

## **The Labour and Social Rights of Migrants in International Law**

Bernard Ryan (University of Kent) and Virginia Mantouvalou (University College London)

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### **Introduction**

Questions as to the personal scope of internationally recognised civil rights have largely been resolved today. Because civil rights are linked to basic humanity, it is generally accepted that everyone is entitled to them, simply by virtue of being human.<sup>1</sup> In contrast, the personal scope of labour and social rights is far from settled, as these are often thought to be connected to an individual's position as a worker, or to the status of citizenship, rather than to basic humanity. The content and practical achievement of these rights are themselves deeply controversial amongst activists, academic scholars, lawyers and judges alike.<sup>2</sup> When it comes to the position of migrants, a further complication is the presumed inter-connection between immigration policy and labour and social rights protection, as destination countries often limit the rights of non-nationals in the belief that that will deter migration to their territory.<sup>3</sup>

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<sup>1</sup> For a theoretical analysis of the normative core of human rights, see John Tasioulas, 'On the Nature of Human Rights', in Ernst and Heilinger (eds), *The Philosophy of Human Rights: Contemporary Controversies* (2011).

<sup>2</sup> For the general debate on social rights, see Conor Gearty and Virginia Mantouvalou, *Debating Social Rights*, (Hart, 2011).

<sup>3</sup> See Sylvie Da Lomba, 'Fundamental Social Rights for Irregular Migrants: The Right to Health Care in France and England', in Bogusz, Cholewinski, Cygan and Szyssczak (eds) *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, (Martinus Nijhoff, 2004), p 363 and Ryszard Cholewinski, *Irregular Migrants: Access to Minimum Social Rights*, (Council of Europe Publishing, 2005), p 18.

This chapter is concerned with the evolution of international standards on the labour and social rights of migrants.. Section 1 will summarise the pre-1945 approach, when the position of foreign nationals was considered to be an aspect of the relationship between the state of nationality and that in which the individual was present. In contrast, the decades since 1945 have seen the growing acceptance in international law of the equal treatment of migrants in labour and social matters, irrespective of their state of nationality. The acceptance of equal treatment has been seen in instruments specifically concerning migrants, at both the global and European levels (see sections 2 and 3, respectively). It has also been reflected in the increasing role of general human rights instruments in the protection of foreign nationals in economic and social matters, at both the global and regional levels (sections 4 and 5. respectively).

The chapter as a whole will show that, today, the main question is no longer whether foreign nationals should be eligible for equal treatment in the labour and social field. Rather, the questions are whether, and to what extent, such rights may be denied or limited in the case of persons who are not lawfully resident ('irregular migrants'). The general answer is that, while the exclusion of migrants from basic labour and social rights protection is now considered to be incompatible with international human rights law, some differences of treatment may still be acceptable in the case of irregular migrants.

The chapter will also show how general human rights instruments have come to the fore within international law provision for the labour and social rights of foreign nationals. We will see that there are various limitations to migrant-specific instruments, including that that they apply to only a limited number of states, and that they are carefully drafted to deny rights to certain migrant groups. In contrast, general human rights instruments typically have a wider reach and do not have specific exceptions for migrant categories. As a result, general instruments are more likely to lead to the development of international standards in the contemporary context of international migration, within which irregular migration is a significant element.

Before proceeding to the chapter's substantive analysis, it is necessary to outline our understanding of the categories of 'labour' and 'social' rights. We take the category of 'labour' rights to refer to rights concerning access to employed activity or the terms on which that activity is engaged in. In the discussion here, we cover the right to work and the prohibition on forced labour under the first of these headings, and the freedom of association in trade unions and the right to fair terms and conditions of employment under the second. We take the category of 'social' rights to refer to rights concerning the basic needs of individuals in a given society.<sup>4</sup> In this chapter, we focus on access to four important social rights: education, health, housing, and social security.

### 1. Pre-1945 developments

In the early twentieth century, the treatment of foreign nationals in other countries remained subject to the overriding principle that only states were the subjects of international law. In Richard Lillich's summary:

"If a State committed a wrong against an individual who was an alien, then that wrong, if unaddressed, was translated into a wrong against the alien's State of nationality. ... [The] alien himself had no right which was cognisable by traditional international law against the host State."<sup>5</sup>

Within this approach, states were generally taken to be bound by a minimum international standard of fair treatment, which covered injuries to a foreigner's

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<sup>4</sup> On the concept of 'social' rights, see Virginia Mantouvalou, 'In Support of Legalisation' in Conor Gearty and Virginia Mantouvalou, *Debating Social Rights* (Hart, 2011), 90-91. Further literature on social and labour rights includes Malcolm Langford (ed), *Social Rights Jurisprudence* (CUP, 2008), Daphne Barak-Erez and Aeyal M Gross (eds), *Exploring Social Rights* (Hart, 2007) and Philip Alston (ed), *Labour Rights as Human Rights* (OUP, 2005).

<sup>5</sup> Richard Lillich, *The Human Rights of Aliens in Contemporary International Law* (1984), p 1.

person and the expropriation of their property.<sup>6</sup> The traditional principle was therefore concerned neither with equal treatment nor with the labour and social rights at issue in this chapter. Latin American states in particular sought to promote a national standard, based upon the principle of equal treatment. But even when that approach was elaborated after 1945, it applied only to fundamental civil rights, and not to labour and social matters.<sup>7</sup>

As industrialised states came to assume greater responsibility for the economic welfare of their populations from the early twentieth century onwards, international arrangements began to address the treatment of foreign workers in labour and social matters. Initially, the extension of labour and social rights to foreign nationals depended upon bilateral agreements between the states in question. Probably the first example was a 1904 agreement between France and Italy, which provided for the retention of each state's social insurance benefits by the nationals of the other if they ceased to be resident, and for equal treatment in each country's laws on compensation for industrial accidents.<sup>8</sup> That precedent was followed by France in labour recruitment agreements with Poland, Italy (both 1919) and Czechoslovakia (1920) in the period of reconstruction immediately after World War I.<sup>9</sup> These agreements provided that immigrant workers should be paid equally with nationals, and that they should benefit from the same statutory protection as them.<sup>10</sup>

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<sup>6</sup> On the minimum standard, see Myres McDougal, Harold Lasswell and Lung-chu Chen, 'The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights' (1976) 70 *American Journal of International Law* 432, 450-451.

<sup>7</sup> For the leading statement of the equal treatment approach, see International Law Commission, *International Responsibility: Second Report by F.V. García Amador, Special Rapporteur* (15 February 1957, doc. A/CN.4/96).

<sup>8</sup> Convention entre la France et l'Italie, en vue d'assurer des garanties à la personne du travailleur, *Journal Officiel*, 12 October 1904. See Arthur Fontaine, 'Exposé de la convention franco-italienne relative au travail et à la prévoyance sociale' (undated), available from <http://gallica.bnf.fr/> (accessed 1 February 2013).

<sup>9</sup> Conventions between France and Poland (3 September 1919, 1 LNTS 337), Italy (30 September 1919, 5 LNTS 280) and Czechoslovakia (20 March 1920, 3 LNTS 139).

<sup>10</sup> Articles 2 and 3 in each case.

A second phase in the protection of the labour and social rights of foreign nationals was the emergence of multilateral treaties, applicable on a reciprocal basis between contracting parties. Several conventions of this type were adopted in the inter-war years under the aegis of the International Labour Organization (ILO). The Unemployment Convention of 1919 provided for equality in unemployment benefits for foreign nationals once a bilateral agreement had been entered into by the two states concerned.<sup>11</sup> The Equality of Treatment (Accident Compensation) Convention (1925) provided for the equal treatment of foreign workers in workers' compensation schemes, on a reciprocal basis between contracting states.<sup>12</sup> The same approach was taken in the Maintenance of Migrants' Pension Rights Convention (1935), which provided for the protection of benefits within social insurance schemes when migrants moved between participating states.<sup>13</sup> The (unimplemented) Migration for Employment Convention of 1939 sought to apply the principle of equal treatment more generally, to state provisions on "conditions of work and ... remuneration", "the right to be a member of a trade union" and "legal proceedings relating to contracts of employment".<sup>14</sup> Reciprocity would not have been automatic, however, with contracting states instead permitted to limit equal treatment to nationals of other parties with which a reciprocity agreement had been concluded on the subject in question.<sup>15</sup>

While innovative, these inter-war instruments concerning migrant workers remained within a logic of reciprocity. For that reason, League of Nations instruments which give recognition to the labour and social rights of refugees

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<sup>11</sup> ILO Convention No. 2, Article 3. This Convention remains in force, with 54 parties at the time of writing.

<sup>12</sup> ILO Convention No. 19, Article 1(1). This Convention remains in force, with 121 parties at the time of writing.

<sup>13</sup> ILO Convention No. 48. This Convention was ratified by 12 states. The ILO website describes it as a "shelved Convention": [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_ILO\\_CODE:C048](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C048) (accessed 1 February 2013).

<sup>14</sup> ILO Convention No 66. This Convention was not ratified by any state, and was 1 withdrawn by a decision of the International Labour Conference on 15 June 2000: <http://www.ilo.org/public/english/standards/relm/ilc/ilc88/pdf/pr-6-2.pdf> (accessed 1 February 2013).

<sup>15</sup> Ibid, Article 6(2).

are of particular interest.<sup>16</sup> The first of these was the recommendation in the 1928 Arrangement Relating to the Legal Status of Russian and Armenian Refugees that “restrictive regulations concerning foreign labour ... not be rigorously applied to ... refugees in their country of residence”.<sup>17</sup> The 1933 Convention on the International Status of Refugees - which applied to Russian and Armenian refugees, and others “assimilated” to them – went somewhat further.<sup>18</sup> In addition to providing that labour market restrictions should “not be applied in all their severity to refugees domiciled or regularly resident in the country,” it added that those restrictions should not be applied to refugees with at least three years’ residence, refugees married to a person with the nationality of the country of residence or with a child with that nationality, and refugees who had been combatants in the First World War.<sup>19</sup> The 1933 Convention also went beyond previous instruments in its provision for social rights. In the case of benefits arising out of industrial accidents, “relief and assistance” and social insurance, it required that resident refugees should benefit from “the most favourable treatment ... accord[ed] to the nationals of a foreign country”.<sup>20</sup> Education in “schools, courses, faculties and universities” was subject to a requirement that treatment be at least as favourable as for “other foreigners in general”.<sup>21</sup> Subsequently, a Convention of 1938 would extend essentially the same labour and social rights to refugees from Germany.<sup>22</sup>

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<sup>16</sup> For a detailed discussion, see James Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005), 83-91.

<sup>17</sup> 30 June 2008, 89 LNTS 53, para 6.

<sup>18</sup> 159 LNTS 199. The 1933 Convention was ratified by eight states (Belgium, Bulgaria, Czechoslovakia, Denmark, Egypt, France, Italy and Norway). The category of “assimilated refugees” covered stateless Assyrian, Assyro-Chaldean, Syrian, Kurdish and Turkish persons, as defined in the Arrangement Concerning the Extension to Other Categories of Certain Measures Taken in Favour of Russian and Armenian Refugees of 30 June 1928 (89 LNTS 63).

<sup>19</sup> Ibid, Article 7.

<sup>20</sup> Ibid, Articles 8, 9 and 10.

<sup>21</sup> Ibid, Article 12

<sup>22</sup> Convention concerning the Status of Refugees coming from Germany (1938), 192 LNTS 59, Articles 9-11 and 14. Only Belgium, France and the United Kingdom ratified the 1938 Convention. Note that Article 9 made no reference to the right to work of former combatants in the First World War.

These inter-war instruments concerning refugees had important limitations. They applied only to specific groups, only covered a limited range of labour and social rights, and aimed at equality of treatment with other foreign nationals in the given state, rather than equality with that state's nationals. Their significance lies in the fact that, for the first time, the treatment of foreigners within international law was separated from any link to a state of nationality. As Hathaway has put it, "The consequential decisions to waive reciprocity, and to guarantee basic ... rights in law, served as a direct precedent for a variety of international human rights projects, including the modern refugee rights regime".<sup>23</sup> We will see in the rest of this chapter the many ways in which that break with a state-based approach has been elaborated in post-1945 international law.

## **2. Global instruments on migrants' rights**

The period after the end of the Second World War is generally accepted as the moment when respect for human rights came to be recognised within international law. It has been said that the Second World War gave rise to a "spreading conviction that how human beings are treated anywhere concerns everyone, everywhere", one result of which was "agreement ... that individual human rights are of 'international concern', and a proper subject for diplomacy, international institutions and international law".<sup>24</sup> While the original impetus to internationalisation was primarily to ensure respect for civil and political rights, it has been clear since the 1948 Universal Declaration of Human Rights that labour and social rights were also covered.<sup>25</sup> That shift would provide decisive for the position of migrants.

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<sup>23</sup> Hathaway, 2005, 91.

<sup>24</sup> Louis Henkin, *The Age of Rights* (1990), pp 16, 17.

<sup>25</sup> See Articles 22-26 of the Universal Declaration on Human Rights. Note in particular the statement in Article 22 that "Everyone ... is entitled to realization ... of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."

### *Refugees and stateless persons*

The early post-1945 period saw particular attention paid to the international provision for refugees and the related category of stateless persons. In relation to refugees, the Convention on the Status of Refugees ('the Refugee Convention'), adopted in 1951, broke with the pre-war approach, which had focused on particular nationalities, by laying down standards which were potentially applicable to all refugees.<sup>26</sup> Initially, the Refugee Convention applied only to persons who were refugees as a result of events prior to 1 January 1951, and contracting states were permitted to confine their obligations to refugees from Europe. Further expansion came with the 1967 New York Protocol, which removed the 1951 cut-off date altogether, while only allowing obligations to be limited to Europe where a contracting state had done so the 1951 Convention.<sup>27</sup> In practice, few states have retained a European limit, with the result that the economic and social rights set out in the Refugee Convention are now guaranteed to *all* refugees in contracting states.<sup>28</sup>

The substantive provisions of the Refugee Convention are limited in several respects. Refugees are entitled to access to employment after three years' residence, or if they have a spouse or children with the nationality of the country of residence.<sup>29</sup> They are also entitled to full equal treatment with nationals in labour legislation, elementary education, "public relief and assistance" and social security.<sup>30</sup> But the Refugee Convention falls short of full equal treatment in applying the "most favourable treatment of foreign nationals" standard to access to employment in the first three years, and to freedom of association.<sup>31</sup> Self-employment, recognition of professional qualifications, access to housing and post-elementary education are meanwhile governed by an even lower standard:

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<sup>26</sup> Convention on the Status of Refugees, 189 UNTS 150.

<sup>27</sup> Protocol relating to the Status of Refugees, 606 UNTS 267.

<sup>28</sup> At the time of writing, the Congo and Turkey are the only parties to the Protocol to have continued to limit their obligations to refugees from Europe.

<sup>29</sup> Ibid, Article 17(2).

<sup>30</sup> Ibid, Articles 22(1), 23 and 24.

<sup>31</sup> Ibid, Articles 15 and 17.



“treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances”.<sup>32</sup>

Moreover, most of the labour and social rights provisions of the Refugee Convention are subject to limitations concerning the individual’s status in the country of residence. The provisions on the right to work, labour law, freedom of association, recognition of professional qualifications, housing, public relief and social security apply only to refugees “lawfully staying” in the state in question.<sup>33</sup> On any interpretation, this excludes applicants for refugee status who are in a state with an effective procedure for determining such applications.<sup>34</sup> One exception is the right to engage in self-employment, which is stated to apply to those ‘lawfully in’ the territory of the state in question.<sup>35</sup> A second exception is access to public education, which is stated to apply to ‘refugees’, without any qualification.<sup>36</sup>

Broadly similar provision was made for the labour and social rights of stateless persons, by virtue of the 1954 Convention on the Status of Stateless Persons.<sup>37</sup> Stateless persons too benefit from the principle of equal treatment with nationals in relation to elementary education, public relief and labour legislation and social security.<sup>38</sup> One difference from the Refugee Convention is that there is no right of access to employment after three years. In addition, there is no ‘most favoured nation’ rule for freedom of association or for employment in the first three years, which are instead governed by a requirement of treatment “as favourable as possible ... not less favourable than that accorded to aliens generally”.<sup>39</sup> Meanwhile, the provisions concerning the degree of connection to

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<sup>32</sup> Ibid, Articles 18, 19, 21 and 22(2).

<sup>33</sup> For this phrase, see Articles 15, 17, 19, 21, 23 and 24.

<sup>34</sup> On the interpretation of ‘lawfully staying’, see Hathaway, 2005, p 189 and Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd ed, 2007), 525-526.

<sup>35</sup> Refugee Convention, Article 18.

<sup>36</sup> Ibid, Article 22.

<sup>37</sup> Convention on the Status of Stateless Persons, 360 UNTS 117.

<sup>38</sup> Articles 22(1), 23 and 24.

<sup>39</sup> Ibid, Articles 15, 17, 18, 19, 21 and 22(2).

the state in question – ‘lawfully staying’, ‘lawfully in’ and silence – are identical to those in the equivalent provisions of the Refugee Convention.

*ILO instruments concerning migrant workers*

In the post-1945 era, the ILO was again a pioneer in the development of the labour and social rights of migrants. In 1949, it adopted the Migration for Employment Convention (Revised) 1949 (No 97), to which it later added the Migrant Workers (Supplementary Provisions) Convention 1975 (No 143). These two Conventions are potentially applicable to everyone who is a “migrant for employment”.<sup>40</sup> That term is defined to mean a person who “migrates from one country to another with a view to being employed otherwise than on his own account.” It follows that these Conventions do not distinguish between permanent and temporary migrants. For our purposes, it is significant that neither of the Conventions is based on reciprocity – i.e. contracting states undertake obligations in respect of all migrant workers, irrespective of nationality.

At the time that the 1949 Convention and a related Recommendation (No 86) were adopted, the ILO’s aim was to “facilitate the international distribution of manpower and in particular the movement of manpower from countries which have a surplus of manpower to countries that have a deficiency”.<sup>41</sup> Accordingly, Convention No 97 contains standards in relation to both recruitment and working conditions. The full protection of the Convention is limited to “immigrants lawfully within its territory”, who alone are guaranteed treatment equal to the country’s nationals with respect to issues such as remuneration, hours of work, pay for overtime, union membership, social security and access to justice.<sup>42</sup>

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<sup>40</sup> See Article 11 in each case. Note that in Convention No. 143, this definition covers only Part II of the Convention, which concerns rights of equal treatment.

<sup>41</sup> ILO Recommendation No 86 (1949), para 4(1).

<sup>42</sup> ILO Convention 97, Article 6.

When the 1975 Convention and the related Recommendation (No 151) were adopted, the rationale and approach had changed significantly, as the key concern was now to control migration, rather than to facilitate it. As an ILO study put it: “Convention No 143 and Recommendation No 151 resulted from the first multilateral attempt to deal with migrant workers in irregular status and to call for sanctions against traffickers”.<sup>43</sup> Because of that background, the personal scope of Convention No 143 is different to that of Convention No 97. Firstly, Article 1 of Convention No 143 covers both regular and irregular migrants, and states that member states have a duty to respect the “basic human rights” of *all* workers. The ILO Committee of Experts (‘CEACR’) has subsequently given that term a broad interpretation, as referring to the International Bill of Rights (i.e., the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), the UN Migrant Workers Convention, and the ILO Declaration on Fundamental Principles and Rights at Work.<sup>44</sup> Secondly, Convention No 143 provides that irregular migrants have rights to remuneration, social security and other benefits stemming from past employment.<sup>45</sup> That said, lawful migrants are in a stronger position, as they continue to enjoy equal treatment and equality of opportunity, in a manner similar to Convention No 97.<sup>46</sup> In the case of migrant workers in a lawful position, the Convention also permits states to make the free choice of employment conditional upon a two-year period of residence for the purposes of employment, or, in cases of fixed term contracts of less than two years, conditional upon the completion of the first work contract.<sup>47</sup>

The ILO has also developed provisions on the social security rights of migrant workers. According to a recent ILO study, “it is of particular importance for migrant workers (1) to have the same access to coverage and entitlement to benefits as native workers, (2) to maintain acquired rights when leaving the

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<sup>43</sup> *International Labour Migration: A Rights-Based Approach*, ILO, 2010, p 129.

<sup>44</sup> Patrick Taran and Eduardo Geronimi, ‘Globalisation, Labour and Migration: Protection is Paramount’, International Migration Programme, (International Labour Office, 2003), p 13.

<sup>45</sup> ILO Convention No. 143, Article 9.

<sup>46</sup> *Ibid*, Article 10.

<sup>47</sup> *Ibid*, Article 14.

destination country, including the right to export the benefits they have earned, and (3) to benefit from the accumulation of rights acquired in different countries".<sup>48</sup> The Equality of Treatment (Social Security) Convention (1962) No 118, and the Maintenance of Social Security Rights Convention (1982) No 157 each provide for equal treatment of migrant workers and the country's nationals, on the basis of reciprocity. Convention No 118 covers nine areas of social security: medical care, sickness benefit, maternity benefit, invalidity benefit, survivors' benefit, employment injury benefit, unemployment benefit old-age benefit and family benefit. Convention No 157 provides for a system that guarantees that workers who change their residence from one country to another keep acquired social security benefits. Benefits acquired abroad should be maintained when migrants return to their home country. The maintenance of acquired rights applies to all areas where the Contracting States have legislation in force.

### *Migrant Workers Convention*

More systematic recognition for the labour and social rights of foreign nationals, including irregular migrants in particular, came with the International Convention on the Rights of All Migrant Workers and Members of their Families, ('Migration Workers Convention' or 'ICMRW'), adopted in 1990.<sup>49</sup> The background to this treaty was the perception on the part of some states of origin of migrants that ILO Convention No 143 had focused too much on combating irregular migration and employment. Because that outcome was thought to be linked to the pre-eminence of 'industrialised' countries within ILO decision-making, the Migrant Workers Convention came to be adopted under the aegis of the United Nations General Assembly.<sup>50</sup>

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<sup>48</sup> As note 43, p 125.

<sup>49</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 2220 UNTS 3.

<sup>50</sup> See Roger Böhning 'The ILO and the New UN Convention on Migrant Workers: The Past and Future' (1991) 25 *International Migration Review* 698.

A key feature of the Migration Workers Convention is its broad personal scope.<sup>51</sup> This arises in particular from its definition of ‘migrant worker’, as “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.”<sup>52</sup> This definition covers all economically active migrants, including both employees and the self-employed. It applies to economically-active foreign nationals irrespective of their reasons for migration, or the immigration category (if any) they were admitted under. It is also independent of the lawfulness of the person’s presence or their economic activity. Because the Convention also covers immediate family members,<sup>53</sup> its breadth means that it is close to being an instrument concerning migrants *as such*.

The rights recognised in the Migrant Workers Convention are differentiated by immigration status. Part III of the Convention recognises various human rights for all migrant workers and their family members, irrespective of immigration status. Part IV of the Convention then limits certain rights to migrant workers and their family members whose stay complies with immigration laws. This division within the Convention is open to the criticism that it implies that some rights do not apply to persons in an irregular position.<sup>54</sup> Nevertheless, the Convention as a whole appears an improvement for irregular migrants, precisely because it is explicit as to the rights that *do* apply to them.<sup>55</sup> In addition, the

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<sup>51</sup> Article 3 ICRMW lists several exceptions, including persons sent by international organisations and foreign states, refugees and stateless persons (who are covered by the separate regime discussed above), and students and trainees.

<sup>52</sup> Article 2 ICRMW. See Ryszard Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (1997), pp 149-152.

<sup>53</sup> Article 3 ICRMW gives a definition of family members which includes the spouses of migrant workers, persons “having with them a relationship that, according to applicable law, produces effects equivalent to marriage”, and their dependent children.

<sup>54</sup> See Linda Bosniak, ‘Human Rights, State Sovereignty, and the Protection of Undocumented Migrants Under The International Convention For The Protection of The Rights of All Migrant Workers and Members of Their Families’ (1991) 25 *International Migration Review* 737, at p 759.

<sup>55</sup> See Isabelle Slinckx, ‘Migrants’ Rights in UN Human Rights Conventions’ in Paul de Guchteneire, Antoine Pécoud and Ryszard Cholewinski (eds), *Migration*

supervisory work of the Committee on Migrant Workers ('CMW') has shown the particular relevance of the Convention to those in an irregular position.<sup>56</sup>

The provisions of the Migrant Workers Convention concerning the right to work, set out in its Part IV, are limited to migrants in a lawful position. Article 52 provides for the free choice of employment after a maximum of five years. (This is less generous than the two-year maximum set out in Article 14 of ILO Convention No 143, discussed above.<sup>57</sup>) Article 54 includes provision for equal treatment with nationals in access to public work schemes and – subject to Article 52 – to alternative employment in the event of loss of work. Article 55 recognises the right of migrant workers to equal treatment with nationals in the exercise of remunerated activity for which they have permission.

Other labour and social rights set out in the Convention are of benefit to all migrants, including those in an irregular position. Take first the Convention's provisions concerning the employment relationship. The one provision in that area which applies to legal migrant workers alone is Article 54, which guarantees a right to equal treatment in respect of protection against dismissal. The norm under the Convention, however, is that labour laws apply to all workers, irrespective of the legality of their stay or their employment. In particular, Article 25 recognises the right of all migrant workers to equal treatment with nationals in remuneration and in other terms and conditions of employment. It specifically provides that migrant workers should not be deprived of the right to equal treatment "by reason of any irregularity in their stay or employment", and that "employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by

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*and Human Rights: The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press, Cambridge 2009), pp 146-147.

<sup>56</sup> The CMW was established on 1 January 2004. Its main role is the consideration of state reports on the implementation of the Convention. It has also adopted a General Comment on Migrant Domestic Workers (2010). The discussion of its work here draws upon material in Bernard Ryan, 'In Defence of the Migrant Workers Convention: Standard-Setting for Contemporary Migration' in Satvinder Juss (ed), *The Ashgate Research Companion to Migration Theory and Policy* (forthcoming, 2013).

<sup>57</sup> For a discussion, see Cholewinski (1997), 163.

reason of such irregularity” (Article 25(3)). The CMW has also focused attention on whether national labour laws protect migrants, irrespective of the legality of their stay.<sup>58</sup> It has called for the inclusion of migrant domestic workers within the scope of labour law, and for labour law protections to be made effective for migrant domestic workers and for migrant workers in agriculture.<sup>59</sup> The CMW has also made specific recommendations concerning access by irregular migrant workers to labour law protections, through the possibility to initiate legal proceedings and to rely upon other complaint mechanisms.<sup>60</sup>

Trade union rights provide a second illustration. These are provided for in two places in the Convention. Article 26 sets out three rights concerning trade unions, which apply to all migrant workers: “to join freely”, “to seek ... aid and assistance”, and “to take part in meetings and activities”. Article 40 of the Convention then adds the right “to form ... trade unions” for migrants in a lawful position alone. The implication that those in an irregular position cannot *establish* trade unions is at odds with the position under more general international instruments (ILO Convention 87, Article 8 ICESCR and Article 22 ICCPR, discussed below).<sup>61</sup> In practice too, the Committee on Migrant Workers has focused upon Article 40, even though Article 26 might have been applicable – for example, when contracting states fail to fully recognise foreign nationals’ trade union rights, and when contracting states exclude foreign nationals from official positions within trade unions.<sup>62</sup> Nevertheless, Article 26 covers the trade

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<sup>58</sup> The CMW observations on labour law have not always been expressly based upon Article 25. It has also relied upon the requirement for an effective remedy for violations of the Convention (Article 83 ICRMW) or the principle of equal protection under the law (not stated expressly in the Convention). For a fuller discussion, see Ryan (2013).

<sup>59</sup> In relation to scope, see CMW observations on Egypt (2007) paras 38-39 and in General Comment No. 1 (2010), para 38. In relation to effectiveness, see for example CMW observations on Mexico (2006), paras 33-34 and 37-38 and General Comment No. 1 (2010), para 41.

<sup>60</sup> CMW observations on Mexico (2006), paras 25-26, Syria (2008), paras 25-26, and Algeria (2010), paras 16-17.

<sup>61</sup> For a discussion, see Cholewinski (1997), 164-165.

<sup>62</sup> In relation to trade union rights in general, see the CMW observations on the Philippines (2009), paras 33-34, Sri Lanka (2009), paras 25-26 and 31-32 and Algeria (2010), paras 28-29. In relation to official positions, see the CMW

union rights that irregular migrants are most likely to need in practice, and has been relied upon by the CMW to criticise provisions which specifically deny workers in an irregular position the right to join trade unions.<sup>63</sup>

A third example concerns social rights. Part III of the Convention contains three provisions in this area of benefit to all migrant workers and their family members. Article 27 provides that they should be treated equally with nationals in relation to social security. Article 28 provides for equal treatment with nationals in respect of medical care that is “urgently required for the preservation of ... life or the avoidance of irreparable harm to ... health,” and expressly states that “shall not be refused ... by reason of any irregularity with regard to stay or employment.” Article 30 sets out the right of a migrant worker’s child to equal access to education, and specifically states that access to pre-school education and schools should not be refused because of irregularity in the position of the child or of either parent. These Articles are supplemented by Article 43(1), which provides for the equal treatment of migrants in a lawful position *inter alia* in education, vocational guidance and training, housing, and “social and health services.” While the rights of irregular migrants are therefore incomplete, the extensive recognition given to them is highly significant. It has in particular permitted the CMW to criticise failures to make provision for irregular migrants in relation to each of social security, medical care and education in social provision for irregular migrants.<sup>64</sup>

### **3. European instruments on migration**

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observations on Mexico (2006), para 36 and (2011), para 46, Ecuador (2007), para 42 and (2010), para 42, El Salvador (2009), para 32 and Senegal (2010), para 16.

<sup>63</sup> CMW observations on Albania (2010), paras 29-30, Algeria (2010), para 19 and Guatemala (2011), para 31.

<sup>64</sup> CMW observations on Ecuador (2007), paras 39-40 (medical care), Egypt (2007), paras 36-37 (education), Azerbaijan (2009), paras 30-31 (medical care and education) and Algeria (2010), para 19 (social security and medical care).



The only migration-specific instruments at a regional level to have addressed labour and social rights have been adopted in Europe. The discussion here firstly considers Council of Europe instruments, which have made extensive provision for migrants' rights, but which are limited by reciprocity rules. This section goes on to consider the contribution of European Union law, and in particular of directives in the field of immigration and asylum law. These show the opposite pattern: fewer labour and social rights, for defined categories, but without a reciprocity condition.

### *Council of Europe*

To date the Council of Europe has adopted four instruments on the labour and social rights of foreign nationals. The first to be adopted was the 1953 European Convention on Social and Medical Assistance ('ECSMA').<sup>65</sup> It establishes a principle of equal treatment in social and medical assistance between foreign nationals of contracting states who are lawfully present, and who have insufficient resources, and the nationals of the state in question.<sup>66</sup> The Convention also provides that a person cannot be repatriated simply because they are in need of such assistance.<sup>67</sup> There are however some exceptions to that principle: a person may be returned to their home country if they have not been continuously resident in the Contracting Party for at least five years if they entered before the age of 55, or for 10 years if they entered after that age. In order for repatriation to be compatible with the Convention, the person also needs to be fit to travel and to have no close ties with the country of residence. In addition, the Convention provides that the Contracting Parties "agree not to have recourse to repatriation except in the greatest moderation", and only when "there is no objection on humanitarian grounds".<sup>68</sup>

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<sup>65</sup> European Convention on Social and Medical Assistance, CETS No 14.

<sup>66</sup> Ibid, Article 1.

<sup>67</sup> Ibid, Article 6(a).

<sup>68</sup> Article 7.

Secondly, the 1955 European Convention on Establishment includes a number of provisions on the labour and social rights of nationals of other contracting states.<sup>69</sup> Its Article 10 recognises the right of those persons to engage in gainful occupation in another state on an equal footing with that state's own nationals, unless there are "cogent economic or social reasons for withholding this authorization." Article 12 provides for a foreign national's right to engage in gainful occupation equally with another state's nationals, provided (a) they have lawfully engaged in that occupation in that state's territory for a continuous period of five years, (b) they have lawfully resided in that state for a continuous period of ten years, or (c) they are permanently resident in that state. Equal treatment with respect to wages and working conditions is guaranteed by Article 17, without any express requirement of lawfulness of stay. Finally, Article 20 provides for equal treatment in access to state education for lawfully resident foreign nationals of school age, but leaves scholarships to the discretion of individual states.

Thirdly, the 1972 European Convention on Social Security deals with issues such as unemployment benefits, invalidity benefits and old age benefits.<sup>70</sup> In these fields, it establishes a principle of equal treatment between nationals of contracting parties and the state's own nationals. Exceptions may however be made for non-contributory benefits whose amount does not depend on an individual's length of residence. For those benefits, a qualifying period of residence is possible, subject to the following limitations: in the case of maternity and unemployment benefits, a period of not more than six months before a claim; for invalidity and survivors' benefits, a period of not more than five consecutive years before a claim; and, for old-age benefits, not more than ten years' residence between the age of sixteen and the pensionable age, which may include the five years immediately before a claim.<sup>71</sup> With respect to voluntary insurance which depends on periods of compulsory insurance, the Convention provides that periods completed in another Contracting Party should be taken

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<sup>69</sup> European Convention on Establishment, CETS No 19.

<sup>70</sup> European Convention on Social Security, CETS No 78, Article 2.

<sup>71</sup> *Ibid*, Article 8.

into account.<sup>72</sup> As with the earlier Conventions, the European Convention on Social Security applies in principle only to the nationals of other contracting parties (see its Article 4). In this case, however, refugees and stateless persons are also included among the beneficiaries.

The fourth instrument is the 1977 European Convention on the Legal Status of Migrant Workers ('ECLSMW'), which elaborates the principle of equal treatment in labour and social rights.<sup>73</sup> The ECLSMW provides, for instance, that migrant workers and their families have equal rights to housing, to education and vocational training, and to access to higher education institutions.<sup>74</sup> Migrant workers should also enjoy working conditions equal to national workers, as provided by law, administrative action, collective agreements or custom, and derogation by contract from this provision is explicitly prohibited.<sup>75</sup> Similarly, migrant workers enjoy equal rights to national workers with respect to social security, industrial accidents and occupational diseases, as well as equal entitlements concerning labour inspections.<sup>76</sup> As with the earlier instruments, this Convention applies only to nationals of other contracting parties who are in a lawful position. Indeed, Article 1 goes further, and provides that "the term 'migrant worker' shall mean a national of a Contracting Party who has been authorised by another Contracting Party to reside in its territory in order to take up paid employment". The implication is that nationals of other parties who were authorised to reside for *other* reasons are not covered by the Convention.

It can be seen therefore that the Council of Europe treaties concerning the status of foreign nationals are based on reciprocity, and generally require that a foreign national be lawfully resident. Faced with these limitations, the political organs of the Council of Europe have sought to provide for the position of migrants in an irregular situation through non-binding measures. In 2000, the Committee of

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<sup>72</sup> Ibid, Article 10.

<sup>73</sup> European Convention on the Legal Status of Migrant Workers, 24 November 1977, CETS No 93.

<sup>74</sup> Ibid, Articles 13 and 14.

<sup>75</sup> Ibid, Article 16.

<sup>76</sup> Ibid, Articles 18, 20 and 21.

Ministers adopted a Recommendation on the 'Right to the Satisfaction of Basic Material Needs of All Persons in a Situation of Extreme Hardship'.<sup>77</sup> According to the Recommendation, member states should recognise a right of persons who are destitute to the satisfaction of "basic material needs", which right should at least include provision for food, clothing, shelter and basic medical care. Principle 4 of the Recommendation makes clear that this right is applicable to everyone, irrespective of nationality or legal status. In addition, in 2006, the Council of Europe's Parliamentary Assembly adopted a Resolution specifically on the 'Human Rights of Irregular Migrants',<sup>78</sup> which urged Member States to protect at least a "core minimum" of rights of irregular migrants. The labour and social rights identified were the following: adequate housing and shelter; emergency healthcare and healthcare for those that have special needs, such as children or the elderly; social protection through social security where that is "necessary to alleviate poverty and preserve human dignity"; social benefits for those who have made social security contributions; fair wages and working conditions, compensation for accidents, access to justice and trade union rights for all those that work; a right to education for children; and, particular protection for vulnerable groups such as children and the elderly.<sup>79</sup>

### *European Union*

The European Union has made several important contributions concerning migrants' labour and social rights. Firstly, its highly developed framework for the free movement of EU citizens and their family members ensures both the right to work in other member states and equal treatment on grounds of nationality in employment conditions and in social provision.<sup>80</sup> Secondly, the European

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<sup>77</sup> Council of Europe, Committee of Ministers, Recommendation No R (2000) 3.

<sup>78</sup> Council of Europe, Parliamentary Assembly Resolution 1509 (2006).

<sup>79</sup> Ibid, para 13.

<sup>80</sup> The economic and social rights of EU workers and their families are provided for in Regulation 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, [1968] OJ L 257/2, especially Articles 1 and 7-12. The rights of EU citizens and their family members in general are provided for in Directive 2004/38 on the right of citizens of the

Union's own bilateral agreements with third countries have given extensive recognition to labour and social rights. The most significant of these have been the European Economic Area agreement with Iceland, Liechtenstein and Norway, and an agreement on the free movement of persons with Switzerland, which include those countries' nationals within the framework applicable to EU citizens.<sup>81</sup> Measures adopted under an association agreement with Turkey guarantee equal treatment in working conditions and in social security provision (including non-contributory benefits) to Turkish workers in EU member states.<sup>82</sup> In addition, a series of bilateral agreements guarantee equal treatment either in working conditions and social security, or in working conditions alone, to many other states' nationals who work in the European Union.<sup>83</sup>

More importantly for our purposes, a series of directives on migration since 2003 have addressed the labour and social rights of migrants.<sup>84</sup> Among these, the most extensive provisions are contained in the 2003 Long-term Residents Directive.<sup>85</sup> It applies to non-EU nationals who have been lawfully resident in a Member State for five years, and who are not in temporary immigration categories, including – from 20 May 2013 – persons who are refugees or beneficiaries of international protection. Those covered by the Directive are eligible for equal treatment across a range of economic and social rights, including access to employment and self-employment, education and vocational

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Union and their family members to move and reside freely within the territory of the Member States, [2004] OJ L 158/ 77, Articles 23 and 24.

<sup>81</sup> Agreement on the European Economic Area, [1994] OJ L 1/3, Annex V, as amended by Decision 158/2007 of the EEA Joint Committee, [2008] OJ L 124/20, and Agreement on the Free Movement of Persons with Switzerland [2002] OJ L 114/6, Annex I, Article 9.

<sup>82</sup> Decision 1/80 of the EC-Turkey Association Council (unpublished), Article 10 and Decision 3/80 of the EC-Turkey Association Council, [1983] OJ C 110/60, Article 3.

<sup>83</sup> For an overview, see Steve Peers, *EU Justice and Home Affairs Law* (3rd Ed, 2011), pp 424-427.

<sup>84</sup> Britain and Ireland each have a right to choose whether to participate in individual measures. Denmark is excluded automatically from these measures.

<sup>85</sup> Directive 2003/109 concerning the status of third-country nationals who are long-term residents, [2004] OJ L16/44, as amended by Directive 2011/51, [2011] OJ L132/1. These Directives do not apply to Britain, Denmark or Ireland.

training (including study grants), “core benefits” within social assistance and social protection, housing and freedom of association.<sup>86</sup>

Extensive provision for labour and social rights has also been made by the Qualification Directives of 2004 and 2011, which concern both refugees and a wider category of humanitarian cases (‘subsidiary protection’).<sup>87</sup> In the labour field, under the 2011 Directive, both categories are entitled to equal treatment with nationals in access to employment and self-employment, in vocational training and in “the law in force” concerning remuneration and other conditions of employment.<sup>88</sup> In the social sphere, both categories benefit from equal treatment with nationals in relation to social security for employed and self-employed persons, the education of minors, and health care.<sup>89</sup> In contrast, a lower standard of equal treatment with “third country nationals legally resident” applies to the education of adults and to access to accommodation, for both categories.<sup>90</sup> Finally, refugees alone are entitled to full equal treatment in relation to social assistance, with member states free to limit the equal treatment rights of beneficiaries of subsidiary protection to “core benefits”.<sup>91</sup> Despite some departures from full equal treatment for refugees, the Qualification Directives

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<sup>86</sup> Ibid, Article 11.

<sup>87</sup> Directive 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, [2004] OJ L 304/ 12 and Directive 2011/95 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, [2011] OJ L 337/9. The 2011 Directive applies to twenty-four states, Britain and Ireland are bound by the 2004 Directive alone, and Denmark is bound by neither.

<sup>88</sup> Directive 2011/95, Article 26. Under the 2004 Directive, member states may take “the situation of the labour market ... into account” in deciding on access to employment by beneficiaries of subsidiary protection (its Article 26(3)).

<sup>89</sup> Directive 2011/95, Articles 26(4), 27(1) and 30(1). The rules are the same for social security and the education of minors under the 2004 Directive (its Articles 26(5), 27(1)), but member states may limit equal treatment in health care to “core benefits” (its Article 29(2)).

<sup>90</sup> Directive 2011/95, Articles 27(2) and 32(1). The rules are the same under the 2004 Directive (its Articles 27(2) and 31).

<sup>91</sup> Directive 2011/95, Article 29(2). The same difference between the categories is made by the 2004 Directive (its Article 28(2)).

have gone beyond the Refugee Convention in giving refugees more extensive rights to employment (equal treatment with nationals in the first three years), to self-employment (equal treatment with nationals), and to education (minors' rights are not limited to elementary education), and an express right to health care. Moreover, in the case of beneficiaries of subsidiary protection, these Directives have been a new departure, as a detailed status had not previously been elaborated for that category at the international level.

More limited recognition is given in EU law to the labour and social rights of foreign nationals who have recently been admitted under immigration law. The Family Reunification Directive of 2003 applies to third-country nationals who hold a residence permit with a period of validity of one year or more, and who have "reasonable prospects of obtaining the right of permanent residence." These persons' immediate family members are entitled to be admitted to the member state in question, and are then eligible for employment and self-employed activity after a maximum of twelve months' stay.<sup>92</sup> The Directive does not however provide access to social rights, presumably because self-sufficiency is a condition of admission.

Protection for economic and social rights is also incomplete within the 2009 Directive on Highly Qualified Employment. It provides for equal treatment *inter alia* in respect of working conditions, freedom of association, access to education and vocational training, and in social security provision.<sup>93</sup> The right to change employer is limited, however: in the first two years, changes are allowed only if the Directive's qualifying conditions continue to be met, and thereafter the right to change employer is confined to highly qualified employment.<sup>94</sup> The Directive also omits provision for equal access to health care, presumably because it is a

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<sup>92</sup> Directive 2003/86 on the right to family reunification, [2003] OJ L 251/12, Article 14. The Directive applies to none of Britain, Denmark or Ireland.

<sup>93</sup> Directive 2009/50 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, [2009] OJ L155/17, Article 14. The Directive applies to none of Britain, Denmark or Ireland. Note that highly skilled workers may continue to benefit from more generous member state schemes.

<sup>94</sup> *Ibid*, Article 12.

requirement under the Directive that the person has adequate health insurance.<sup>95</sup>

Finally, what of those who do not have a secure immigration status? One contribution made by EU law concerns the social and economic position of *applicants* for refugee status.<sup>96</sup> The Reception Conditions Directive of 2003 requires member states to grant asylum applicants “access to the labour market” if, through no fault of the applicant’s, they have not had an initial determination of their asylum claim within one year.<sup>97</sup> Minors who are applicants for refugee status, or their children, are eligible to full access to the state education system.<sup>98</sup> More generally, asylum applicants and their families are entitled to material provision “to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence.”<sup>99</sup> While these standards are low ones, the Directive does go further than the Refugee Convention (discussed above) in unequivocally laying down binding standards as to the economic and social position of applicants for international protection.

Reference may also be made to the Employer Sanctions Directive of 2009.<sup>100</sup> Its main purpose is to ensure that member states penalise employers for hiring workers whose stay in a member state is unlawful. In line with the overall purpose of discouraging irregular work by migrants, the Directive also requires that employers be liable for remuneration owed to irregularly staying

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<sup>95</sup> Ibid, Article 5(1)(e).

<sup>96</sup> Directive 2003/9 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18, Article 11(2). The Directive applies to Britain, but not Denmark or Ireland. In 2008 and 2011, the European Commission proposed the extension of the Directive to all applicants for refugee status and/or subsidiary protection, and substantive amendments concerning economic and social rights: see COM (2008) 360, revised by COM (2011) 320. These proposals had not led to legislation at the time of writing.

<sup>97</sup> Ibid, Article 11(2).

<sup>98</sup> Ibid, Article 10(1).

<sup>99</sup> Ibid, Article 13(2).

<sup>100</sup> Directive 2009/52 of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, [2009] OJ L 168/24.



workers.<sup>101</sup> In support of that requirement, it specifically provides for the pursuit of legal action by workers after having been removed from the state in question.<sup>102</sup> While these guarantees do not recognise the right of irregular migrant workers to the full protection of labour law, they are in line with the acceptance of that principle elsewhere at the international level.

The labour and social rights provided for in the EU's migration directives are therefore highly differentiated by migration category. That said, the EU measures have the advantage over Council of Europe instruments that they are universally applicable, benefitting all non-EU citizens, without the need for agreement with particular countries. They are therefore similar in spirit to international conventions on migration adopted in other fora, while stronger in their effects, as they are covered by the EU law principles of direct effect and supremacy in the legal orders of the member states.

#### **4. General global instruments**

The discussion of migration-specific instruments in sections 2 and 3 showed the gradual expansion, in the post-1945 era, of the recognition given within international law to the labour and social rights of migrants. In the first place – with the exception of the Council of Europe Conventions up to 1977 - reciprocity has generally come to be rejected as a requirement. Secondly, there has been gradual acceptance that equal treatment with the nationals of the country of residence, rather than with other foreign nationals, is the appropriate standard of treatment. To that, the main exception is that 'foreign national' comparators apply within the Refugee and Stateless Persons Conventions.

Nevertheless, there remain large gaps in the coverage of the migration-specific instruments. Among these instruments, the treaties concerning refugees and stateless persons have had the most extensive participation. At the time of

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<sup>101</sup> Ibid, Article 6(1)(a).

<sup>102</sup> Ibid, Article 6(2)(a).

writing (early 2013), of the 193 member states of the United Nations, 146 states are parties to the 1967 Protocol to the Refugee Convention, and 76 are parties to the Convention on the Status of Stateless Persons. By contrast there has been far less endorsement of other international standards. At the time of writing, the employment-oriented ILO Conventions 97 and 143 have 49 and 23 parties, respectively, with 55 states having ratified one or both. Meanwhile, the broader Migrant Workers Convention has 46 parties. Among the Council of Europe instruments, at the time of writing, the ECSMA has been ratified by eighteen of the 47 Council of Europe members, the European Convention on Establishment by twelve, the European Convention on Social Security by eight, and the ECLSMW by eleven.<sup>103</sup> The EU migration directives listed above are of greater significance, as they bind between 24 and 26 EU member states.

Because of these limitations to the coverage of the migration-specific instruments, it is necessary to go on to consider the potential contribution of general human rights standards. As before, the discussion first considers global instruments adopted within the ILO or United Nations (this section), and then those adopted at the regional level - in this case, in Europe and the Americas (section 5).<sup>104</sup>

### *ILO Conventions*

In addition to the ILO instruments concerning migrant workers (discussed above), general ILO Conventions, which apply to everyone, may be of particular importance for migrant workers. This can be illustrated by an examination of three principles which the ILO's 1998 Declaration of Fundamental Principles and Rights at Work treated as binding on all ILO Member States: freedom of

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<sup>103</sup> Moreover, these Conventions added little to European Union law, as Turkey was the only non-EEA state which was party to the first three Conventions, while the only non-EEA parties to the ECLSMW were Albania, Moldova, Turkey and the Ukraine.

<sup>104</sup> There is no discussion of the African regional human rights framework, as we could find no example of its having addressed the economic and social rights of foreign nationals.

association and the right to collective bargaining, the elimination of forced or compulsory labour and the elimination of discrimination in employment.<sup>105</sup>

The principle of freedom of association is elaborated within the ILO by the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No 98). At the time of writing, these two Conventions have been ratified by 152 and 163 states, respectively. The ILO's Committee on Freedom of Association (CFA) examines complaints on freedom of association and collective bargaining against all ILO members, both those that have ratified these Conventions, and those that have not. It has confirmed that Article 2 of ILO Convention No 87 applies to *all* workers, irrespective of their immigration status. Accordingly, in 2002, the CFA ruled that it was incompatible with Convention No 87 for Spanish legislation to exclude irregular migrants from the scope of the freedom of association.<sup>106</sup> In 2003, in a complaint against the United States, it found that the failure to protect irregular migrant workers against anti-union discrimination by employers was contrary to "freedom of association principles".<sup>107</sup> The principle that Convention No 87 applies to all workers, irrespective of immigration status, was reiterated by the CFA in its 2007 ruling

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<sup>105</sup> The abolition of child labour was a fourth fundamental principle listed in the Declaration, but is not discussed here as it does not appear to be of particular relevance to migrants. For a brief presentation of the Declaration and its follow-up procedure see Hilary Kellerson, "The ILO Declaration of 1998 on Fundamental Principles and Rights: A Challenge for the Future", (1998) 137 *International Labour Review* 223.

<sup>106</sup> *Spain (Case No 2121)* (23 March 2001) Report of the Committee on Freedom of Association No 327 (Vol LXXXV 2002 Series B No 1), paras 561-562

<sup>107</sup> *United States (Case No 2227)* Report of the Committee on Freedom of Association No 332 (Vol LXXXVI, 2003, Series B, No 3), para 613. As the United States has not ratified ILO Conventions Nos 87 and 98, its Government argued that it had no obligation to comply. In response, the CFA emphasised that it has a specific mandate, which stems from the ILO Constitution, to examine state compliance with both ratified and unratified Conventions: *ibid*, para 600. This complaint arose out of the *Hoffman* decision of the US Supreme Court in 2002: see further, section 5, below.

on a complaint against the Republic of Korea over its refusal to register a trade union which represented migrant workers.<sup>108</sup>

Forced labour is a second area where ILO has adopted Conventions that may be particularly pertinent to migrant workers – in this case, the Forced Labour Convention, 1930 (No 29) and the Abolition of Forced Labour Convention, 1957 (No 105). These two Conventions have been ratified by 177 and 174 states, respectively. Article 2, paragraph 1 of Convention No 29 defines ‘forced labour’ as “work or service exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”. The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) is the body which examines State reports on compliance with ILO instruments as a whole. It has ruled that retention of passports or other legal documents is a situation that indicates the existence of coercion. This practice, combined with further elements such as physical or sexual violence, restriction of the worker’s movement, debt bondage, withholding of wages or refusing to pay the worker, and threat of denunciation to the authorities, points towards the existence of forced labour.<sup>109</sup>

In the field of non-discrimination, the Discrimination (Employment and Occupation) Convention (1958) No 111 has been ratified by 172 states. It prohibits discrimination in employment on the grounds of “race, colour, sex, religion, political opinion, national extraction or social origin.” It does not therefore make specific reference to nationality or immigration status as prohibited grounds, which means that migrants are not sufficiently protected by this Convention. However, the CEACR has said that migrant workers are covered

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<sup>108</sup> *Republic of Korea (Case No 2620)* (18 December 2007) Report of the Committee on Freedom of Association No 353 (Vol XCII 2009 Series B No. 1), para 788.

<sup>109</sup> International Labour Office, “Human Trafficking and Forced Labour Exploitation: Guidance for Legislation and Law Enforcement”, Geneva, 2005, pp 19-21.

by Convention No 111 when they are discriminated against on the basis of one of the enumerated grounds.<sup>110</sup>

Beyond the instruments covered by the 1998 Declaration, there are other ILO Conventions, which are particularly relevant to migrant workers.<sup>111</sup> Of special importance is the Convention on Domestic Workers (2011) No 189, which takes a human rights approach to the regulation of domestic work, and has been ratified by four states. The Preamble to the Convention recognises that domestic workers are often migrants, and its text contains provisions that are specifically addressed to their migration status. One example is Article 8, which provides that migrant domestic workers recruited in another country should be given a written offer of employment or contract containing the terms of the offer, which is enforceable in the country of destination. Importantly, recognising that domestic workers may fear going to the authorities themselves or that they may not be aware of their rights, the Convention encourages a system of labour inspection (Article 17(2)). The Convention is to be welcomed for emphasising the urgency of domestic workers' claims, targeting the particularities of their sector and making them visible.<sup>112</sup>

### *The International Covenant on Economic, Social and Cultural Rights*

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is the general global instrument with the greatest significance for the labour and social rights of migrants. This is partly because of its very wide coverage, with 160 states having ratified it at the time of writing. The significance of the ICESCR

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<sup>110</sup> See for instance, the individual observation of the CEACR concerning Convention 111, (Australia), International Labour Conference, 89<sup>th</sup> Session, Geneva, 2001.

<sup>111</sup> Leading examples are the Labour Inspection Convention (1947) No 81 and the Occupational Safety and Health Convention (1981) No 155. For further discussion, see International Labour Office, 'International Labour Migration: A Rights Based Approach', Geneva, 2010, p 124 ff.

<sup>112</sup> For analysis of the Convention, see Einat Albin and Virginia Mantouvalou, 'The ILO Convention on Domestic Workers: From the Shadows to the Light', (2012) 41(1) *Industrial Law Journal* 67-78.

is also a consequence of the work of the Committee on the Economic, Social and Cultural Rights (CESCR), which makes observations on state reports concerning implementation of the Covenant, and adopts General Comments on the interpretation of its provisions.<sup>113</sup>

Under Article 2(2) ICESCR, the contracting states guarantee that Covenant rights “will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>114</sup> The relevance of the Covenant to migrants flows from the CESCR’s interpretation of the concept of ‘other status’ to include both nationality and immigration status. As it put it, in its General Comment No. 20 on *Non-discrimination in Economic, Social and Cultural Rights* (2009):

“The ground of nationality should not bar access to Covenant rights ... The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.”<sup>115</sup>

Building upon that reading, the Committee has repeatedly criticised restrictions upon the labour and social rights of migrant workers and refugees. We will see however that it has been somewhat less consistent in its analysis of the position of asylum-seekers and of migrants in an irregular position.

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<sup>113</sup> Information concerning CESCR observations on state reports is for the period from 2000, and has been taken from the Universal Human Rights Index (<http://www.universalhumanrightsindex.org/>).

<sup>114</sup> Note that Article 2(3), allows “developing countries” to limit the *economic* rights – but not the *social* rights – of non-nationals. For a discussion, see E.V.O. Dankwa, Working Paper on Article 2(3) of the International Covenant on Economic, Social and Cultural Rights’ (1987) 9 *Human Rights Quarterly* 230. His interpretation of the concept of ‘economic’ rights is similar to that set out in the Introduction above: *ibid*, 239-240.

<sup>115</sup> General Comment No. 20, *Non-discrimination in Economic, Social and Cultural Rights* (2009), para 30.

The Committee's strongest rejection of *all* discrimination on grounds of nationality or immigration status has been in relation to the right to education (Article 13 ICESCR). In General Comment No. 13 on the subject (1999), both nationality and lack of legal status were ruled out as reasons to deny education to "persons of school age residing in the territory of a State party".<sup>116</sup> Accordingly, the CESCR has criticised states for excluding the children of migrant workers, refugees and asylum-seekers from compulsory education, or for discriminating against them in relation to fees.<sup>117</sup> It has criticised inadequacies in the education actually provided to the children of foreign nationals, such as the failure to provide sufficient instruction in the mother tongue or in the state's official language, and the provision of a separate education system for refugee children.<sup>118</sup> The Committee has also taken the view that the children of irregular migrants should benefit fully from the right to education in practice.<sup>119</sup>

The Committee has been somewhat less clear in relation to the right to health (Article 12 ICESCR). In its General Comment No. 14 on this right (2000), the CESCR stated that parties were obliged to "refrain[] from denying or limiting equal access for all persons, including ... asylum seekers and illegal immigrants, to preventive, curative and palliative health services."<sup>120</sup> The strength of that statement was that it required those lacking an immigration status to have *equal* access to *all* health services, and not only those of an urgent nature (as in the

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<sup>116</sup> CESCR, *General Comment No. 13: The Right to Education* (1999), para 34. The Committee has also taken the view that the freedom to set up educational institutions (Article 13(4) ICESCR) should not be restricted on grounds of nationality: *ibid*, para 30.

<sup>117</sup> In relation to migrants, see the CESCR observations on Kuwait (2004), paras 26 and 46, and on China (2005), paras 89, 101, 116 and 126 (concerning Hong Kong and Macao). In relation to refugees, see the observations on Nepal (2001), paras 29 and 54. In relation to asylum-seekers, see the observations on Senegal (2001), paras 33 and 54, and Norway (2005), paras 22 and 43.

<sup>118</sup> CESCR observations on Sweden (2001), para 38, Liechtenstein (2006), paras 20 and 36, and Macedonia (2008), paras 27 and 48.

<sup>119</sup> CESCR observations on Spain (2004), para 7, welcoming a system that allowed access to schooling where parents registered with a local authority.

<sup>120</sup> CESCR, *General Comment No. 14: The Right to the Highest Attainable Standard of Health* (2000), para 34.

Migrant Workers Convention, above).<sup>121</sup> That approach has been reflected in recommendations that Italy “extend the subsidized health-care system to asylum-seekers without discrimination”, that Israel extend its health provisions to persons without a permanent resident permit, that Germany ensure “equal treatment in access to ... health care” for asylum-seekers, and that Spain “not limit the access of persons residing in the State ... to health services, regardless of their legal situation”.<sup>122</sup> Elsewhere, the Committee has been less categorical, calling instead for access to “adequate health care facilities, goods and services” for asylum-seekers and irregular migrant workers and members of their families.<sup>123</sup> The requirement to make “adequate” health care available, rather than all health care, presumably implies something less than full equality in health provision.

An emphasis on adequacy is also evident in the CESCR’s approach to the housing of non-nationals, probably because Article 11 ICESCR itself refers to “the right of everyone to an adequate standard of living for himself and his family, including adequate ... housing.” The Committee’s General Comment No. 4 on the subject (1991) was silent in relation to non-nationals, stating simply that “The right to adequate housing applies to everyone” and that “enjoyment of this right must ... not be subject to any form of discrimination”.<sup>124</sup> The CESCR’s observations on state reports have typically focused on practical considerations - calling upon states to address the sub-standard housing of certain categories of migrant,<sup>125</sup> and to take measures against *de facto* discrimination against migrant groups in

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<sup>121</sup> See Vincent Chetail and Gilles Giacca, ‘Who Cares? The Right to Health of Migrants’ in Andrew Clapham and Mary Robinson (eds), *Realising the Right to Health* (Zurich, Rueffer, 2009).

<sup>122</sup> CESCR observations on Italy (2000), para 32, Israel (2011), para 31, Germany (2011), para 13, and Spain (2012), para 19.

<sup>123</sup> CESCR observations on Belgium (2008), para 35, in relation to irregular migrant workers and their families only, and on France (2008), para 47, in relation to asylum-seekers as well.

<sup>124</sup> CESCR, *General Comment No. 4: The Right to Adequate Housing* (1991), para 6.

<sup>125</sup> CESCR observations on Costa Rica (2008), para 26, and Cyprus (2009), para 21.



the housing market.<sup>126</sup> It has also complained about states' own failures to make adequate provision for current asylum-seekers, for those whose applications have failed, and for irregular migrants and failed asylum-seekers who are in detention.<sup>127</sup> It is therefore clear that the Committee considers that all foreign nationals, including irregular migrants, are covered by the right to adequate housing.

Under the Covenant, access to social provision is covered both by the right to social security set out in Article 9 ICESCR and by the right to an "adequate standard of living" in Article 11 ICESCR. The Committee has frequently criticised states for restricting or delaying migrant workers' access to social security schemes.<sup>128</sup> In addition, in General Comment No 19 on *The Right to Social Security* (2005), the Committee declared that "non-nationals should be able to access non-contributory schemes for income support", and that "refugees, stateless persons and asylum-seekers ... should enjoy equal treatment in access to non-contributory social security schemes".<sup>129</sup> That statement must however be read in the light of its call for Austria (2006) to ensure "adequate social support" for this category.<sup>130</sup> The Committee has also contemplated more limited forms of support for failed asylum applicants and irregular migrants.<sup>131</sup> Its position therefore appears to be that all persons, irrespective of status, are entitled to at least a basic form of social support – probably aimed at subsistence – rather than full equal treatment in social assistance and social security.

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<sup>126</sup> CESCR observations on Denmark (2004) paras 21 and 34, Italy (2004), para 46, Belgium (2008), para 14, and France (2008), paras 21 and 41.

<sup>127</sup> CESCR observations on Switzerland (2010), para 18, Norway (2005), paras 19 and 38, and Cyprus (2009), para 22, respectively.

<sup>128</sup> CESCR observations on Australia (2000), para 32, Jordan (2000), para 19, Kuwait (2004), paras 20 and 40, China (2005), paras 84, 96, 114 and 124 (in relation to Hong Kong and Macao), Monaco (2006), paras 10 and 18 and San Marino (2008), paras 13 and 25.

<sup>129</sup> CESCR, *General Comment No. 19: The Right to Social Security* (2008), paras 37 and 38.

<sup>130</sup> CESCR observations on Austria (2006), para 29.

<sup>131</sup> CESCR observations on the United Kingdom (2009), para 27 (both groups) and Switzerland (2010), para 12 (irregular migrants).

In the field of labour rights, the most complex questions concern the scope of the right to work (Article 6 ICESCR). In its General Comment No. 18 on the subject (2005), the CESCR listed protection from forced labour, policies to assist the unemployed, access to work, and non-discrimination in employment opportunities as falling within this right.<sup>132</sup> The Committee's observations on the right to work of foreign nationals have emphasised the need to address comparatively high levels of unemployment among migrants, and discrimination against foreign nationals in the labour market, where these occur.<sup>133</sup> It is evident from these observations that the CESCR considers that long-term resident foreign nationals and recognised refugees benefit fully from Article 6. CESCR observations concerning the United Kingdom (2009) and Germany (2011) have shown that it also considers asylum-seekers to be covered by the principle of equal access to work,<sup>134</sup> and we must presume that they are also therefore covered by the other elements of the right to work listed above. In addition, the Committee has criticised state policies which do not give workers whose right to stay is linked to a specific employment sufficient opportunity to find a new employer when the initial employment comes to an end.<sup>135</sup> What is uncertain is the extent to which these workers also benefit from protection against discrimination in hiring decisions, or from policies aimed at reducing unemployment. Finally, the Committee has to date been silent as to the position of irregular migrant workers. While it appears unlikely that they benefit from rights concerning access to employment, nevertheless, they arguably ought to be

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<sup>132</sup> CESCR, *General Comment No. 18: The Right to Work* (2005), paras 9 and 12.

<sup>133</sup> In relation to unemployment, see CESCR observations on Denmark (2004), paras 15 and 26, Belgium (2008), paras 16 and 30, Sweden (2008), para 20, Australia (2009), para 18, and Switzerland (2010), para 9. In relation to discrimination, see CESCR observations on Sweden (2001), para 29, and Azerbaijan (2004), para 15.

<sup>134</sup> In its concluding observations on the United Kingdom (2009), the CESCR "encourage[d]" it "to ensure that asylum-seekers are not restricted in their access to the labour market while their claims for asylum are being processed" (para 27). It has also called on Germany (2011) to "ensure, in line with international standards, that asylum-seekers enjoy equal treatment in access to ... [sic] labour market" (para 13). In addition, in the case of Slovakia (2012, para 13), the CESCR criticized a waiting period of one year before asylum-seekers gained access to the labour market.

<sup>135</sup> CESCR observations on China (2001), para 15 and (2005), paras 78 and 95, and South Korea (2009), para 21.

included within the principle against forced labour, as they have a particular need for that protection.

The principle that “everyone” has “the right ... to the enjoyment of just and favourable conditions of work” (Article 7 ICESCR) has featured prominently in Committee observations concerning foreign workers. It has expressed concern at the concentration of migrants in the informal economy, on the grounds that they are likely to lack security and/ or protection against poor terms and conditions.<sup>136</sup> It has also expressed concern at insufficient labour market enforcement activity on the part of state authorities where migrant workers face exploitative treatment – both in general,<sup>137</sup> and in the particular cases of migrant domestic workers<sup>138</sup> and migrant workers in agriculture.<sup>139</sup> In addition, the Committee has criticised gaps in labour law: both the exclusion of foreign workers as a whole, and the specific exclusion of domestic workers, as that is an occupation in which foreign nationals are highly represented.<sup>140</sup> Finally, it has been clear that both the protection of labour law, and related enforcement measures, should cover workers in an irregular position.<sup>141</sup> There therefore appear to be no categories of foreign national who are not fully protected by Article 7 ICESCR.

Article 8 ICECSR provides for freedom of association into trade unions, including “the right of everyone to form trade unions and join the trade union of his choice”, “the right of trade unions to function freely”, and the right to strike. In this area, the CESCER has criticised the exclusion of foreign nationals from the

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<sup>136</sup> CESCER observations on Russia (2003), paras 17 and 45, Serbia (2005), para 17, Costa Rica (2008), paras 19 and 38, and Kenya (2008), para 13.

<sup>137</sup> CESCER observations on Kuwait (2004), para 16, Cyprus (2009), para 14, South Korea (2009), paras 18 and 21 and the United Kingdom (2009), para 22.

<sup>138</sup> CESCER observations on Spain (2004), paras 15 and 32, China (2005), para 83 (in relation to Hong Kong), Canada (2006), para 49 and Costa Rica (2008), para 18.

<sup>139</sup> CESCER observations on Kazakhstan (2010), para 20.

<sup>140</sup> CESCER observations on Jordan (2000), para 19 (foreign nationals excluded from minimum wage) and Kuwait (2004), paras 17 and 27 (domestic workers excluded from coverage of labour law).

<sup>141</sup> CESCER observation on the Dominican Republic (2010), para 18.

right to join trade unions,<sup>142</sup> their exclusion from holding trade union office,<sup>143</sup> and their being “denied participation in trade union activities” in practice.<sup>144</sup> In addition – as in the case of Article 6 - the Committee has been explicit that trade union rights apply to workers an irregular position.<sup>145</sup> This absence of limits to the trade union rights of foreign nationals may be contrasted with the convoluted position under the Migrant Workers Convention (discussed above).

### *The International Covenant on Civil and Political Rights*

The contribution of the International Covenant on Civil and Political Rights (ICCPR) to the economic and social rights of foreign nationals may be addressed more briefly.<sup>146</sup> The ICCPR is of potential interest because 167 states are parties to it. Moreover, in a General Comment on *The Position of Aliens under the Covenant*, published in 1986, the Human Rights Committee (HRC) set out the general view that, unless otherwise stated in the Covenant, the rights it contained applied “to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.”<sup>147</sup>

The ICCPR contains only two provisions which clearly address labour and social rights. The first is the prohibition on forced labour in Article 8(3). Relying upon Article 8, in 2001 the HRC expressed its concern at “the failure to protect Haitians living or working in the Dominican Republic from serious human rights

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<sup>142</sup> CESCR observations on Kuwait (2004), paras 18 and 38 and Peru (2012), para 12.

<sup>143</sup> CESCR observations on Senegal (2010), paras 22 and 44.

<sup>144</sup> CESCR observations on Jordan (2000), para 19.

<sup>145</sup> CESCR observations on South Korea (2009), para 21 and the Dominican Republic (2010), para 18.

<sup>146</sup> The discussion here of HRC observations on state reports is for the period from 2000 only, and draws upon the Universal Human Rights Index, available at <http://www.universalhumanrightsindex.org/>. We are unaware of any examples of individual complaints to the Human Rights Committee that concerned the economic and social rights of foreign nationals.

<sup>147</sup> HRC, *General Comment No. 15: The Position of Aliens under the Covenant* (1986), para 1.

abuses such as forced labour ...”<sup>148</sup> The prohibition on forced labour was also cited in criticism of Thailand in 2005, when the Committee’s assessment was that “the deplorable conditions in which migrants are obliged to live and work indicate serious violations of Article [ ] 8 ... of the Covenant.”<sup>149</sup>

The second ICCPR provision of relevance is Article 22, which recognises the right of association into trade unions. The HRC expressed its concern that in Kuwait (2000) the rights to form trade unions and to take part in their activities were “restricted *de facto*” for both foreign and domestic workers.<sup>150</sup> Article 22 ICCPR was referred to as one of the rights that should be guaranteed to Haitian workers in the Dominican Republic (2001), in order to address their poor working and living conditions.<sup>151</sup> In the same vein, in the case of South Korea (2006), the HRC noted that “migrant workers face[d] persistent discriminatory treatment and abuse in the workplace, and [were] not provided with adequate protection and redress”, and recommended that the state ensure that migrant workers enjoyed Covenant rights, including the right to form trade unions.<sup>152</sup>

In its comments concerning Thailand and South Korea which have been referred to, the HRC also commented on deficiencies in the remedies available to migrant workers who faced discriminatory or exploitative conditions at work. Here, the Committee relied on the non-discrimination principles contained within the Covenant: Article 2, under which a contracting state “undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind”, and Article 26, which requires states to “prohibit[] any discrimination and guarantee to all persons equal and effective protection against discrimination”, and Article 2.<sup>153</sup> Through this creative use of non-discrimination principles to call for effective remedies, the HRC has given partial recognition under the ICCPR to the

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<sup>148</sup> HRC observations on the Dominican Republic (2001), para 17.

<sup>149</sup> HRC observations on Thailand (2005), para 23.

<sup>150</sup> HRC observations on Kuwait (2000), para 22.

<sup>151</sup> HRC observations on the Dominican Republic (2001), para 17.

<sup>152</sup> HRC observations on South Korea (2006), para 12.

<sup>153</sup> HRC observations on Thailand (2005), para 23 (Article 26 only) and South Korea (2006), para 12 (Articles 2 and 26).

right to fair conditions at work, usually taken to be protected under Article 7 ICESCR (discussed above).

## **5. Regional human rights instruments**

We saw in section 3 that, with the exception of those adopted at European Union level, regional migration-specific instruments are limited in their provision for the labour and social rights of migrants. The Council of Europe instruments on the subject are constrained by reciprocity rules, and generally do not cater for persons who are not lawfully resident. In other regions, moreover, there are no specific instruments of any kind on the subject.

In this section, we will see that general human rights instruments at the regional level have gone some way to redress that deficit, particularly in relation to persons in an irregular position. The Council of Europe has two general human rights documents with implications for the labour and social rights of migrants. Because of the subject-matter of this chapter, the European Social Charter (ESC), adopted in 1961, which guarantees labour and social rights, will be considered first, before going on to consider the implications in the socio-economic field of the European Convention on Human Rights (ECHR), adopted in 1950, which primarily concerns civil and political rights. The section will then examine the provision for labour and social rights made within the American regional human rights system.

### *European Social Charter*

The ESC protects labour and social rights, and is gradually being replaced by the Revised ESC, which entered into force in 1999. Of the 47 Member States of the

Council of Europe, 43 have ratified either the 1961 or the 1996 ESC.<sup>154</sup> The Charter has a particularity that distinguishes it from other human rights documents, in that it allows Contracting Parties discretion as to the rights by which they will be bound. There are seven core provisions in the ESC, of which five must be ratified. Some provisions that are applicable to migrants and are discussed below are included in these core provisions.<sup>155</sup> The Revised ESC contains a similar undertaking.<sup>156</sup> The Charter initially contained no complaints procedure, but rather a reporting obligation, with the European Committee of Social Rights ('ECSR') assessing state compliance in its conclusions. Today, the ECSR also has jurisdiction over collective complaints, brought by international organisations of employers and employees, national representative organisations of employers and employees and some international non-governmental organizations, under the Collective Complaints Protocol, which entered into force in 1998.

Article 12 ESC sets out a right to social security, and includes provision for contracting states to "take steps" to ensure both the equal treatment of foreign nationals and the retention of benefits arising out of periods of employment and insurance in other Contracting States (Article 12(4)). The ESC also includes a right to social and medical assistance (Article 13), which is to apply "on an equal footing" "to nationals of other Contracting Parties lawfully within their territories", in accordance with the obligations under the ECSMA 1953 (Article 13(4)). The ECSR has concluded that this paragraph applies to nationals of

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<sup>154</sup> At the time of writing, the 1961 Charter has been ratified by 27 states, and the Revised ESC by 32 states. Liechtenstein, Monaco, San Marino and Switzerland have not ratified either version.

<sup>155</sup> The core provisions are Article 1 (right to work), Article 5 (right to organise), Article 6 (right to bargain collectively), Article 12 (right to social security), Article 13 (right to social and medical assistance), Article 16 (right of the family to social, legal and economic protection) and Article 19 (right of migrant workers to protection and assistance).

<sup>156</sup> States must sign up to six out of nine core provisions of the Revised ESC, which adds Article 6 (right of children and young persons to protection) and Article 20 (the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex).

contracting parties who are lawfully present in another contracting state, even if they do not have a legal right of residence in its territory.<sup>157</sup>

In relation to the right to work, Article 18 of the Charter provides for the right of nationals of Contracting States to engage in a gainful occupation in other Contracting States. This Article provides that existing regulations should be applied in a spirit of liberality, that formalities ought to be simplified, and that regulations on the employment of foreign workers should be liberalised. It also recognises the right of nationals of Contracting States to leave their home country so as to engage in gainful occupation in other Member States. The ECSR has examined the question of expulsion following the loss of a job and has stated that “the threat of being obliged to leave the host country ... in fact constitutes an infringement of the freedom of the individual that it cannot be regarded as evidence of ‘a spirit of liberality’ or of liberal regulations.”<sup>158</sup>

Article 19 provides for a right of migrant workers and their families to “protection and assistance” when “in the territory of any other Contracting Party”. From as early as its first set of Conclusions, the ECSR said that the provision’s aim was to assist migrant workers and their families.<sup>159</sup> In its view, the challenges that migrants face mean that equal treatment between foreign and national workers may be insufficient, and that positive action towards migrants may be required. Under Article 19(4), Contracting States undertake to secure for “workers lawfully within their territories”, treatment not less favourable than that given their own nationals in three areas, in so far as these are regulated by law or regulations, or are subject to the control of administrative authorities: “remuneration and other employment and working conditions”; “membership of trade unions and enjoyment of the benefits of collective bargaining”; and, accommodation. This provision mirrors Article 6(1)(a) of ILO Convention No 97 (discussed above). In the work of the ECSR, the phrase ‘employment and working conditions’ has been interpreted to cover

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<sup>157</sup> Conclusions XIII-4 (1996), pp 60-61.

<sup>158</sup> Conclusions XIII-1 (1995), p 262.

<sup>159</sup> Conclusions I (1969), p 81.



vocational training.<sup>160</sup> In relation to union membership, the ECSR has found, for instance, that Turkey did not comply with its obligations, because it restricted the union membership of migrant workers.<sup>161</sup> The Committee has also emphasised the importance of accommodation to migrant workers and their families, and has criticised states that make public assistance with housing conditional upon the length of employment.<sup>162</sup>

The express personal scope of the Charter is narrow, in much the same way that the Council of Europe's migration-specific instruments are (see section 3, above). In the first place, the benefits of the Charter are limited to nationals of other contracting states. A provision in the Appendix to both the ESC and the Revised ESC on the 'Scope of the Social Charter in Terms of Persons Protected' confines Articles 1 to 17 to "foreigners only insofar as they are nationals of other Contracting Parties". The same limitation arises in the text of Articles 18 and 19, as indicated above. The Appendix to the Revised European Social Charter sets out exceptions for refugees and stateless persons lawfully staying in the territory of a contracting state. These categories are to be treated as favourably as possible, and in any event no less favourably than is required of the given contracting state under its obligations under the Refugee Convention of 1951, the 1967 Protocol, the Convention on the Status of Stateless Persons 1954 and other international treaties.<sup>163</sup>

Secondly, persons in an irregular position appear to be excluded from the scope of the Charter's substantive Articles other than Articles 18 and 19. This is achieved by a reference in the Appendix to "nationals of other Contracting Parties lawfully resident or working regularly within the territory of the Contracting Party". There is however a caveat - the precise implications of which are unclear - that the narrow personal scope of those Articles is "subject to the

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<sup>160</sup> Conclusions VII (1981), p 103.

<sup>161</sup> Conclusions XIII-3 (1995), p 418.

<sup>162</sup> Conclusions I (1969), p 215.

<sup>163</sup> The equivalent provision in the 1961 European Social Charter refers only to refugees, and only specifically mentions the 1951 Refugee Convention.

understanding that these Articles are to be interpreted in the light of the provisions of Articles 18 and 19.”

Recently, the ECSR has attempted to address the limitations on the personal scope of the ESC in the context of collective complaints. In the case *International Federation of Human Rights Leagues (FIDH) v. France*, the lack of access to healthcare of children of undocumented migrants was held to breach the right of children and young persons to social, legal and economic protection under Article 17 of the Revised ESC.<sup>164</sup> While that Conclusion appeared contrary to the clear wording of the Appendix, the Committee ruled that the exclusion of irregular migrants would be contrary to human dignity, which constitutes one of the document’s most fundamental underlying values.<sup>165</sup> This interpretation was confirmed in a subsequent ruling against the Netherlands, which held that the exclusion of children in an irregular position from access to housing was a breach of the specific right to housing in Article 31 of the Revised ESC, and the right of migrants to protection in Article 17.<sup>166</sup>

The decision to interpret the Appendix in a manner apparently opposed to its wording is not uncontroversial. It is difficult to predict with certainty whether the Committee would be prepared to extend the coverage of other Charter Articles to irregular migrants. It may be that it was willing to extend the coverage of the Charter only in cases of those that are most vulnerable, namely migrant children. More fundamentally, it might have been preferable for a re-examination of the personal scope of the ESC to be achieved through a revision of the text, so as to extend key principles of protection to irregular migrants. In that way, the ECSR would not find itself in the invidious situation of feeling compelled to disregard the wording of the documents that it interprets.

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<sup>164</sup> *International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No 14/2003, Decision of 8 September 2004.

<sup>165</sup> *Ibid*, para 26 ff.

<sup>166</sup> *Defence for Children International (DCI) v. Netherlands*, Complaint No 47/2008, Decision of 20 October 2009.

## *European Convention on Human Rights*

Like the ICCPR, which was discussed earlier, the ECHR protects civil and political rights. Even though the ECHR does not contain social rights, the ECtHR stated early on in its case-law, in *Airey v. Ireland*, that there is no watertight division between the Convention and the area of socio-economic rights.<sup>167</sup> In recent years the Court has adopted what has come to be known as an ‘integrated approach’ to interpretation.<sup>168</sup> In the case of the ECHR, that approach has meant that certain labour and social labour rights are treated as essential elements of what is primarily a civil and political rights document, and protected as such.<sup>169</sup>

Article 3 ECHR, which prohibits torture and inhuman or degrading treatment or punishment, is of particular relevance to migrants. In the case of *M.S.S. v. Belgium and Greece*, the Grand Chamber of the European Court of Human Rights examined whether the extreme poverty in which an asylum seeker lived in Greece, while his asylum application was pending, was compatible with that prohibition.<sup>170</sup> The applicant had found himself homeless with no access to sanitary facilities; had slept in fear that he would be attacked; and, had spent days looking for food, receiving some material support only from passers-by and a church. His claim before the Court was that his situation amounted to such vulnerability and deprivation that it breached Article 3. In response, the Greek Government argued that the Convention did not contain a right to asylum or a right to housing, which raised budgetary issues. Nevertheless, the Court held that “the applicant had been the victim of humiliating treatment showing a lack of

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<sup>167</sup> *Airey v Ireland*, App No 6289/73, Judgment of 9 October 1979.

<sup>168</sup> See Martin Scheinin, ‘Economic and Social Rights as Legal Rights’ in A Eide, C Krause, and A Rosas (eds), *Economic, Social and Cultural Rights*, Kluwer, 2nd ed, 2002, p 32, and Virginia Mantouvalou, ‘Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation’, (2013) 13 *Human Rights Law Review* (forthcoming).

<sup>169</sup> See *Sidabras and Dziautas v. Lithuania*, App Nos 55480/00 and 59330/00, Judgment of 27 July 2004. For analysis, see Virginia Mantouvalou, ‘Work and Private Life: *Sidabras and Dziautas v Lithuania*’, (2005) 30 *European Law Review* 573.

<sup>170</sup> *M.S.S. v. Belgium and Greece*, App No 30696/09, Grand Chamber judgment of 21 January 2011. For analysis see Gina Clayton, ‘Asylum Seekers in Europe: *M.S.S. v Belgium and Greece*’, (2011) 11 *Human Rights Law Review* 758.

respect of his dignity and [...] this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation.”<sup>171</sup> As these living conditions were due to the inaction of the authorities, Greece was in breach of Article 3. It is significant that in *M.S.S.* the Court took note of budgetary limitations that Greece faced because of an economic crisis, but ruled that such circumstances could not absolve a contracting state from their duties under Article 3, which contains an absolute prohibition.<sup>172</sup>

Article 4 ECHR, which prohibits slavery, servitude, forced and compulsory labour, is a second provision from which migrants may benefit. The landmark case of *Siliadin v. France* illustrated the operation of an integrated approach to interpretation.<sup>173</sup> It involved a migrant domestic worker from Togo who lived and worked in appalling conditions in France. The Court did not classify the situation as ‘slavery’ because the employers did not exercise a right of legal ownership over the applicant, but did find that the situation amounted to “servitude, forced and compulsory labour”. The applicant’s immigration status was viewed as a factor that made her particularly prone to exploitation. The Court placed special emphasis on the fact that she had been promised by her employers that her status would be regularised – something that never occurred – and on her fear that she would be arrested, which as the Court stressed, the employers further nurtured.<sup>174</sup> In relation to France, the Court held that the lack of legislation criminalising these extremely harsh working conditions amounted to a breach of Article 4. In support of the imposition of positive obligations on the state, the Court made reference to the ILO Forced Labour Convention No 30 (1929), which contains a special provision on the horizontal application of the prohibition on private individuals.

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<sup>171</sup> *M.S.S.*, para 263.

<sup>172</sup> *M.S.S.*, para 223.

<sup>173</sup> *Siliadin v. France*, App. No. 73316/01, Judgment of 26 July 2005. For analysis, see Virginia Mantouvalou, ‘Servitude and Forced Labour in the 21<sup>st</sup> Century: The Human Rights of Domestic Workers’, (2006) 35 *Industrial Law Journal* 135. On the social rights of domestic workers, see also Virginia Mantouvalou, ‘Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labor’, (2012) 34 *Comparative Labor Law and Policy Journal* 133.

<sup>174</sup> See, for example, paras 118 and 126.

The situation of migrant domestic workers was again examined in the case of *C.N. v. United Kingdom*.<sup>175</sup> The applicant had entered the United Kingdom unlawfully, and worked as a live-in domestic worker for an elderly couple, with only one afternoon off per month. During her employment, her wages were withheld in order to pay off a debt of which she was unaware, her passport was withheld, and she was threatened with denunciation to the authorities. When she did access the authorities, the police investigation unit specialising in human trafficking concluded that there was no evidence of that offence. At the time (2007-2009) there was no legislation in the United Kingdom criminalising slavery, servitude, or forced or compulsory labour. The absence of such legislation was incompatible with the Convention, as *Siliadin* had already shown. In addition, the Court ruled that the authorities had not had an adequate basis to investigate the offence of 'domestic servitude', which was the aspect of Article 4 at issue in the case. This ineffective investigation on the part of the authorities, due to the lack of criminal legislation, was also ruled to have breached Article 4 of the Convention.

The Convention contains a non-discrimination provision (Article 14), which is not a free standing equality right: instead, it prohibits discrimination in the enjoyment of the rest of the Convention rights. It also contains a right of everyone to the peaceful enjoyment of their possessions (Article 1 of Additional Protocol 1). These two provisions were examined in the case of *Gaygusuz v. Austria*, which concerned the social security benefits of foreign nationals.<sup>176</sup> The applicant was a Turkish national lawfully resident and working in Austria, who had paid contributions to an unemployment insurance fund in the same way as Austrian nationals. The authorities refused to pay an advance on his pension as an emergency payment under Austrian legislation for the sole reason that he did not have Austrian nationality. Reading social rights into the right to property and in this way adopting an integrated approach to the interpretation of the Convention, the ECtHR held that the benefit that Mr Gaygusuz claimed could be

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<sup>175</sup> *CN v. UK*, App. No. 4239/08, Judgment of 13 November 2012.

<sup>176</sup> *Gaygusuz v. Austria*, App No 17371/90, judgment of 16 September 1996.

classified as 'possessions', so that his claim was within the ambit of Article 1 of Additional Protocol 1. Turning to Article 14, the Court considered whether the difference of treatment between the applicant and Austrian nationals was justified, and ruled that it was not based on an 'objective and reasonable justification'. There was therefore a violation of the prohibition of discrimination in conjunction with the right to property. A similar finding was later made in the case *Koua Poirrez v. France*, where the authorities refused a non-contributory disability benefit to the applicant, who was a lawful resident in France.<sup>177</sup> The refusal of the authorities was again ruled to breach Article 14, in conjunction with Article 1 of Protocol 1.

This case law shows that the ECtHR recognises an overlap between civil, political, economic and social rights.<sup>178</sup> The coverage of the ECHR, as developed through the case law of the Court, appears to address some of the shortcomings of the ESC with its narrow personal scope. The ECtHR does not hesitate to extend the scope of protection to irregular migrants, when faced with grave hardship in circumstances that can fall within the scope of the ECHR, and is willing to find that the discriminatory treatment of migrant workers is in compatible with the Convention.

### *The Organisation of American States*

The key regional organisation in the Americas is the Organisation of American States (OAS), which has 35 Member States. It has adopted three significant texts in the field of human rights. The first was the American Declaration of the Rights and Duties of Man (1948). It mainly covers civil and political rights, but also includes three labour and social rights: the right to health (Article XI), the right to education (Article XII) and the right to work (Article XIV). The second is the

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<sup>177</sup> *Koua Poirrez v. France*, App No 40892/98, Judgment of 30 September 2003.

<sup>178</sup> Cf *N v. UK*, App. No. 26565/05, Grand Chamber judgment of 27 May 2008. For criticism of *N v. UK*, see Virginia Mantouvalou, '*N v UK*: No Duty to Rescue the Nearby Needy?', (2009) 72 *Modern Law Review* 815.

American Convention on Human Rights (1978).<sup>179</sup> It focuses on civil and political rights, and whose only provision concerning labour and social rights is a general, vague provision for the “progressive implementation” of those rights (Article 26). The third is the Additional Protocol in the Area of Economic, Social and Cultural Rights (‘the San Salvador Protocol’), which was adopted in 1988 and entered into force in 1999. Labour and social rights included in the San Salvador Protocol are the right to work, which makes reference to states’ duty to promote full employment (Article 6), the right to just conditions of work, including a right to decent remuneration, rest and leisure (Article 7), trade union rights (Article 8), the right to social security (Article 9) and the right to health (Article 10).

The ACHR protects the rights of everyone within the contracting states’ jurisdiction, irrespective of national origin (Article 1). The San Salvador Protocol contains a similar obligation (Article 3), which is also emphasised in its Preamble, which states: “the essential rights of man are not derived from one’s being a national of a certain State, but are based upon attributes of the human person, for which reason they merit international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American States”.

The American Convention on Human Rights (ACHR) is monitored by the Inter-American Court of Human Rights (IACtHR), where individuals can lodge an application for an alleged violation of rights under the Convention. An integrated approach to interpretation, which reads certain labour and social rights in a civil and political rights document, has appeared in the case law under the ACHR too.<sup>180</sup> Two landmark cases under the ACHR illustrate the expansive approach that the IACtHR has taken to the question of the social rights of migrants.

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<sup>179</sup> For a discussion of the relationship between the Declaration and the Convention, see Matthew Craven, ‘The Protection of Economic, Social and Cultural Rights under the Inter-American System of Human Rights’, in *The Inter-American System of Human Rights*, Harris and Livingstone (eds) (OUP, 1998) at 292 ff.

<sup>180</sup> See the discussion in Tara J Melish, ‘Rethinking the “Less as More” Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas’, (2006-2007) 39 *NYU Journal of International Law and Politics* 171 at 193 ff.

The first of these is the IACtHR's much-discussed advisory opinion on the rights of undocumented migrants.<sup>181</sup> This opinion was adopted in response to a question brought by the Government of Mexico, as to whether it was lawful to exclude undocumented migrants from access to labour rights. While that question did not refer to a particular state, it was understood to relate to the decision of the US Supreme Court in *Hoffman Plastic Compounds v. NLRB*,<sup>182</sup> in which undocumented migrant workers were denied back pay for lost wages, after their dismissal for attempts to organise a trade union. The IACtHR ruled that the exclusion of undocumented migrants from labour rights breached international principles of equality before the law and non-discrimination, which it recognised as norms of *jus cogens*. The Court accepted that it would be compatible with human rights law to deny employment to undocumented migrants, but emphasised that it would not be lawful to deny labour rights once someone is already employed. In its words:

“Labor rights necessarily arise from the circumstance of being a worker, understood in the broadest sense. A person who is to be engaged, is engaged or has been engaged in a remunerated activity, immediately becomes a worker and, consequently, acquires the rights inherent in that condition [...] [T]he migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment.”<sup>183</sup>

The Court's advisory opinion suggests that, while the state has no duty to provide employment to undocumented migrants, once they are employed, they are protected equally with other workers.<sup>184</sup>

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<sup>181</sup> *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, 17 September 2003, IACtHR (Ser A) No 18 (2003).

<sup>182</sup> 535 US 137 (2002).

<sup>183</sup> Paras. 133-134.

<sup>184</sup> For a case note, see Sarah H Cleveland, 'Legal Status and Rights of Undocumented Workers', (2005) 99 *American Journal of International Law* 460.



The second case is *Yean and Bosico Children v. the Dominican Republic*, which involved stateless children.<sup>185</sup> The applicants were two girls born and raised in the Dominican Republic, but who were of Haitian ancestry. Against a background of prejudice and discrimination against individuals of Haitian descent, when their parents applied for their birth certificate in order for the girls to attend school, the authorities refused it to them. The reason for the refusal was that they were not recognised as nationals of the Dominican Republic. The IACtHR held that that was discriminatory and breached the ACHR. It rendered the children stateless, and therefore unable to have access to several rights, including the right to education. It ruled that “[t]he State should comply with its obligation to guarantee access to free primary education for all children, irrespective of their origin or parentage, which arises from the special protection that must be provided to children”.<sup>186</sup>

These two decisions show that there is scope for the effective protection of the labour and social rights of irregular migrants within the Inter-American human rights system. In both cases, migrants who had lived and worked without legal documentation in a country, have been protected by the Court, which has focused on foundational values of human rights law – values such as dignity – rather than nationality and lawful residence.

## Conclusion

The initial aim of this chapter was to document the ways in which contemporary international law addresses the labour and social rights of migrants. It has shown that these questions are now covered in international texts specifically concerned with migration adopted within the ILO, United Nations, Council of Europe and European Union. It has also given evidence of a particular emphasis upon migrants’ labour and social rights on the part of supervisory bodies,

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<sup>185</sup> *Yean and Bosico Children v the Dominican Republic*, 8 September 2005, IACtHR (Ser C) No 130.

<sup>186</sup> Para. 244.

including the Committee on Migrant Workers, the CESCR, the ILO Committee on Freedom of Association, the European Committee of Social Rights, the European Court of Human Rights and the Inter-American Court of Human Rights. On the evidence of this chapter, these committees and courts are far freer to accept that *all* persons are eligible for key labour and social rights than the political actors who negotiate migration-specific texts.

The widespread interest in the labour market and social position of migrants within international law is presumably linked to the growth in international migration, and to the rise in political controversy concerning it, in developed countries and elsewhere. This chapter suggests that it also has another source: a fundamental evolution in the international law approach to the treatment of foreign nationals. The traditional view - that the treatment of foreigners is an aspect of the relationship between the two states in question - characterised pre-1945 international law. It was also evident in the reciprocity limit to the Council of Europe conventions concerning migrants adopted between 1953 and 1977. The first departures from that approach came with the provision for refugees and stateless persons and ILO Conventions on migrant workers. The move beyond reciprocity has become clearer over the past twenty-five years, as is evidenced by the Migrant Workers Convention of 1990, the European Union norms adopted since 2003, and the supervisory body activity already referred to. The presumption today in international law is that all migrants are entitled to equal treatment in the labour market and in social provision.

The main controversies in the contemporary context concern the position of irregular migrants. There is now clear support for the right of irregular migrant workers to the full protection of labour law, both in international texts and in the work of supervisory bodies. Similarly, there is clear support for the equal treatment of irregular migrants in respect of schooling. In the case of other social rights, meanwhile, the emerging consensus is for equal access to a basic level of social support and a basic level of health care, but not necessarily more than that.

It may perhaps be objected that a focus on international standards is too abstract, as states continue to limit the labour and social rights of migrants with short periods of residence, asylum-seekers, and those without status. Our response to any such objection is that international norms, and related supervisory activity, define the limits of acceptable policies in a perennially controversial field. The emerging international consensus concerning labour and social rights is of potential relevance within national-level debates, even in those states that are not fully bound by the international standards examined here.