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HUMAN RIGHTS OF MIGRANTS: THE DAWN OF A NEW ERA?

RYSZARD CHOLEWINSKI*

1. INTRODUCTION

At the beginning of the 21st century, lawyers and activists concerned with the treatment of migrants in various parts of the world had good reason for concern. While international human rights law in principle applies to all persons regardless of nationality and immigration status, the core human rights instrument devoting specific attention to the protection of migrant workers and their families, adopted ten years earlier, had still not received the required number of ratifications to enter into force. Similarly, the conventions of the International Labour Organization (“ILO”) protecting migrant workers remained poorly ratified in relative terms and the ILO was discussing whether to reformulate these standards.

At the regional level, there appeared to be little or no prospect for advancing the human rights of migrants. In Europe, the specific treaties addressing migration in the Council of Europe, the pan-European organization mandated to protect human rights, were considered by some to be an anachronism in the light of new migration realities. The European Union (“EU”) had just begun to embark on the implementation of its new mandate concerning asylum and immigration from non-EU Member States (third countries), but there were no explicit legally binding human rights provisions regulating these questions, with the exception of general references to the protection of fundamental rights and the 1951 Geneva Convention relating to the Status of Refugees and its 1967 Protocol.¹ In Africa, the Americas and Asia, migrants were not the subject of any specific legal instruments specifically concerned with their protection. With regard to non-binding activities, many of the intergovernmental processes discussing migration were preoccupied with refugees and asylum-seekers or control-oriented issues, such as border management and the prevention of irregular migration,

* Migration Policy Specialist, International Migration Programme, International Labour Office (“ILO”), Geneva. The views expressed in this article are my own and do not necessarily reflect those of ILO. For a more extensive discussion of some of the topics raised in this article, see Ryszard Cholewinski, *The Human and Labor Rights of Migrants: Visions of Equality*, 22 GEO. IMMIGR. L.J. 177, 177-219 (2008). © 2010, Ryszard Cholewinski.

1. Convention relating to the Status of Refugees, adopted in Geneva on July 28, 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, convened under G.A. Res. 429 (V) (Dec. 14, 1950), 189 U.N.T.S. 150; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

particularly in its worst manifestations of human trafficking and migrant smuggling.

At the very end of the twentieth century, however, some progress had been made in the special procedures mandate of the then United Nations (“U.N.”) Human Rights Commission by the 1999 creation of the mandate of the U.N. Special Rapporteur on the human rights of migrants, a position effectively replicating a similar mandate relating to migrant workers in the Inter-American system for the protection of human rights.² While there were a number of non-governmental organizations (“NGOs”) advocating for the better protection of migrants, the large human rights NGOs had not yet fully engaged with migrant issues. Instead, they preferred to focus their activities on a group of non-nationals who had traditionally invoked their concern, namely refugees and asylum-seekers.

In contrast to these late twentieth century trends, the first decade of the twenty-first century has seen a significant improvement in raising awareness and the adoption of measures relating to the state of migrants’ rights. This is a welcome development, because it also mirrors the greater attention being paid to migration on national government agendas, particularly in the light of growing concerns in developed countries with aging populations and labour forces, the dialogue taking place in various fora on the migration and development relationship, and the current global economic crisis. The purpose of this article, therefore, is to highlight a number of key legal and policy developments which have occurred since the turn of the twenty-first century and to reflect on how these have and may advance the protection of the human rights of migrants. This article is optimistic and forward-looking in tenor, although the generally positive developments discussed do not necessarily mean that abuses of migrants and violations of their rights are no longer taking place. Nonetheless, if ten years of relatively intense activity can be viewed as a sound measure of progress, there is some cause for optimism that a new era may well be dawning for the human rights of migrants and for human rights generally, through the growing recognition that adequately protecting one of the most vulnerable groups in many societies is today the true measure of our humanity.

2. INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

During the last decade, the most significant development for the protection of migrants under international human rights treaty law was the July 1, 2003, entry into force of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (“ICRMW”),

2. Special Rapporteurship on Migrant Workers and their Families, established by the Inter-American Commission on Human Rights (IACHR) in 1997, *available at* <http://www.cidh.org/Migrantes/defaultmigrants.htm>.

more than twelve years after it was adopted on December 18, 1990.³ The ICRMW, of course, does not apply to all non-nationals⁴ or migrants, although it contains a broad definition of “migrant worker,” which includes persons planning to leave their country of origin as well as those who have returned,⁵ along with their family members.⁶ Furthermore, the majority of today’s 214 million international migrants⁷ are migrant workers and their dependants.⁸ On the other hand, the ICRMW, which as of the end of October 2010 has received forty-four ratifications, has still not been ratified by a single high-income country, including the established countries of immigration and the twenty-seven EU Member States.⁹ Nonetheless, it can no longer be argued that this instrument is obsolete or a “white elephant.”¹⁰ Monitoring of State party compliance with the ICRMW by the treaty body responsible, the Committee of Migrant Workers (“CMW”), began in 2004. To date, the CMW has considered and issued concluding observations in respect of fifteen initial State party reports.¹¹ In these concluding observations, the Committee has drawn attention to the plight of particularly vulnerable groups of migrants, such as those in an irregular or undocumented situation, children and women domestic workers.¹²

3. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, U.N. Doc. A/RES/45/158 (Dec. 18, 1990) [hereinafter ICRMW].

4. In this regard, see the non-binding Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live, U.N. G.A. Res. 40/144 (Dec. 13, 1985) and the subsequent work of the Special Rapporteur on the human rights of non-citizens, U.N. Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 55th Sess., *The rights of non-citizens*, Final Report of the Special Rapporteur, Mr. David Weissbrodt, U.N. Doc. E/CN.4/Sub.2/2003/23 (May 26, 2003).

5. See ICRMW, *supra* note 3, art. 2(1): “The term ‘migrant worker’ refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.”

6. *Id.*, at art. 4 (defining family members).

7. U.N. Dep’t. of Econ. & Soc. Affairs, Population Div., *Trends in International Migrant Stock: The 2008 Revision*, U.N. database POP/DB/MIG/Stock/Rev. 2008, available at <http://esa.un.org/migratiON/index.asp?panel=1>.

8. The ILO estimates that of the estimated 214 million international migrants in 2010, approximately 105.4 million are economically active. Along with their families, economically active migrants account for nearly 90 percent of all international migrants. Int’l Labour Office, *International Labour Migration: A Rights-based Approach* at 1-2 (2010).

9. For an updated list of ratifications of the ICRMW, see ICRMW Ratification Status Report, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en.

10. Writing in 1996, I feared that this is what the ICRMW might become when only seven States had ratified it. See Ryszard Cholewinski, MIGRANT WORKERS IN INTERNATIONAL HUMAN RIGHTS LAW: THEIR PROTECTION IN COUNTRIES OF EMPLOYMENT 199, 203 (1997).

11. See the CMW’s web pages at <http://www2.ohchr.org/english/bodies/cmw/>. Consideration of State party reports started in 2006 and to date the CMW has examined (in order of their consideration) the reports of Mali, Mexico, Egypt, Ecuador, Bolivia, Syrian Arab Republic, El Salvador, Azerbaijan, Bosnia and Herzegovina, Colombia, Philippines, Sri Lanka, Algeria, Albania, Ecuador (second periodic report) and Senegal. The initial reports of Argentina, Chile and Guatemala, and the second periodic report of Mexico have also been submitted but have not yet been scrutinized.

12. For example, in consideration of Egypt’s initial report, the CMW recommended that migrant workers and members of their families, including those in an irregular situation, are provided access to the courts on an equal basis with nationals, that the children of all migrant workers born in Egypt are ensured the right to a name, registration of birth and to a nationality in accordance with ICRMW,

The application to migrants of the other core human rights treaties currently in force,¹³ although not disputed by human rights lawyers, scholars and practitioners, has also been increasingly underlined in the concluding observations of treaty monitoring bodies in respect of more than half of States parties' reports,¹⁴ and further clarified through a number of key General Comments and Recommendations issued by the treaty monitoring bodies in addition to those that had been previously adopted.¹⁵ Most importantly, the application of the principle of non-discrimination to migrants irrespective of their immigration status was recently underscored in a General Comment issued by the Committee on Economic, Social and Cultural Rights ("CESCR"). The CESCR confirmed that the term "other status" in the non-discrimination provision (Article 2(1) of the International Covenant on Economic, Social and Cultural Rights ("ICECSR")) encompasses additional prohibited grounds of discrimination, including that of nationality, with the result that the rights in the Covenant "apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation."¹⁶ Earlier, the Committee on the Elimination of Racial Discrimination ("CERD") recommended that States parties to the

art. 29, and that these children are also entitled to the delivery of a birth certificate by the Egyptian civil registry. It also recommended that the Labour Code be amended to apply to domestic workers, including migrant domestic workers, and that appropriate measures be taken to protect them. *See* U.N., Comm. On Migrant Workers, *Concluding Observations: Egypt*, U.N. Doc. CMW/C/EGY/CO/1 (May 25, 2007) at 4, para. 23(a), 6, paras. 35 & 39, respectively. With regard to migrant domestic workers, the CMW has issued a General Comment, which is its first General Comment. Committee on Migrant Workers, General Comment No. 1, *Migrant domestic workers*, 13th Sess., U.N. Doc. CMW/C/12/CRP.2/Rev.2 (Nov. 30, 2010). *See* the CMW web pages at http://www2.ohchr.org/english/bodies/cmw/cmw_migrant_domestic_workers.htm.

13. In addition to the ICRMW, the other core international instruments currently in force are the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), Annex, U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6104 (Dec. 21, 1965) [hereinafter ICERD]; Convention on the Elimination of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/RES/34/180 (Dec. 18, 1979) [hereinafter CEDAW]; Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984) [hereinafter CAT]; Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/44/49 (Nov. 20, 1989) [hereinafter CRC]; Convention on the Rights of Persons with Disabilities (CRPD), G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Dec. 13, 2006); and the International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/177, U.N. Doc. A/RES/61/177 (Dec. 20, 2006). The texts of all the core international instruments are available at <http://www2.ohchr.org/english/law/>.

14. *See* International Catholic Migration Commission (ICMC) and December 18, The UN Treaty Monitoring Bodies and Migrant Workers: a Samizdat (Nov. 2004 and updated July 2007), available at <http://www.december18.net/sites/default/files/TMB.pdf>. This study considered the work of six treaty monitoring bodies over the period 1994–2007.

15. *See, e.g.*, U.N. Human Rights Committee [hereinafter HRC], General Comment No. 15, *The Position of Aliens Under the Covenant*, 27th Sess., U.N. Doc. A/41/40 (Nov. 4, 1986) and Committee on the Elimination of Racial Discrimination, General Recommendation No. 11, *Non-citizens (Art. 1)*, 42nd Sess., U.N. Doc. A/46/18 (Mar. 19, 1993).

16. Committee on Economic, Social and Cultural Rights [hereinafter CESCR], General Comment No. 20, *Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2)*, 42nd Sess., U.N. Doc. E/C.12/GC/20 (June 10, 2009) at 8 ¶ 30.

International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”) adopt measures to “[e]nsure that legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status, and that the implementation of legislation does not have a discriminatory effect on non-citizens.” The Committee on the Elimination of Discrimination against Women affirmed that the Convention on the Elimination of Discrimination Against Women (“CEDAW”) applies to all women, including migrant women, and that the latter should not be discriminated against in any sphere of their life.¹⁷

While it is recognized that in principle all the international labour standards of the ILO apply to every person in his or her working environment, including those “employed in countries other than their own,”¹⁸ and indeed that the four categories of the fundamental principles and rights at work¹⁹ have to be respected, promoted and realized by all ILO Member States by virtue of their membership in the Organization and thus to all migrant workers within those countries,²⁰ there have only been a few additions in the past decade to ratifications of the two specific ILO instruments protecting migrant workers.²¹ While in 1999 the ILO Committee of Experts on the Application of Conventions and Recommendations contemplated reformula-

17. Committee on the Elimination of Racial Discrimination [hereinafter CERD], General Recommendation No. 30, *Discrimination Against Non-Citizens* (Oct. 1, 2004), at ¶ 7. General Recommendation No. 30 replaces General Recommendation No. 11, *supra* note 15); Committee on the Elimination of Discrimination against Women, General Recommendation No. 26 on women migrant workers, U.N. Doc. CEDAW/C/2009/WP.1/R (Dec. 5, 2008), at 2 ¶¶ 1-2.

18. The second recital of the Preamble to the revised ILO Constitution, *available at* <http://www.ilo.org/ilolex/english/constq.htm>, reads (emphasis added):

Whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of persons as to produce unrest so great that the peace and harmony of the world are imperiled [sic]; and an improvement in these conditions is urgently required; as, for example . . . [inter alia] *protection of the interests of workers when employed in countries other than their own.*

19. The abolition of all forms of forced or compulsory labour; the elimination of child labour; freedom of association and the right to collective bargaining—trade union rights; and equality and non-discrimination in respect of employment and occupation.

20. ILO Declaration on Fundamental Principles and Rights to Work, ILOLEX Doc. 261998 (June 1998), para. 2, *available at* <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang-en/index.htm>. Regarding trade union rights, their correct application is supervised by the ILO Committee on Freedom of Association, which draws its mandate directly from the ILO Constitution. In 2001, the Committee found, in a complaint against Spain, that qualifying the right to freedom of association according to a worker’s status in the country was not in conformity with Article 2 of ILO Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organize, July 9, 1948, 68 U.N.T.S. 17. *See* ILO Comm. on Freedom of Ass’n, Complaint against the Government of Spain presented by the General Union of Workers of Spain, Report No. 327, Case No. 2121, Vol. LXXXV, Series B, No. 1 (Mar. 23, 2001).

21. *See* ILO Convention (No. 143) concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, June 24, 1975, 17426 U.N.T.S. 1120 [hereinafter Convention No. 143]; ILO Convention (No. 97) concerning Migration for Employment (Revised), July 1, 1949, 1616 U.N.T.S. 120 [hereinafter Convention No. 97], ratified by twenty-three and forty-nine States parties respectively. Nonetheless, these recent ratifications should also be viewed in a positive context given that nine countries have ratified Convention No. 97 and six countries have ratified Convention No. 143 since 2000.

tion of Conventions Nos. 97 and 143 into a single instrument,²² the ILO's International Labour Conference decided in 2004 to implement an ILO plan of action for migrant workers²³ and pursued non-binding activities that are discussed in Section 6 below. However, there have been some further significant normative developments in the ILO of relevance to international labour migration. In 1997, the International Labour Conference adopted Convention No. 181 concerning Private Employment Agencies,²⁴ which attempts to regulate the recruitment process in the private sector where abuse and exploitation of migrants often begins. This instrument contains the principle that fees should not be charged to workers unless there are exceptional circumstances²⁵ and imposes an obligation on States parties:

after consulting the most representative organizations of employers and workers, [to] adopt all necessary and appropriate measures, both within its jurisdiction and, where appropriate, in collaboration with other Members, to provide adequate protection for and prevent abuses of migrant workers recruited or placed in its territory by private employment agencies.²⁶

To date, however, Convention No. 181 has only been ratified by twenty-three states, sixteen of which are in Europe. Moreover, the thorny issue of domestic work, which remains unregulated by many national labour codes and laws and in which many women migrant workers are found, was the subject of discussion by the International Labour Conference in June 2010.²⁷ The Conference resolved to propose a comprehensive standard concerning decent work for domestic workers in the form of a Convention supplemented by a Recommendation with a view to their adoption at the next Conference in

22. International Labour Conference, 87th Sess., 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) International Labour Office, Geneva, 1999, at ¶ 667.

23. International Labour Conference, 92nd Sess., Provisional Record, Geneva, 2004, Sixth item on the agenda: Migrant workers, Resolution and Conclusions concerning a fair deal for migrant workers in a global economy, at p. 60, ¶¶ 21-22, available at <http://www.ilo.org/public/english/standards/reln/ilc/ilc92/pdf/pr-22.pdf> [hereinafter *Resolution and Conclusions concerning a fair deal for migrant workers*].

24. ILO Convention (No. 181) concerning Private Employment Agencies, June 19, 1997, 2115 U.N.T.S. 251 [hereinafter Convention No. 181].

25. *Id.* art. 7. ILO Convention No. 97, *supra* note 21, art. 7(2), obliges States parties to ensure that services provided by their public employment agencies to migrant workers are rendered free of charge.

26. *Id.* art. 8(1).

27. See International Labour Conference, 99th Sess., 2010, Report IV(1), *Decent Work for Domestic Workers*, International Labour Office, Geneva, 2010, at pp. 95-97, ¶¶ 328-340, available at http://www.ilo.org/wcmsp5/groups/public/-ed_norm/-relconf/documents/meeting_document/wcms_104700.pdf. Indeed, the ILO, *id.* at pp. 6-7, observes that women comprise the majority of domestic workers in Europe, the Gulf countries and the Middle East.

June 2011.²⁸

3. DEVELOPMENTS IN THE U.N. HUMAN RIGHTS COUNCIL

The replacement of the U.N. Commission on Human Rights by the Human Rights Council in March 2006 has given rise to an important new mechanism, the Universal Periodic Review (“UPR”), which ensures that the human rights obligations of all 192 U.N. Member States, including those applicable to migrants, are subject to scrutiny.²⁹ By the end of 2011, all the U.N. Member States will have been subjected to the UPR, which to date has revealed interesting information relating to the human rights of migrants, including on the position of the countries concerned vis-à-vis ratification of the ICRMW.³⁰ The U.N. Human Rights Council has also renewed the mandate of the U.N. Special Rapporteur³¹ on the human rights of migrants. The current incumbent, Mr. Jorge Bustamante, has continued to promote the human rights of migrants around the world by focusing on specific human rights issues of concern to migrants in his annual reports,³² making country visits,³³ and urging States to apply pertinent human rights standards including ratification and implementation of the ICRMW.³⁴ However, the human

28. For the proposed texts, see Int’l Labour Conf., 100th Sess., *Report IV (1), Decent Work for Domestic Workers*, ILC. 100/IV/1 (Aug. 10, 2010), available at http://www.ilo.org/wcmsp5/groups/public/-ed_norm/-relconf/documents/meetingdocument/wcms_143337.pdf.

29. For more information on the UPR, see Office of the High Commissioner for Human Rights (OHCHR), Universal Periodic Review, available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx> (last visited Apr. 7, 2010).

30. For example, in the review of Canada’s human rights obligations, a number of U.N. Member States recommended that Canada ratify the ICRMW. U.N.G.A., Human Rights Council, 11th Sess., *Report of the Working Group on the Universal Periodic Review: Canada*, ¶ 86, U.N. Doc. A/HRC/11/17 (Oct. 5, 2009) (recommendation 5). In response, Canada reported that this recommendation “cannot currently be accepted,” that “at present, Canada is not considering becoming a party to the . . . ICRMW,” and that this treaty (along with a number of others) “may be reviewed at a later date.” U.N.G.A., Human Rights Council, 11th Sess., *Report of the Working Group on the Universal Periodic Review: Canada (Add.: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review)*, ¶ 9, U.N. Doc. A/HRC/11/17/Add. 1 (June 8, 2009).

31. This position was first established in 1999 and all U.N. Member States are subject to the mandate.

32. For example, in his fifth annual report to the U.N. Human Rights Council, the Special Rapporteur examines two important (and related) social rights for migrants, the right to health and the right to adequate housing. Human Rights Council, 14th Sess., *Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante*, U.N. Doc. A/HRC/14/30 (Apr. 16, 2010), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.30.en.pdf>.

33. For a list of the countries the Special Rapporteur has visited to date, see Special Rapporteur on the human rights of migrants, OHCHR, <http://www2.ohchr.org/english/issues/migration/rapporteur/visits.htm> (last visited Apr. 7, 2010).

34. For example, after his visit to the United States (April 30, 2007–May 18, 2007), the Special Rapporteur recommended that: “The Government should ensure that state and federal labour policies are monitored, and their impact on migrant workers analysed. Policymakers and the public should be continually educated on the human needs and human rights of workers, including migrant workers. In this context, the Special Rapporteur strongly recommends that the United States consider ratifying the [ICRMW]”. See Human Rights Council, 7th Sess., *Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante (Add. 2: Mission to the United States of America)*, ¶ 126, U.N. Doc. A/HRC/7/12/Add.2 (Mar. 5, 2008).

rights of migrants are not only the subject of Mr. Bustamente's mandate but have also been considered under the mandates of other special rapporteurs, such as the rapporteurs on trafficking in persons, especially women and children; on violence against women, its causes and consequences; on contemporary forms of slavery, including its causes and consequences; and on contemporary forms of racism, racial discrimination, xenophobia and related intolerance.³⁵ The work of the U.N. Human Rights Council's Working Group on Arbitrary Detention³⁶ is particularly important given recent state detention practices in respect to migrants around the world. The Working Group recently expressed the following view regarding the detention of migrants in an irregular situation:

[The Working Group] considers that administrative detention as such of migrants in an irregular situation . . . is not in contravention of international human rights instruments . . . [and] is fully aware of the sovereign right of States to regulate migration. However, it considers that immigration detention should gradually be abolished. Migrants in an irregular situation have not committed any crime. The criminalization of irregular migration exceeds the legitimate interests of States in protecting its territories and regulating irregular migration flows.

If there has to be administrative detention, the principle of proportionality requires it to be the last resort. Strict legal limitations must be observed and judicial safeguards be provided for. The reasons put forward by States to justify detention, such as the necessity of identification of the migrant in an irregular situation, the risk of absconding, or facilitating the expulsion of an irregular migrant who has been served with a removal order, must be clearly defined and exhaustively enumerated in legislation

The detention of minors, particularly of unaccompanied minors, requires even further justification. Given the availability of alternatives to detention, it is difficult to conceive of a situation in which the detention of an unaccompanied minor would comply with the requirements stipulated in article 37 (b), clause 2, of the Convention on the Rights of the Child, according to which detention can be used only as a measure of last resort.

Further guarantees include the fact that a maximum period of detention must be established by law and that upon expiry of this period the detainee must be automatically released. Detention must be ordered or approved by a judge and there should be automatic, regular and

35. For an overview of these mandates, see Taryn Lesser, *The Role of United Nations Special Procedures in Protecting the Human Rights of Migrants*, 28 REFUGEE SURVEY QUARTERLY 139, 139-164 (2009). Other mandates of relevance to the protection of migrants include the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, the Independent Expert on minority issues, and the Working Group on Arbitrary Detention, *infra* note 36.

36. See OHCHR, Working Group on Arbitrary Detention, <http://www2.ohchr.org/english/issues/detention/index.htm> (last visited Apr. 7, 2010).

judicial, not only administrative, review of detention in each individual case. Review should extend to the lawfulness of detention and not merely to its reasonableness or other lower standards of review. The procedural guarantee of article 9(4) of the International Covenant on Civil and Political Rights requires that migrant detainees enjoy the right to challenge the legality of their detention before a court. Established time limits for judicial review must obtain in “emergency situations” when an exceptionally large number of undocumented immigrants enter the territory of a State. All detainees must be informed as to the reasons for their detention and their rights, including the right to challenge its legality, in a language they understand and must have access to lawyers.³⁷

The administrative detention of migrants is also the subject of a discussion paper in a series initiated by the Office of the U.N. High Commissioner for Human Rights (“OHCHR”) Internal Taskforce on Migration,³⁸ which started in 2004 and which has contributed to reinforce the OHCHR’s attention to issues concerning the human rights of migrants.³⁹

4. REGIONAL HUMAN RIGHTS LAW

At the regional level, the Inter-American Court of Human Rights significantly advanced the human rights of migrants in an irregular situation in its Advisory Opinion concerning the legal status and rights of undocumented migrants in 2003.⁴⁰ At the request of Mexico, the Court underscored unequivocally in an extensively argued opinion that such persons are entitled to all international human rights, including rights in the employment context as workers.⁴¹ Clearly, this opinion, which drew inspiration from a broad range of international and regional human rights norms, has implications

37. Human Rights Council, *Report of the Working Group on Arbitrary Detention*, ¶¶ 58-61, U.N. Doc. A/HRC/13/30 (Jan. 15, 2010). See also the Working Group’s earlier Deliberation No. 5 on the situation regarding immigrants and asylum seekers, U.N. Doc. E/CN.4/2000/4, Annex 2 (Dec. 28, 1999).

38. See Migration Discussion Papers, OHCHR, <http://www2.ohchr.org/english/issues/migration/taskforce/disc-papers.htm> (last visited Apr. 8, 2010). Other discussion papers concern the expulsion of non-nationals and the right to education of migrant children.

39. The U.N. Treaty Monitoring Bodies and Migrant Workers: a Samizdat, *supra* note 14, 28 n.37.

40. Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R., (ser. A) No.18 (Sept. 17, 2003), available at http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf.

41. The court stated that

The migratory status of a person can never be a justification for depriving him [or her] of the enjoyment and exercise of his [or her] human rights, including those related to employment. On assuming an employment relationship, the migrant acquires rights as a worker, which must be recognized and guaranteed, irrespective of his [or her] regular or irregular status in the State of employment. These rights are a consequence of the employment relationship.

Id. at ¶ 134.

going beyond the Americas. The same court subsequently ruled in *The Yean and Bosico Children v. Dominican Republic*⁴² that it was a violation of the American Convention on Human Rights (“ACHR”) to refuse to issue birth certificates to stateless children of migrants in irregular status born in that country and thus to deny them a number of important rights associated with citizenship. This ruling has had a similarly important impact. Moreover, the Court underscored that all children irrespective of their background, including immigration status, have the right to free primary schooling.⁴³ With regard to the Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador),⁴⁴ in July 2008 the Inter-American Commission on Human Rights issued guidelines for the evaluation and monitoring of these rights, in which it identified equality and non-discrimination as one of the three cross-cutting themes (in addition to access to justice and access to information and participation). Migrants in an irregular situation were recognized as one of the social groups in the Americas to which specific attention should be paid in respect of the “situations of severe inequality that condition or limit the possibility to enjoy their social rights.”⁴⁵

In the forty-seven Council of Europe Member States, the social rights of a particularly vulnerable category of migrants in an irregular situation have been advanced by the European Social Committee, which is responsible for supervising the application of the 1961 European Social Charter and its 1996 revised version.⁴⁶ The Charter is the complementary treaty to the better-known European Convention on Human Rights (“ECHR”),⁴⁷ which is largely concerned with the protection of civil and political rights⁴⁸ and applies to all persons present within the jurisdiction of Council of Europe Member States.⁴⁹ Significantly, the opinions of the European Social Committee have been adopted contrary to the explicit wording of the Charter, which limits its application to nationals of State parties lawfully present in another

42. *The Yean and Bosico Children v. Dominican Republic*, Inter-Am. Ct. H.R. (ser. C) No. 130 (Sept. 8, 2005), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_130_%20ing.pdf.

43. *Id.*

44. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 17, 1988, O.A.S.T.S. No. 69.

45. Organization of American States, Inter-Am. C.H.R., Guidelines for Preparation of Progress Indicators in the Area of Economic, Social and Cultural Rights, OEA/Ser.L/V/II.132 doc. 14 ¶ 53 (2008).

46. European Social Charter, Oct. 18, 1961, E.T.S. 35; Revised European Social Charter, May 3, 1996, E.T.S. 163.

47. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. 5 [hereinafter ECHR].

48. In its First Protocol, however, the ECHR also protects the right to the peaceful enjoyment of property and the right to education. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, E.T.S. No. 9, arts. 1 and 2.

49. ECHR, *supra* note 47, art. 1.

State party that has ratified the Charter.⁵⁰ In complaints against France and the Netherlands under the Charter's Collective Complaints Protocol,⁵¹ which has been accepted by just over one quarter of Council of Europe Member States,⁵² the Committee has adopted a teleological and liberal interpretation of its provisions to ensure that the children of migrants in an irregular situation have access to health care and adequate housing.⁵³ The Committee also underlined the need to interpret the Charter in the light of other international human rights instruments:

[T]he Charter cannot be interpreted in a vacuum. The Charter should so far as possible be interpreted in harmony with other rules of international law of which it forms a part, including in the instant case [i.e. against the Netherlands] those relating to the provision of adequate shelter to any person in need, regardless whether s/he is on the State's territory legally or not.⁵⁴

Other notable developments in the Council of Europe have taken place in the realm of non-binding standards or "soft law," with the adoption by its executive body, the Committee of Ministers and its legislative body, the Parliamentary Assembly, of a number of recommendations and resolutions. Important measures have covered the human rights of irregular migrants,⁵⁵ including in the process of forced return;⁵⁶ "mixed migration flows," especially by sea, to Mediterranean Council of Europe Member States;⁵⁷ and the detention of asylum-seekers and irregular migrants in Europe.⁵⁸ Moreover, in 1999, the Council of Europe also established the independent Office of the

50. See Appendix to the European Social Charter and the Revised Charter (Scope of the (Revised) Social Charter in terms of persons protected), May 3, 1996, E.T.S. 163 at para. 1.

51. Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, Nov. 9, 1995, E.T.S. 158 [hereinafter Collective Complaints Protocol].

52. *Id.* The Collective Complaints Protocol has been ratified by 12 Council of Europe Member States.

53. See Int'l Fed'n of Human Rights Leagues (FIDH) v. France, Complaint No. 14/2003 Eur. Comm. of Social Rights (May 4, 2005) available at http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC14Merits_en.pdf; Def. of Children Int'l v. the Netherlands, Complaint No. 47/2008, Eur. Comm. of Social Rights (Oct. 20, 2009), available at http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC47Merits_en.pdf.

54. *Defence of Children Int'l v. the Netherlands*, *id.* at 10, para. 35.

55. Council of Europe, Parliamentary Assembly, *Report of the Comm. on Migration, Refugees and Population on the human rights of irregular migrants in Europe*, Doc. No. 10924 (2006) (subsequent Assembly debate adopting Resolution 1509 and Recommendation 1755).

56. Council of Europe, Committee of Ministers, *Twenty Guidelines on Forced Return*, 925th Meeting of the Ministers' Deputies (May 4, 2005).

57. Council of Europe, Parliamentary Assembly, *Report of the Comm. on Migration, Refugees and Population on Europe's "boat-people": mixed migration flows by sea into southern Europe*, Doc. No. 11688 (2008) (subsequent Assembly debate unanimously adopting Resolution 1637 and Recommendation 1859).

58. Council of Europe, Parliamentary Assembly, *Report of the Comm. on Migration, Refugees and Population on the detention of asylum seekers and irregular migrants in Europe*, Doc. No. 12105 (2010) (subsequent Assembly debate unanimously adopting Resolution 1707 and Recommendation 1900).

Commissioner for Human Rights.⁵⁹ The present incumbent, Mr. Thomas Hammarberg, assumed his position on April 1, 2006 and, during visits to Council of Europe Member States, has pronounced on a range of questions pertaining to the human rights of migrants.⁶⁰ He has also commissioned two issue papers addressing the human rights of irregular migrants in Europe and the human rights implications of the criminalization of migration in Europe.⁶¹

5. REGIONAL INTEGRATION PROCESSES

Regional integration processes, which are at different stages of development in various parts of the world, are primarily driven by economic considerations, which can often mean that human rights are not considered a priority, at least in the initial phases of such processes. This section focuses on developments at the level of the European Union, the most advanced regional integration process in the world. While the human rights of migrants, particularly of non-EU or third-country nationals, are beginning to move up the political agendas of the EU and its Member States, much work remains to be done to reap the promise of the developments taking place. Some other regions in the world are also paying greater attention to migration issues, particularly labour mobility. Indeed, within the Association of Southeast Asian Nations (“ASEAN”), governments heading the Asian “tiger” economies increasingly understand today that much of the economic development in these countries is being built by the labour of migrant workers, largely from within the region, and that their social protection needs to be an important consideration.

At the beginning of 2000, human rights did not figure significantly in the EU architecture, in spite of the fact that the then-fifteen EU Member States saw themselves as countries with deeply rooted democratic traditions.⁶² They

59. Council of Europe, *Resolution (99) 50 of the Comm. of Ministers*, 104th Sess., (May 7, 1999) (deciding to institute the office of Council of Europe Commissioner for Human Rights).

60. Council of Europe, *Report of the Commissioner for Human Rights of the Council of Europe following his visit to Italy on 13–15 January 2009* at p. 2, Doc. No. CommDH (Apr. 16, 2009). Commissioner Thomas Hammarberg expressed concern about new legislative measures adopted or proposed to criminalize the letting of accommodation to irregular migrants and to lift the ban on doctors to report irregular migrants who access the health system to the authorities. The latter proposal was not adopted.

61. Council of Europe, Commissioner for Human Rights, *Issue Paper - The Human Rights of Irregular Migrants in Europe*, Doc. No. CommDH/IssuePaper (2007) (Dec. 17, 2007) (prepared with the assistance of Stefanie Grant), available at <https://wcd.coe.int/com.intranet.InstraServlet?Index=no&command=com.intranet.CmdBlobGet&IntranetImage=1370893&SecMode=1&DocId=1481740&Usage=2>; Council of Europe, Commissioner for Human Rights, *Issue Paper—Criminalisation of Migration in Europe: Human Rights Implications*, Doc. No. CommDH/IssuePaper(2007)1 (Feb. 4, 2010) (prepared by Elspeth Guild), available at <https://wcd.coe.int/com.intranet.InstraServlet?Index=no&command=com.intranet.CmdBlobGet&IntranetImage=1518757&SecMode=1&DocId=1535524&Usage=2>.

62. See PHILIP ALSTON, *THE EU AND HUMAN RIGHTS* (1999) (on the EU and human rights generally).

were joined by twelve new Member States in the EU enlargements of May 2004 and January 2007 respectively: ten countries from Central and Eastern Europe, as well as the island states of Cyprus and Malta. All twenty-seven EU Member States are also members of the Council of Europe and have ratified the ECHR.⁶³ They are also all U.N. Member States and have accepted, with one notable exception,⁶⁴ most of the core international human rights treaties, as well as being parties to the 1951 Geneva Convention relating to the Status of Refugees and the 1967 Protocol. While the Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community⁶⁵ made a number of references to human rights, the provision that stood out was Article 6:

1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.⁶⁶

In December 2000, the European Council, held in Nice, adopted the Charter of Fundamental Rights of the European Union (“EU Charter”),⁶⁷ but Member States at that time were not prepared to give it legally binding force. While the entry into force of the Amsterdam Treaty⁶⁸ gave a mandate to the EU Council of Ministers to legislate in the fields of asylum and immigration, apart from an explicit reference to the 1951 Geneva Convention relating to the Status of Refugees and its 1967 Protocol in the pertinent part of the amended treaties,⁶⁹ there was no further reference to conformity with

63. Indeed, acceptance of the principles of the rule of law and protection of human rights and fundamental freedoms are prerequisites for membership in the Council of Europe. Statute of the Council of Europe, arts. 3-4, May 5, 1949, E.T.S. No. 1.

64. Not a single EU Member State or European Economic Area (EEA) country has ratified the ICRMW as of Nov. 17, 2010. See ICRMW Ratification Status Report, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en. For an analysis of some of the obstacles to its ratification in the EU and EEA, see EUAN MACDONALD AND RYSZARD CHOLEWINSKI, THE MIGRANT WORKERS CONVENTION IN EUROPE 51-66 (UNESCO Migration Studies No. 1, 2008), available at <http://unesdoc.unesco.org/images/0015/001525/152537E.pdf>.

65. Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community, Dec. 29, 2006, 2006 O.J. (C 321) 1 [hereinafter Consolidated EU and EC Treaties].

66. *Id.*

67. Charter of Fundamental Rights of the European Union, Dec. 18, 2000, 2000 O.J. (C 364) 1 [hereinafter EU Charter], (updated by EU Charter, Mar. 10, 2010, 2010 O.J. (C 83) 389).

68. Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1.

69. Consolidated EU and EC Treaties, *supra* note 65, art. 63(1). Although they were able to opt in to measures being adopted, Ireland and the United Kingdom secured opt-outs from Part Three, Title IV of the Consolidated EU and EC Treaties. Denmark opted out altogether, but could decide to

Member States' human rights obligations in the development of law and policy in the fields of asylum and immigration. Some of the subsequent migration measures adopted do refer to Council of Europe human rights instruments such as the European Social Charter (and Revised Charter)⁷⁰ and the European Convention on the Legal Status of Migrant Workers;⁷¹ this is particularly true in the context of ensuring that the more favourable provisions in these instruments are safeguarded.⁷² However, there were few direct human rights provisions inserted in the main bodies of texts, a situation which began to change as of January 1, 2005, when the adoption of measures in the fields of asylum and immigration was subject to the ordinary "co-decision procedure," which meant that the measures had to be agreed to by both the Council of Ministers and the directly elected European Parliament, rather than just the Council acting unanimously after consultation with the European Parliament.⁷³ Thereafter, a number of non-discrimination provisions have been inserted into the substantive parts of EU migration legislation, most notably the Schengen Borders Code on the rules governing the movement of persons across borders, and the Visa Code laying out the rules relating to the issue of visas to third-country nationals wishing to enter the EU for a period of up to three months.⁷⁴

However, the entry into force of the Lisbon Treaty⁷⁵ on December 1, 2009 means that human rights have now been placed on a much firmer footing in the EU. The Lisbon Treaty amendments have resulted in Consolidated

implement in its national law measures building on the Schengen *acquis. Id.*; Protocol (No. 4) on the position of the United Kingdom and Ireland (1997), 2006 O.J. (C 321) 198; Protocol (No. 5) on the position of Denmark (1997), 2006 O.J. (C 321) 201.

70. European Social Charter and Revised Charter, *supra* note 46.

71. European Convention on the Legal Status of Migrant Workers, Nov. 24, 1977, Europ. T.S. No. 93.

72. *See, e.g.*, Council Directive 2003/86/EC, art. 3(4)(b), Sept. 22, 2003, 2003 O.J. (L 251) 12 (on the right to family reunification).

73. Council Decision 2004/927/EC of 22 Dec. 2004, 2004 O.J. (L 396) 45 (providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty; the field of "legal migration" was excluded, but this changed as of Dec. 1, 2009 on the entry into force of the Lisbon Treaty, *infra* note 75).

74. *See* Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), art. 6, 2006 O.J. (L 105) 1; Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), art. 39, 2009 O.J. (L 243) 1. Art. 6 of the Schengen Borders Code, entitled "Conduct of border checks," reads:

1. Border guards shall, in the performance of their duties, fully respect human dignity. Any measures taken in the performance of their duties shall be proportionate to the objectives pursued by such measures.
2. While carrying out border checks, border guards shall not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

75. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13 Dec. 2007, 2007 O.J. (C 306) 1 [hereinafter Lisbon Treaty].

Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [hereinafter Consolidated Treaty],⁷⁶ which reiterates that respect for human rights is one of the values upon which the EU is founded.⁷⁷ Furthermore, Article 7 of the Consolidated Treaty contains a procedure whereby a Member State may suffer suspension of some of its rights under the Treaty if the European Council determines “the existence of a serious and persistent breach by a Member State of the values referred to in Article 2.”⁷⁸ Importantly, the Consolidated Treaty also gives legally binding force to the EU Charter in a revised version of Article 6 referred to above and obliges the EU to accede to the ECHR.⁷⁹

Most of the provisions of the EU Charter do not distinguish between persons on grounds of citizenship or immigration status. Indeed, many of its articles apply to “everyone.” The EU Charter contains a number of rights of particular relevance to third-country nationals in the EU, including those in an irregular situation. Article 1 underlines that human dignity “must be respected and protected.” Fundamental civil and political rights are protected in Articles 4 and 6, which are concerned with the right to be free from torture or inhuman or degrading treatment or punishment, and the right to liberty and security of the person, thus mirroring the content of Articles 3 and 5 of the ECHR. There is also an express prohibition in the EU Charter on “collective expulsion” in Article 19(1) and the intriguing “right to asylum” in Article 18.⁸⁰ Equality before the law and the principle of non-discrimination are reiterated in Articles 20 and 21 respectively. With regard to due process, a “right to an effective remedy before a tribunal” is guaranteed to everyone

76. Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2010 O.J. (C 83) 1 [hereinafter Consolidated Treaty].

77. Article 2 of the Consolidated Treaty reads, “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.” *Id.* art. 2.

78. *Id.* art. 7(2).

79. *Id.* art. 6, which now reads in part as follows:

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.
The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties
2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties.
3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.

80. For a discussion of Article 18 of the EU Charter in the context of international human rights and refugee law instruments, see Maria-Teresa Gil-Bazo, *The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union’s Law*, 27 REFUGEE SURVEY QUARTERLY 3, at 33-52 (2009).

whose rights and freedoms under EU law are violated, and there is also an obligation to make available legal aid to those who lack sufficient resources “in so far as such aid is necessary to ensure effective access to justice.”⁸¹ Significantly for third-country nationals, the EU Charter does not make any distinctions regarding nationality in respect of access to social rights. “Everyone” is afforded “the right to education and . . . access to vocational and continuing training,” which includes “the possibility to receive free compulsory education,”⁸² and “everyone has the right of access to preventive health care and the right to benefit from medical treatment.”⁸³ The latter right encompasses a holistic conception of health care, and although it is to apply “under conditions established by national laws and practices,” this needs to be understood in the context of the overall objective, namely that “a high level of human health protection shall be ensured in the definition and implementation of all the Union’s policies and activities.”⁸⁴ As far as employment rights are concerned, *every* worker has rights “to working conditions which respect his or her health, safety and dignity”⁸⁵ and “protection against non-dismissal,” although this is qualified by the wording “in accordance with Union law and national laws and practices.”⁸⁶

Despite the listing of this positive array of rights in the EU Charter applicable to “everyone,” some words of caution must be expressed, because not all EU Charter provisions appear to be fully in line with international human rights law as far as their universal application to all migrants is concerned. First, the entitlement to “working conditions equivalent to those of citizens of the Union” is only afforded to “nationals of third countries who are authorized to work in the territories of the Member States.”⁸⁷ Similarly, only those persons “residing and moving legally” within the EU are “entitled to social benefits and social advantages in accordance with Union law and national laws and practices.”⁸⁸ Such an explicit exclusion of migrants in an irregular situation from fundamental employment and social rights cannot be justified, particularly in light of the advisory opinion of the Inter-American Court of Human Rights and the opinions of the European Social Committee under the European Social Charter discussed in Section 4 above. Second, the

81. EU Charter, *supra* note 67, art. 47, first and third indents respectively.

82. *Id.* arts. 14(1) and (2).

83. *Id.* art. 35.

84. *Id.*

85. *Id.* art. 31(1).

86. *Id.* art. 30. Art. 15(1), *id.*, stipulates that “everyone has the right to engage in work and to pursue a freely chosen or accepted occupation” and contains no qualifier in respect of EU law, although it is difficult to see how this provision might be fully applicable to third-country nationals who clearly have less opportunities to freely access employment in EU Member States given that EU citizens normally receive preference in national labour markets and also benefit from EU-wide recognition of professional qualifications. In this latter regard, see Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, 2005 O.J. (L 255) 22.

87. EU Charter, *supra* note 67, art. 15(3).

88. *Id.* art. 34(2).

“discrimination on grounds of nationality” in Article 21(2) is only explicitly prohibited “within the scope of application of the Treaties” and without prejudice to any of their specific provisions, even though the first paragraph in this article does not list an exhaustive set of prohibited grounds of discrimination as reflected in the words “such as.”⁸⁹

The application of the EU Charter, however, is of limited scope because, in accordance with Article 51(1), its provisions are addressed to “the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.” Moreover, protocols to the Lisbon Treaty preclude justiciability of the rights in the EU Charter by the courts and tribunals in two EU Member States (Poland and the United Kingdom) and the European Court of Justice.⁹⁰ However, the explicit reference to “implementation” of EU law by Member States in Article 51(1) is important. While the measures adopted to date in the field of immigration might not appear “friendly” to migrants generally, and, as some commentators have contended, are essentially “hostile” to those migrants in an irregular situation,⁹¹ the legally binding nature of the EU Charter means that national courts in a considerable majority of Member States as well as the Court of Justice will be able to scrutinize these measures in accordance with fundamental rights, which, as observed above, are applicable to “everyone” in most instances, not just EU citizens or third-country nationals who lawfully reside in the EU.

The potential impact of the EU Charter on the interpretation of EU measures addressing immigration (and asylum) is likely to reinforce the judicial scrutiny already starting to take place at the EU level in respect of some of the measures that have been adopted. This scrutiny is expected to heighten further as an important amendment introduced by the Lisbon Treaty enables all courts dealing with an asylum or immigration issue, and not merely the court of last instance hearing the case, to raise a question concerning the interpretation of the Treaties or measures adopted there under before the Court of Justice for a preliminary ruling.⁹² One interesting recent

89. The EU secondary legislation outlawing discrimination on the grounds of race or ethnic origin applies generally to third-country nationals, but does not cover unfair distinctions on the basis of citizenship or nationality and, moreover, excludes the immigration context. *See* Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, 2000 O.J. (L 180) 22, art. 3(2):

This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

90. *See* Protocol No. 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom, 2010 O.J. (C 83) 313.

91. *See, e.g.* Ryszard Cholewinski, *The Criminalization of Migration in EU Law and Policy, in WHOSE FREEDOM SECURITY AND JUSTICE? EU IMMIGRATION AND ASYLUM LAW AND POLICY* 301-336 (Helen Toner et al. eds., 2007).

92. Consolidated Treaty, *supra* note 76, art. 267.

example is the Court of Justice's judgment in *Kadzoev*,⁹³ which addresses the provisions in the controversial "Returns Directive"⁹⁴ that *inter alia* permits the administrative detention of migrants in an irregular situation.⁹⁵ This judgment demonstrates that the Court will carefully look at the wording in these new EU instruments, particularly when it concerns fundamental rights. In *Kadzoev*, the Court confirmed *inter alia* that where a migrant in an irregular situation is held in detention, he or she must be released immediately where there is no reasonable prospect of removal (which it interpreted as a "real prospect") in accordance with Article 15(4) of the Directive.⁹⁶ The Court added that such a prospect does not exist if it appears unlikely that the individual will be admitted to a third country. Moreover, the Court refused to allow continued detention on grounds not specified in the Directive, such as public order or public safety.⁹⁷

As noted above, the Lisbon Treaty amendments also pave the way for EU accession to the ECHR.⁹⁸ Importantly, there are now two commissioners overseeing the Justice, Liberty and Security portfolio of the European Commission, the Commissioner for Justice, Fundamental Rights and Citizenship and the Commissioner for Home Affairs. However, the fact that migration (and asylum) will continue to be addressed under the mandate of the latter Commissioner has attracted criticism from civil society organizations that view this field more in terms of human rights. The new Commissioner responsible for fundamental rights issues complements the role of the EU Fundamental Rights Agency ("FRA"), established in March 2007.⁹⁹ While the FRA's mandate remains rather limited,¹⁰⁰ its 2010 work pro-

93. Case C-357/09, *Kadzoev v. Direktsia 'Migratsia' pri Ministerstvo na vatreshnite raboti*, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009J0357:EN:NOT> (Nov. 30, 2009).

94. Directive 2008/115/EC of the European Parliament and the Council on common standards and procedures in Member States for returning illegally staying third-country nationals, 2008 O.J. (L 348) 98 [hereinafter Returns Directive].

95. *Id.* ch. IV (arts. 15-18).

96. Art. 15(4), *id.*, reads:

When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 [i.e. risk of absconding by the third-country national or he or she avoids or hampers the preparation of return or the removal process] no longer exist, detention ceases to be justified and the person concerned shall be released immediately.

97. *Kadzoev*, *supra* note 93, ¶ 70. This does not mean however that EU Member States cannot conceivably detain migrants in an irregular situation for such reasons under national law subject to due process safeguards, only that they cannot do so on the basis of the Returns Directive.

98. Consolidated Treaty, *supra* note 76, art. 6(2) (for the text, *see supra* note 79) and Protocol No. 8 relating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, 2008 O.J. (C 115) 273.

99. Council Regulation 168/2007 Establishing a European Union Agency for Fundamental Rights, 2007 O.J. (L 53) 1. *See also* FRA—European Union Agency for Fundamental Rights, available at http://fra.europa.eu/fraWebsite/home/home_en.htm (last visited Apr. 10, 2010).

100. Council Regulation 168/2007, *supra* note 99, arts. 2-5.

gramme refers to projects on the fundamental rights of irregular migrants and the treatment of third-country nationals at the EU external border.¹⁰¹

Given these developments, it is not surprising that the Stockholm Programme, adopted by the European Council (the highest political body in the EU defining its general political direction and priorities) in December 2009 under the auspices of the Swedish EU Presidency—which sets the political agenda for policymaking in the fields of justice, liberty and security, including asylum and immigration, for the next five years (2010–2014)¹⁰²—is more responsive to fundamental human rights questions. The Stockholm Programme identifies “promoting citizenship and fundamental rights” as a political priority.¹⁰³ While the Programme refers to “citizen[s]” in its title, it recognizes that the EU also has responsibility for “other persons.”¹⁰⁴ “[R]espect for the human person and human dignity and for the other rights set out in the Charter of Fundamental Rights and the European Convention on Human Rights” are identified as “core values.”¹⁰⁵ Moreover, the Stockholm Programme emphasizes that “allowances must be made for the special needs of vulnerable people.”¹⁰⁶ When focusing specifically on “irregular migration,” however, the language is much less positive. The document persists in using the negative terminology of “illegal migration,” which has been criticized by some commentators, including the Council of Europe Commissioner for Human Rights, as the language of criminalization.¹⁰⁷ While the Stockholm Programme sees action against irregular migration as an important political priority for maintaining credible and sustainable immigration and asylum systems, the tone of its language is not very helpful.¹⁰⁸ Little is offered in terms of explicit commitments to protect the fundamental rights of migrants in an irregular situation, considered by many to be one of the most vulnerable groups of persons in the EU. With the exception of proposed measures to further protect the victims of trafficking and unaccompanied minors,¹⁰⁹ the approach advanced to address irregular migration is hardly comprehensive in scope. It is essentially control-oriented, and while there is

101. See FRA, Annual Work Programme 2010: Helping to Make Fundamental Rights a Reality for Everyone in the EU, Oct. 2009, available at http://fra.europa.eu/fraWebsite/attachments/wp10_en.pdf.

102. The Stockholm Programme—An Open and Secure Europe Serving and Protecting Citizens, O.J. (C 115) 1 [hereinafter Stockholm Programme]. For a succinct critical overview of the Stockholm Programme’s provisions relating to migration, see Elizabeth Collett, *The European Union’s Stockholm Program: Less Ambition on Immigration and Asylum, But More Detailed Plans*, Migration Information Source, Migration Policy Institute, Washington, D.C., Jan. 12, 2010, available at <http://www.migrationinformation.org/Feature/display.cfm?ID=768>.

103. Stockholm Programme, *supra* note 102, at 4.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Criminalisation of Migration in Europe: Human Rights Implications*, *supra* note 61, at 8–10.

108. Stockholm Programme, *supra* note 102, at 5 (“[I]n order to maintain credible and sustainable immigration and asylum systems in the EU, it is necessary to prevent, *control* and *combat* illegal migration . . .” (emphasis added)).

109. *Id.* at 45, 68.

mention of cooperation in respect of regularization, this is made with reference to the Pact on Immigration and Asylum, adopted under the auspices of the French EU Presidency in September 2008, by which the European Council agreed “to use only case-by-case regularisation, rather than generalised regularisation, under national law, for humanitarian or economic reasons.”¹¹⁰

One concrete example of the “new-found” greater responsiveness to fundamental rights following the adoption of the Stockholm Programme is a proposal the European Commission issued in February 2010 for the adoption of a regulation to strengthen the mandate of the European Border Management Agency, FRONTEX, where emphasis is given to strengthening fundamental rights’ safeguards, including in the context of joint return operations and the training of border guards.¹¹¹

Beyond the EU and the larger Europe, migration and human rights questions have also begun to move up the political agendas of governments engaged in burgeoning regional integration processes. In January 2007, the ASEAN Heads of State/Government adopted a Declaration on the Protection and Promotion of the Rights of Migrant Workers, which includes the political commitment to move toward the adoption of a legally binding instrument in the future, and has since resulted in the establishment of a committee to oversee the implementation of the Declaration.¹¹² Although this may not be surprising in the context of a region where labour migration features prominently on the economic and social landscape,¹¹³ it is a notable development given the absence of an Asian human rights instrument¹¹⁴ and the fact that international human rights and labour standards have generally been

110. Council Doc. 13440/08, European Pact on Immigration and Asylum, Sept. 24, 2008, at 7.

111. *Commission Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, COM (2010) 61 final (Feb. 24, 2010).

112. ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, Cebu, Philippines, Jan. 13, 2007, ¶ 22, available at <http://www.aseansec.org/19264.htm>, and ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW). The ACMW’s work plan identifies three tracks along the lines of the Declaration: namely, (i) protection of migrant workers against exploitation, discrimination and violence; (ii) labour migration governance; and (iii) the fight against trafficking in persons—as well as an additional track concerned with the development of a legally binding instrument. The work plan is available at <http://www.aseansec.org/23062.pdf>.

113. According to the Population Division of the U.N. Department of Economic and Social Affairs (DESA), the estimated number of international migrants in Southeast Asia in 2010 amounted to 6.7 million. The three largest migrant-hosting countries were Malaysia (approximately 2.4 million migrants), Singapore (1.97 million) and Thailand (1.16 million). *Trends in International Migrant Stock: The 2008 Revision*, *supra* note 7.

114. However, in July 2009, the ASEAN summit also inaugurated the ASEAN Intergovernmental Commission on Human Rights, the purposes of which are inter alia to “promote and protect human rights and fundamental freedoms of the peoples of ASEAN” and “to uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN Member States are parties.” See ASEAN Intergovernmental Commission on Human Rights (Terms of Reference), Oct. 2009, ¶¶ 1.1, 1.6, available at <http://www.aseansec.org/publications/TOR-of->

poorly ratified by countries in this region. In the African Union, the Migration Policy Framework for Africa, while also non-binding, devotes special attention to the human rights of migrants.¹¹⁵

6. NON-BINDING INTERGOVERNMENTAL PROCESSES AT THE GLOBAL AND REGIONAL LEVEL

The increasing importance attached to international migration on national policy agendas has led to a growth in intergovernmental processes discussing this subject at both global and regional levels. Migration and human rights is now also becoming a regular agenda item in these processes.¹¹⁶ These processes are attractive to government policymakers because they enable an open discussion on a subject of mutual interest to many due to its transnational nature, but which nonetheless remains very close to sovereign State concerns. Moreover, the non-binding and generally confidential nature of these forums is conducive to the informal exchange of “good practices” across countries and regions.¹¹⁷

At the global level, some of these processes are no longer in operation but have resulted in useful tools for further action. The Berne Initiative, led by the Swiss Government and facilitated by the International Organization for Migration (“IOM”), resulted in the *International Agenda for Migration Management* (“IAMM”), a non-binding document containing a set of common understandings and effective practices for a planned and comprehensive approach to the management of migration for policymakers, which includes a short chapter on the human rights of migrants.¹¹⁸ The Global Commission on International Migration (GCIM), an independent body established on the

AICHR.pdf. For more information on the Commission and related documents, *see generally* <http://www.aseansec.org/22769.htm>.

115. *See* African Union (A.U.), Executive Council, Ninth Ordinary Sess., June 25–29, 2006, Banjul, The Gambia, The Migration Policy Framework for Africa, A.U. Doc. EX.CL/276 (IX) at 24, *available at* [http://www.africa-union.org/root/au/Conferences/Past/2006/November/SA/EU/EXCL276\(IX\)_Strategic_Framework_for_Policy_Migration.doc](http://www.africa-union.org/root/au/Conferences/Past/2006/November/SA/EU/EXCL276(IX)_Strategic_Framework_for_Policy_Migration.doc).

Ensuring the effective protection of the human rights of migrants is a fundamental component of comprehensive and balanced migration management systems. Historically, migrants have often been deprived of their rights and subjected to discriminatory and racist actions and policies including exploitation, mass expulsion, persecution and other abuses. Safeguarding the human rights of migrants implies the effective application of norms enshrined in human rights instruments of general applicability as well as the ratification and enforcement of instruments specifically relevant to the treatment of migrants.

116. *See* Ryszard Cholewinski, *Labour Migration Management and the Rights of Migrant Workers*, in *HUMAN SECURITY AND NON-CITIZENS: LAW, POLICY AND INTERNATIONAL AFFAIRS* 273, 273-313 (Alice Edwards & Carla Ferstman, eds., 2010).

117. For a recent assessment of regional consultative processes (RCPs), see Randall Hansen, *AN ASSESSMENT OF PRINCIPAL REGIONAL CONSULTATIVE PROCESSES ON MIGRATION* (IOM Migration Research Series No. 38, 2010), *available at* http://publications.iom.int/bookstore/free/MRS_38.pdf.

118. IOM and Swiss Federal Office for Migration, The Berne Initiative, *International Agenda for Migration Management*, 45-49 (2005), *available at* http://www.bfm.admin.ch/etc/medialib/data/migration/internationales/iamm_be_initiative/konferenzen.Par.0001.File.tmp/IAMM_E.pdf.

initiative of the U.N. Secretary General and supported by a core group of interested states, published its report in 2005.¹¹⁹ The report drew attention to the need to close the gap between the promise of existing international human rights and labour standards and their effective application to migrants. In addition to the IAMM and the GCIM report, a third document of significance is the ILO's Multilateral Framework on Labour Migration,¹²⁰ which came about as a result of the tripartite discussion on migrant workers at the International Labour Conference in June 2004 and the resultant ILO plan of action for migrant workers calling for

a rights-based approach, in accordance with existing international labour standards and ILO principles, which recognizes labour market needs and the sovereign right of all nations to determine their own migration policies, including determining entry into their territory and under which conditions migrants may remain.¹²¹

The ILO Multilateral Framework sets out a number of principles in nine areas supported by more detailed guidelines and a compendium of "best practices" in connection with the areas outlined.¹²² In 2009, the Government of Sri Lanka, on the basis of tripartite discussions and with ILO's support, adopted a national labour migration policy guided by the Multilateral Framework.¹²³

One ongoing global process is IOM's International Dialogue on Migration ("IDM"), where IOM member states and observers¹²⁴ gather in Geneva to discuss specific migration themes, in accordance with Article 1(e) of IOM's Constitution, which provides that one of IOM's purposes and functions is "to provide a forum to States as well as international and other organizations for the exchange of views and experiences."¹²⁵ In 2009, the overarching IDM

119. Global Comm'n on Int'l Migration [GCIM], *Migration in an Interconnected World: New Directions for Action* (Oct. 2005), available at <http://www.gcim.org/attachements/gcim-complete-report-2005.pdf>.

120. Tripartite Meeting of Experts on the ILO Multilateral Framework on Labour Migration, Geneva, Switz., Oct. 31–Nov. 2, 2005, *ILO Multilateral Framework on Labour Migration: Non-binding principles and guidelines for a rights-based approach to labour migration* (2006), available at http://www.ilo.org/public/libdoc/ilo/2006/106B09_343_engl.pdf.

121. *Resolution and Conclusions concerning a fair deal for migrant workers*, *supra* note 23, at 60 ¶ 20.

122. The nine areas covered are decent work, means for international cooperation on labour migration, global knowledge base, effective management of labour migration, protection of migrant workers, prevention of and protection against abusive migration practices, migration process, social integration and exclusion, and migration and development.

123. Ministry for Foreign Employment Promotion and Welfare, National Labour Migration Policy for Sri Lanka, 2008, available at http://www.ilo.org/public/English/protection/migrant/download/mpolicy_srilanka_en.pdf.

124. As of November 2010, there are 132 IOM Member States and 17 Observer States. Observers also include non-governmental organizations (NGOs), including prominent international human rights NGOs such as Amnesty International and Human Rights Watch.

125. IOM, Constitution of the International Organization for Migration art. 1(e), available at <http://www.iom.int/jahia/Jahia/about-iom/constitution>.

theme was “Human Rights and Migration: Working Together for Safe, Dignified and Secure Migration”; two workshops were held on trafficking and exploitation, and the human rights of migrants.¹²⁶

Another ongoing global process is the Global Forum on Migration and Development (“GFMD”)¹²⁷ a states-led process conducted outside of the U.N. system which came into being following the U.N. General Assembly’s High-Level Dialogue on International Migration and Development in September 2006.¹²⁸ It retains links to the U.N. via the Secretary General’s Special Representative on Migration, Mr. Peter Sutherland, and has held four annual meetings to date, in Brussels, Manila, Athens and Puerto Vallarta respectively.¹²⁹ While attracting criticism from a number of civil society organizations for not giving sufficient attention to human rights issues, one roundtable on the human rights of migrants at the second GFMD meeting in Manila on October 27–30, 2008 was devoted to “Protecting the rights of migrants—a shared responsibility.” Additionally, “Inclusion, protection and acceptance of migrants in society—linking human rights and migrant empowerment for development” was the topic of a roundtable at the third GFMD meeting in Athens on November 2–5, 2009.

There is no intergovernmental regional consultative process (“RCP”) on migration devoted exclusively to the consideration of the human rights of migrants. While a number of RCPs in the Americas, such as the Regional Conference on Migration (“RCM” or “Puebla Process”) and the South American Conference on Migration (“SACM” or “Lima Process”),¹³⁰ have a strong record of examining human rights-related questions, a clear recent trend is the greater consideration of labour migration, human rights and integration questions by those RCPs which previously focused almost wholly

126. See International Dialogue on Migration 2009 First Intersessional Workshop: Effective Respect for the Human Rights of Migrants: A Shared Responsibility, Mar. 25–26, 2009, *Final Report*, available at <http://www.iom.int/jahia/Jahia/policy-research/international-dialogue-migration/intersessional-workshops/effective-respect-human-rights-migrants-shared-responsibility>; International Dialogue on Migration 2009 Second Intersessional Workshop: Trafficking in Persons and Exploitation of Migrants: Ensuring the Protection of Human Rights, July 9–10, 2009, *Final Report*, available at <http://www.iom.int/jahia/Jahia/policy-research/international-dialogue-migration/intersessional-workshops/ensuring-protection-of-human-rights>.

127. For the GFMD website, see <http://www.gfmd.org/en/home.html>.

128. High-Level Dialogue on International Migration and Development, U.N. General Assembly, Sept. 14–15, 2006, New York. For all the documents connected with the High-Level Dialogue, see the website of the Population Division of U.N. DESA at <http://www.un.org/esa/population/migration/hld/index.html>. For a summary of the meeting see High-Level Dialogue on International Migration and Development, Sept. 14–15, 2006, *Summary of the High-level Dialogue on Int'l Migration and Dev.*, U.N. Doc. A/61/515 (Oct. 13, 2006).

129. For more information on the most recent GFMD meeting, held in Puerto Vallarta, Mexico on Nov. 8–11, 2010, see <http://www.gfmd.org/mexico-2010/>.

130. For more details on these two RCPs, see Regional Conference on Migration, <http://www.rcmvs.org> and Organizacion Internacional Para Las Migraciones, <http://www.oimconosur.org/variados/index.php?url=conferencia> (in Spanish only—a short description of the latter in English is available at <http://www.iom.int/jahia/Jahia/policy-research/regional-consultative-processes/snapshots-selected-reps/sacm>).

on asylum and the prevention of irregular migration.¹³¹ Indeed, today there are two RCPs, the related Colombo Process and Abu Dhabi Dialogue,¹³² which exclusively address labour migration in Asia and devote specific attention to the welfare and wellbeing of migrant workers.

7. INTERNATIONAL ORGANIZATIONS

As is evident from the above discussion, a number of international organizations have been involved in actions on the human rights of migrants to varying degrees. With respect to those U.N. bodies and U.N. specialized agencies with a clear legal mandate to protect the human rights of migrants, the OHCHR focused on this issue in 2010 and the U.N. Commissioner for Human Rights has also clearly spoken against specific violations.¹³³ The ILO is mandated by its Constitution to protect “persons employed in countries other than their own,” and a number of the most recent normative developments in this field have been discussed in Sections 2 and 6 above. In addition, the ILO Bureau for Workers’ Activities has produced a guide for trade unions on migrant workers’ rights.¹³⁴ The UNHCR is mandated to protect refugees under its Statute¹³⁵ and is also the “guardian” of the Geneva Convention relating to the Status of Refugees and Protocol. In this context, the UNCHR adopted the 10-Point Plan of Action on refugee protection and mixed migration,¹³⁶ which aims to ensure that asylum-seekers and refugees are not overlooked in responses to mixed migratory movements. The United Nations Development Programme (“UNDP”) is interested in migration from the human development perspective, and its Human Development Report 2009 also takes a “human (rights) approach” to migration by exploring how

131. *See, e.g.*, Intergovernmental Consultations on Migration, Asylum and Refugees (IGC), which in recent years has begun to focus more on labour migration and integration. According to its webpage, <http://www.igc.ch/>, the IGC describes itself as “an informal, non-decision making forum for intergovernmental information exchange and policy debate on issues of relevance to the management of international migratory flows.” The IGC brings together 17 participating States (Australia, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Netherlands, New Zealand, Norway, Spain, Sweden, Switzerland, United Kingdom and the United States), and the UNHCR, IOM and the European Commission as observers.

132. The full names of these two processes are respectively: the Regional Consultative Process on Overseas Employment and Contractual Labour for Countries of Origin in Asia; and the Ministerial Consultation on Overseas Employment and Contractual Labour for Countries of Origin and Destination in Asia. Information on both RCPs is available at <http://www.colomboprocess.org>.

133. *E.g.*, on Mar 2, 2010, the U.N. High Commissioner for Human Rights called on the Egyptian Government to immediately order its security forces to stop using “lethal force” against unarmed migrants trying to enter Israel via the Sinai Desert. *See* The Office of the Spokesperson for the U.N. Secretary-General, “Egypt Urged to Stop using ‘Lethal Force’ Against Unarmed Migrants,” available at http://www.un.org/News/press/docs/2010/hlites/hlites_arch_view.asp?HighID=1580.

134. INTERNATIONAL LABOUR OFFICE, BUREAU FOR WORKERS’ ACTIVITIES (ACTRAV), IN SEARCH OF DECENT WORK—MIGRANT WORKERS’ RIGHTS: A MANUAL FOR TRADE UNIONISTS (2008).

135. G.A. Res. 428(v), ¶ 2, U.N. GAOR, 5th Sess. (Dec. 14, 1950).

136. UNHCR, Refugee Protection and Mixed Migration: A 10-Point Plan of Action, rev. 1, Jan. 2007, available at <http://www.unhcr.org/4742a30b4.html>.

improved migration policies can enhance human development.¹³⁷ Finally, the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) international migration programme is very much focused on the promotion of migrants’ human rights. In furtherance of this objective, UNESCO is a member of the Steering Committee campaigning for ratification of the ICRMW and has engaged in a project on the ICRMW that has led to a number of publications identifying the main obstacles and prospects for its ratification in various regions of the world.¹³⁸ It is also responsible for the publication in 2005 of an information kit on the ICRMW and in 2010 of the first-ever book on this core international human rights instrument.¹³⁹

IOM is not a member of the U.N. family, but maintains a close relationship with the U.N., both in Geneva and New York, and at the country level where it participates in U.N. country teams and plays a role in the cluster process concerning humanitarian relief work. While IOM is not the “guardian” of a particular international instrument, the Organization is required to act in accordance with its Constitution, which underlines in the preamble “that there is a need to promote the co-operation of States and international organizations, governmental and non-governmental, for research and consultation on migration issues, not only in regard to the migration process *but also the specific situation and needs of the migrant as an individual human being.*”¹⁴⁰

In June 2007, IOM Member States adopted a Strategy, which stipulates that “[t]he primary goal of IOM is to facilitate the orderly and humane management of international migration.”¹⁴¹ One of the twelve activities identified in the Strategy to achieve this goal is “[t]o enhance the humane and orderly management of migration and the effective respect for the human rights of migrants in accordance with international law.”¹⁴² Moreover, the Organization aims to protect migrants *de facto* through many of its pro-

137. UNDP, HUMAN DEVELOPMENT REPORT 2009: OVERCOMING BARRIERS: HUMAN MOBILITY AND DEVELOPMENT (2009).

138. For the project website, see http://portal.unesco.org/shs/en/ev.php-URL_ID=6554&URL_DO=DO_TOPIC&URL_SECTION=201.html. For the study on six countries in the EU and the European Economic Area (EEA), see THE MIGRANT WORKERS CONVENTION IN EUROPE, *supra* note 64.

139. See UNESCO Information Kit on the United Nations’ Convention on Migrants’ Rights (Nov. 2005), available at http://portal.unesco.org/shs/en/files/3454/11401039211English_Kit.pdf/English%2BKit.pdf, and Paul de Guchteneire et. al., MIGRATION AND HUMAN RIGHTS: THE UNITED NATIONS CONVENTION ON MIGRANT WORKERS’ RIGHTS (2010). In 2009, a special issue on the human rights of migrants was also published by the UNESCO Journal of Multicultural Societies, Vol. 11, No. 1, available at http://portal.unesco.org/shs/en/ev.php-URL_ID=12997&URL_DO=DO_TOPIC&URL_SECTION=-465.html.

140. IOM Constitution, *supra* note 125, at preamble (emphasis added).

141. IOM Council Res. 1150, IOM Strategy Doc. MC/INF/287 (Nov. 9, 2007) at 3, available at http://www.iom.int/jahia/webdav/shared/shared/mainsite/about_iom/docs/res1150_en.pdf (adopted by the Council at its 481st meeting on June 7, 2007).

142. *Id.* at 3, point 2.

grammes and projects.¹⁴³ At the 98th Session of the IOM Council in November 2009, the Secretariat presented a paper explaining its policy in this field and outlining examples of activities relating to the human rights of migrants.¹⁴⁴ It also issued a document on irregular migration and mixed flows in which it identified as the essence of IOM's approach to this question affording direct assistance to particularly vulnerable groups of migrants in an irregular situation, and providing support and services to governments and other relevant actors in their responses to the challenges posed by such movements.¹⁴⁵

OHCHR, UNHCR, UNDP, UNESCO, ILO and IOM, together with a number of other agencies,¹⁴⁶ are members of the Global Migration Group ("GMG"). GMG is "an inter-agency group bringing together the heads of agencies to promote the wider application of all relevant international and regional instruments and norms relating to migration, and to encourage the adoption of more coherent, comprehensive and better coordinated approaches to the issue of international migration."¹⁴⁷ In 2008, on the eve of the 60th anniversary of the Universal Declaration of Human Rights ("UDHR"), the GMG prepared a report on international migration and human rights in which it underscores key messages in a number of areas.¹⁴⁸ With regard to the legal framework, the report contains five key messages:

- Migrants are human beings with rights which must be protected by States as they exercise their sovereign right to determine who enters and remains in their territory.
- Migration, development and human rights are intrinsically interconnected. Respect for the fundamental rights and freedoms of all migrants is essential for reaping the full benefits of international migration.
- Human rights of migrants are a shared responsibility. Governments

143. See IOM Council Res. 1150, *supra* note 141, at point 9 fn. 1 ("Although IOM has no legal protection mandate, the fact remains that its activities contribute to protecting human rights, having the effect, or consequence, of protecting persons involved in migration").

144. IOM Council, 98th Sess., *Human Rights of Migrants. IOM Policy and Activities*, Doc. MC/INF/298 (Nov. 19, 2009), available at <http://www.iom.int/jahia/Jahia/about-iom/governing-bodies/council/98th-session>.

145. IOM Council, 98th Sess., *Irregular Migration and Mixed Flows: IOM's Approach*, Doc. MC/INF/298 (Nov. 19, 2009), available at <http://www.iom.int/jahia/Jahia/about-iom/governing-bodies/council/98th-session>.

146. U.N. DESA, U.N. Conference on Trade and Development (UNCTAD), U.N. Population Fund (UNFPA), U.N. Children's Fund (UNICEF), U.N. Institute for Training and Research (UNITAR), U.N. Office on Drugs and Crime (UNODC), the World Bank and the U.N. Regional Commissions.

147. See Global Migration Group, *What is the GMG?*, available at http://www.globalmigrationgroup.org/what_is_gmg.htm.

148. Global Migration Group, *International Migration and Human Rights: Challenges and Opportunities at the Threshold of the 60th Anniversary of the Universal Declaration of Human Rights* (2008), available at http://www.globalmigrationgroup.org/pdf/Int_Migration_Human_Rights.pdf.

of origin, transit and destination each have an important role to play in safeguarding the human rights of migrants.

- The [ICRMW] offers States the most comprehensive framework for the protection of the human rights of migrants. Concerns linked to its low level of ratification must be addressed and efforts must be intensified to better articulate a human rights approach to migration, including through greater dissemination of tools to strengthen States' capacities in this regard. Good practices should be documented to serve as guidance to inform States' approaches.
- Intergovernmental organizations and civil society have key roles to play in working with governments and migrants to achieve protection of their rights, and respect for their obligations. This should be encouraged and further cooperation developed.¹⁴⁹

8. CIVIL SOCIETY

The crucial role of civil society in advancing the human rights of migrants cannot be understated. It is evident that some of the progress relating to the promotion of these rights in the various areas discussed above might not have taken place or would have been much slower if there had not been mobilization and engagement among NGOs, large and small, advocating for migrants' rights. As discussed in Section 2 above, it was difficult to see at one point how the ICRMW would enter into force because of the low level of support it was receiving among U.N. Member States soon after its adoption and despite the early projections that considerably more governments were prepared to ratify it.¹⁵⁰ Because of the role of civil society and committed NGOs, coalitions and networks of NGOs specifically concerned with the protection of the human rights of migrants,¹⁵¹ and international organizations campaigning for its ratification,¹⁵² there are forty-four States parties to the ICRMW today. This development resulted in the expansion, as of January 1, 2010, of the Committee on Migrant Workers from ten to fourteen experts as provided in the Convention.¹⁵³ While continuing to work for the ratification of the ICRMW, particularly in high-income destination countries including in Europe, many of these NGOs also participate in a coalition concerned with

149. *Id.* at 99-100.

150. Cholewinski, *supra* note 10, at 202-203.

151. Some of the most prominent migration-specific NGOs and coalitions of NGOs include: December 18, *available at* <http://www.december18.net/>; Migrants Rights International (MRI), *available at* <http://www.migrantwatch.org/>; International Catholic Migration Commission (ICMC), *available at* <http://www.icmc.net/>; and Migrant Forum in Asia (MFA), *available at* <http://www.mfasia.org/>.

152. *See* The Global Campaign for Ratification of the Convention on Rights of Migrants, *available at* <http://www.migrantsrights.org/committee.htm> (last visited April 12, 2010).

153. ICRMW, *supra* note 3, art. 72(1)(b).

its effective implementation¹⁵⁴ and have drawn attention to important linkages between migration, development and human rights during the civil society days of the states-owned GFMD process. For example, during the third GFMD meeting in Athens in November 2009, with respect to Roundtable II on “Migrant integration, reintegration and circulation for development,” civil society organizations reiterated that *all* migrant workers are entitled to basic labour rights, including the right to be free from non-discrimination, and the need to ratify and implement relevant U.N. and ILO conventions. They also recommended that a minimum set of conditions apply to both temporary and long-term workers, namely: flexibility of stay/residence permits with the possibility to switch from short to long-term status; employee portability and freedom of movement; portability of benefits (pensions and insurance, health coverage, accumulation of benefits); portability of justice; a reasonable period of time to find new employment on loss of a job; and universal education and preventive health coverage for all persons. Moreover, they underlined that specific attention should be paid to the particularly vulnerable status of domestic workers.¹⁵⁵

The activities described above essentially on the part of civil society organizations with a specific migration focus have been greatly assisted by the engagement of large human rights NGOs, such as Amnesty International and Human Rights Watch,¹⁵⁶ which in the last few years have strategized internally, identifying the treatment of migrants as a particular subject of concern. These organizations have been able to mobilize their substantial resources to research and document abuses occurring against migrants around the world, publishing their findings in headline-hitting and influential reports.¹⁵⁷ Workers’ organizations have also mobilized on the part of migrant

154. See The International NGO Platform on the Migrant Workers Convention (IPMWC), described at <http://www.december18.net/international-ngo-platform-migrant-workers-convention-ipmwc>.

155. Global Forum on Migration & Development, *Report on the Civil Society Days of the Global Forum on Migration and Development: Integrating Migration Policies into Development Strategies for the Benefit of All 4*, (Nov. 3, 2009), available at http://www.gfmd2009.org/UserFiles/file/REPORT_CSD_ATHENS2009_7NOV2009_EN.pdf.

156. For the relevant pages of the websites of Amnesty International (AI) and Human Rights Watch (HRW), see <http://www.amnesty.org/en/refugees-and-migrants> (which covers refugees, migrants and internally displaced persons) and <http://www.hrw.org/en/topic/migrants> (which focuses on migrants).

157. For a summary of HRW activities in 2009 and 2010, see respectively *Slow Movement: Protection of Migrants’ Rights in 2009* (Dec. 2009) and *Rights on the Line. Human Rights Watch Work on Abuses Against Migrants in 2010* (Dec. 2010), available at <http://www.hrw.org/en/news/2009/12/16/slow-movement> and <http://www.hrw.org/en/reports/2010/12/12/rights-line-0>. The HRW reports are available at <http://www.hrw.org/en/publications/reports?page=0>, and those focusing on migrants’ rights in 2010 and 2009 include: *Buffeted in the Borderland. The Treatment of Asylum Seekers and Migrants in Ukraine* (Dec. 16, 2010); *Walls at Every Turn. Abuse of Migrant Domestic Workers Through Kuwait’s Sponsorship System* (Oct. 6, 2010); *Without Protection: How the Lebanese Justice System Fails Migrant Domestic Workers?* (Sept. 16, 2010); “*Hellish Work*”: *Exploitation of Migrant Tobacco Workers in Kazakhstan* (July 14, 2010); *From the Tiger to the Crocodile: Abuse of Migrant Workers in Thailand* (Feb. 23, 2010); *No Healing Here: Violence, Discrimination and Barriers to Health for Migrants in South Africa* (Dec. 7, 2009); *Locked Up Far Away: The Transfer of*

workers as reflected in the work of trade union coalitions on both the regional and global level.¹⁵⁸

Another successful strategy of civil society organizations has been to investigate in more detail the violations occurring in specific human rights' areas. The work of the Platform for International Cooperation on Undocumented Migrants ("PICUM") has brought to the attention of governments, interested stakeholders and the public the difficult plight of migrants in an irregular or undocumented situation, especially in Europe, and the legal and practical obstacles that preclude their enjoyment of important social rights, such as fair working conditions, health care, education and adequate housing.¹⁵⁹ PICUM has published a number of reports detailing the problems undocumented migrants experience across a range of countries,¹⁶⁰ which have contributed to changes in the law and in administrative practice.¹⁶¹ Positive changes regarding access by undocumented migrants to social rights have also come about as a result of litigation by civil society organizations at both the national and regional level. For example, the two cases before the

Immigrants to Remote Detention Centers in the United States (Dec. 2, 2009); *No Refuge: Migrants in Greece* (Nov. 2, 2009); *Returned to Risk: Deportation of HIV-Positive Migrants* (Sept. 23, 2009); *Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers* (Sept 21, 2009); *Discrimination, Denial and Deportation: Human Rights Abuses Affecting Migrants Living with HIV* (June 18, 2009); *"The Island of Happiness": Exploitation of Migrant Workers on Saadiyat Island, Abu Dhabi* (May 19, 2009); *Forced Apart (By the Numbers): Non-Citizens Deported Mostly for Nonviolent Offenses* (April 15, 2009); *"Are You Happy to Cheat Us?": Exploitation of Migrant Construction Workers in Russia* (Feb. 10, 2009). The Amnesty International (AI) reports can be accessed from the AI library at <http://www.amnesty.org/en/library>. Some key recent reports include: *Journeys of hope and fear: Migrants on the move in Mexico* (Nov. 8, 2010); *Trapped: The exploitation of migrant workers in Malaysia* (Mar. 24, 2010); *Disposable labour: Rights of migrant workers in South Korea* (Oct. 21, 2009); *Irregular migrants and asylum-seekers: Alternatives to immigration detention* (Apr. 1, 2009); *Migration-related detention: A global concern* (Dec. 1, 2008); *Isolated and Abused: Women migrant domestic workers in Jordan denied their rights* (Oct. 30, 2008); *Mauritania: "Nobody wants to have anything to do with us": Arrests and collective expulsions of migrants denied entry into Europe* (July 1, 2008); *The Netherlands: The detention of irregular migrants and asylum-seekers* (June 27, 2008).

158. See, e.g., European Trade Union Confederation (ETUC), <http://www.etuc.org/tr/49>; International Trade Union Confederation (ITUC), <http://www.ituc-csi.org/-migrant-workers-.html>; Public Services International (PSI), http://www.world-psi.org/TemplateEn.cfm?Section=Migrant_workers2&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=151&ContentID=18920 (providing information on activities relating to migrant workers; promoting the rights of *inter alia* migrant women health workers).

159. For PICUM's website, see <http://www.picum.org/>.

160. See, e.g., *Ten Ways to Protect Undocumented Migrant Workers* (2005); *Undocumented Migrants Have Rights! An Overview of the International Human Rights Framework* (2007); *Access to Health Care for Undocumented Migrants in Europe* (2007); *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions* (2009); *Undocumented and Seriously Ill: Resident Permits for Medical Reasons in Europe* (2009), available at <http://www.picum.org/article/reports>.

161. For example, on 18 September 2009, the German Federal Parliament adopted General Administrative Regulations for the Residence Law clarifying the law's interpretation concerning the access of undocumented migrants to emergency medical care. The regulations stipulate that undocumented migrants may seek emergency care at hospitals without fear of arrest or deportation, since both medical personnel and hospital administrators are exempt from the duty to report undocumented individuals to the Social Security Office, which, in turn, may not transmit the personal data of undocumented patients to the Foreigners' Office. See PICUM Newsletter, Nov. 2009, at p. 12 (Health Care), available at http://www.picum.org/sites/default/files/data/newsletters/en/nl_en_01-11-2009.pdf.

European Social Committee, discussed in Section 4 above, concerning access of migrant children in an irregular situation to health care and adequate housing, were brought by NGOs, namely the Fédération Internationale des Ligues des Droits de L'Homme ("FIDH") and Defence of Children International ("DCI"). Adequate protection of migrant domestic workers is a concern for many of these NGOs, including those whose work is completely devoted to this group,¹⁶² and, as discussed in Section 2 above, adoption of a comprehensive standard on decent work for domestic workers will be the focus of the International Labour Conference in June 2011. Another issue of concern has been the increase in the use of administrative detention against migrants in an irregular situation in many parts of the world, which has led to a movement focusing on the abolition of this practice and/or seeking alternatives to detention. A particularly interesting initiative is the Global Detention Project, which aims to document in some detail the administrative detention of migrants in all corners of the world.¹⁶³

9. CONCLUSION

The title of this article asks a question. Has a "new era" indeed dawned for the protection of the human rights of migrants? When tracing the range of developments in this field during the last decade, it may certainly be concluded that awareness of the difficulties migrants face in accessing the full panoply of rights during the migration process has been raised considerably, with the result that migrants' rights today are more clearly recognizable as human and labour rights. Human rights treaty-monitoring bodies have reported violations against migrants and moved to integrate their needs and interests in authoritative pronouncements on the interpretation of the instruments they supervise, particularly in the application of the principle of non-discrimination. The ICRMW is clearly recognized as a core international human rights instrument, and the impact of its growing number of ratifications as well as the work of the Committee on Migrant Workers will be felt in the years to come, although it goes without saying that its ratification by high-income destination countries would make a significant difference to the stature and influence of this treaty. Regional human rights mechanisms have continued to develop responsiveness to the vulnerable and "right-less" situations in which many migrants frequently find themselves, especially those in an irregular or undocumented situation, and regional tribunals as well as "soft law" measures have emphasized the need for migrants to concretely enjoy their rights. There have also been important developments in those regions of the world which are marked by functioning regional

162. See, e.g., Kalayaan (justice for migrant domestic workers) available at <http://www.kalayaan.org.uk/> (providing advice, advocacy and support services in the United Kingdom for migrant domestic workers).

163. See The Project website at <http://www.globaldetentionproject.org/>.

economic integration processes, particularly in the EU and ASEAN. While the adoption of a more coherent EU framework for the protection of third-country nationals and migrants in an irregular situation has to date not been possible to achieve, recent legal and institutional changes to the EU architecture mean that stronger tools are now in place to advance the fundamental rights of these vulnerable groups of persons. Finally, governments meeting in the context of regional and global consultative processes to advance their own sovereign policies and interests in the sphere of international migration are increasingly being reminded and recognizing that safeguarding the human rights of migrants is an integral aspect of good migration governance.

Pessimists might contend, however, that rights violations against migrants are pervasive, as evidenced in the increasing number of reports published by migrant and human rights NGOs in recent years indicating that progress in protecting migrants remains slow,¹⁶⁴ and that such violations are being exacerbated in the present global economic crisis, where migrants are less likely to be viewed as beneficial to the economy and more as taking away the jobs of natives and draining national welfare systems. Clearly, many challenges remain, not least in protecting migrants in an irregular situation, temporary workers in low-skilled jobs and migrant women domestic workers. Challenges also exist in ensuring that unjustifiable distinctions regarding access to fundamental rights are not arbitrarily introduced between certain categories of migrant workers, such as temporary and long-term workers and low-skilled and skilled workers, and that social rights are recognized as being of universal application, in conformity with the fundamental principle of non-discrimination. These challenges can only be addressed by applying the rights' construct to the entire migration life-cycle and understanding that, while destination countries clearly have the primary obligation to safeguard the rights of all persons on their territories, abuses often start in countries of origin, particularly in the process of migrant worker recruitment, and that protecting migrants' rights as human and labour rights is also a shared responsibility of countries of origin, transit and destination, and the international community as a whole.

164. See, e.g., *Slow Movement: Protection of Migrants' Rights in 2009*, *supra* note 157.