flemish regional Government also decided, on 30 April 2004, to officially approve Belgian ratification of the ICRMW. See Vanheule, Foblets, Loones, and Bouckaert, loc. cit. n. 96, at p. 288, n. 11.

Part 4: Specific Obstacles to Ratification

4.1 LEGAL OBSTACLES

The perceived legal obstacles to the ratification of the ICRMW by the countries under consideration for the purposes of this report can be divided into two broad categories: as being of general (i.e., regularly cited, in one form or another, in most if not all of the countries involved, if not in official government documents and responses, then at least during the interviews conducted for the purposes of the individual country reports) or particular (i.e., specific to certain countries) concern.

4.1.1 General Legal Obstacles

From the individual country reports carried out for the purposes of this study, two different types of general concerns emerged, which may be (loosely) termed “legal” and “political” respectively. The latter will be dealt with in Section 4.3.1 below, although it is worth bearing in mind that this categorisation is in many ways an artificial one; there are strong political aspects to the first group, just as there are some decidedly legal elements present in the second. However, it can also be argued that these two groups also map, contingently but fairly neatly, onto the distinction outlined in Section 3.1 above between misconceptions requiring only correction and arguments that remain to be won; perhaps unsurprisingly, it is the general “political” concerns that must be viewed as falling under the latter category.

The two general legal obstacles, which belong firmly to the “misconception” category, are, firstly, the common claim that the ICRMW would limit the sovereign rights of states to decide upon who can enter their territory and for how long they can remain; and, secondly, the equally ubiquitous fear that the Convention would provide for a robust right of family reunification to all migrant workers present in a regular situation in the territory of a state. At the most general level, the relevant provisions of the Convention relating to these perceived obstacles are contained in Articles 79 and 44 respectively.

To begin with the former, Article 79 appears to lay this matter to rest both explicitly and clearly, in terms of admission onto the territory of the receiving state at least:

Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families. Concerning other matters related to their legal situation and treatment as migrant workers and members of their families, States Parties shall be subject to the limitations set forth in the present Convention.¹²⁸

Nonetheless, many governments seem to fear that their hands will be tied to an unacceptable degree, particularly in terms of removing migrants who lose or leave the employment for which permission to enter was granted. Consider, for example, the following excerpt from the official response of the UK Government to the House of Commons Select Committee report on Migration and Development:¹²⁹

If the UK were to ratify the Convention, we would not be able to restrict the employment that work permit holders can do to that specified on their permit and they would have access to public funds from the date that they entered the UK. Although the UK would retain the right to refuse entry, this would be particularly problematic after entry as the Convention requires that a migrant stays for the length of their latest permission to stay, regardless of whether they subsequently become unemployed. The UN Convention would therefore allow migrant workers to circumvent current immigration controls and remain in the UK even when they are not fulfilling the conditions on which they were granted entry to the UK (pursuing the specified employment).

This is a more subtle deployment of essentially the same argument: that the Convention limits unacceptably the sovereignty of states to decide, if not who enters, then at least who remains on their territory. This too, however, is a misconception of what the provisions of the Convention actually entail. Article 51 is the relevant article here, which provides that

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

128. It is worth noting, however, that the *travaux préparatoires* of the Convention do indicate a considerable amount of debate over the meaning of this provision, and in particular over how expansive an interpretation should be given to the term “admission”. See Bosniak, loc. cit. n. 29, at pp. 756-757, and Cholewinski, op. cit. n. 29 at pp. 192-193.

129. Op. cit. n. 116.

their work permit, *except where the authorization is expressly dependent upon the specific remunerated activity for which they were admitted.*¹³⁰

Here, the misconception underpinning the UK Government's stance on this point is readily evident: the italicised passage allows states to retain the capacity to expel those who lose or leave their jobs where residence permission was explicitly made dependent upon that particular employment – precisely the power that the UK Government claimed it would have to surrender upon ratification.

The misconception surrounding the implications of the ICRMW for family reunification, which also appeared as an obstacle common to many of the individual country reports,¹³¹ is if anything more easily dispelled. The relevant provision, Article 44(2), reads as follows:

States Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children.

This provision is so weakened by the language in which it is couched and the caveats to which it is subjected that it is difficult to see in it any obligation of any sort, let alone one that could present a serious obstacle to ratification for any state. Firstly, it should be noted that states are not obliged to grant, but only to “facilitate” reunification; secondly, and even more importantly, they are only obliged to take such measures “*that they deem appropriate*” to do so. Given that the Article contains no apparent limit on this discretionary power, it is not at all clear how any state could ever be held to be in breach of this “obligation” (short, perhaps, of an explicit and blanket ban on all family reunification), as it stands at its current state of development.¹³² However, it is worth noting in this regard one of the potential obstacles to ratification that arose in the Polish context: that the Convention contained a number of vague and open-ended provisions that could, through the use of soft law mechanisms, be subsequently interpreted and developed in an expansive manner, so that states could not be entirely sure, in many instances, of precisely what

130. Emphasis added.

131. In France, for example, the NGO GISTI had raised concerns that recent developments in the law pertaining to family reunification, which extended the waiting period and tightened certain other conditions, would be against “the spirit of the Convention”; and the Norwegian Directorate of Immigration expressed concerns that it was “unclear” the extent to which Article 44 would provide a right to family reunification to seasonal workers.

132. On this point, see also Piper and Iredale, *loc. cit.* n. 6, at p. 46, where they note, in terms of the attitudes to the ICRMW in Singapore, that “[o]ne of the biggest obstacles to ratification is the misconception that the [ICRMW] mandates the right to bring one’s family. The [ICRMW] does not require that family members be admitted”; and Vanheule *et al.*, *loc. cit.* n. 96, where the authors note, on p. 308, that “[g]iven the broad scope for policy development that is granted to the State, the provision most probably lacks direct effect”.

they were committing themselves to. This being said, it nonetheless appears clear that the “family reunification” obstacle, much as the “surrender of sovereignty” obstacle above, is based upon a simple misunderstanding of the relevant provisions of the Convention.

4.1.2 Particular Legal Obstacles

While the general obstacles, outlined above, were cited in most if not all of the states under consideration here, the findings of the country reports revealed a number of more concrete legal obstacles to the ratification of the ICRMW particular to each state, largely on the basis of some incompatibility between certain provisions of the Convention and those of national law. It is worth making clear from the outset, however, that in no state did these appear to be either insurmountable or, indeed, particularly serious barriers to ratification; many would require a fairly simple amendment of national legislation, and, indeed, could be obviated entirely by the insertion of a reservation to the Convention provision in question at the time of ratification.

One such problem particular to France, for example, concerns the “group right” contained in Article 31, obliging states to “ensure respect for the cultural identity” of migrants.¹³³ This is at odds, of course, with the long-standing French policy of asserting the indivisibility of the French people, and on that basis denying the applicability of any group-specific rights on their territory. France has, however, faced this issue before, inserting an interpretative declaration to its ratification of the ICCPR stating that “[i]n the light of article 2 of the Constitution of the French Republic, the French Government declares that article 27 [which protects the rights of persons belonging to ethnic, religious or linguistic minorities] is not applicable so far as the Republic is concerned”;¹³⁴ there is nothing in the ICRMW that would prevent it from doing the same again.

Secondly, the Minister for Foreign Affairs has suggested, in a response to a question in Parliament in November 2005, that France no longer has competence to ratify the Convention, due to the transfer of powers in the field to the EU following the Long-Term Residents Directive;¹³⁵ again, however, this does not seem persuasive, given that EU law allows Member States to take measures more favourable to migrants than those laid down at the EU level. Moreover, there are no EU measures that establish a common framework of protection for third-country nationals who are admitted to take up legal employment in Member States and who have not completed the five years of lawful residence to qualify for long-term resident status. Indeed, the EU Commission will be tabling a draft directive on the rights of such migrant workers in the second half of 2007.¹³⁶

133. This was raised as a potential issue in the Opinion of the CNCDH recommending ratification; see *supra*, n. 102.

134. See http://www.unhcr.ch/html/menu3/b/treaty5_asp.htm.

135. Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16/44), discussed in Section 5.2.1 below.

136. European Commission, *Policy Plan on Legal Migration* (COM (2005) 669, 21 Dec. 2005) at p. 13.

In Italy, the basic immigration law of 1998 (known as the Turco-Napolitano law, after the politicians responsible for promoting it) has been found to be largely in conformity with the provisions of the ICRMW. However, in 2002, some restrictive amendments were passed (referred to as the Bossi-Fini law, for the same reason) which may be incompatible with the Convention, in particular the provisions in the Bossi-Fini allowing for administrative expulsion of certain migrants, even when an appeal on their case is pending, which may fall foul of the procedural safeguards against expulsion contained in Article 22. Several of the provisions of the restrictive 2002 law are currently being reviewed by the Constitutional Court; if they are struck down, then many of these minor legal obstacles will have been removed.¹³⁷

Perhaps more important in the Italian context is the gap that exists between the impressive array of rights guaranteed to migrant workers, both regular and irregular, on paper, and their ability to access and enjoy these rights in practice. Upon ratification of the ICRMW, Italy would be obliged under international law to *guarantee* these rights in practice, and would have to submit to the reporting requirements of and general oversight by the Committee on Migrant Workers. Again, however, given the extent and scope of the international legal instruments to which Italy is already party (as already noted, Italy has an extremely impressive ratification record not just with regard to general human rights treaties but also to specifically migrant-related instruments), and in terms of which a similar gap between paper and practice exists, it seems unlikely that the need to make enjoyment of the rights effective would act as a significant deterrent to ratification here. Broadly speaking, the general view seems to be that in Italy, as in France, becoming a party to the ICRMW would entail only very minor alterations to the current laws regulating immigration.¹³⁸

By and large, the legal obstacles cited in Germany, Norway and Poland fall into one of the general categories dealt with in the previous section. In all three states, there is a view, shared between the governments, politicians and civil society more generally, that the rights of migrant workers are already adequately protected by national legislation. A study by the Polish Government, for example, into the compatibility of national law with the ICRMW found that Poland already guaranteed most of the rights contained therein to migrant workers and their family members present on its territory; it did, however, acknowledge that some fairly far reaching reforms would be necessary to bring the law relating to irregular migrants up to the Convention standard. Likewise, in Norway, the fact that health and education systems are inaccessible to those without a National Identification Number would again seem to run counter to the guarantees of certain economic and social rights to all migrant workers and their families contained in Part III of the Convention.

137. The Constitutional Court has, in fact, already struck down a number of these restrictive amendments to the immigration law as unconstitutional: see, for example, Decision 222/2004 (declaring unconstitutional the fact that expulsion orders can be carried out immediately, before any appeal); Decision 223/2004 (declaring unconstitutional a provision mandating arrest of anyone remaining more than 5 days beyond an expulsion order); Decision 78/2005 (striking down the absolute prohibition on regularising irregular migrants accused of criminal activity); and Decision 30774/2006 (mandating that expulsion orders must be communicated in a language that the migrant in question understands).

138. See e.g. the Baratta study, op. cit. n. 96.

In Spain, as in Italy, the problem of particular incompatibilities between the ICRMW and national legislation stems from certain restrictive amendments placed on a basically compliant immigration law. The law 8/2000, enacted to amend the liberal law 4/2000 passed earlier the same year, contains a host of restrictions on the freedom of association, freedom to join trade unions, the right of migrants belonging to certain groups to strike and the right to receive free legal assistance that would certainly fall foul of the relevant Convention provisions.¹³⁹ Also as in Italy, however, these provisions are currently the subject of multiple challenges before the Spanish Constitutional Court; if they are struck down, the largely compatible law 4/2000 would be reinstated, and these minor obstacles to ratification would disappear.

Lastly, the UK Government has argued that “incorporating the full terms of the UN Convention into UK law would mean fundamental changes to legislation”, although, as noted in the previous section, some of the major difficulties it envisages are based upon misconceptions of the content of particular ICRMW provisions. This being said, there do remain a number of minor incompatibilities, which would require either legislative amendment or the lodging of a reservation should the Convention be ratified. The first of these concerns Article 52 of the Convention, on freedom of employment, which provides that properly documented migrant workers should be allowed free choice of employment after a period of not more than two years; this is at odds with current UK policy, in terms of which work permit holders are formally permitted to work only for the employer specified on their permit.¹⁴⁰ Another potential area of conflict is the principle contained in the Convention of equal treatment in relation to social benefits. Article 43 provides that documented migrant workers should have equality of treatment with nationals in terms of, *inter alia*, education for their children, housing, social and health services; while Article 54 contains similar provisions with regard to unemployment benefits. Currently in the UK, lawfully employed migrant workers are entitled to health care and equal treatment in education, and are eligible for any other benefits which derive from their contributions to the national insurance system. However, migrant workers from outside the EEA, or who are nationals of the eight Central and Eastern European states that joined the EU in 2004, are not entitled under UK law to any non-contributory benefits in terms

139. Paragraphs 7(1), 8, 11(1), 11(2) and 22 of the Law 4/2000, as reformed by Law 8/2000. Indeed, in March 2001, the ILO supervisory Committee on Freedom of Association, which draws its mandate from the ILO Constitution, concluded that the Spanish Foreigners' Law restricting migrants' trade union rights by making their exercise dependent on authorization of their presence or status in Spain was not in conformity with the broad scope of Article 2 of ILO Convention No. 87 of 1948 on Freedom of Association and Collective Bargaining. See Case No. 2121 (23 March 2001); ILO, Committee on Freedom of Association, *Report No. 327*, Vol. LXXXV, 2002, Series B, No. 1, para. 561 (<http://webfusion.ilo.org/public/db/standards/normes/libsynd/index.cfm?hdroff=1>). Article 2 states unequivocally that “[w]orkers 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).

140. It should be noted, however, that this potential conflict is lessened by the fact that Art. 52(3) ICRMW also permits restrictions on access to employment for up to 5 years in accordance with a preference policy. In the UK, migrants who have been legally resident for five years are then entitled to apply for indefinite leave to remain (i.e., permanent residence), in terms of which their access to employment would, if granted, no longer be restricted.

of housing, council tax relief, or job-seekers allowance (paid to the unemployed). This is in clear conflict with the provisions of Articles 43 and 54 of the ICRMW.

There remain two other aspects of UK law that could be viewed as legal obstacles to the ratification of the ICRMW. The first concerns the provisions in Article 25 relating to the right of equal treatment of irregular workers with regard to remuneration and other conditions of employment; and in particular to Article 25(3), which provides that states must take all appropriate measures to ensure that migrant workers are not deprived of this right by reason of their irregular status, and that such status shall not relieve employers of any contractual obligations to the worker concerned. UK law is certainly incompatible at present on this point, as, where a worker knowingly enters into an irregular working situation, his/her contract is viewed as illegal, and hence unenforceable in law. The final area of potential incompatibility relates to the Convention's vague provisions on regularisation of undocumented migrants, and in particular its Article 69(1), which requires that "States Parties shall, when there are migrant workers and members of their families within their territory in an irregular situation, take appropriate steps to ensure that such a situation does not persist". While it would certainly be unfounded to read into this provision a right to regularisation of undocumented migrants, it can be read as a "regularise or expel" obligation; that is, a requirement to regularise the situation of all migrants that a state does not intend to expel. To the extent that the Convention is read as placing a regularisation requirement of any sort on states, it is at odds with current UK policy, which makes only limited standing provision for the regularisation of undocumented migrants – mainly, providing in its Immigration Rules for individuals to obtain indefinite leave to remain (i.e., permanent residence) after fourteen years of residence, irrespective of the regularity of that stay, and a Home Office practice according to which parents of a child who has been continuously in the UK for seven years or more are normally granted indefinite leave to remain. The UK has no history of granting collective amnesties in regularisation processes as exists, for example, in Spain and Italy.

4.2 FINANCIAL/ ADMINISTRATIVE OBSTACLES

Much has been made in the academic literature about the potential financial and administrative implications of the ICRMW, and the manner in which these may create genuine obstacles to its ratification. Factors often cited as major barriers in general terms include the lack of necessary infrastructure at the national level, the high cost of implementing the instruments, and the complexity both of the Convention itself and of the domestic immigration legislation and practice that would have to be brought into line.¹⁴¹ Moreover, it is clear that each of these is applicable to at least some of the countries of the EU/EEA

141. Pécoud and de Guchteneire, loc. cit. n. 1, at p. 9, following P. Taran, "Status and Prospects for the UN Convention on Migrants' Rights", 2 *European Journal of Migration and Law* (2000) 85-100. See also R. Cholewinski, "Protecting Migrant Workers in a Globalized World", *Migration Information Source* (March 2005); (<http://www.migrationinformation.org/Feature/display.cfm?id=293>).

region: neither Poland nor Norway, for example, has had much experience historically with immigration, and both lack the highly developed regulatory institutional framework that the Convention seems to suppose; while the gap between legislated and practically enjoyed rights in Italy provides a stark illustration of what the costs involved in effective implementation might be for some. It is perhaps surprising, then, that in almost none of the countries analysed for the purpose of this report did factors of an administrative or financial nature emerge as major perceived obstacles to ratification.

Again, it is important to stress here the artificial nature of this type of categorisation. Of course, the fact that ratification would create some costs of this nature is present implicitly in many of the “legal” objections outlined above: the idea, for example, that existing national or international commitments render the Convention superfluous relies in large degree on the existence of some financial and administrative costs if it is to be at all persuasive as a reason for non-ratification; and the fear that it may entail an increased burden on national social security systems, creating amongst other things a “pull factor” for irregular migrants, was also present to some extent in all of the individual country studies. Certain other, more country-specific difficulties were also raised: in Germany, for example, the lack of any clear demarcation of competencies between Governmental Ministries in immigration matters, compounded by the fact that the different institutional bodies deal with the different areas of law implicated by the Convention and by a generally nationally-orientated administrative ethos, was put forward as a potential obstacle; while some in Norway cited a rigid and bureaucratic decision-making process that would sit uneasily with some of the ICRMW’s provisions. What is striking, however, is that, in general, few if any of those interviewed for those reports viewed the implications of this sort as being themselves of major importance in the reluctance to ratify the Convention.

The only significant exception in this regard is the position of the French Government, which is unique in citing the Convention’s financial provisions as a major obstacle to ratification. While there seems to be a general view that the Convention would prove too costly to implement, a position confirmed in a letter from the Ministry of Foreign Affairs to the *Collectif pour la ratification* of 3 February 2005, the particular problem seems to concern the issue of remittances. The 2005 *Avis* of the CNCDH¹⁴² highlighted the fact that Article 47 of the ICRMW, which recognises the right of migrants to remit funds from the country of employment to their country of origin and requires States Parties to “take appropriate measures to facilitate such transfers”,¹⁴³ was likely to be strongly opposed by the Government. Despite the fact that, once again, the language of the provision is decidedly less than restrictive, the Ministry of Finance appears to view the current banking practice of charging high fees for such transfers as a potential violation thereof, and thus as a major obstacle to ratification; testament both to the strength of the banking lobby in France, and to the fear that facilitating remittances could result in very significant sums of money being removed from the French economy. As also noted by the CNCDH in its

142. Loc. cit. n. 102

143. ICRMW, Art. 47(1).

Avis, however, even if this practice is to be retained, the insertion of a reservation upon ratification would again be a simple and effective means of overcoming this obstacle.

It is also worth noting that, even where ratification of the ICRMW would give rise to no significant legal incompatibilities with domestic regulations, certain administrative practices at the national level may fall foul of the implicit obligation to not merely legislate all of the rights contained in the Convention but also to guarantee that they are effectively enjoyed in practice. Perhaps the most obvious situation in which this may well prove to be a significant burden is in Italy, where it is not uncommon for year-long residence permits to have expired by the time they are actually issued (despite the 20 day period formally provided for by Italian law). It is likely, however, that certain practices will run counter to the actual enjoyment of rights in all countries in the region; particular attention must thus be paid not merely to the letter of the law, but also to its implementation in practice.

France again provides an instructive example in this regard. French national legislation stipulates, in conformity with Article 28 of the ICRMW, that all migrants, regardless of the legality of their situation, have the right to emergency medical care. The conditions of access to the *Aide médicale d'État* are currently regulated by two Decrees of 29 July 2005, which provide that all foreigners seeking to access emergency care must provide documentary evidence not only of an uninterrupted period of residence on French territory for three months or more, but also of all of their own resources. Such administrative requirements clearly work against the actual enjoyment of the right to emergency health care by irregular migrants, many of whom will be without the necessary documentation, or unwilling to provide it as it could be used to facilitate their own expulsion. It is worth noting here that the Council of Europe's European Committee of Social Rights has held that the practice of admitting children of irregular immigrants to such care only after a certain period of time runs counter to Article 17 (the right of children and young persons to social, legal and economic protection) of the Revised European Social Charter.¹⁴⁴

A similar difficulty, to some degree at least, exists in Germany. There, although the rights to education and to emergency health care, for example, are not formally dependent upon the legal status of the migrant in question, the Government will take action against undocumented foreigners if alerted to their presence by schools, hospitals, or the like. In most cases, then, the decision on whether or not to afford many key social and labour rights to undocumented migrants must be taken by those at the frontline of provision of the service in question, such as doctors or headteachers, who must themselves take responsibility for whether to report the migrant in question to the relevant authorities – perhaps even risking prosecution for the misdemeanour of assisting an irregular migrant.¹⁴⁵ This situation obviously engenders high levels of uncertainty and ambiguity as to the effective

144. See European Committee of Social Rights, Complaint No. 14/2003, *International Federation of Human Rights Leagues (FIDH) v. France* (2003), http://www.coe.int/t/e/human_rights/esc/4_collective_complaints/list_of_collective_complaints/RC14_on_merits.pdf

145. It should be noted that, although this possibility exists, recent years have only seen one case of a prosecution for failure to declare an undocumented migrant to the relevant authorities.

enjoyment of certain rights, which in turn may make many irregular migrants less likely to seek access to them. Despite these difficulties, however, what emerges clearly from the individual country studies is that practical problems of this nature are generally not viewed as genuine obstacles to the ratification of the ICRMW.

4.3 POLITICAL OBSTACLES

If, as the individual reports indicate, it can be concluded that there are no insurmountable, or even major, legal, financial or administrative barriers to ratification of the ICRMW in the countries analysed for the purposes of this study, they are equally clear and unanimous in the view that the real obstacles facing the Convention are political in nature. As with the legal considerations outlined in Section 4.1 above, it is worth distinguishing between political obstacles of general concern – that is, present to a greater or lesser degree in all seven of the EU/EEA states under consideration here) – and those that appear particular to certain among them.

4.3.1 General Political Obstacles

As already noted, those in this second category of general obstacles are considerably harder to dismiss than the mere “misconceptions” that comprised the first. There are three obstacles in this regard that emerge from the individual country reports: firstly, that the ICRMW is entirely superfluous in the context of international human rights law;¹⁴⁶ secondly, and relatedly, that the rights it prescribes are already largely guaranteed, on paper at least, by national laws and the international norms to which the states concerned are party;¹⁴⁷ and thirdly (and perhaps slightly incoherently, when read in the light of the previous two) that the Convention endows irregular migrants with too many rights, and as a result would hinder both processes of social integration and the struggle against irregular movements of people. These three objections appear to be perhaps the most common general objections to the ICRMW from the governments of EU/EEA states, if the findings of the individual country reports presented here can be at all extrapolated to the other countries of the region; and each represents a real challenge to the prospects of ratification of the Convention.

146. This view was evident, for example, in the response from the Norwegian Ministry for Foreign Affairs that the protection of vulnerable groups should be undertaken through the implementation of existing standards; and in the view expressed by the Spanish Office for Human Rights to Amnesty International Spain that the whole Convention was covered by other international instruments to which Spain was already party.

147. This was one of the basic elements of the response of the UK Government to the House of Commons Select Committee report on Migration and Development (op. cit. n. 116), when it stated that “[t]he rights of migrant workers are already protected in UK legislation and the UK’s existing commitments under international law, including the Human Rights Act 1998 [which gives effect to the European Convention on Human Rights (ECHR) in UK law]”. Ibid., Appendix.

Each of these obstacles, of course, overlaps with administrative and legal concerns; and each, if it is to be persuasively refuted, will require an intellectual engagement that goes far beyond the simple demonstration of misconception to which those in the previous category were susceptible. The formulation of such responses is, of course, beyond the scope of the present report; it may be possible, however, to outline some of the directions that an in-depth refutation might take, at least in terms of the legal element contained in each.

A response to the first obstacle, that the already-existing norms of international human rights law render the ICRMW superfluous, or of no discernible added value, would necessitate a robust defence both of the practice of producing group-specific conventions to complement and develop the norms contained in the more general instruments, and of the urgent necessity of doing so in the practical context of the protection of migrant workers; the importance of specifying general norms to the particular situations faced by the vulnerable groups of persons. The second, related, objection, that national laws already protect the human rights of migrant workers to a sufficient degree, would seem to call for some sort of cost/benefit analysis for the receiving states in question, who quite properly inquire as to why they should accept the often onerous administrative burdens associated with the ratification and oversight of UN Conventions, when to do so would bring no discernible benefit to those that the instrument seeks to protect. An argument of this sort might underline the importance of the prevention of lowering standards in response to political or economic crises, emphasise the symbolic value of developed European nations providing an example in terms of human rights protection, or illustrate the extent to which a dedicated multilateral convention, complete with international oversight, can help to close the gap between rights as they exist on paper and as they are enjoyed in practice. Although, of all the countries examined for the purposes of this report, this last issue is undoubtedly most evident in the situation in Italy, there is equally little doubt that vulnerable migrants do not receive the full benefits of the rights that they are ostensibly guaranteed under national law (whether or not this law has been adopted to implement an international or regional human rights instrument), in any of the countries under consideration here.¹⁴⁸

The third objection in this category, that the ICRMW provides too many rights to irregular migrants (and which, somewhat oddly, often appears in the same breath as the first two),¹⁴⁹ represents perhaps the single most important obstacle to its ratification among receiving states, encapsulating as it does both major legal and political concerns. The legal

148. One example is provided by the opinion of the European Committee of Social Rights, in Complaint No. 14/2003, loc. cit. n. 144, in which it held that the French practice of restricting access to health care to those who have been in the country for a set period of time, was a violation of Article 17 of the Revised European Social Charter, in terms of the rights of children of irregular migrants.

149. As in, for example, the response by the German Federal Ministry for Economy and Labour to the questions raised in the course of the individual country report, to the effect that 1) the human rights of all migrants were already provided for in the ICCPR/ ICESCR; and 2) what is granted to irregular migrants in the Convention goes far beyond what is necessary to protect their basic human rights. Unless there is a very considerable degree of difference between the rights accorded to all migrants in the ICCPR/ ICESCR on one hand and the ICRMW on the other (which most seem to agree there is not), the presence of these two considerations side by side appears more than a little incongruous.

element could perhaps best be undermined by means of a comparative examination of the rights guaranteed under Part III of the Convention – that is, the right of all migrant workers regardless of status – and the rights already nominally guaranteed to all persons under the more general instruments to which the states concerned are party. If the former are shown to be in large part simple codifications and specifications of the latter, then, to the extent that objection remains, it reveals itself, ultimately, as political and not legal; and this point is only strengthened by the argument, outlined in Section 1.3 above, that in many respects the provisions of the ICRMW are significantly *less* extensive than those of the ICCPR or ICESCR. That this is in fact the case was the opinion of the overwhelming majority of those interviewed in the process of researching the individual country reports. One variation on this objection is the fear of being *first* to ratify; that being the first in a highly developed region to accept the Convention as law will lead to an even greater, disproportionate increase in irregular migration. While this aspect could undoubtedly be overcome by co-ordinated action by a group of states (and the EU could provide one institutional mechanism for achieving this), the more basic claim – that the Convention goal of combating irregular movements through granting rights to undocumented migrants is destined to be counter-productive – will require detailed arguments from both sociological and political economy perspectives if it is to be refuted.

Arguments of this sort can undoubtedly be made, and made persuasively; indeed, they may well already exist in academic and other literature.¹⁵⁰ If so, however, the urgent task is to bring them into the mainstream of the discourse and debate surrounding the ICRMW; for, if this does not prove to be possible, it seems doubtful whether the governing elites of many EU/EEA countries of destination will ever be persuaded to take the Convention seriously.

4.3.2 Particular Political Obstacles

While the general political obstacles outlined above constitute without doubt the most significant barriers to ratification in the states analysed for the purposes of this report, it is also worth concluding this section with a brief account of some of the more particular concerns that were raised in certain of them. In France, for example, the concern that ratification will lead to increased numbers of migrants, documented and otherwise, is compounded by the fear that this would undermine the unity and indivisibility of the French “People” (the same doctrine that has led France to reject the applicability of group-based human rights on the territory of the Republic), which is reflected in, amongst other things, the recent decision to introduce a “contract of integration” for foreigners looking to live and work in the country.¹⁵¹

150. See, e.g., R. Cholewinski, “The Rights of Migrant Workers”, in R. Cholewinski, R. Perruchoud and E. MacDonald, eds., *International Migration Law: Developing Paradigms and Key Challenges* (The Hague: T.M.C. Asser Press, 2007) 255-274.

151. When first introduced in 2003, this contract was voluntary; however, in 2006 it became compulsory for non-EU nationals looking to live and work in France. See the *loi relative à l’immigration et à l’intégration* [Immigration and Integration Law] 2006, Art. 5.

In Germany, ratification of the Convention at the time of its adoption and for a number of years afterwards was never on the agenda, as the country focused its efforts and resources on reunification. Now, the task of “selling” it is made considerably more difficult by the high levels of unemployment among nationals; indeed, some interviewees even suggested that ratification could be counter-productive in the current climate, creating a racist or xenophobic backlash against foreigners on German territory. Moreover, there is, as in many other of the countries under consideration here, a widely-held (and possibly correct) view that migrant workers lawfully resident in Germany are better protected than those in most other states; that their situation simply does not warrant the ratification of a specialised international instrument, with all of the costs that this would entail. Lastly, the Convention’s insistence on a range of rights for undocumented migrants is particularly unwelcome, as this whole issue appears largely taboo in German public discourse.

The Italian situation, in which there seems to be something of a cross-party consensus to simply ignore the Convention altogether, is different again. Here, one of the major political (and, indeed, economic) obstacles to ratification seems to be that, far from looking to prevent or reduce irregular migration, the Italian economy not only tolerates but tacitly encourages the entry and engagement of this most flexible element of the labour force, by making regular access to employment increasingly difficult, even as the demand for migrant labour itself increases (when a legislative decree on the issue in 2005 created the possibility of offering 99,500 new work permits to non-EU citizens, the Government received over 240,000 requests, largely from *employers*).¹⁵² Another issue raised in the Italian context that was echoed in other individual country studies (and, indeed, in studies in other regions of the world)¹⁵³ was that the Convention, drafted over two decades ago with an entirely different problem set in mind to the one currently faced by countries of origin and destination alike, was simply too outdated to be of use in regulating the complexities of modern labour migration.¹⁵⁴

In the other states under consideration here, the political obstacles cited are in large degree variations on one or more of the general concerns outlined in the previous subsection; some, such as Poland and the UK, are mostly concerned with the risk that the Convention would create a “pull factor” for irregular migration, whereas others, in particular Norway and Spain, focus more on the possibility of a negative public reaction to ratification. Of course, these are not necessarily entirely distinct issues: in Spain (where

152. See European Migration Network (EMN), *Annual Policy Report (Luglio 2004-Dicembre 2005): Italia* (EMN: Rome, 2006), p. 2 (<http://www.emnitaly.it/download/iapr2005-italian.pdf>).

153. See e.g. Piper and Iredale loc. cit. n. 6, at p. 58.

154. It is worth noting here that even one of the main drafters of the ICRMW acknowledged, as early as 1991, that the Convention had its origins in a 1975 ECOSOC Report, which “was based on the experiences of the migratory process of the late 1960s and early 1970s”, going on to note that “[e]ven if the main achievements of the Convention represent the vision of its ‘founding fathers’, some fundamental questions remain. Will the instrument work? Will its vision come true in the world of tomorrow as it was in the world of yesterday? The provisions of the Convention will be implemented in the circumstances beyond the year 2000. The world ten years from now will be different as it was ten years ago”. See Löhnroth, loc. cit. n. 11, at pp. 712-713.

another distinct political obstacle has been created by the inconsistencies between the position of the Socialist Party in opposition and in government), one politician from the Catalan Conservative Party *Convergència I Unió* suggested that any public backlash from ratification would stem directly from the perception that the main purpose of the Convention is to protect the rights of undocumented migrants; it would not, in his view be “politically wise” for a government to create the impression that this is the priority in immigration policy in the current climate.

Underlying all of these political concerns, general and particular, is an even more basic consideration that, while rarely if ever explicitly cited by those in government, was raised frequently by civil society interviewees in the context of the individual country reports: namely, that migrants’ rights – quite unlike those of women or children, the other vulnerable groups to benefit from targeted “core” human rights treaties – are often viewed with suspicion and even outright hostility by both the media and the general public in the states of the region. There is undoubtedly a contingent and situational element to the ontology of “the migrant” that is simply not present in the other two: while women and children are in need of protection and empowerment (or, at least, widely perceived of and accepted as such) simply by *being*, migrants only become troublesome by virtue of being *there* (or, perhaps more frequently, *here*). This, however, all-too-easily slips into the view that most migration is essentially voluntary; which in turn feeds the ideas that, if conditions in the receiving country are not to the liking of the migrants in question, they can and should simply go back to where they came from, and that, far from claiming rights, those accepted into another country should somehow be grateful for the privilege. Within constructs of this kind, of course, the plight of irregular migrants elicits less, and not more, sympathy, despite their increased vulnerability. Such beliefs, although prevalent in the general public and frequently both engendered and encouraged by a hostile media, display an almost complete lack of understanding not only of the complex phenomenon of migration, and the contribution that migrants, both regular and irregular, make to the host society’s economy, but also of the nature and function of human rights, as currently conceived.

The philosophy behind the ICRMW stands in stark opposition to thinking of this sort; and in this lies one of the most powerful – and stubborn – political obstacles to its ratification. Put simply, it is (or is perceived as) a vote-loser, particularly in terms of the hugely politically sensitive issues concerning the treatment of undocumented foreigners and the sovereign right to decide on admissions. This observation is supported by the findings of Section 3.3 above on political parties, which illustrated that, in general, only those on the left without serious governing ambitions were prepared to align themselves formally and explicitly with the Convention. Even in Spain, where, it will be recalled, leading figures in the Socialist Party had pushed for ratification whilst in opposition, those same politicians have, since coming to power in March 2003, fallen altogether silent on the issue. Changing these attitudes in order to gain recognition that migrants in general, and those in an irregular situation in particular, are a vulnerable group that are both in need *and deserving* of protection in the destination country is one of the most important, and one of the most difficult, challenges that any successful campaign for ratification of the

ICRMW will have to confront. The idea that someone may not be *deserving* of protection is, of course, completely alien to human rights theory; what must be shown, however, is that people who cross international borders do not forfeit any of their basic rights as a result of the “choice” to do so. This, put simply, is the struggle to win acceptance of the idea that migrants’ rights, as specified in the ICRMW, are *human* rights.

Part 5: The EU Context

5.1 BACKGROUND

The European Union, by far the most developed supranational polity in the world, is in many respects an entity *sui generis*; both the breadth and the depth of integration that it has achieved, and the manifold complexities of its functioning, render it quite unique among regional political, social and economic unions. In no other setting have so many states agreed to cede so much decision-making power over such a wide range of topics to an “international” body; and no other such entity can, in turn, boast the political, economic and legal influence over the domestic systems of its members – including, perhaps most notably in the international context, a regional court with compulsory jurisdiction over all matters within Union competence, the European Court of Justice – as can the EU. For these reasons, and unlike any other study in this UNESCO series to date, no examination of the obstacles to, and prospects for, ratification of the ICRMW in the EU/EEA region would be complete without at least a brief analysis of the situation in, and potential future role for, the highly developed regional legal order that exists, and the institutions responsible for it.

While the EU could undoubtedly have had an important part to play in encouraging ratification of the ICRMW in the years immediately following its adoption by the UN General Assembly in 1990, certain more recent developments in both the composition and the competencies of the Union have meant that it will have a vital role in either the success or the failure of the Convention, both within the region itself and beyond. Chief among these, and in a real sense the basis of all of the others, was the decision to create Title IV of Part III of the Treaty Establishing the European Communities (EC Treaty),¹⁵⁵ introduced as an amendment by the Treaty of Amsterdam in 1997,¹⁵⁶ which transfers asylum and immigration matters to Community competence.¹⁵⁷ That these new powers will not lie dormant

155. OJ 2002 C 325/5.

156. OJ 1997 C 340/1.

157. It is worth noting here that the UK, Ireland and Denmark all negotiated opt-outs of any Community action in this field during the adoption of the Treaty of Amsterdam. Denmark only participates if the measure in question builds on the Schengen acquis, which today largely concerns measures in the fields of border controls and irregular migration. Although Ireland and the UK have chosen to participate in many of the measures in the fields of asylum and the struggle against irregular migration, they have been significantly less keen to opt-in to measures concerning legal migration. The UK in particular has chosen not to participate in any of the Community measures in this field.

was signalled by the Conclusions to the Tampere Summit in October 1999:¹⁵⁸ recalling that “[f]rom its very beginning European integration has been firmly rooted in a shared commitment to freedom based on human rights, democratic institutions and the rule of law”,¹⁵⁹ the Conclusions went on to proclaim the objective of creating a common EU asylum and migration policy within the framework of the area of freedom, security and justice, on the basis that

[t]his freedom should not... be regarded as the exclusive preserve of the Union’s own citizens. Its very existence acts as a draw to many others worldwide who cannot enjoy the freedom Union citizens take for granted. It would be in contradiction with Europe’s traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory.¹⁶⁰

The European Union, then, has, since the Treaty of Amsterdam, seen its powers increased to include, in theory, all aspects of immigration law and policy; and it has, both in the Tampere Conclusions and in subsequent legislative action (discussed in more detail below), signalled its intent to use them. Given this, it is perhaps unsurprising that one common thread running through all of the individual country reports carried out for the purposes of this study was the very real possibility that concerted action in favour of ratification of the ICRMW by and through the regional institutions could have a positive impact on the prevailing positions of the respective national governments, even in the most recalcitrant of the countries under consideration here.

Certainly, the potential importance of the EU in terms of the prospects for ratification of the ICRMW in the countries of the region was manifested slightly differently in different national settings. Perhaps the strongest formulation is to be found in the claim of the French Government, outlined in Section 4.1.2 above, that the transfer of competence in the field of immigration effected by the Treaty of Amsterdam means that France would be acting unlawfully if it unilaterally ratified the Convention: that, since the famous judgment by the Court of Justice of the European Communities in the *AETR* case in 1971, once common Community rules on a certain issue have been established, Member States no longer have the power to undertake unilateral commitments with third countries in that field.¹⁶¹ This argument, as a point of law, has been dealt with above: Community legislation in this area represents a minimum standard; it does not prevent Member States

158. *Presidency Conclusions*, Tampere European Council, 15-16 October 1999, *Bulletin EU* 10-99.

159. *Ibid.*, Conclusion 1.

160. *Ibid.*, Conclusion 3.

161. Case 22/70 *Commission v. Council* [1971] ECR 263 (the *AETR* [*Accord Européen sur les Transports Routiers*] judgment), in which the Court held that the decision by the EC to implement a common transport policy meant that Member States no longer had the right to unilaterally conclude other agreements with third parties on that issue. The French Government has relied on this view in two written responses to parliamentary questions on the issue: the first in a response to a question put by the Socialist Party Deputy M. Lignère-Cassou on 1 November 2005 (*Journal Officiel Assemblée-Nationale* 1/11/2005, p. 10157), and the second in response to a question put by the Green Party Senator A. Boumediene-Thiery on 10 November 2005 (*Journal Officiel Senat*, 10/11/2005, p. 6854).

from adopting national (or international) provisions more favourable than those laid down at the regional level.

Politically, however, there does seem to be a view, in some states at least, that, having formally transferred competence on migration matters to the EU, states should not proceed unilaterally in this regard. This was the view very clearly expressed by the French Minister for Foreign Affairs, Philippe Douste-Blazy, in his response to the CNCDH *Avis* calling for ratification of the ICRMW, discussed above.¹⁶² Moreover, the lack of a common Union position on the Convention was the reason perhaps most frequently cited by Spanish Government officials (and, indeed, members of other political parties and civil society groups) for their own non-ratification; there seems to be a very general belief within that country that the correct course of action politically was to wait for the EU institutions to take the lead on the issue. Indeed, the Secretary of State for Immigration informed the Amnesty International representative responsible for promoting the Convention in Spain that it would hardly be prudent for the Spanish Government to take the lead on this question given the recent criticism of its 2005 regularisation programme by a number of EU Member States. While none of the other Governments have been as explicit as the French and the Spanish in looking to defer responsibility for ratification of the ICRMW onto the EU, the general view to emerge from those interviewed for the individual country reports is unmistakably that Union action in this regard could make an important difference in altering the prevailing negative attitudes towards the Convention.

Of course, it would be naïve to read into this nothing other than a genuine expression of regional solidarity; although this may be present to some degree, the use of the EU in this manner seems to be just as much, if not more, about finding a convenient alibi to help evade awkward questions as to the non-ratification of a core international human rights treaty. Most importantly, it must be recalled that it will not be possible to make any serious headway in terms of forging a strong regional position on ratification without the active consent and participation of the Member States themselves; and their general lack of activity in this regard at the regional level makes the appeal for EU guidance seem more than a little disingenuous. Nonetheless, such rhetorical strategies do serve to underline the considerable potential that exists in terms of the Union encouraging ratification by its Members, and also points to one way in which governments can seek to minimise the perceived political risk of being seen to support the Convention, discussed in the previous section. It is important to recall, in this regard, that the “EU alibi” can, and frequently does, work both ways; there can scarcely be a government in the Union that does not know full well the benefits of displacing responsibility for politically sensitive decisions onto European institutions. While this is a strategy that raises significant issues in terms of democratic accountability, its potential usefulness in terms of encouraging ratification of the ICRMW in the face of the distortions and sensationalism introduced into the debate by an often hostile and capricious media should not be underestimated.

162. *Supra*, n. 102. The response from the Minister for Foreign Affairs, given on 30 August 2005, is available, in its French original, at <http://www.commission-droits-homme.fr/bin/InfoGeneFr/affichageDepeche.cfm?iIdDepeche=159>.

5.2 THE ICRMW AND EU MIGRATION LAW

Having established that EU action in this regard is of paramount and growing importance to the prospects for ratification of the ICRMW amongst EU/EEA countries, it is worth taking a little time to consider what EU legislation has been passed in this field, before going on to outline the contours of its interaction, present and future, with the provisions of the Convention. One thing should, however, be noted at the outset: namely, that EU law in general provides migrant nationals of EU Member States with a catalogue of rights that goes far beyond the minimum standards laid down in the ICRMW. In examining EU migration legislation in terms of the Convention, then, we are concerned in very large degree with the treatment of third-country nationals and members of their families present on, or looking to enter, the territory of the Union.

5.2.1 Community Migration Legislation

As noted above, the transfer of competence in migration matters to Union institutions is a relatively recent phenomenon (in terms of the development of EU law), beginning with the introduction of Title IV to Part III of the EC Treaty by the Treaty of Amsterdam in 1997, which aimed at the creation of an area of freedom, security and justice. The starting point for the practical realisation of that goal was provided by the Tampere Conclusions of 1999, which set out the target of achieving a common asylum and migration policy among the Member States of the Union. The most relevant Conclusions for the purposes of this report come under heading III, entitled “Fair Treatment of Third Country Nationals”:¹⁶³

18. The European Union must ensure fair treatment of third country nationals who reside legally on the territory of its Member States. A more vigorous integration policy should aim at granting them rights and obligations comparable to those of EU citizens. It should also enhance non-discrimination in economic, social and cultural life and develop measures against racism and xenophobia. ...

163. *Presidency Conclusions*, loc. cit. n. 158. The legislative programme for the years 2005-2009 set out by the Brussels European Council in November 2004 in the so-called Hague Programme on Strengthening Freedom Security and Justice in the European Union, so named because it was adopted under the Dutch Presidency, is oriented more towards a security approach, which is hardly surprising given that its adoption followed the terrorist attacks of 11 September 2001 in New York and of 11 March 2004 in Madrid. With regard to third-country nationals lawfully resident in the EU, the Hague Programme focuses on the need for their integration, observing in this regard: “While recognising the progress that has already been made in respect of the fair treatment of legally resident third-country nationals in the EU, the European Council calls for the creation of equal opportunities to participate fully in society. Obstacles to integration need to be actively eliminated”. *Presidency Conclusions*, Brussels European Council, 4-5 Nov. 2004, *Bulletin EU* 11-2004, Annex I, Point I.23.

21. The legal status of third country nationals should be approximated to that of Member States' nationals. A person, who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit, should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by EU citizens; e.g. the right to reside, receive education, and work as an employee or self-employed person, as well as the principle of non-discrimination vis-à-vis the citizens of the State of residence. The European Council endorses the objective that long-term legally resident third country nationals be offered the opportunity to obtain the nationality of the Member State in which they are resident.

It is also worth noting, however, that this “fair treatment” goal represents only one dimension of the common migration policy; the next subheading of the Conclusions, also devoted to the same topic, is entitled “Management of Migration Flows”. It thus seems evident that the EU common migration policy and the ICRMW are structured, in broad outline at least, along similar lines; that is, an attempt to encourage regulation of trans-boundary movements of people whilst also guaranteeing a set of fundamental rights to all of those who cross international borders. What is less clear, however, is whether the manner in which the balance between these two often competing imperatives is being struck by Community legislation in practice is in accord with the Convention’s approach to that issue; this will be considered in more detail in the next section.

In general, however, progress on the elaboration of the common migration policy has been neither as swift nor as comprehensive as that on the related issue of asylum.¹⁶⁴ Nine major instruments have been adopted in the field of immigration since the Tampere summit, although there are considerable grounds for doubt over the extent to which they can be viewed as contributing to a “common” migration policy even in those limited areas that they do cover.¹⁶⁵ Moreover, the most ambitious proposal to date – and the one that would have had been most clearly relevant to the issues covered by the ICRMW – has been withdrawn due to the hostility it generated from some Member States, and will not now be considered for adoption by the Council: namely the draft Directive, proposed by the Commission in 2001, on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities.¹⁶⁶ The Commission now plans to introduce five more specific directives dealing with economic migration in the next three years: two in 2007 (on admission

164. See, e.g., R. Cholewinski, “The UN Convention on Migrant Workers as a Rights-based Framework for the EU’s Common Immigration Policy: A Preliminary Assessment”, paper prepared for the Workshop on Key Roles of the Migrant Workers Convention and other International Instruments in the Management of Migration, 9th International Metropolis Conference on Co-operative Migration Management: International, National and Local Answers, 27 Sept. – 1 Oct. 2004, University of Geneva, Switzerland, pp. 4-5.

165. For both a listing and a detailed critical analysis of the nine instruments, and of the future prospects for a common EU migration policy, see P. De Bruycker, “Legislative Harmonization in European Immigration Policy”, in Cholewinski, Perruchoud and MacDonald, *op. cit.* n. 150, at pp. 329-348.

166. COM (2001) 386, 11 July 2001.

of highly-skilled workers and on a general framework on the status of all persons admitted for the purposes of employment); one in 2008 (on seasonal workers); and the remaining two in 2009 (on intra-corporate transferees and remunerated trainees).¹⁶⁷

Of those Community instruments in the field of migration that are in force, many focus in large degree on the conditions of admission or permission to remain for certain categories of people, such as students,¹⁶⁸ scientific researchers,¹⁶⁹ or victims of trafficking,¹⁷⁰ or they focus on cooperation between Member States in the execution of removal orders;¹⁷¹ as such, they largely fall outside the immediate scope of the ICRMW, although it should be noted that, where they contain provisions regulating certain rights of the specific groups they concern after entry to the host state, they may be brought back within its ambit – and the same can even be said for certain measures adopted within the framework of the common asylum policy that seek to regulate asylum-seekers' access to employment.¹⁷² By far the two most important instruments adopted in this field in terms of the human rights of migrants, however, are the Directive on the right to family reunification¹⁷³ and the Directive concerning the status of third-country nationals who are long term residents,¹⁷⁴ which were to have been transposed into the laws of 22 Member States by 3 October 2005 and 23 January 2006 respectively. Denmark, Ireland and the UK are not participating in these measures, having negotiated opt-outs during the adoption of the Treaty of Amsterdam.

The first of these, the Family Reunification Directive, provides that all third-country nationals with a residence permit valid for one year or more, and who have “reasonable prospects of obtaining the right of permanent residence”¹⁷⁵ have the right to bring their spouse and minor dependent children.¹⁷⁶ This, of course, speaks directly to Article 44 of

167. See the Commission *Policy Plan on Legal Migration*, loc. cit. n. 136; more generally, see S. Peers, “Key Legislative Developments on Migration in the European Union”, 8 *European Journal of Migration and Law* (2006) 97-114, at p. 111.

168. Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service (OJ 2004 L 375/12).

169. Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research (OJ 2005 L 289/15).

170. Council Directive 2004/81/EC of 29 April 2004 on the residence permits issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with competent authorities (OJ 2004 L 261/19).

171. See e.g. Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third-country nationals (OJ 2001 L 149/34); Council Directive 2003/110/EC of 25 November 2003 on assistance in case of transit for the purposes of removal by air (OJ 2003 L 321/26).

172. See Cholewinski, loc. cit. n. 164, at pp. 5-6.

173. Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251/12).

174. Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long term residents, loc. cit. n. 135.

175. Family Reunification Directive, loc. cit. n. 173, Art. 2.

176. *Ibid.*, Art. 3.

the ICRMW, which provides only that states should “facilitate” as “they deem appropriate” such reunification; there can be little doubt that the Community legislation in this area goes some distance beyond the Convention in terms of the right that it affords third-country nationals. Moreover, the Directive provides, in its Article 14, for certain economic and social rights of family members who enter through exercising this right, in particular to access to education, employment and vocational guidance (although these provisions are subsequently weakened by limiting references to national legislation).¹⁷⁷ It should be noted, however, that these rights are provided only to the same extent as they are enjoyed by the sponsor, not on a par with nationals of the host state as they would have to be according to Article 45(1) of the ICRMW; and this does seem to be one area in which the Directive lags behind the provisions of the Convention. On the whole, however, despite the fact that this Directive has been much criticised – and, indeed, was the subject of a failed challenge brought by the European Parliament before the ECJ on the grounds that certain provisions it contained violated Article 8 of the European Convention on Human Rights (ECHR)¹⁷⁸ – it nonetheless provides for a right to family reunification that is, even without taking into consideration the extremely favourable regime applicable to EU citizens working in other Member States, unrivalled by any other international instrument, and certainly goes far beyond the very weak obligation contained in Article 44 of the ICRMW.¹⁷⁹

In many respects, the basic subject matter of the Long-Term Residents Directive itself falls outside the scope of the ICRMW, concerned as it is with the conditions under which migrants who have resided legally for a particular length of time in an EU Member State should be granted the right to a secure residence status. However, the Directive also contains a number of provisions that lay down the rights to which those accorded long-term resident status are entitled. Most important here is the equal treatment provision contained in Article 11, which provides that long-term residents shall be afforded treatment equal to nationals of the host state in relation, *inter alia*, to access to employment, vocational training, social security and tax benefits, and to freedom of association; although it is worth noting that Article 11(4) immediately allows Member States to restrict equal treatment to certain largely undefined “core benefits”.¹⁸⁰ These rights, it must be said, compare in many respects rather badly to

177. For a critique of the introduction of references to national legislation in this Directive, and in others in this field more generally, see De Bruycker, *loc. cit.* n. 165, at pp. 334-335.

178. Case C-540/03, *Parliament v. Council*, OJ 2004 C 47/21. The ECJ judgment of 12 August 2006 (OJ 2006 C 190/1) is available from the Court’s website at <http://curia.europa.eu/en/content/juris/index.htm>.

179. The right to family reunification under Community law is in fact significantly more complex than this brief outline suggests, drawing as it does on no less than three separate legal bases, of which the Family Reunification Directive is only one. For a detailed discussion of this right, see K. Groenendijk, “Family Reunification as a Right under Community Law”, 8 *European Journal of Migration and Law* (2006) 215-230.

180. The term “core benefits” receives no further elaboration in the operative provisions of the Directive; however, Recital 13 of the Preamble does note that it should be understood as including “at least minimum income support, assistance in case of illness, pregnancy, parental assistance and long-term care”. This, however, leaves a considerable degree of ambiguity, not just as to the content and scope of the rights concerned, but also as to the formal legal status of the definition, contained as it is in the Preamble and not the substantive provisions of the text. For a critique of this legislative technique, used with some regularity in Community instruments in the field of migration, see De Bruycker, *loc. cit.* n. 165, at pp. 335-336.

the equivalent provisions in the ICRMW: Article 45 of the Convention provides for equal treatment with nationals in relation to access to educational institutions, vocational guidance, social and health services – and only the last of these is subject to any sort of caveat or restriction (“provided the requirements for participation in the scheme are met”). More importantly, however, the relevant provision in the ICRMW applies to *all* migrants in a regular situation; the clear implication of the Long-Term Residents Directive, by proclaiming these rights as a benefit of that status, is that those migrants who do not fall under its terms are not entitled to these rights, at least to the same extent, regardless of the regularity of their stay.

EU legislation in the field of migration to date, then, appears, insofar as it directly concerns issues also dealt with by the ICRMW, to have been of mixed quality, with some rights granted far exceeding those laid out in the Convention, and others not even measuring up to that proposed minimum standard. Again, it should be stressed that this is in terms of migrants who are third-country nationals; the catalogue of rights afforded to Union citizens goes far beyond anything envisaged by the Convention. In general, however, the Community action in this field has focused less on the actual rights of migrants present on the territory of the Union, and more on the regulation of those seeking to enter; in this manner, what is perhaps most striking is that there is relatively little material with which direct comparisons between the provisions of the ICRMW and Community law, of the type carried out in the last two paragraphs, can be made. This suggests that the two bodies of law, though looking to regulate, ostensibly at least, the same broad subject-matter, are driven by two very different logics; while the Convention adopts an overwhelmingly rights-based approach, Community action has, in large degree, been guided by labour market and security issues.

5.2.2 The ICRMW and the Development of the Common Migration Policy

As noted above, the Tampere Conclusions lay down a dual approach to the creation of the EU common migration policy, the strands of which may, in practice, introduce competing imperatives into: the “fair treatment of third country nationals” on one hand, and the “management of migration flows” on the other. The drafting history of the ICRMW, as led by the MESCA grouping, displays the same dual concern;¹⁸¹ however, with four out of the six substantive sections clearly devoted to the enunciation and definition of the human rights of migrants, and only one – Part VI on the “promotion of sound, equitable, humane and lawful conditions connection with international migration of workers and members of their families” – overtly concerned with the regulation of migration flows themselves, the structural bias of the latter instrument is abundantly clear. It seems equally clear that, if anything, the basic logic that has to date driven Community legislative action in the construction of the common migration policy has been structured in the opposite manner, with considerably more attention being paid to the regulation of migration flows, both regular and irregular, than with the rights of those that constitute them.¹⁸²

181. See Section 1.2 above.

182. On this see generally Cholewinski, loc. cit. n. 164, at pp. 7-14.

While it is undoubtedly true that the EU is, in general, firmly committed to the principle of respect for fundamental human rights as they are laid down in the ECHR,¹⁸³ this commitment has not, to date, been fully transposed into the action taken in terms of the creation of the common migration policy. The focus instead has been on regulating the entry and movement of third-country nationals to the union, through, for example, the EU/Schengen visa list¹⁸⁴ and, much more recently, the development of an EU Borders Code.¹⁸⁵ While it is not normally claimed that these measures, and others like them, actually themselves violate the human rights of migrants, although it has been argued that such measures, or their application, may amount to unlawful discrimination,¹⁸⁶ the practical relegation of rights discourse in this field to a status below that of the technical regulation of labour markets or national security will almost inevitably lead to policies and laws that conflict with the provisions laid down in the ICRMW. This can, perhaps, be seen most clearly in two areas in which the developing EU common migration policy and the Convention diverge: on the principle of equal treatment between migrants and nationals; and on the treatment of irregular migrants

The former consideration is one of the very basic principles upon which the ICRMW rests. Fundamental rights, including basic social rights such as decent employment conditions, emergency health care, and primary schooling, are guaranteed to all migrant workers and members of their families, regardless of the regularity of their situation, by Part III of the Convention. A more expansive set of rights are afforded in Part IV to migrants in a regular situation, again on a par with nationals, such as access to housing or to other social and health services.¹⁸⁷ The emphasis in the developing Community legislation in this field is, on the other hand, quite different: as noted above, the Long-Term Residents Directive not only allows Member States to limit the equal treatment principle to certain vague “core benefits”, it also strongly implies, through granting these rights to those who have exercised their right to apply for permanent residence after five years in the host state, that those migrants that are not eligible to do so are not entitled to those rights, at least on a basis equal to nationals. By thus allowing “core” social benefits to be attached to a particular privileged status (that of long-term residence), EU law leaves little or no conceptual space at all for the social rights of other regular migrants – not to mention those that the ICRMW insists should be enjoyed by all, regardless of status.

183. Article 6(2) of the Treaty on the European Union states that the ECHR is to be considered part of the EU/EC *acquis*.

184. Council Regulation 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ 2001 L 81/1, as amended.

185. Regulation 562/2006/EC of the European Parliament and of the Council of 15 March 2006 establishing a Community Code governing the movement of persons across borders (Schengen Borders Code), OJ 2006 L 105/1. For a detailed analysis of the Borders Code, see S. Peers, “Enhancing Cooperation on Border Controls in the European Union”, in Cholewinski, Perruchoud and MacDonald, *op. cit.* n. 150, at pp. 447-463.

186. See generally R. Cholewinski, *Borders and Discrimination in the European Union* (Brussels/ London: Migration Policy Group (MPG)/ Immigration Law Practitioners’ Association (ILPA), January 2002).

187. ICRMW, Art. 43.

The Family Reunification Directive is even less generous in this regard: contrary to the ICRMW (which, although providing only a very weak “right” to reunification, does provide for equality of treatment with nationals in respect of a fairly robust set of social rights, such as access to health and education, to those family members that are admitted),¹⁸⁸ while admittedly providing for a much stronger right of reunification, it only grants those family members that are admitted access to similar social benefits to the extent that these are enjoyed by the sponsor.

Even the now-redundant proposal for a Directive on the admission of third-country nationals for the purpose of paid employment and self-employed economic activities displays the same dilution of rights discourse as the others, despite the fact that it was eventually rejected. The Commission’s original proposal contained a provision guaranteeing equal treatment between national and third-country migrant workers in the sphere of social rights, and ended with the insertion of an additional clause in the final version of the Council’s amended text, granting Member States a significant margin of discretion in limiting and undermining these rights.¹⁸⁹

This considerable dilution of the principle of equal treatment in the construction of the common migration policy was not, however, an aberration only introduced at the level of binding legislative instruments; rather, its roots are quite clear in the basic aspirational rhetoric of Community endeavour in this field. The Tampere Conclusions were welcomed by many in civil society as constituting a balanced and ambitious document that laid a sound foundation for the improvement of the living and working conditions of third-country nationals within the borders of the Union; indeed, some who are now sharply critical of the progress that has been made to date in terms of the common migration policy, such as the European Economic and Social Committee (EESC),¹⁹⁰ prefer to read the legislative developments outlined above as a move away from sound objectives contained in the Conclusions, rather than a continuation of the logic of flawed ones.

That a robust version of the equal treatment principle, so central to the ICRMW, was never envisaged in the EU context is confirmed by anything more than a superficial engagement with the text of the Tampere Conclusions, in particular the sections thereof quoted at length in Section 5.2.1 above. Everywhere, the rhetoric of equality is qualified: after stating that the EU must ensure the “fair” treatment of third-country nationals *who are legally resident*, this is clarified by the goal of providing them with rights “comparable” to those of nationals, coupled with efforts to “enhance” non-discrimination. Further on, the goal is stated as “approximating” the rights of third-country nationals and those of Member States; indeed, even those of the former group who are long-term residents in Member States should only be guaranteed rights “as near as possible” to those of Union citizens. It is not, then, surprising that the bind-

188. Ibid., Art. 45.

189. Compare Art. 11 of the Commission proposal, loc. cit. n. 166, with the same provision in Council doc. 13954/03 (25 November 2003). See also Cholewinski, loc. cit. n. 164, at p. 11.

190. The EESC is a consultative body representing the social partners and other civil society organisations set up under the EC Treaty. See EESC Opinion on the International Convention on Migrants (Own-initiative opinion), Brussels, 30 June 2004, Doc. SOC/173.

ing legislative measures adopted in this field by the Community institutions, often the result of lengthy negotiating processes and dealing with topics that are highly sensitive politically, should display a marked lack of commitment to the principle of equal treatment.

It is, however, important not to overstate this point. The Member States of the EU guarantee a wide range of social and economic rights to Union citizens, and it is far from clear that claiming all of these entitlements as *human* rights is not stretching that concept further than is helpful. A lack of a robust commitment to a principle of equal treatment with nationals is, then, alone insufficient to constitute a human rights violation, particularly as the equal treatment principle itself allows for distinctions based on nationality if these are prescribed by law and can be objectively and proportionately justified in pursuance of a legitimate and pressing social concern in a democratic society; what it does bring usefully to the fore, however, is the difference in the basic driving philosophies behind the ICRMW on one hand and Community legislation in this field on the other. It is this difference, moreover, that can best explain those areas in which EU law actually does (or will) stand in stark contradiction to the rights laid out in the Convention. The area in which this is most evident is in the Community treatment of irregular migrants.

One of the most obvious incongruities in this regard relates to a document that, for the moment, is only declaratory: the Charter of Fundamental Rights of the European Union,¹⁹¹ which has not yet acquired legally binding force because of the rejection in the 2005 French and Dutch referenda of the EU Constitutional Treaty.¹⁹² The Charter makes a threefold distinction, between Union citizens, regular migrants, and irregular migrants. Most rights contained therein are afforded either to the first or to all of these categories; and, in this respect, the instrument does (or will, if and when it becomes legally binding) provide many protections to all those present on the territory of the EU, regardless of the regularity of their presence. Most notable, perhaps, is the strength and universality with which the right to health care is formulated: “*Everyone* has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices”;¹⁹³ this is certainly considerably more than the right to emergency health care proclaimed in Article 28 of the ICRMW. The Charter, however, makes the limitation of access to all social security rights to “*everyone residing and moving legally within the European Union*”,¹⁹⁴ that is, to *regular* migrants only; this stands in contrast to Article 27 of the ICRMW, which provides for (albeit qualified) access to social security rights for all migrant workers and members of their families.¹⁹⁵

191. Charter of Fundamental Rights of the European Union, OJ 2000 C 341/1.

192. Treaty Establishing a Constitution for Europe, OJ 2004 C 310/1.

193. Charter of Fundamental Rights, loc. cit. n. 191, Art. 35 (emphasis added).

194. Ibid., Art. 34(2) (emphasis added).

195. It is also worth noting in this regard that a number of Association Agreements, concluded between the EU and third states, contain provisions explicitly removing certain rights in respect of employment conditions and social security from migrant nationals of that third state who are present irregularly on the territory of the Union. See, e.g., the Euro-Mediterranean Association Agreement with Morocco, OJ 2000 L 70/2, Art. 66 (“The provisions of this chapter shall not apply to nationals of the Parties residing or working illegally in the territory of their host countries”); more generally, see R. Cholewinski, “The EU *Acquis* on Irregular Migration: Reinforcing Security at the Expense of Rights”, 2 *European Journal of Migration and Law* (2001) 361-405, at pp. 371-372.

That a lack of focus on the human rights element of the common migration policy can lead to the unwarranted erosion of those rights in the name of either migration management or national security is best brought out by the EU treatment of irregular migrants more generally. Firstly, it's worth noting that without having ratified the ICRMW, the only regional human rights treaty that is clearly applicable to all migrants, regular and otherwise, on EU/EEA territory is the ECHR; the other Council of Europe instruments, such as the European Social Charter, the Revised Charter, and the ECMW, in principle apply only to those present lawfully; and even then only to nationals of Contracting Parties, although, as noted in Section 4.2 above, the European Committee of Social Rights has extended the personal scope of the European Social Charter to encompass vulnerable irregular migrants. While migrant workers have in the past used the provisions of the ECHR to secure effective protection of certain rights (such as, for example, the extension of right to respect for family and private life (Article 8) or to peaceful enjoyment of one's possessions, contained in Article 1 of Protocol No. 1 to the ECHR to encompass certain housing and social security entitlements, respectively),¹⁹⁶ the ECHR does not contain the full range of economic, social and cultural rights that are guaranteed by the core UN human rights instruments.

The Tampere Conclusions adopted an explicitly security-based approach to irregular migration, proclaiming that “[t]he European Council is determined to tackle at its source illegal immigration, especially by combating those who engage in trafficking in human beings and economic exploitation of migrants”.¹⁹⁷ It was expected at the time, however, that this legitimate aim would be complemented by measures designed to protect the human rights of the irregular migrants concerned; this, however, has not materialised. Indeed, in 1994, the Commission itself made a strong plea for enacting such safeguards. In a landmark Communication on immigration and asylum policies, it argued that the credibility of a restrictive policy to prevent irregular migration would be undermined without the adoption of measures to define minimum standards for the treatment of this vulnerable group.¹⁹⁸ Instead, however, the focus has been on criminalisation and penalisation – often not merely of those involved in trafficking, but of irregular migrants themselves;¹⁹⁹ and legislation to protect the rights of the migrants thus criminalised has not been forthcoming. Indeed, even the provisions of the ECHR, which in principle is applicable to “everyone” within the jurisdiction of States Parties (Article 1), are essentially limited in this regard to a prohibition of collective expulsion of aliens (mirrored in Article 22 of the ICRMW), the safeguards implied by Article 3 (freedom from degrading treatment and a right of *non-refoulement*), Article 5(1)(f) (detention of migrants is only permissible either to prevent unauthorised entry or for those subject to removal or deportation) and Article 8 (respect for family life).²⁰⁰

196. In terms of the latter, see in particular *Gaygusuz v. Austria* (1996) 23 EHRR 364 and *Poirrez v. France*, Application No. 40892/98, Eur. Ct. H.R., judgment of 30 Sept. 2003.

197. *Presidency Conclusions*, loc. cit. n. 158, Conclusion 23.

198. European Commission, *Communication to the Council and the European Parliament on immigration and asylum policies* (COM (1994) 23, 23 Feb. 1994) at p. 29, para. 109.

199. On this point generally, see Cholewinski, loc. cit. n. 195, esp. at pp. 376-382.

200. See R. Cholewinski, “The Need for Effective Individual Legal Protection in Immigration Matters”, 7 *European Journal of Migration and Law* (2005) 237-262, at pp. 241-242.

The issue of the criminalisation of irregular migrants provides one further illustration of the differing philosophies behind the ICRMW and the Community legislation in this field to date. The latter endorsed this practice by its Member States with the incorporation into the *acquis* of Article 3(2) of the Schengen Implementation Agreement,²⁰¹ under which states undertake to “introduce penalties for the unauthorised crossing of external borders at places other than crossing points or at times other than the fixed opening hours”. The former, on the other hand, although not expressly ruling out the imposition of criminal penalties on those who seek to enter or remain in the territory of a state without the proper authorisation, equally does not explicitly sanction it, focusing instead on providing for penalties for employers, migrant smugglers and traffickers; and it is worth noting that, in this, it follows the example set by ILO Convention No. 143.²⁰² In 1999, the ILO Committee of Experts on the Application of Conventions and Recommendations went so far as to suggest that sanctions against irregular migrant workers are “contrary to the spirit of the [ILO] instruments”.²⁰³

It would, in all likelihood, be going too far to suggest that laws criminalising irregular migrants are actually contrary to the provisions of the ICRMW; the Convention does, at points, seem to imply that some such practices are acceptable.²⁰⁴ Its overwhelming preoccupation, however, is with proclaiming and protecting the fundamental rights of those concerned; and, as the discussion above illustrates, the emphasis of Community action in this field is entirely elsewhere. This alternative focus is even manifest at the level of public rhetoric. Amongst the various major institutions and organisations dealing with migration at the international (regional or global) levels, almost all have begun to use terms such as “irregular” or “undocumented” to refer to those entering or remaining on the territory of a state without authorisation. The EU, on the other hand, is almost unique in retaining the vocabulary of “illegality” in this regard; even, on occasion, to the extent of using the derogatory contraction “illegals” in official documents.²⁰⁵ One effect of this terminology is to deflect attention away from the image of the irregular migrant as

201. Agreement on the Implementation of the Schengen Agreement of 14 June 1985 concerning the Gradual Abolition of Checks at their Common Borders, 19 June 1990, 30 *International Legal Materials* (1991) p. 84.

202. See ILO Convention No. 143 concerning Migration in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, 24 June 1975, 1120 UNTS 324, Art. 6(1).

203. International Labour Conference, 87th Session, Geneva, June 1999, Report III (1B), *Migrant Workers: General Survey on the reports on the Migration for Employment Convention (Revised) (No. 97), and Recommendation (Revised) (No. 86), 1949, and the Migrant Workers (Supplementary Provisions) Convention (No. 143), and Recommendation (No. 151), 1975*, at para. 338. See also R. Cholewinski, loc. cit. n. 195, at p. 379.

204. The ICRMW does appear to implicitly acknowledge that irregular migrants may face criminal or administrative penalties when it provides, for example, in Art. 17(3), that any migrant detained by state authorities for violation of migration-related provisions should be held, as far as is practicable, separately from convicted persons or those awaiting trial. See Cholewinski, *ibid.*, at n. 91.

205. See Council Conclusions on the development of the Visa Information System (VIS), Doc. 6534/04 (20 February 2004) where one of purposes of the VIS is to “assist in the identification and documentation of undocumented *illegals* and simplify the administrative procedures for returning citizens of third countries” (emphasis added). For a critique of the use of this rhetoric, see Cholewinski, loc. cit. n. 164, at pp. 13-14.

first and foremost a bearer of rights – precisely the image that the ICRMW seeks to both recapture and to foreground.

The subordination of the rights of irregular migrants to issues of security and labour market regulation is itself both symptom and cause of what is perhaps the biggest difference between the approach pursued in the developing EU common migration policy and that of the ICRMW: even in those areas where the former looks to lay down rights for third-country nationals living and working on the territory of the Union, there is often little or no sense that *human* rights are involved. Consider, for example, the Commission's recent Green Paper on economic migration, which aimed to "identify the main issues at stake... for an EU legislative framework on economic migration" by laying out "the basic foundations upon which any action in this field must be built". The discourse of rights features only peripherally in the paper, and even then there is no sense that such entitlements inhere in each and every human being. Rather, "[t]he EU must... take account of the fact that the main world regions are already competing to attract migrants to meet the needs of their economies. This highlights the importance of ensuring that an EU economic migration policy delivers a secure legal status and a guaranteed set of rights..."²⁰⁶

This basic idea of migrant-as-consumer is carried on in the Commission's Policy Plan on legal migration, which grew out of the Green Paper. It sets out the important project of a "general framework directive" covering the rights of all economic migrants who are in a regular situation but who are not yet entitled to long-term residence status, and in this sense may go some way to addressing the imbalance in Community legislation to date on this issue. Again, however, the idea of *human* rights is conspicuous in its absence from the text; instead, providing rights to such migrants is justified in economic terms: "[t]his would not only be fair toward persons contributing with their work and tax payments to our economies, but would also contribute to establishing a level playing field within the EU".²⁰⁷

When such understandings of the role and function of rights are allowed to dominate, it is easy to see how the entitlements guaranteed by international human rights instruments come to be truncated, or, in the case of irregular migrants, almost entirely neglected. There is no guarantee that the logic of economics and that of human rights will lead to exactly the same protections and to exactly the same degree; indeed, where one is systematically subordinated to the other, such convergence seems unlikely. Perhaps more importantly, however, the economic logic that is used to justify a set of rights in the context of *legal* migration pulls in largely the opposite direction when confronted with the issue of how to deal with irregular migrants; neither rights-as-incentive nor rights-as-just-deserts leave any conceptual space for a robust protection regime of that vulnerable group of people (as current EU legislation in this field amply demonstrates). It is important to note, in this regard, that the proposed general framework directive will only set out rights for those in a regular situation; the Policy Plan makes reference to "illegal" immigration only to

206. In this regard, see the Commission Green Paper *On an EU Approach to Managing Economic Migration* (COM (2004) 811, 11 Jan. 2005) p. 4.

207. See the Commission Policy Plan, loc. cit. n. 167, at p. 6, para. 2.1.

exclude it from consideration.²⁰⁸ It seems unlikely, therefore, that irregular migrants will have the benefit of having their human rights laid out clearly in binding Community legislation in the foreseeable future.

5.3 COMMUNITY INSTITUTIONS AND THE ICRMW

There can, therefore, be little doubt that the EU could play an important role in promoting and encouraging the ratification of the ICRMW, both among its own Member States and in the world more generally. It seems equally clear, however, that, from a human rights standpoint at least, Community legislation could only benefit from an explicit endorsement of the ICRMW, in such a manner as to allow the provisions and basic philosophy of the Convention to inform the development of the common migration policy. This section will examine the prospects of such a shift occurring, by looking briefly at the position of various EU institutions *vis-à-vis* the Convention.

As noted above, the need to respect the rights of migrants whilst regulating the phenomenon of migration, both regular and irregular, has long been present in the EU rhetoric on this issue, even if this has not always been effectively translated into practice as regards the treatment of third-country nationals. Despite the fact, however, that rights in general, and human rights in particular, have often been lacking from the approach pursued by the EU in this field, the ICRMW has received a degree of support from some of the major institutional players. Worth mentioning first among these is the Commission Communication of 1994, noted above, which explicitly recognised the importance of a rights-based approach in the construction of a credible and effective migration policy, particularly in terms of restricting irregular migration, and which called upon Member States to ratify the ICRMW as a means of giving practical expression to this goal.²⁰⁹ Of course, this early endorsement by one of the most important Community institutions

208. Ibid., at p. 4. The Policy Plan states that the issue of “illegal” immigration will be dealt with in a separate Communication. This Communication, released in July 2006, entitled *On Policy priorities in the fight against illegal immigration of third-country nationals* (COM (2006) 402, 19 July 2006), does make a number of references to the need to observe fundamental rights, as laid down in, *inter alia*, the ECHR and the EU Charter of Fundamental Rights, when legislating in this field (p. 3, para. 8). It does not, however, contain any specific guidance on what these rights might be in the particular context of irregular migration; as already noted, both the ECHR and the Charter provide for significantly lower levels of protection in many respects than does the ICRMW.

209. European Commission, *Communication to the Council and the European Parliament on Immigration and Asylum Policies*, loc. cit. n. 198, at p. 29, paras. 109-110.

has not proved as significant as it might have, in that none of the Member States have followed the course of action recommended; moreover, it represents the one and only time that the Commission has engaged in any serious manner with the ICRMW.²¹⁰ The Convention receives absolutely no mention in any of the major Commission documents on the common migration policy of the last few years, from the draft Directive on migration for employment,²¹¹ through the Green Paper on economic migration to its most recent Policy Plan on legal migration.²¹² While there were some signs, briefly, that the Commission was planning to undertake a more systematic study of the provisions of the Convention and their compatibility with the developing Community law and policy in this field,²¹³ this has not, to date materialised; and a more recent response from the Commissioner for Freedom, Security and Justice, Franco Frattini, to a letter from the European Platform for Migrant Workers' Rights, suggests that the Commission itself has adopted a negative stance on the ICRMW.²¹⁴

The ICRMW does, however, enjoy stronger and more recent support from two other EU institutions, which, although significantly less powerful in terms of actual legislative and decision-making competences, may none the less prove to be allies of considerable

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210. The only other occasion on which the Commission mentioned the ICRMW was a matter-of-fact reference in the Communication containing the *Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents* (COM (2001) 127, 13 March 2001), which noted, at p. 4, para. 2.1, that “[i]n 1990 the United Nations adopted an International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, which is not yet in force. It has not yet been ratified by any of the Union Member States”. See also Cholewinski, loc. cit. n. 164, at p. 4. This statement appeared before the ICRMW entered into force on 1 July 2003.
211. Commission Green Paper *On an EU Approach to Managing Economic Migration*, loc. cit. n. 206.
212. Commission *Policy Plan*, loc. cit. n. 167.
213. See the answer given by the former Justice and Home Affairs Commissioner, Mr. Vitorino, on behalf of the Commission (written question E-0068/04 by MEP Miet Smet (PPD-PE) on the International convention on the protection of the rights of all migrant workers and their families) (5 March 2004), in which he notes that “the Commission intends to launch a study on the points in common with – and those on which it differs from – the common immigration policy as it has developed at EU level since the entry into force of the Treaty of Amsterdam” (http://www.europarl.europa.eu/omk/sipade3?L=EN&OBJID=71667&LEVEL=4&SAME_LEVEL=1&NAV=S&LSTDOC=Y).
214. See Commissioner Frattini’s response to the letter from the European Platform for Migrant Workers’ Rights, 25 February 2005 (http://www.coordeurop.org/sito/en/10arch/10en_doc_frame.html). Frattini himself refers to Vitorino’s response, outlined above, in noting the “specific problem raised by this Convention [the ICRMW]”; that “there is no clear distinction between third-country workers who are legally residing in a Member State and those whose position is not regular”; one important difference, however, is that Vitorino’s answer was framed in terms of what the obstacles to ratification may be given how Member States *perceive* the Convention – indeed, he begins by noting that “[t]he Member States are [probably] better placed than the Commission to explain their reasons for not ratifying”. In Frattini’s letter, on the other hand, this lack of a clear distinction between regular and irregular migrants is presented both as objective fact, and as the position of the Commission itself. In any event, this argument seems more than a little disingenuous; the ICRMW does make a very clear distinction between the rights that must be granted to all migrants, and those that need be afforded only to those in a regular situation. This objection thus seems to collapse, upon closer inspection, into the claim, familiar from Section 4.3.1 above, that the former category is simply too broad, and will thus be more of a hindrance than a help in efforts to prevent or reduce irregular immigration.

importance. The European Parliament adopted, on 18 February 1998, a Resolution on human rights in the EU, in which it deplored the fact that no Member State had ratified the Convention, and called upon them to do so;²¹⁵ perhaps more importantly, however, it has repeated this call on several occasions since, in various different contexts. Thus, the European Parliament resolution on the EU's priorities and recommendations for the 61st Session of the UN Commission on Human Rights from 2005 makes the now-familiar (from that institution, at least) call "on the Member States to ratify the UN Migrant Workers' Convention and to support the universal ratification thereof";²¹⁶ while an even more recent Resolution on women's immigration makes a number of references to the Convention, calling on Member States to act in accordance with its provisions.²¹⁷

Moreover, as noted above, the EESC has published an own-initiative opinion on the ICRMW in which it calls strongly for ratification. The motivation behind the opinion seems to be a sense of dissatisfaction with the development of the EU common migration policy since the Tampere Conclusions of 1999, and in particular with the lack of a robust rights-based approach in the legislative action taken in this field to date:

The Commission has drawn up numerous legislative proposals which have, however, met with considerable resistance within the Council. Four years on, the results are meagre: the legislation that has been adopted is disappointing and has moved away considerably from the Tampere objectives, the proposals of the Commission, the opinion of the Parliament and the stance of the EESC. The current system used within the Council to adopt agreements allows proposals to be blocked. This, coupled with the attitudes of some governments, makes it very difficult to achieve consensus.²¹⁸

The EESC goes on to note that "Europe is an area of freedom, democracy and respect for the human rights of all people. In order to strengthen these values in the future, all the Member States of the EU must ratify the international conventions that protect these basic human rights and their legal precepts must be incorporated into both Community and national legislation",²¹⁹ concluding in this regard not merely by encouraging Member States to ratify the ICRMW,²²⁰ and urging the Presidency of the Council to "undertake

215. The text of the Resolution is available in French on the website of the NGO *GISTI*, <http://www.gisti.org/doc/plein-droit/38/europe.html>.

216. European Parliament resolution on the EU's priorities and recommendations for the 61st Session of the UN Commission on Human Rights in Geneva (14 March to 22 April 2005), 24 February 2005, P6_TA-PROV(2005)0051, para. 22. This call is repeated on an annual basis in the same context; more Resolutions in a similar vein are listed on the December 18 website, at <http://www.december18.net/web/general/page.php?pageID=79&menuID=36&lang=EN>.

217. European Parliament resolution on women's immigration: the role and place of immigrant women in the European Union, 24 October 2006, P6_TA-PROV(2006)0437, at, e.g., para. 8.

218. EESC Opinion on the International Convention on Migrants, loc. cit. n.190, at para. 4.4.

219. *Ibid.*, at para. 5.6.

220. *Ibid.*, at para. 6.1.

the necessary initiatives” to ensure that they do so within a period of two years following the release of the Opinion, but also that the EU itself should ratify the Convention, if and when it acquires the power to enter into international agreements.²²¹

The European Union thus not only has the potential to play a crucial positive role in encouraging ratifications of the ICRMW in its own Member States and, by example, in the world more generally, through its highly developed legal order capable of enforcing policy changes on national governments (and providing them with a useful alibi when confronted with sceptical publics); it also boasts by far the highest level of sustained institutional support for the Convention of any polity in the region. If this constitutes grounds for renewed optimism, however, it must be approached with great caution: those bodies that have come down in favour of ratification (the Parliament and the EESC) can play only a very limited role in the enactment of measures in the field of legal migration, while those with the real legislative power (the Commission and the Council) clearly remain less than convinced of the benefits that the ICRMW could bring to the developing common migration policy. It is clear that many of the general political obstacles outlined in Section 4.3.1 above still constitute powerful barriers at the Community level; and this is hardly surprising, given the dominant role that national government representatives still play in the Commission and the Council. There is no real prospect, then, of positive EU action in this regard without the active support of at the very least a handful of influential Member States.

It is also important to recall that, although the Treaty of Amsterdam transferred asylum and immigration matters to Community law (under Title IV EC), the competence of the European Parliament on legal migration is still limited to a consultative role; it does not have the ability, as it does in the fields of asylum, border control or irregular migration as well as in other areas within the Community Pillar, to co-legislate with the Council on the basis of proposals advanced by the Commission.²²² This is a significant limitation on the strength of the Parliament’s voice, and will make it more likely that the ICRMW will not feature in the planned migration directives for the period of 2007-2009. Of these, by far the most important for the purposes of this study will be the proposed General Framework Directive, which, as noted above, will seek to set down a set of rights to be enjoyed by all migrants present in a regular situation on the territory of the Union, who have not yet qualified for long-term residence status. The Policy Plan on Legal Migration, which sets out the proposal for the Framework Directive, is largely silent on the issue of which rights will be recognised; it is, however, substantially clearer on the issue of who the beneficiaries will be when it states that the purpose of the instrument is “to guarantee a common framework of rights to all third-country nationals *in legal employment* already admitted in a Member State”.²²³ Here, the absence of the ICRMW’s approach, of guaranteeing human rights to all, is readily evident; while this does not, of course, rule out the

221. Ibid., at para. 6.2.

222. Treaty Establishing the European Community, OJ 2002 C 325/1, Art. 67 as amended.

223. Commission *Policy Plan*, loc. cit. n. 167, at p. 6, Section 2.1 (emphasis added).

possibility that the human rights of irregular migrants will be dealt with satisfactorily in other instruments, the Community track record in this regard provides little grounds for assuming that this will be the case.

A second issue of interest concerns the basis on which the rights contained in the Framework Directive will be afforded to their beneficiaries – on an equal footing with those of Member State nationals, or according to some minimum standard? Again, the Policy Plan remains silent on this issue; however, the Green Paper on economic migration, from which the Policy Plan was developed, does contain a little guidance. In its (very brief) section on “rights”, it notes simply that “[t]hird country workers should enjoy the same treatment as EU citizens in particular with regard to certain basic economic and social rights before they obtain long-term resident status”.²²⁴ This formulation seems to contain a more robust idea of equal treatment even than that expressed in the Tampere Conclusions; it remains, however, extremely vague both on the nature and specific content of the rights it concerns. This ambiguity is further compounded by the fact that, although long-term residents are to be entitled to a broader catalogue of rights “in line with the principle of the differentiation of rights according to the length of stay”,²²⁵ even their rights in respect of which they are entitled to equal treatment of nationals can be restricted to “core” economic and social rights. The relation between these two categories, the “basic” rights that the Green Paper suggests should be ensured to all regular migrants, and the “core” rights that the Long-Term Residents Directive protects from restrictions as to equal treatment, will have to be worked out and clarified in the course of the negotiations on the text of the Directive; that there will be some difference seems likely, as otherwise it would be difficult to discern the added-value, in rights terms, of long-term residence status. In any event, however, it seems likely that the notion of equal treatment will not receive as strong a formulation as it would were the ICRMW taken more fully into consideration.

The limitation of the Parliament’s input to a purely consultative role makes it likely, then, though not unavoidable, that Community legislation in this field will continue to be at odds with, if not always actually contrary to, certain fundamental premises of the ICRMW – itself, it should be recalled, recognised by the OHCHR as one of seven “core” international human rights instruments. This is perhaps clearest in terms of the two issues outlined above: the erosion of the equal treatment principle, and the general absence of explicit recognition of the importance of the human rights of irregular migrants in the development of the common migration policy. The Framework Directive is, however, still in the process of being drafted, and it is not impossible that the Commission could be persuaded to address some of these concerns in the proposal that it eventually formulates. The period in which the EU negotiates and lays down the rights of all regular migrant workers present on its territory could be crucial in defining the future attitudes towards the ICRMW within Community institutions; and these, in turn, will have a major

224. Commission Green Paper on economic migration, loc. cit. n. 206, at p. 10, Section 6.1.

225. Ibid.

impact on the prospects for ratification of the Convention within individual Member States. Thus, although at present it seems that the main holders of legislative power in this field of Community action retain a predominantly negative stance on the ICRMW, there is nonetheless a real window of opportunity to change this; and it should be remembered in this regard that the Convention enjoys both a higher profile and a higher degree of institutional support at the regional level than it does in any of the individual EU/EEA Member States analysed for the purposes of this report. This means that, despite the obvious reticence of both the Commission and the Council, the European Union remains at one and the same time the most efficient focus for lobbyists in this regard (in terms of the potential power it has in promoting the ratification of the Convention in the region), and the forum in which such efforts are most likely to succeed.

Part 6: Conclusions and Recommendations

6.1 SUMMARY OF FINDINGS

Generally speaking, the major conclusion that must be drawn from the foregoing pages is that, while the prospects for the ratification of the ICRMW within the EU/EEA region remain poor, they are not unremittingly so. Certainly, none of the Governments in the countries analysed for the purposes of this report could be said to be in favour of the Convention; equally, however, none (with the possible exception of Germany) seems to be overtly hostile to it. Rather, there is a prevailing sense of vaguely negative indifference, in which genuine concerns are combined with simple misunderstanding; and this, when confronted with a sceptical public and media, has led to the governments of the region generally adopting the path of least resistance. Broadly speaking, until the public perception of migrants in general, and irregular migrants in particular, changes from an undesirable necessity to an understanding of them as rights-bearing individuals, the political incentive to inaction in this regard will remain; ratification of the ICRMW, however, should be viewed as not merely the end result of such a transformation, but also as one of the key means of its achievement.

As noted at the outset, there are a number of peculiarities of both subject and content that have contributed to making the ICRMW by far the least-subscribed of any of the core international human rights instruments. Not only is there a widespread perception that migrants do not constitute a particularly vulnerable grouping in the same manner as, for example, women and children, but also the length of time between conception, adoption and ratification has led to concerns over the continued relevance of the Convention's provisions, in a world assuredly significantly different from that envisaged by those involved in the drafting process. This being said, while the phenomenon of migration has undoubtedly changed considerably since the Convention was first conceived, international human rights instruments have remained broadly similar; and there seems little reason to suppose that the morass of developments commonly grouped together under the heading of "globalisation" have been such as to fundamentally alter the basic rights to which all human beings are entitled, regardless of race, nationality, gender or any other status, as laid down in the Universal Declaration of Human Rights, the ICCPR and

the ICESCR. Indeed, in many senses one of the oddest arguments to have been raised – repeatedly – in this context is that the human rights of migrants have somehow been radically transformed in the last forty or so years in a manner different from those pertaining to women or children, or for that matter victims of racial discrimination or torture. While there can be no doubt that current global conditions are significantly different from those prevailing in the 1960s and 1970s, it is equally true that one of the main symbolic strengths of human rights discourse lies in its claim to transcend the fluctuations and vagaries of particular contexts, and to provide a basic and secure status to *all* human beings, regardless of the situation in which they find themselves. The most urgent task in terms of promoting the ratification of the ICRMW is to make this argument successfully at the most general level.

While a number of different obstacles of a legal and administrative/ financial nature emerged from the individual country reports, each was unambiguous in its finding that the major barriers to ratification were essentially political in character. This is not to imply that the former do not generate genuine concerns, as the ubiquity of the claim that the ICRMW involves an unacceptable cession of sovereignty over rights of admission, or that it would commit states to allowing the reunification of all regular migrants with their families on their territory, suggests. However, as argued in Section 4.1.1 above, these concerns, although perhaps representing genuine *perceptions* of obstacles, are based upon simple misinterpretations (or misrepresentations) of the relevant provisions in the Convention: Article 79 is clear in reserving the sovereign right to admission to the states concerned, while the provision contained in Article 44 is so heavily qualified as to create no real “right” to family reunification on which any migrant could legally rely. Regardless, then, of how they are perceived, it is difficult to imagine that either of these could represent a genuine obstacle to ratification to a well-informed public or political elite.

The same is true, in large degree, of the more specific obstacles of a legal or financial nature that were brought to light by the individual country reports. In most, if not all, of the states concerned, the general view was not that the provisions of the ICRMW were in stark opposition to those of national legislation; to the contrary, the claim that the Convention was largely superfluous given the extensive protections already provided for was far more frequently made. Areas of conflict were, then, relatively particular and circumscribed; such as, for example, the French objection to recognising “minority” groups on its territory, or its fear of the financial implications of the Convention obligation to “facilitate” the transfer of remittances. These concerns and others like them, such as the UK practice of linking residence permits to specific employments beyond the two-year period envisaged by the Convention, would require only very minor changes to national legislation; indeed, the need for this could even be circumvented by the insertion of reservations to specific Convention provisions at the time of ratification. However, it should be recalled that, where domestic laws operate in contradiction of the Convention, national governments are violating the human rights of migrants as set out by the international community and recognised by the OHCHR; and it is indicative of the relative poverty of support for the Convention that these can be presented as general obstacles to ratification in countries that traditionally pride themselves on being world leaders in

terms of adherence to and promotion of human rights. In this regard, it is worth noting that many of the provisions of recent Italian and Spanish legislation that may be in conflict with the ICRMW are still subject to challenges before the constitutional courts of those countries.

If the legal and financial/ administrative obstacles can be relatively easily dismissed, however, the same cannot be said for what the individual country reports were in unanimous agreement constitute the main barriers to ratification of the ICRMW in the countries of the region: the political issues that it raises. These are, at the most basic level, threefold: that existing international human rights instruments render the ICRMW superfluous; that existing national commitments have the same effect; and that the catalogue of rights that the Convention guarantees to irregular migrants is too expansive, and will encourage, rather than prevent, irregular migration. As noted in Section 4.3.1 above, none of these can be reduced to mere misunderstandings in the manner of the two general legal obstacles; rather, the hard task of persuasion remains in large part to be accomplished – both in terms of governing elites and of the populations to whom they answer. This can only be achieved by a combination of in-depth analyses into the legal, social, economic and political effects of ratification on one hand, and by a successful public information campaign, based on the results of the foregoing, on the other. Only in this manner can the hostility created by the media-public dynamic in many Member States be reversed, effectively removing from political calculation the overriding (and quite genuine) fear that being seen to be identified with the ICRMW is a fast-track to losing crucial votes.

6.2 SPECIFIC RECOMMENDATIONS

While all of the individual country reports found that more-or-less negative attitudes to the ICRMW prevailed in the national context, there was also a strong sense in each that one (and, in some cases, the only) way of reversing this was through the adoption at the EU level of a strongly positive stance on ratification, either through political pressure or the incorporation of the provisions of the Convention into the developing legislation on the common migration policy. There can be no doubt that the regional arrangements within Europe present a unique opportunity for lobbying in this regard: in no other region of the world does such a comprehensive supranational legal order exist, capable to some degree of overriding the policy concerns of Member States and holding them to account for violations of human rights obligations. The existence of this highly developed institutional order at the regional level creates a fulcrum from which by far the most efficient leverage stands to be gained in terms of promoting the ratification of the ICRMW; a concentration of efforts at this level may well produce results far beyond what could currently be expected in any individual Member State. Nor is this purely a question of abstract potential; as outlined in Section 5.3 above, not only do the Community institutions possess genuine power in this regard, but they also display a higher level of actual and explicit support for the Convention than can be found in any national context.

Moreover, the potential benefits of such a focus are not limited to Member States of the Union themselves: as the report on Norway suggests, a strong EU position on ratification of the ICRMW would have a major effect on the prospects for ratification of the Convention in the other EEA countries and beyond. In this regard, a more detailed analysis than that provided here of the lacunae in terms of human rights protections in the current and developing Community common migration policy is paramount.

Recommendation 1: That efforts be focused, in full cooperation and collaboration with both the European Parliament and the European Economic and Social Committee, on ensuring that the ICRMW has a major influence on the developing Community legislation on migration.

Recommendation 2: That particular and urgent attention is paid in this regard to the ongoing drafting process of the proposed EU General Framework Directive on the rights of regular migrants, and to subsequent negotiations in the Council on the text of the proposed measure.

Recommendation 3: That detailed analyses of the compatibility of current and proposed Community legislation in this field with the provisions of the ICRMW, paying particular attention to the rights of irregular migrants within the EU, are commissioned and publicised.

It would be a mistake, however, to view the possibilities afforded by the EU as a simple and easy panacea for the difficulties facing the ICRMW, if only because Union policy in this sphere is still in large degree formulated and driven by the Member States themselves. This means that, without clear leadership from at least a vocal minority of major EU Member States, there is no prospect of obtaining a positive Community position on the Convention. While it is difficult, then, to overstate the potential importance of regional institutions in this regard, this can only ultimately be realised in conjunction with a number of successful campaigns for ratification at the national level.

Recommendation 4: That, in terms of national politics, efforts be focused to promote ratification of the ICRMW on those major EU Member States, such as the UK and France, in which civil society campaigns have been most effective, with a view to encouraging them to take on a leadership role within the EU.

While time and resources may well be better spent if focused on a minority of major states who have shown themselves to be relatively amenable (that is, indifferent rather than hostile) to the ICRMW, even the EU may find it difficult to promote the Convention if a majority of national governments, and the public opinion that sustains them, continue to oppose ratification. It is crucial, therefore, that continued efforts are made to increase the level of awareness of both the existence and the content of the Convention, in the hope that the very prevalent misconceptions of what it entails might be dispelled; and the relatively successful civil society campaigns carried out in the UK and France can provide a model for achieving this goal. Furthermore, in the context of a human rights instrument struggling to gain popular support, and bearing in mind the important role that committed individuals can play in raising the profile of the ICRMW, the fact that the task of providing translations of the Convention has been left, in a number of countries

of the region, to civil society actors to carry out as and when they see fit, is little short of astonishing.

Recommendation 5: That steps be taken to commission, or otherwise ensure the existence and availability of, full, accurate and authoritative translations of the text of the ICRMW in all of the official languages of EU/EEA countries.

Recommendation 6: That the establishment of national civil society coalitions in favour of ratification of the ICRMW, following the model established in the UK and France, ensuring the participation both of major migrant and human rights NGOs and relevant trade unions, be encouraged.

Recommendation 7: That steps be taken to commission or encourage detailed comparative analyses of national legislations with the provisions of the ICRMW, in order that awareness not only of the content, but also of the implications of ratification, of the Convention increases.

One of the major findings of this report, however, is that basic awareness-raising is insufficient: many of the political obstacles to the ratification of the ICRMW simply cannot be disposed of in this manner; rather, more sustained argumentation and justification is required if they are to be persuasively dispelled. Winning these arguments is among the most difficult of tasks facing proponents of the Convention; it is also, however, among the most urgent, as in the absence of convincing justifications of the necessity of the Convention, it is doubtful whether the governing elites of EU/EEA countries will ever be persuaded to seriously consider ratification.

Recommendation 8: That academic studies into the “added value” of the ICRMW be commissioned or encouraged, both in terms of its place in the system of international human rights norms, and its translation into the highly developed human rights legislation in the various national contexts of the region.

Recommendation 9: That similar studies into the broad catalogue of rights afforded by the ICRMW to all migrants, regardless of status, and in particular to the likely effect that this would have on preventing or reducing irregular migration, be commissioned or encouraged.

Recommendation 10: That steps be taken to ensure that such studies, either those already existing or those carried out in the future, are given as high a profile as possible within public and political debates on the issue of migration.

Perhaps the most basic political obstacle of all, however, is that the media/ public dynamic in many countries of the region combines to create an attitude of hostility towards migrants in general, and irregular migrants in particular. As long as this remains the case, even those governments who are persuaded as to the benefits of the ICRMW in human rights terms may be considerably less so as to the added value of supporting it in political terms. Considerably more needs to be done, therefore, both to increase awareness of the Convention and to target specific arguments in its favour beyond the relatively esoteric

world of politicians and policy makers, towards the public more generally. For example, one useful suggestion in this regard is that the ICRMW, a long and complicated instrument, be summarised and reproduced in a format that can fit on a single sheet of paper, outlining the most basic rights to which migrants are entitled, and where to look for further assistance or information. Such a “Bill of Rights for Migrants” would help to bridge the gap between the worlds of human rights activism on one hand and the general public on the other, in which the Convention is largely unknown, even in those countries in which the civil society awareness-raising campaign has been relatively successful.²²⁶ Here again, however, simple awareness-raising is likely to be insufficient; it will need to go hand-in-hand with persuasive arguments that the rights proclaimed are indeed *human* rights, to be afforded equally to all.

Recommendation 11: That more be done to promote the ICRMW among the public more generally, in particular through regular interventions in the popular media, in order to promote the principle that all migrants are entitled to basic human rights, including, importantly, core economic and social rights.

Recommendation 12: That a synthesis and synopsis of the ICRMW, capable of being displayed on a single page, be developed and made available in all official languages of the EU/EEA region, containing both the general core of rights to which every migrant is entitled, and details on where to seek further information.

226. This idea of a “Bill of Rights for Migrants” has been suggested recently by Aleinikoff. See T.A. Aleinikoff, “International Legal Norms on Migration: Substance without Architecture”, in Perruchoud, Cholewinski and MacDonald, *op. cit.* n. 150, 467-479, at pp. 477-479.

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The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families entered into force on 1 July 2003, some 13 years after it had been formally opened for ratification in 1990.

It has, however, attracted very little in the way of support from states, having been ratified by only 37 States – a figure that is the lowest of any of the core human rights treaties. This is all the more apparent upon consideration of the fact that not one major migrant receiving state is among the parties to the Convention.

The purpose of this report is to analyse the reasons behind non-ratification in Europe, one of the most developed migrant-receiving regions in the world. To this end, this report presents the findings of detailed, UNESCO-commissioned reports into the situation of the Convention on Migrant Workers' Rights in six European Union countries, France, Germany, Italy, Poland, Spain, the United Kingdom, and in Norway, which is a member of the European Economic Area.

Based in part upon interviews with major migration stakeholders in each country (government officials from both central and regional authorities, members of political parties, and representatives of civil society), this study addresses such issues as general awareness of the Convention, the nature and extent of any political or parliamentary activity carried out regarding it, and the main obstacles to ratification. It also examines the situation regarding the Convention within the highly developed legal and political system of the European Union. Finally, it presents a set of recommendations for future action with a view to increasing support for, and ultimately ratifications of, the Convention.



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