



**Centre for European Policy Study (CEPS)**

**REPORT**

***Fundamental and Human Rights Framework: Protecting  
Irregular Migrants in the EU***

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## Introduction

Thousands of irregular migrants are living and working in the European Union in situations of acute vulnerability: denied basic labour protection, they tend to work long hours in sub-standard conditions for low pay in precarious employment. Many struggle to meet the most basic human needs: shelter, food, healthcare and education, and face the constant possibility of deportation.

Yet irregular migrants are holders of human rights and are protected by a multi-level human rights framework. This report aims to provide an overview of the fundamental and human rights applicable to irregular migrants in the European Union territory. It summarises the basic labour standards as well as the social and economic rights guaranteed within three different legal frameworks: the European Union (EU), the Council of Europe (CoE), and the international human rights treaties.

Section one analyses the set of fundamental rights granted by the EU level legal framework. It focuses particularly on the protection accorded by the EU Charter of Fundamental Rights to irregular migrants, which since acquiring a legally binding status with the entry into force of the Treaty of Lisbon in December 2009, has become the key instrument for the protection of fundamental rights for irregular migrants within the EU legal order.

Section two focuses on the human rights framework developed at regional level within the system of the Council of Europe. It examines the two primary human rights instruments of this protection regime – the European Convention on Human Rights (ECHR) and the European Social Charter – to which every EU member state is a contracting party. The application of these rights to irregular migrants will be examined against the backdrop of ongoing negotiations for the EU's accession to the ECHR with is set to reinforce the relevance of the ECHR for the EU.

Finally, section three sets out the framework of protection accorded to irregular migrants at international level. It presents the most relevant provisions of the universal human rights instruments of the UN, including the International Convention on the Protection of the Rights of all Migrant Workers and their Families (ICRMW), and of the International Labour Organisation (ILO).

Each section analyses the extent to which texts enshrining human rights can be applicable to irregular migrants and the mechanisms for the legal enforcement of rights. It does not examine the obstacles facing irregular migrants' access to rights in practice, which can be significant. This paper should therefore be read in conjunction with the accompanying CEPS report: *Irregular Migration in Europe: EU policies and the Fundamental Rights Gap*.

# 1. The European Union framework for the protection of fundamental rights

## 1.1. The EU Charter of Fundamental Rights

The Charter of Fundamental Rights of the EU (hereinafter ‘the Charter’) constitutes the core instrument for the protection of fundamental rights in the EU.<sup>1</sup> It lays down in a single text the range of civil, political, economic and social rights granted to European citizens and all persons resident in the EU. Following the entry into force of the Lisbon Treaty in 2009, the Charter is now legally binding. The result should see a strengthening of the fundamental rights framework in the scope of EU law.

All rights within the Charter apply to irregular migrants, unless explicitly stated otherwise.<sup>2</sup> Nevertheless, the Charter does accord some leeway to Member States to restrict the application of certain articles, by qualifying that rights are provided “under the conditions established by national laws and practices.”

Regarding labour rights, Article 15 of the Charter enshrines the right to work and Article 12 provides the right of everyone to form and join trade unions. A further set of labour rights are provided by the Charter in Title IV “Solidarity”, including Article 31 which provides the right of every worker to fair and just working conditions, including conditions which respect the health and safety of the worker. Article 31 limits maximum working hours and provides the right for rest periods and paid leave.

The Charter also provides a further set of social and economic rights, including the right of everyone to education and access to training (Article 14) and the right of access to preventive health care and to medical treatment (Article 35), although the latter is to be provided “under the conditions established by national laws and practices”. Social security benefits are limited to individuals *residing or moving legally* within the EU (Article 34.2).

Also relevant to note are the Charter provisions which stipulate that everyone has the *right to an effective remedy* and *to a fair trial* before an independent and impartial tribunal, including the provision of legal aid for those who lack sufficient resources (Article 47). These procedural rights should be central to preventing violations of irregular migrants’ wider fundamental rights.

The Charter specifies that the meaning and the scope of the fundamental rights which it foresees shall be the same as those laid down by the ECHR, but that this provision should not prevent EU law from providing more extensive protection (Article 52.3). This means that the Charter both guarantees as

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<sup>1</sup> The Charter of Fundamental Rights of the European Union O.J. (2010/C 83/02), 30.03.2010.

<sup>2</sup> Only a limited number of rights provided in the Charter (concerning for instance, the right to vote in European Parliamentary elections or the right to consular protection abroad) are restricted to citizens or lawful residents only.

minimum standards of protection the rights established by the Council of Europe system (see section 2), while at the same time allowing for Union law to provide still higher standards.<sup>3</sup>

### **Application and Monitoring**

The Charter applies to the laws and policies of the EU institutions, and can be used to scrutinise Member States' actions only when they are implementing EU law (Article 51). Therefore the Charter has no jurisdiction in areas over which the EU has no competence.

With regard to the rights' protection of irregular migrants, the limitation on the Charter's scope of application should not be too restrictive given the transfer of several aspects of immigration policy from the national sphere to (shared) EU legal competence.

The European Commission is responsible for ensuring that EU policies are compliant with the Charter and publishes an Annual Report on the Charter's application to monitor the progress achieved. The Commission may also use the charter to challenge member states if it thought fundamental rights were being violated.

The Court of Justice of the European Union (CJEU) will also play a role in enforcing the Charter, through requests for preliminary rulings from national courts. The CJEU has developed a solid jurisprudence in rights protection, and can be expected to continue to develop fundamental rights through its case law.

## **1.2. EU Secondary Immigration Legislation**

A number of secondary legislative instruments have been adopted by the EU in the domain of immigration.<sup>4</sup> However, the focus of EU immigration policy has primarily been one of migration control, manifesting in instruments for the removal of irregular migrants or penalising those who assist them, rather than rights protection. Those initiatives which do accord minimum rights to immigrants are reserved for legally residing third country nationals.

Nevertheless, provisions of the following two EU legislative instruments partially address the rights of irregular migrants:

- The **Returns Directive** (2008/115/EC)<sup>5</sup> provides minimum common standards and procedures for member states' removing irregular third country nationals from their territory. Though controversial, particularly provisions providing for extended detention periods, the Directive does

<sup>3</sup> O. De Schutter (2007), *Promoting and Protecting Fundamental Rights in the European Union: The Relation between the European Convention of Human Rights, the European Charter and the EU Member States Constitutions*, Briefing Paper, European Parliament, DG Internal Policies of the Union, Brussels.

<sup>4</sup> See the CEPS Report “: *Irregular Migration in Europe: EU Policies and the Fundamental Rights Gap*”

<sup>5</sup> Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals, (OJ 2008 L 348/98).

provide a number of safeguards for irregular persons pending removal, for instance, the right to appeal or seek review of decisions related to return (Article 13) and to receive essential health care and, in the case of children, to access education while removal is pending (Article 14). Furthermore, the directive states that when using coercive measures for non-voluntary removal, the member states are obliged to carry them out in a proportionate manner and in accordance with fundamental rights (Article 8.4) and foreseen the possibility for Member states to grant an autonomous residence permit for compassionate, humanitarian or other reasons, to an irregular immigrant (Article 6.4).

- The **Directive on residence permits for trafficking victims** (2004/81/EC)<sup>6</sup> defines the conditions for granting residence permits of limited duration to non-European Union (EU) nationals who are victims of human trafficking and (optionally) to “third country nationals who have been the subject of an action to facilitate illegal immigration to whom the residence permit offers a sufficient incentive to cooperate with the competence authorities” (para 9, preamble). Member states are obliged to offer victims of trafficking a reflection period during which time they are exempt from expulsion and granted access to accommodation, medical treatment and legal aid.

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<sup>6</sup> Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (OJ 2004 L 261/19).

## 2. Human rights in the Council of Europe framework

Within the comprehensive human rights framework of the Council of Europe, which includes about 200 legally binding treaties or conventions, there are two core human rights instruments: the European Convention of Human Rights (ECHR) and the European Social Charter (ESC).

Both instruments provide a framework of protection which is also applicable to irregular migrants. The proactive case law of both the European Court of Human Rights (ECtHR) and the European Committee on Social Rights – bodies charged with monitoring the application of the ECHR and the ESC – has been central to extend their respective reaches in protecting the fundamental rights of irregular migrants. However, the

### 2.1. The European Convention of Human Rights

The ECHR is of general application, meaning that its rights and freedoms apply to *everyone* within the jurisdiction of the contracting parties.<sup>7</sup> It covers primarily civil and political rights, such as prohibition of slavery and forced labour, right to respect for private and family life, freedom of association and free assembly, right to an effective legal remedy and prohibition of discrimination.

Among this set of rights, two articles in particular are central for the protection of irregular migrants in the EU: Article 3, the right not to be subject to torture or inhuman and degrading treatment and Article 8, the right to family and private life.

Article 3 ECHR, which prohibits torture as well as cruel, inhuman or degrading treatments is relevant for irregular migrants for three reasons. First, it provides safeguards for irregular migrants in detention condition.<sup>8</sup> Second, it restricts the authorities of the contracting states from proceeding with expulsions which would lead to prohibited treatment. Here, both conditions in the country of destination, as well as the personal characteristics of the foreigner (relating to age, pregnancy, health, etc.) are taken into account when determining the legality of the expulsion. Third, Article 3 is relevant for the protection of basic social and economic rights. The denial of basic social services (such as food, shelter or medical treatment) may bring the individual to conditions of destitution which could amount to inhuman and or degrading treatment.<sup>9</sup>

Article 8 ECHR on the right to family and private life has also been invoked to limit the scope of a contracting state's power to expel or refuse entry to a third country national. The European Court of

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<sup>7</sup> See Article 1 of the ECHR which states that “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.”

<sup>8</sup> In the *Saadi* case the ECtHR considered that the detention of a foreigner “can be to prevent his effecting an unauthorised entry” but provided guidelines to avoid arbitrariness, specifying that the place and conditions for detention should be appropriate, “bearing in mind that the measure is applicable not to those who have committed criminal offences but to aliens who have fled from their country”. ECtHR *Saadi v. United Kingdom*, No. 13229/03, 29 January 2008, paragraph 74.

<sup>9</sup> Invoking Article 3 for the protection of basic social and economic rights has tended to be reserved for the most severe cases of destitution, such as those involving the withdrawal of medical treatment for the medically ill.

Human Rights (ECtHR) has developed an extensive jurisprudence on the basis of Article 8, with which it may constrain national admission or expulsion decisions, contending that deportation would lead to an unjustified interference with the right of family life in the country of residence.<sup>10</sup>

Indeed, in taking a proactive approach to interpreting the provisions of the ECHR, the European Court of Human Rights (ECtHR) has played a decisive role in the development of an extensive body of jurisprudence drawing on the foundations provided by the Convention. In this way, it has expanded the reach of the Convention beyond political and civil rights, to include also the protection of certain social rights. For instance, the ECtHR has considered the legal position of the individual in social security law as 'ownership', with any disproportionate interference constituting a violation of the right to property as established by Article 1 of the first protocol to the Convention.<sup>11</sup> This could be relevant for irregular migrant workers who may have accrued social security rights and who are granted the right to property under the ECHR.

### **Application and Monitoring**

All 27 EU member states are contracting parties of the ECHR. *Everyone* within the jurisdiction of a contracting party, after having exhausted all national judicial remedies, can lodge complaints against any of those contracting parties before the ECtHR in Strasbourg.

The judgments of the ECtHR are legally binding on the signatory states. Where the ECtHR rules that there has been a violation of the ECHR, the member state responsible can be compelled to pay compensation to the victim whose rights have been infringed and required to take adequate remedial measures to comply with the legal obligations following from the judgement. It is then for the Council of Europe's Committee of Ministers to ensure that these remedial measures are properly implemented by the state in question.

The European Union is currently not party to the Convention. This means that if an individual feels that their rights have been infringed by acts and bodies of the EU institutions, including when EU Member States are acting in compliance with EU law, the ECtHR is limited in the scrutiny it can exercise. This has risked creating a gap in the European framework for the protection of fundamental rights.

This mismatch should be rectified once the EU becomes a signatory of the ECHR, as foreseen by the Treaty of Lisbon (Article 6 TEU). Accession to the Convention should ensure that the EU is subject to more rigorous external control and monitoring in human rights matters.

<sup>10</sup> See for instances the cases: ECtHR *Berrehab v. the Netherlands*, No. 10730/84, 21 June 1988; ECtHR *Moustaquim v. Belgium*, No. 12313/86, 18 February 2001.

<sup>11</sup> See K. Kapuy (2009), 'European and International Law in Relation to the Social Security of Irregular Migrant Workers', in D. Pieters and P. Schoukens (eds.) *The Social Security Coordination Between the EU and Non-EU Countries*, Oxford: Intersentia, pp. 129-30.



## 2.2. The European Social Charter

The European Social Charter (ESC)<sup>12</sup> complements the ECHR by offering further guarantees of economic and social human rights, including housing, healthcare, social security and education. However, the personal scope of the Social Charter is more limited than that of the ECHR. The Appendix of the ESC stipulates that the Charter is limited to "... foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned ..." (emphasis added).

Despite the fact that the wording of the ESC excludes irregular migrants from its scope of application, there are examples of exceptions, particularly where cases relate to children. In the formal complaint *FIDH v. France*<sup>13</sup> the European Committee on Social Rights (the body charged with overseeing complaints received concerning violations of the Charter) stated that "legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter". The Committee stressed that health care is a prerequisite for the preservation of human dignity, which is a fundamental value in European human rights law.<sup>14</sup>

Similarly, in the complaint *Defence for Children International v. the Netherlands*,<sup>15</sup> the European Committee on Social Rights call attention to the fact that the right to shelter is directly linked to the right to life, social protection, and respect for the child's human dignity and best interests. Consequently, the Committee concluded that: "states parties are required, under Article 31.2 of the revised Charter, to provide adequate shelter to children unlawfully present in their territory for as long as they are in their jurisdiction".<sup>16</sup>

### Application and Monitoring

All 27 EU member states are signatories of the European Social Charter.

To ensure the effective enforcement of social rights, the Social Charter is monitored through the system of "collective complaints". This system permits social partners and non-governmental organisations to lodge collective complaints of violations of the Charter with the European Committee of Social Rights. Admissible complaints are forwarded to the Committee of Ministers. The Committee of Ministers may then adopt a resolution recommending the state to take action to meet its obligations to the Charter.

<sup>12</sup> First adopted in 1961, the European Social Charter was revised in 1996. In this Chapter we refer to the Revised European Social Charter.

<sup>13</sup> See the European Committee on Social Rights, *International Federation for Human Rights (FIDH) v. France*, Collective Complaint No. 14/2003, Decision on the merits of 8 September 2004, available at: [http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC14Merits\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC14Merits_en.pdf) (14.06.2010).

<sup>14</sup> European Committee on Social Rights, *International Federation for Human Rights (FIDH) v. France*, Collective Complaint No. 14/2003, Decision on the merits of 8 September 2004, paragraphs 31 and 32.

<sup>15</sup> *Defence for Children International v. the Netherlands*, Complaint No 47/2008, European Committee on Social Rights.

<sup>16</sup> *Defence for Children International v. the Netherlands*, Complaint No 47/2008, European Committee on Social Rights, paragraph 64 of the Decision.

### 3. International Human Rights law

International human rights law comprises the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and two Covenants) and a further six core UN human rights treaties, known as thematic treaties. Together, these instruments represent the set of international norms and standards for the protection and promotion of human rights.<sup>17</sup>

International human rights norms are generally applicable to every person as a consequence of being human, irrespective of their migration status. Therefore, as a general rule, human rights apply to irregular migrants unless they are expressly excluded from the personal scope of application of the provision.

<b>International Bill of Human Rights</b>	<b>Date</b>	<b>Monitoring Body</b>
• Universal Declaration of Human Rights (UDHR)	1948	
• The Covenant on Civil and Political Rights (ICCPR)	1966	CCPR
• The Covenant on Economic Social and Cultural Rights (ICESCR)	1966	CESCR
<b>Thematic Human Rights Instruments</b>	<b>Date</b>	<b>Monitoring Body</b>
• The International Convention on the Elimination of All Forms of Racial Discrimination (CERD)	1965	CERD
• Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	1979	CEDAW
• The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	1984	CAT
• Convention on the Rights of Child (CRC)	1989	CRC
• International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW)	1990	CMW
• Convention on the Rights of Persons with Disabilities (CRPD)	2006	CRPD

#### 3.1 International Bill of Human Rights

**The Universal Declaration of Human Rights (UDHR)** sets out in 30 articles the human rights entitled to every individual. It clearly stipulates that everyone is entitled to the rights and freedoms set forth in the

<sup>17</sup> The Office of the High Commissioner for Human Rights has defined these 9 Conventions as “Core Human Rights Instruments”. List available at: <http://www2.ohchr.org/english/law/> (04.06.2010).

Declaration, “*without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth “or other status”*” (emphasis added).<sup>18</sup>

As the UDHR is of a declaratory nature, it is not legally binding. To give the standards in the UDHR legal force, the Covenant on Civil and Political Rights (ICCPR)<sup>19</sup> and the Covenant on Economic Social and Cultural Rights (ICESCR)<sup>20</sup> were developed. They provide a set of political and civil rights (ICCPR) and economic, social and cultural rights (ICESCR) which are legally binding on those States which ratify them. The two covenants and the declaration are known as the International Bill of Human Rights.

**The Covenant on Civil and Political Rights** is applicable to everybody, including irregular migrants, although certain rights (such as the right to vote or to be elected) are limited to citizens and others stipulate that only apply to lawfully residing aliens.<sup>21</sup>

**The Covenant on Economic Social and Cultural Rights**, which enshrines rights including those relating to just and favourable conditions, to social protection, education, an adequate standard of living and the highest attainable standards of physical and mental health, does not make any distinction on the basis of nationality or legal status.

However, the interpretation of the personal scope of the ICESCR’ social rights (in particular social security, social services, medical care and health protection) has proved controversial. In 1985, the UN Declaration on “The Human Rights of Individuals who are not Nationals of the Country in which They Live” limited the application of social rights only to migrants *lawfully* residing in the territory of the State. Afterwards, the Committee on Economic, Social and Cultural Rights (CESCR)<sup>22</sup> specified in two General Comments that irregular migrants are also entitled to the right of health care.<sup>23</sup>

### 3.2. The Other Thematic Human Rights Treaties

In addition to the International Bill of Human Rights, five further so-called “thematic treaties” have been developed in order to protect specific groups:

The **International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families** (ICRMW) is the most important universal instrument concerning immigrant workers. Adopted in 1990, it entered into force in 2003 and offers a common supranational framework of

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<sup>18</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), Articles 2 and 3, U.N. Doc A/810 at 71 (1948).

<sup>19</sup> International Covenant on Civil and Political Rights. United Nations General Assembly Resolution 2200A [XXI]. 16 December 1966.

<sup>20</sup> International Covenant on Economic, Social and Cultural Rights. United Nations General Assembly Resolution 2200A (XXI). 16 December 1966.

<sup>21</sup> Such as the right of movement and to choose his residence (Article 12) and the limits on the expulsion of aliens (Article 13).

<sup>22</sup> The CESCR is the monitoring body of the ICESCR. For a full explanation of how the monitoring bodies operate, see the text box on page 12 on Application and Monitoring.

<sup>23</sup> CESCR, General Comment N.14: the right to the highest attainable standard of health (Article 12), E/C.12/2000/4, paragraph 34; CESCR, General Comment N.19: the right to social security (Article 9), E/C.12/GC/19, paragraph 37.

basic norms and principles on how to develop labour immigration policies.<sup>24</sup> The fact that no EU Member State has yet ratified the ICRMW (alongside the other major immigrant receiving states such as the US and Canada) creates an important gap in the framework of protection for migrant workers, particularly those in an irregular situation.<sup>25</sup>

The ICRMW applies to all migrant workers and members of their families “without distinction of any kind” (Article 1). It offers a comprehensive and non-discriminatory definition of a 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 s/he is not a national” (Article 2.1).

The rights included in Part III (Articles 8 to 35) of the ICRMW are addressed to *all migrant workers and their family members irrespective of their administrative status*.<sup>26</sup> Article 25(1) guarantees equal treatment (including in relation to nationals) in respect of remuneration, other conditions of work and other terms of employment. The following two paragraphs of Article 25 specify that it is not lawful to derogate from the above principles in private contracts and that the irregular status of the worker does not alter in any way the legal or contractual obligations of the employer. Irregular migrant workers and their family members are also granted the right to join trade unions (Article 26) and, with respect of social security, “...shall enjoy in the state of employment the same treatment granted to nationals...” (Article 27).<sup>27</sup> Beside employment rights, the ICRMW also grants minimum procedural rights in case of detention (Articles 16 and 17) or expulsion (Articles 22 and 23).

Further to the ICRMW, rights enshrined in the other thematic treaties could also be relevant for irregular migrants:

- **The Convention on the Elimination of All Forms of Racial Discrimination**<sup>28</sup> calls on state parties to undertake a policy of eliminating racial discrimination, which is defined as:

“any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life” (Article 1(1)).

The CERD stipulates that it does not protect against discrimination on the grounds of citizenship, that is between citizens and non-citizens (Article 1(2)). However, this does not mean that “non-

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<sup>24</sup> For a more detailed overview of the ICRMW see V.A. Leary (2003), ‘Labour Migration’, in A.T. Aleinikoff and V. Chetail (eds.), *Migration and International Legal Norms*, The Hague: TMC Asser Press, p. 234.; R. Cholewinski, P. de Guchteneire and A. Pecoud (eds.) *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights*, Cambridge: Cambridge University Press.

<sup>25</sup> See the International Steering Committee for the Campaign for Ratification of the Migrants' Rights Convention, *Guide on Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, available at: [www.migrantsrights.org](http://www.migrantsrights.org) (14.06.2010).

<sup>26</sup> Part IV (Articles 36 to 56) only covers those who are documented or in a regular status/situation.

<sup>27</sup> Article 27 guarantees equal treatment between migrants and nationals in respect of social security “in so far as they fulfill the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties.” Although it is in Part III (applicable to all workers) the state could apply exceptions for undocumented not to be covered in ‘its applicable legislation’.

<sup>28</sup> For more detailed overview of the CERD see P. Thornberry (2005), ‘Confronting Racial Discrimination: A CERD Perspective’, in *Human Rights Law Review*, Vol. 5, No. 2, pp.239-269.

citizens” are completely excluded from protection by the Convention. As highlighted by the CERD’s monitoring Committee in its General Comment N.30 on “Discrimination against non citizens”,<sup>29</sup> guarantees against racial discrimination apply also to non-citizens regardless of their immigration status.<sup>30</sup>

- **The Convention on the Elimination of All Forms of Discrimination Against Women**<sup>31</sup> has interpreted by its relevant Committee as granting basic human rights (such as access to legal remedies and justice; and for rights whilst in detention) to undocumented women migrant workers.<sup>32</sup>
- **The Convention on the Rights of the Child**<sup>33</sup> also applies a broad personal scope, stating (in Article 2) that its provisions apply to every child in a signatory state: “*without discrimination of any kind* irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or *other status*” (emphasis added). The General Comment No. 6 of the Committee on the rights of the Child has further specified that the rights enshrined in the CRC, if not explicitly stated otherwise, apply to all children irrespective of their status.<sup>34</sup>

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<sup>29</sup> Committee on the Elimination of Racial Discrimination, General Comment No. 30: Discrimination against non-citizens, 01/10/2004, paragraph 7.

<sup>30</sup> K. Kapuy (2009), ‘European and International Law in Relation to the Social Security of Irregular Migrant Workers’, in D. Pieters and P. Schoukens (eds.) *The Social Security Coordination Between the EU and Non-EU Countries*, Oxford: Intersentia, pp. 124-125.

<sup>31</sup> UN Committee on the Elimination of Discrimination against Women, General Recommendation No. 26 on women migrant workers, CEDAW/C/2009/WP.1/R, provides for the rights of undocumented women migrant workers to; Right to enjoy the highest attainable standard of health and facilities for the treatment of illness and rehabilitation of health; right to education; etc.).

<sup>32</sup> K. Kapuy (2009), ‘European and International Law in Relation to the Social Security of Irregular Migrant Workers’, in D. Pieters and P. Schoukens (eds.) *The Social Security Coordination Between the EU and Non-EU Countries*, Oxford: Intersentia, pp. 124-125.

<sup>33</sup> Convention on the Rights of the Child, General Assembly resolution 44/25, 20 November 1989.

<sup>34</sup> Committee on the Rights of the Child, General recommendation No. 6: Treatment of unaccompanied and separated children Outside their country of origin, CRC/GC/2005/6. Cited in PICUM (2007) *Undocumented Migrants Have Rights! An Overview of the International Human Rights Framework*, p.13.

## Application and Monitoring

In general, all EU member states have ratified and are subsequently bound to comply with the above international treaties (with the exception of the ICRMW).

Each of the above-mentioned international treaties has established a committee of experts tasked with monitoring the execution of its provisions (and eventual protocols) by the signatory states.\* Each state party must regularly submit reports detailing its implementation of the rights envisaged in the relevant convention. The monitoring committees then send comments and recommendations to the state parties drawn up on the basis of the national reports.

The reporting procedure is complemented by three other monitoring mechanisms:

- **Individual complaints** can be submitted (under certain conditions) by anyone alleging a violation of treaty rights by a state party to the following treaty monitoring bodies: HRC, CERD, CAT and CEDAW.
- **Inquiries** may be initiated by the CAT and the CEDAW in case of well-founded information indicating serious or systematic violations by a state party.
- **Inter-state complaints**, concerning alleged violations of the treaty by another State party, are foreseen by some human rights treaties – such as the CAT, the CMW, the CERD, the CCPR and the CEDAW – but have never been used.

\* For a list of the core international human rights instruments and their monitoring bodies see the web page of the Office of the United Nation Commissioner for Human Rights: <http://www2.ohchr.org/english/law/index.htm> (14.06.2010).

### 3.3 International Labour Organisation (ILO)

The ILO sets minimum standards of basic labour rights through the adoption of conventions and non-binding recommendations.

In 1998 the ILO adopted the **ILO Declaration on Fundamental Principles and Rights at Work**.<sup>35</sup> This declaration establishes that all member states, even if they have not ratified the ILO conventions, are nevertheless obliged through their membership of ILO to respect the basic labour rights contained within them, including freedom of association and to collective bargaining; elimination or forced or compulsory labour; abolition of child labour and elimination of discrimination with regard to employment.

The principal ILO instrument addressing irregular migrant workers is the **Migrants Workers Convention N.143**. According to Article 1 of the convention, each state signatory should undertake to respect the basic human rights of *all* migrant workers. The convention stipulates that migrant workers should not be regarded as irregular due to the loss of employment (Article 8), nor should they be deprived of their rights in respect of the work they have performed. According to Article 9, the migrant worker

<sup>35</sup> ILO (1998), *ILO Declaration on Fundamental Principles and Rights at Work*, Geneva.

shall enjoy equality of treatment for him or herself and family in terms of the rights accrued in past employment, such as remuneration, social security and other benefits.

Aside from Convention 143, the other ILO conventions partially apply to irregular migrants, unless explicitly stated otherwise. This position was affirmed in the 2004 **Resolution Concerning a Fair Deal for Migrant Workers in a Global Economy**, which stated:

“It is important to ensure that the human rights of irregular migrant workers are protected. It should be recalled that the ILO instruments apply to all workers, unless otherwise stated. Consideration should be given to the situation of irregular migrant workers, ensuring that their human rights and fundamental labour rights are effectively protected, and that they are not exploited or treated arbitrarily.”<sup>36</sup>

### **Application and Monitoring**

The ILO foresees two kinds of supervisory mechanisms for the application and promotion of international labour standards:

- The regular supervision which consists of a regular examination of periodic reports submitted by Member States.
- Special procedures, which are based on the submission of a representation or a complaint.

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<sup>36</sup> International Labour Organisation “Resolution concerning a fair deal for migrant workers in a global economy”, extracted from the Report of the Committee on Migrant Workers, Geneva 2004.

## Conclusions

This report has synthesised the human rights framework covering irregular migrants in the EU. In doing so it clearly demonstrates that, contrary to popular assumptions and the practices of certain legislatures, irregular migrants are holders of fundamental rights. The European and international human rights instruments enshrine and enforce rights which, unless expressly stated otherwise, are applicable to everyone independent of a person's status. The fact of not complying with the conditions for entry, stay or residence in a Member State should not deprive an individual from certain basic rights which are shared by all human beings.

At EU level, basic labour standards as well as a range of socio-economic, cultural and civic rights are now protected within a legally binding Charter. Those who would feel their rights threatened by measures adopted by the EU institutions and by the EU Member States may challenge them before national courts and the CJEU.

Within the framework of the Council of Europe, both the ECtHR and the European Committee on Social Rights have played a central role in expanding the reach of the provisions of the ECHR and the ESC and upholding the fundamental rights of irregular migrants. Future accession of the EU to the ECHR should empower the ECtHR to reinforce its scrutiny of the EU institutions and of Member States when implementing EU law.

Finally, the international human rights instruments established within the UN and the ILO frameworks provide a set of international norms and standards for the protection and promotion of human rights, including labour rights that are applicable to irregular migrants. However, ratification by the EU member states of the UN Convention on the Protection of the Rights of All Migrants Workers and Members of their Families would provide a much needed reinforcement of the protection framework for this group.

More generally, despite being covered by a comprehensive framework at EU and international level, irregular migrants encounter important obstacles to realising the basic rights to which they are entitled. Wider awareness of their rights, coupled with a stricter monitoring of their application by the relevant bodies would go some way to ensure a stronger enforcement of rights for irregular migrants in the future.



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