

Undocumented Migrants Have Rights!

An Overview of the International
Human Rights Framework



 PICUM

PLATFORM FOR INTERNATIONAL COOPERATION ON UNDOCUMENTED MIGRANTS

This report was made possible with the generous support of the NEF (Network of European Foundations) EPIM program (European Programme for Integration and Migration).



By **Luca Bicocchi**, Program Officer,
and **Michele LeVoy**, Director

PICUM
Platform for International Cooperation
on Undocumented Migrants

Gaucheretstraat 164
1030 Brussels
Belgium

Tel: +32/2/274.14.39

Fax: +32/2/274.14.48

info@picum.org


www.picum.org

March 2007

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PICUM, the Platform for International Cooperation on Undocumented Migrants, is a non-governmental organization that aims to promote respect for the human rights of undocumented migrants within Europe. PICUM also seeks dialogue with organizations and networks with similar concerns in other parts of the world.

PICUM promotes respect for the basic social rights of undocumented migrants, such as the right to health care, the right to shelter, the right to education and training, the right to a minimum subsistence, the right to family life, the right to moral and physical integrity, the right to legal aid, and the right to fair labour conditions.

PICUM is based in Brussels, Belgium, and works as a network of approximately 2,400 civil society organizations and individuals operating in most EU member states.

Acknowledgments

The authors would like to thank Ryszard Cholewinski, Franck Düvell, Nanna Sofie Gram, Anna Visser and Piyasiri Wickramasekara for sharing their knowledge and insight in the preparation of this report.



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Introduction

All across Europe, and in different regions throughout the world, a growing number of non-governmental organizations, local authorities, professionals from diverse fields, as well as undocumented migrants uphold the principle that “no human being is illegal.” In their daily work and lives, these local actors strive to defend undocumented migrants’ human rights, including the right to health care, education and training, fair working conditions, and housing, as well as many other rights. Yet they are confronted on a daily basis with situations in which they witness that irregular status is an obstacle and a way of discriminating a sizeable part of the population in accessing basic social services and in upholding their human rights.

Many people think that undocumented migrants have no rights since they are living without permission to legally reside in a country which is not their own. But it is a myth that undocumented migrants do not have any rights and therefore the purpose of this guide is to give an overview of the human rights which do in fact apply to undocumented migrants in international human rights law.

The human rights of undocumented migrants are articulated within a variety of instruments and treaties on both the international and regional levels. In order to give a clear picture of the

different instruments that specifically relate to undocumented migrants, this overview is structured in two different parts. The first part presents instruments within the international human rights framework as well as those on the European level and clarifies why and how these instruments uphold the human rights of undocumented migrants. The second part enumerates more in detail all of the human rights that apply to undocumented migrants within the international and European conventions and relative articles therein.

The purpose is to offer a big picture of that fragmentary universe that is called the “international migration regime,”¹ and also to offer a useful tool that can be used by a wide range of actors to strengthen their knowledge about undocumented migrants’ human rights. The intended audience is both those interested in deepening their knowledge of the human rights of undocumented migrants within international human rights law, as well as those who are engaged in defending these rights on a daily basis. We thus hope that researchers, members of international organizations, NGOs, trade unions and government agencies, professionals from diverse fields, activists, as well as undocumented migrants themselves may find this a useful instrument for defending undocumented migrants’ human rights.

¹ “Even if there is yet no discrete body of international migration law, nevertheless, there is a nascent ‘international migration regime’, comprising international standards, mechanisms and institutions.” See Amnesty International, *Living in the Shadows: A primer on the human rights of migrants*, Amnesty International Publications, 2006, p.27, (<http://www.amnestyusa.org/news/document.do?id=ENGPOL330062006>), accessed on 10 January 2007.

The use of terminology: Why should undocumented migrants not be referred to as “illegal” migrants?

In referring to migrants without a valid residence permit, PICUM prefers the use of the term “undocumented migrants” (or alternatively “irregular migrants”), as opposed to “illegal migrants.”²

The use of the term “illegal” can be criticized for three reasons: 1) due to its connotation with criminality, and most undocumented migrants are not criminals; 2) defining people as “illegal” can be regarded as denying them their humanity; and 3) labelling “illegal” asylum seekers who find themselves in an irregular situation may further jeopardize their asylum claims.³ It has also been argued that “a human being can never be ‘illegal,’ as otherwise the right of everyone ‘to recognition everywhere as a person before the law’ would be violated.”⁴

PICUM underlines the position that is increasingly being taken by a multitude of non-governmental organizations, local authorities, professionals from diverse fields, and undocumented migrants themselves, and reaffirms what the NGO Solidar has stated, that “both from a juridical and an ethical point of view, no human being can be considered illegal.”⁵

International organizations such as the International Labor Organization (ILO) and the International Organization for Migration (IOM) have specifically refrained from using the term “illegal” when referring to undocumented migrants. In 1975, the UN General Assembly requested “The United Nations organs and the specialized agencies concerned to utilize in all official documents the term ‘non-documented or irregular migrant workers’ to define those workers that illegally and/or surreptitiously enter another country to obtain work.”⁶

Some regional organizations have also expressly referred to the rights of “irregular migrants” or “undocumented migrants” in resolutions or declarations concerning the latter. The Council of Europe adopted a resolution in June 2006 on the human rights of irregular migrants, in which it states that it “prefers to use the term ‘irregular’ migrants.”⁷ The Association of Southeast Asian Nations (ASEAN) signed a declaration in January 2007 on the protection and the promotion of the rights of migrant workers, in which it refers to the “migrant workers who, through no fault of their own, have subsequently become undocumented.”⁸

² See Platform for International Cooperation on Undocumented Migrants, *PICUM’s Comments on the Communication from the Commission on “Policy priorities in the fight against illegal immigration of third-country nationals” COM (2006) 402 final*, February 2007, (<http://www.picum.org/HOME/PAGE/CommentsCOM2006402%20final.pdf>), accessed on 1 February 2007.

³ See Khalid Koser, *Irregular Migration, State Security, and Human Security*, Paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration, September 2005 (<http://www.gcim.org/attachements/TP5.pdf>) at p.5.

⁴ See Ryszard Cholewinski, *Identifying and Clarifying Concepts on ‘Irregular’ Migration*, Paper presented at the 10th Regional Conference on Migration, Migrant Forum in Asia and Singapore National Trade Union Congress, 6-7 November 2006 (<http://www.mfasia.org/mfaResources/RCholewinski-Concepts.pdf>) at p. 4.

⁵ See Solidar, *Irregular migrants have rights: Solidar Position on the European Commission Communication on illegal immigration: a rights-based approach to the question of irregular migration* (www.solidar.org).

⁶ See the General Assembly, *Measures to ensure the human rights of all migrant workers*, 3449, 2433rd plenary meeting, 9 December 1975, para.2.

⁷ See Council of Europe, Parliamentary Assembly, Resolution 1509 (2006), *Human rights of irregular migrants*, at point 7.

⁸ See Association of Southeast Asian Nations, *ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers*, 13 January 2007 (<http://www.aseansec.org/19264.htm>), at point 2.

● **Part I**
**Instruments and Other
Procedures**

1. The International Human Rights Framework

1.1 International Human Rights Law (IHRL)

International human rights law is a set of international rules, established by treaty or custom, on the basis of which individuals and groups can expect and/or claim certain entitlements or benefits from governments.

Human rights are inherent entitlements which belong to every person as a consequence of being human. International human rights law consists of the Universal Declaration of Human Rights (UDHR) and the seven UN human rights treaties. Together these instruments represent international standards for the respect and promotion of human rights.

The Universal Declaration of Human Rights (UDHR) is the basic document of all UN human rights conventions. The declaration consists of 30 articles which outline the view of the United Nations on the human rights that are guaranteed to all people. Even if the UDHR is a declaration and is not binding for states, in 1968 the United Nations International Conference on Human Rights decided that it “constitutes an obligation for the members of the international community” for all persons.⁹ Nowadays the UDHR is considered to be part of customary international law and is thus intended to be binding on states.

The seven UN human rights conventions form the UN treaty body system: they set international standards for the protection and promotion of human rights. These conventions are not part of customary law but states can subscribe to them by becoming a party to each treaty. Each state party has an obligation to take steps to ensure that everyone in the state can enjoy the rights set out in the treaty.

International Bill of Human Rights

- Universal Declaration of Human Rights (1948) - UDHR
- International Covenant on Civil and Political Rights (1966) - ICCPR
- International Covenant on Economic, Social and Cultural Rights (1966) - ICESCR

Other Core Human Rights Instruments (Thematic or Protecting Specific Groups)

- International Convention on the Elimination of All Forms of Racial Discrimination (1965) - ICERD
- Convention on the Elimination of All Forms of Discrimination Against Women (1979) - CEDAW
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) - CAT
- Convention on the Rights of the Child (1989) - CRC
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) - ICRMW

Generally speaking, all of the member states of the European Union have ratified all of the treaty bodies,¹⁰ with the notable exception of the International Convention on the Protection of the Rights of All Migrants Workers and Members of Their Families (see text box on “Lack of ratification of the ICRMW by EU member states”). Therefore the provisions granted in each of the human rights conventions must be considered to be binding for all of the member states that make up the European Union.

⁹ See Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No.2 (Rev.1), The International Bill of Human Rights*, Geneva, June 1996, (<http://www.unhchr.ch/html/menu6/2/fs2.htm>) accessed on 1 February 2007.

¹⁰ The status of ratification of the different treaties can be consulted at the web page of the Office for the High Commissioner of Human Rights, (<http://www.ohchr.org/english/bodies/docs/RatificationStatus.pdf>), accessed on 1 January 2007.

Date of ratification of the seven UN human rights conventions by EU member states

Country	ICESCR	ICCPR	ICERD	CEDAW	CAT	CRC	ICRMW*
Austria	10 Dec 78	10 Dec 78	08 Jun 72	30 Apr 82	28 Aug 87	05 Sep 92	
Belgium	21 Jul 83	21 Jul 83	06 Sep 75	09 Aug 85	25 Jul 99	16 Jan 92	
Bulgaria	03 Jan 76	23 Mar 76	04 Jan 69	10 Mar 82	26 Jun 87	03 Jul 91	
Cyprus	03 Jan 76	23 Mar 76	04 Jan 69	22 Aug 85	17 Aug 91	09 Mar 91	
Czech Republic	01 Jan 93	01 Jan 93	22 Mar 93	24 Mar 93	01 Jan 93	01 Jan 93	
Denmark	03 Jan 76	23 Mar 76	08 Jan 72	21 May 83	26 Jun 87	18 Aug 91	
Estonia	21 Jan 92	21 Jan 92	20 Nov 91	20 Nov 91	20 Nov 91	20 Nov 91	
Finland	03 Jan 76	23 Mar 76	13 Aug 70	04 Oct 86	29 Sep 89	20 Jul 91	
France	04 Feb 81	04 Feb 81	27 Aug 71	13 Jan 84	26 Jan 87	06 Sep 90	
Germany	03 Jan 76	23 Mar 76	15 Jun 69	09 Aug 85	31 Oct 90	05 Apr 92	
Greece	15 Aug 85	05 Aug 97	18 Jul 70	07 Jul 83	05 Nov 88	10 Jun 93	
Ireland	08 Mar 90	08 Mar 90	28 Jan 01	22 Jan 86	11 May 02	28 Oct 92	
Italy	15 Dec 78	15 Dec 78	04 Feb 76	10 Jul 85	11 Feb 89	05 Oct 91	
Latvia	14 Jul 92	14 Jul 92	14 May 92	14 May 92	14 May 92	14 May 92	
Lithuania	20 Feb 92	20 Feb 92	09 Jan 98	17 Feb 94	02 Mar 96	10 Mar 92	
Luxembourg	18 Nov 83	18 Nov 83	31 May 78	04 Mar 89	29 Oct 87	06 Apr 94	
Malta	13 Dec 90	13 Dec 90	26 Jun 71	07 Apr 91	13 Oct 90	30 Oct 90	
Netherlands	11 Mar 79	11 Mar 79	09 Jan 72	22 Aug 91	20 Jan 89	07 Mar 95	
Norway	03 Jan 76	23 Mar 76	05 Sep 70	03 Sep 81	26 Jun 87	07 Feb 91	
Poland	18 Jun 77	18 Jun 77	04 Jan 69	03 Sep 81	25 Aug 89	07 Jul 91	
Portugal	31 Oct 78	15 Sep 78	23 Sep 82	03 Sep 81	11 Mar 89	21 Oct 90	
Romania	03 Jan 76	23 Mar 76	15 Oct 70	06 Feb 82	17 Jan 91	28 Oct 90	
Slovakia	28 May 93	01 Jan 93	28 May 93	27 Jun 93	28 May 93	01 Jan 93	
Slovenia	06 Jul 92	25 Jun 91	06 Jul 92	05 Aug 92	15 Aug 93	25 Jun 91	
Spain	27 Jul 77	27 Jul 77	04 Jan 69	04 Feb 84	20 Nov 87	05 Jan 91	
Sweden	03 Jan 76	23 Mar 76	05 Jan 72	03 Sep 81	26 Jun 87	02 Sep 90	
United Kingdom	20 Aug 76	20 Aug 76	06 Apr 69	07 May 86	07 Jan 89	15 Jan 92	

* The ICRMW has not been ratified by any EU member state.

Lack of ratification of the ICRMW by EU member states

Since the beginning of the drafting process of International Convention on the Protection of the Rights of All Migrants Workers and Members of Their Families (ICRMW), there have been many objections to ratification raised especially by so-called “receiving” countries.¹¹ Since the ICRMW entered into force in 2003, no EU member state, the United States, Canada nor Australia - all major so-called immigrant “receiving” countries - have ratified the convention.

Nonetheless, the number of countries that have ratified the ICRMW is constantly increasing and is starting to include not only “sending” countries but also receiving ones such as Turkey or Libya. Furthermore, policy makers on different levels of government in EU member states have started to debate on the opportunity to ratify the ICRMW.¹² Calls for the ratification of the ICRMW have been recently raised from various European institutions such as for example the European Economic and Social Committee and the Parliamentary Assembly of the Council of Europe.¹³ An exhaustive list of the positions taken by EU member states as well as various EU institutions and different stakeholders on the local, regional, national and European levels can be found in a study by the organization December 18, *The U.N. Migrant Workers Convention: Steps Towards Ratification in Europe*.¹⁴

1.1.1 The Human Rights Treaty Bodies

Each of the seven core human rights treaties has established a treaty monitoring body, whose purpose is to ensure the implementation of the treaty provisions of the state parties. State parties are obligated to report to the treaty monitoring bodies on the implementation of the treaty into national law and practice and the treaty monitoring bodies then assist the state parties in the implementation of the treaties.

Furthermore the treaty monitoring bodies publish *general comments/general recommendations* on each treaty, which consist of the treaty monitoring body’s interpretation of the content of the human rights provisions. The treaty monitoring bodies can also consider individual complaints from individuals alleging that their rights have been violated by a state party.

¹¹ See Luca Bicocchi, *Rights of All Migrant Workers (Part III of the Convention) Travaux Préparatoires*, (<http://ohchr.org/english/issues/migration/taskforce/docs/draftinghistoryrev1.doc>), accessed on 15 December 2006.

¹² The Italian government, for example, has included in its electoral program in the section dedicated to migration the ratification of the ICRMW Convention. See, *Per il bene dell’Italia, Programma di Governo 2006-2011*, p. 251, (http://www.dsonline.it/allegatidef/programma_def_unione31326.pdf), accessed on 10 January 2007.

¹³ See the European Economic and Social Committee, *Opinion of the European Economic and Social Committee on the International Convention on Migrants*, Brussels, 30 June 2004, (http://www.ohchr.org/english/issues/migration/taskforce/docs/EESC-soc173_En.pdf), accessed on 10 January 2007, and the Parliamentary Assembly of the Council of Europe, *Resolution 1509 (2006) on Human rights of irregular migrants*, (<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta06/ERES1509.htm>), accessed on 10 January 2007.

¹⁴ See Amandine Guilbert and René Plaetevoet, *The U.N. Migrant Workers Convention: Steps towards Ratification in Europe*, European Platform for Migrant Workers’ Rights, March 2007, (<http://www.december18.net/web/docpapers/doc5096.pdf>), accessed on 22 March 2007.

There are three main procedures for bringing complaints of violations of the provisions of the human rights treaties before the human rights treaty bodies:

- 1) Individual communications (complaints or communications set forth by individuals);
- 2) State-to-state complaints (one state party may complain about alleged violations of the treaty by another state party);
- 3) Inquires (CAT and CEDAW may initiate inquiries if they have received reliable information containing well-founded indications of serious or systematic violations of the conventions in a state party).¹⁵

1.1.2 The Principle of Non-Discrimination as a Key Element of International Human Rights Law

Non-discrimination, together with equality before the law and equal protection of the law without discrimination, constitute a basic and general principle relating to the protection of human rights. Almost all of the treaties have a clear reference to this principle.¹⁶

The principle of non-discrimination means that any differences in the treatment meted out to migrants must conform to international law and must not breach migrants' internationally recognized human rights. In this extent we can say that the principle of non-discrimination belongs to *jus cogens*, so that the principle must be intended to be binding even without a clear reference to the text.¹⁷

The principle of non-discrimination under international law does not preclude the making of distinctions between groups (including on the basis of nationality) but such distinctions have to be based in the law, meet a legitimate and pressing social concern, can be objectively justified, and are crafted carefully so as not to impinge disproportionately on the rights concerned. Otherwise, such distinctions will amount to discrimination and be unlawful.¹⁸

¹⁵ For a general overview of the Treaty Bodies System, see OHCHR, (<http://www.ohchr.org/english/bodies/treaty/index.htm>), accessed on 10 January 2007.

¹⁶ While article 2 (principle of non discrimination) of the Universal Declaration of Human Rights "is couched in terms of the obligations of State Parties towards individuals as the right holders under the Covenant, every State Party has a legal interest in the performance by every other State Party of its obligations. This follows from the fact that the 'rules concerning the basic rights of the human person' are erga omnes obligations and that, as indicated in the fourth preambular paragraph of the Covenant, there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms." See the Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, [2004] CCPR/C/21/Rev.1/Add.13, para. 2.

¹⁷ In an advisory opinion on the Juridical Condition and Rights of the Undocumented Migrants, the Inter-American Court of Human Rights found that "the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens* [i.e. the most fundamental and peremptory of rights], because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws." See the Inter-American Court of Human Rights, "Advisory Opinion OC-18/03 of 17 September 2003", cited in Amnesty International, *Living in the Shadows: A primer on the human rights of migrants*, 2006, p.28.

¹⁸ See the jurisprudence of the Human Rights Committee (HRC) and the jurisprudence of the European Court of Human Rights (ECHR). The HRC in *Broeks v. the Netherlands*, 9 April 1987, at para. 13 stated that "differentiation based on reasonable and objective criteria does not amount to prohibited discrimination." For the ECHR see judgment of 11 June 2002, *Willis v. the United Kingdom*, Appl. 36042/97, para. 39, summarizing its constant jurisprudence, and the judgment of 30 September 2003, *Piorrez v. France*, Application no. 40892/98, para.46, which relate specifically to discrimination on the ground of nationality.

1.1.3 The Principle of Non-Discrimination and Protection of Undocumented Migrants

All of the seven human rights conventions, as well as the Universal Declaration of Human Rights, contain a number of rights that are applicable to undocumented migrants, as clearly spelled out in their consistent and respective non-discrimination clauses, notwithstanding duly specified restrictive clauses. The following section lists the articles in the core human rights treaties that specify the principle of non-discrimination.

Universal Declaration of Human Rights (UDHR)

The UDHR consists of a preamble and 30 articles, setting forth the human rights and fundamental freedoms to which all men and women, everywhere in the world, are entitled, without any discrimination.

Article 2 states that “everyone is entitled to all the rights and freedoms set forth in this 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.”

International Covenant on Civil and Political Rights (ICCPR)

The rights outlined in the ICCPR are applicable to all, including undocumented migrants.

Some rights granted in the covenant, such as the right to vote or to be elected, are applicable exclusively to nationals.¹⁹ But for all other rights, the covenant clearly requires in Article 2 that states must guarantee the rights recognized in the text to all individuals within their territory and subject to their jurisdiction.²⁰

Article 2 states that “The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant 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.”

The General Comment n15 (1986) to the ICCPR clarifies what is intended concerning “aliens” under the ICCPR, reaffirming that all of the rights outlined in the ICCPR (with the exception of Article 25) must be guaranteed without discrimination between citizens and aliens.²¹

International Covenant on Economic, Social and Cultural Rights (ICESCR)

The ICESCR contains some of the most significant international legal provisions establishing economic, social and cultural rights, including rights relating to work in just and favourable conditions, to social protection, to an adequate standard of living, to the highest attainable standards of physical and mental health, to education, and to enjoyment of the benefits of cultural freedom and scientific progress.

¹⁹ There are some rights that are applicable exclusively to nationals, such as the right to take part in the conduct of public affairs, to vote and to be elected, to have access, on general terms of equality, to public service in his country. See International Covenant on Civil and Political Rights (ICCPR), Art 25.

²⁰ An important distinction is present in article 13 of the ICCPR which limited procedural safeguards for aliens against expulsion states only to lawfully present aliens. This safeguard is extended to undocumented migrants in Article 22 of the ICRMW.

²¹ Inter-alia the comment says that: “In those cases where aliens constitute a minority within the meaning of article 27, they shall not be denied the right, in community with others members of their group, to enjoy their own culture, to profess and practice their own religion and use their own language”. See the Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant*, 11/04/8, para.7.

The ICESCR has a clear reference to the principle of non discrimination. Article 2 states that all of the articles in the covenant are applicable to all “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.”

Moreover an important reference to the rights of undocumented migrants can be found in General Comment 14 to the ICESCR, paragraph 34, which outlines that: “States are under the obligation to respect the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services.”²²

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

The ICERD condemns racial discrimination, e.g. any distinction, exclusion, restriction or preference based on race, color, 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.

The ICERD provides for the possibility of treatment differentiating between citizens and non-citizens, but as the Committee states in General Comments No. 30 on Discrimination against non-citizens, “although some of these rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law.”²³

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

The rights granted in the CEDAW are aimed at fighting and preventing all forms of discrimination suffered by women. Within the different provisions in the convention many articles can also be extended to undocumented migrant women. An important reference that does not specially refer to all undocumented women but can still pertain to those who have been trafficked is Article 6, which invites all state parties “to take all appropriate measures, including legislation, to suppress all forms of trafficking.”

Furthermore, the Committee on the Elimination of Discrimination against Women, in General Recommendation No. 21 entitled “Equality in marriage and family relations,” argued that “migrant women who live and work temporarily in another country should be permitted the same rights as men to have their spouses, partners and children join them.”²⁴

²² See the Economic and Social Council, *General Comment 14 on The right to the highest attainable standard of health (art. 12)*, 11/08/2000, para.34. While the Committee has used the term “illegal immigrants” in its general comment, it must be underlined that the seven UN conventions refer to migrants without permission to stay as “irregular” or “undocumented.”

²³ See the Committee on the Elimination of Racial Discrimination, *General Comment n 30: Discrimination against non-citizens*, 01/10/2004, para.3.

²⁴ See The Committee on the Elimination of Discrimination against Women, *General Recommendation No. 21 on Equality in marriage and family relations*, 04/02/94, para 10.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

The prohibition of torture expressed in the convention applies to every human being and thus covers undocumented migrants.

Article 3 extends the content of this prohibition by stating that “no state party shall expel, return (“refouler”) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.”²⁵

Convention on the Rights of the Child (CRC)

The principal of non-discrimination is clearly recalled in the CRC. Article 2 states that “the rights set forth in the present convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”

The meaning of this article for undocumented children has been clarified by the Committee on the Rights of the Child in General Comment No. 6, “Treatment of unaccompanied and separated children outside their country of origin”. In this General Comment, the committee affirmed that “State obligations under the Convention apply within the borders of a State, including with respect to those children who come under the State’s jurisdiction while attempting to enter the country’s territory. Therefore, the enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children – including asylum-seeking, refugee and migrant children – irrespective of their nationality, immigration status or statelessness.”²⁶

International Convention on the Protection of the Rights of All Migrants Workers and Members of Their Families (ICRMW)

The ICRMW contains the following specific references to the principle of non-discrimination for migrants’ rights:

Article 1 states that the Convention applies to all migrant workers and members of their families without distinction of any kind;

Article 7 provides that States parties should respect and ensure the rights contained in the Convention without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

²⁵ See also the Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment, Theo van Boven, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/59/324, 1 September 2004, Part III The principle of non-refoulement, [http://www.womenwarpeace.org/issues/violence/spraptorture_2004.pdf], accessed on 1 December 2006.

²⁶ See Committee on the Rights of the Child, *General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin*, 01/0902005, para.12. See also the Special Rapporteur on the Human Rights of Migrants, Gabriela Rodríguez Pizarro, *Report on the Human Rights of Migrants submitted by the Special Rapporteur of the Commission on Human Rights*, A/57/292, 9 August 2002, Part IV, par D, “Unaccompanied Minors”.

Furthermore, Part III of the ICRMW (Art. 8-35) grants a fairly broad series of rights to all migrant workers and members of their families, irrespective of their migration status. Many of these articles specify the application of rights spelled out in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the other core human rights treaties. The ICRMW includes a number of rights addressing specific protection needs and providing additional guarantees in light of the particular vulnerability of migrant workers and members of their families.²⁷

In recognizing the vulnerable situation in which undocumented migrant workers find themselves, the ICRMW calls upon states to protect the fundamental rights of migrant workers regardless of their immigration status, and states that all migrant workers and their families have equal treatment with nationals regarding conditions of employment (Art. 25-26), social security rights (Art. 27), emergency medical care (Art. 28), and education (Art. 30).

Part VI of the ICRMW (Art. 64-71) on the promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families, also contains a number of provisions relating to inter-state cooperation/collaboration in addressing irregular migration.

Palermo Protocols to the UN Convention on Transnational Organized Crime (the Smuggling and Trafficking Protocols) (2003-2004).

These protocols concern the smuggling and trafficking of human beings, and while they are not part of the core international human rights treaties, since they fall within the framework of instruments to combat transnational organized crime, they nonetheless contain some human rights provisions. The articles that specifically contain such provisions are:

Article 2 states that the purpose of the Protocol is to prevent and combat trafficking in persons, paying particular attention to women and children, but also to protect and assist the victims of such trafficking, with full respect for their human rights;

Article 6 states that each State Party shall implement measures for the physical, psychological and social recovery of victims;

Article 7 states that each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.

²⁷ Art. 20, for example, provides that no migrant worker or member of his/her family shall be expelled or deprived of his authorization of residence or work permit merely on the ground of failure to fulfill an obligation arising out of a work contract unless fulfillment of that obligation constitutes a condition for such authorization or permit; Article 21 contains safeguards against confiscation, destruction or attempts to destroy identity documents or other documents authorizing entry to or stay. For a detailed analysis of all the rights grant in the ICRMW together with the other UN human rights treaties, see the International Catholic Migration Commission, *Strengthening Protection of Migrant Workers and Their Families with International Human Rights Treaties – A Do-it-yourself Kit*, Geneva: April 2006 (2nd Edition), (http://www.icmc.net/e/viewpoints_advocacy/migrant_right1.htm), accessed on 1 February 2007.

1.2 Non-Binding UN Resolutions and Recommendations

In addition to the international Bill of Rights and the core human rights treaties, there are many other universal instruments relating to human rights of undocumented migrants. Even if those instruments are not binding and thus do not have a legal effect, they have an undeniable moral force and provide practical guidance to states in their conduct.

Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live (adopted by the General Assembly in Resolution 40/144 of 13 December 1985)

The ten articles of this declaration embody basic principles for the protection of human rights without discrimination based upon residence status. In particular Article 5 (para.1 and 2) lists some basic civic rights, such as the right to equality before the courts, the right to freedom of thought, opinion, conscience and religion, the right to peaceful assembly, the right to own property and other basic rights. Nonetheless, the declaration is limited in its application to undocumented non-nationals, as economic and social rights are only supposed to apply to non-nationals who are lawful residents.

Recommended Principles and Guidelines on Human Rights and Human Trafficking - Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council (2002)

This recommendation to the United Nations Economic and Social Council is focused on the protection of and assistance to victims of trafficking. Article 1 states that “the human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims.”

Resolution of the UN General Assembly on the Protection of Migrants (2004)

With this resolution, the General Assembly “Requests all Member States, in conformity with their respective constitutional systems, effectively to promote and protect the human rights of all migrants, in conformity with the Universal Declaration of Human Rights and the international instruments to which they are party.”

Resolution of the UN Commission on Human Rights on the Human Rights of Migrants (2005)

With this resolution, the Commission on Human Rights “Requests States effectively to promote and protect the human rights and fundamental freedoms of all migrants, especially those of women and children, regardless of their immigration status, in conformity with the Universal Declaration of Human Rights and the international instruments to which they are party.”

1.3 Special Procedures Assumed by the Human Rights Council

“Special procedures”²⁸ is the general name given to the mechanisms established by the Commission on Human Rights (the Commission on Human Rights became the Human Rights Council in a reform of this organ in 2006) to address either specific country situations or thematic issues in all parts of the world. There are currently 28 thematic and 13 country mandates in place. The Office of the High Commissioner for Human Rights (OHCHR) provides these mechanisms with personnel and logistical assistance to aid them in the discharge of their mandates.

²⁸ Special procedures refer either to an individual (called “Special Rapporteur”, “Special Representative of the Secretary-General”, “Representative of the Secretary-General”, “Representative of the Commission on Human Rights” or “Independent Expert”) or a working group usually composed of five members. The mandates of the special procedures are established and defined by the resolution creating them. Mandate-holders of the special procedures serve in their personal capacity, and do not receive salaries or any other financial retribution for their work. The independent status of the mandate-holders is crucial in order to be able to fulfill their functions in all impartiality. See also (<http://ohchr.org/english/bodies/chr/special/index.htm>), accessed on 15 January 2007.

Although the mandates given to special procedure mechanisms vary, they usually are to examine, monitor, advise, and publicly report on human rights situations in specific countries or territories, known as country mandates, or on major phenomena of human rights violations worldwide, known as thematic mandates. Various activities can be undertaken by special procedures, including responding to individual complaints, conducting studies, providing advice on technical cooperation, and engaging in general promotional activities.

Among the 28 thematic special procedures currently active, one specifically addresses the rights of migrants, the Special Rapporteur on the Human Rights of Migrants. But other special procedures with a more general mandate can also treat concerns about migrants.

The following are examples of some statements made by different special rapporteurs – both current and former ones – in which the human rights of migrants have been addressed:

Special Rapporteur on the Human Rights of Migrants

Mr. Jorge A. Bustamante (Mexico, 2005-2008)

The Special Rapporteur of Migrants has addressed the question of the human rights of undocumented migrants in many occasions, country visits, annual reports, etc. Among them is a statement made by Mr. Bustamante to the Second Session of the Human Rights Council (September 2006):

“The international consensus that gave rise to the approval of the UN Convention of 1990 on the rights of all migrant workers is found today in contradiction with the rise of anti immigrant sentiments around the world. This is an unfortunate development that has affected particularly the undocumented immigrants as if their irregular migratory status would preclude them from being subjects of human and labour rights. The de facto denial that undocumented immigrants have rights, has led to new trends in some countries of destination that imply ominous ruptures of the rule of law of which the international community should not be indifferent [...].”²⁹

Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Mr. Manfred Nowak (Austria, 2004-2007)

In his report submitted to the General Assembly (September 2004), the former Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Mr. Theo Van Boven, underlined the risk of erosion of the principle of non-refoulement:

“The Special Rapporteur reverts to these issues and wishes to pay particular attention to the principle of non-refoulement which, like other human rights principles, risks being eroded. It must be recalled that the principle of non-refoulement is firmly anchored in international human rights law, notably in Article 3 of the Convention against Torture, which states that “no State Party shall expel, return ‘refouler’, or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”³⁰

²⁹ See “Statement of Jorge G. Bustamante, Special Rapporteur on the human rights of migrants,” Second Session of the Human Rights Council, 18 September 2006, (<http://www.docip.org/Human%20Rights%20Council/Session2/Bustamante%20revised%20statement%20final%20%20version.pdf>), accessed on 15 November 2006.

³⁰ See the Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment, Theo van Boven, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/59/324, 1 September 2004, Part III The principle of non-refoulement, para. 25,26.

Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living**Mr. Miloon Kothari (India, 2000-2006)**

Within Mr. Miloon Kothari's report on adequate housing to the Commission on Human Rights (March 2004), there is an important reference to the dreadful situation faced by migrants and other vulnerable groups.

"The Special Rapporteur has also received continuous reports about forced evictions faced by other vulnerable groups, such as refugees, migrants and national and ethnic minorities, living, sometimes for extensive periods of time, in abandoned military barracks, schools, churches and other private or public buildings not in use."³¹

Independent Expert on the Question of Human Rights and Extreme Poverty**Mr. Arjun Sengupta (India, 2004-2007)**

In her report to the Commission on Human Rights (January 2003), the former Independent Expert on the Question of Human Rights and Extreme Poverty, Ms. A.M. Lizin, called on states to take into account the interests of victims of trafficking, especially unaccompanied minors:

"[...] It is therefore urgent not only to measure the trend now under way towards the criminalization of all forms of immigration, but also to require that in addressing the issue States should take into account first the interests of the victims of trafficking, especially unaccompanied minors, and then the root causes of these population movements, which are more often than not linked to poverty. The independent expert believes that the existence of detention centres and prisons for administrative offenders is a development of law that, if tolerated, will lead in time to a substantial reversal of respect for universal freedoms and rights."³²

Special Rapporteur on Trafficking in Persons, Especially Women and Children**Ms. Sigma Huda (Bangladesh, 2004-2007)**

In her report to the Human Right Commission (December 2004), Ms. Sigma Huda criticized the fact that trafficking continues to be treated as mainly a "law and order" problem:

"The Special Rapporteur believes that, in spite of its overwhelming human rights dimension, trafficking continues to be treated as mainly a "law and order" problem. She intends, through her activities, to highlight the human rights implications and causes of trafficking and to formulate recommendations directed at preventing trafficking through a human rights approach and at upholding the human rights of trafficked persons."³³

³¹ See the *Report of the special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari*, E/CN.4/2004/48, 8 March 2004, para. 65.

³² See the Report submitted by Ms. A.-M. Lizin, independent expert, pursuant to Commission resolution 2002/30, *Human rights and extreme poverty*, E/CN.4/2003/52, 20 January 2003, para. 33.

³³ See the Report of the Special Rapporteur on trafficking in persons, especially women and children, *Integration of the Human Rights of Women and the Gender Perspective*, E/CN.4/2005/71, 22 December 2004, para.56.

1.4 International Labor Organization (ILO)

The International Labour Organization, founded in 1919, is a UN specialized agency which seeks the promotion of social justice and internationally recognized human and labour rights. The ILO formulates international labour standards in the form of conventions and recommendations setting minimum standards of basic labour rights: freedom of association, the right to organize, collective bargaining, abolition of forced labour, equality of opportunity and treatment, and other standards regulating conditions across the entire spectrum of work related issues.³⁴

The core document on basic labour standards for the ILO is the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998)*. With this declaration the ILO establishes a set of minimum standards of right that should apply to all workers, national and migrants, documented and undocumented.³⁵

Article 2 of the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up states that “All Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

- a) freedom of association and the effective recognition of the right to collective bargaining;
- b) the elimination of all forms of forced or compulsory labour;
- c) the effective abolition of child labour;
- d) the elimination of discrimination in respect of employment and occupation.”

The same position has been re-affirmed in the International Labour Conference 2004 (92nd session) where the Conference adopted the “Resolution concerning a fair deal for migrant workers in a global economy” which called on the ILO to carry out a plan of action on migrant workers designed to ensure that migrant workers are covered by the provisions of international labour standards, while benefiting from applicable national labour and social laws.³⁶

³⁴ The eight fundamental ILO Conventions on human rights are: Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Forced Labour Convention, 1930 (No. 29), and Abolition of Forced Labour Convention, 1957 (No. 105); Equal Remuneration Convention, 1951 (No. 100); Discrimination (Employment and Occupation) Convention, 1958 (No. 111); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182). See (<http://www.ilo.org/public/english/about/index.htm>), accessed on 15 December 2006.

³⁵ This principle has also been affirmed in the above-mentioned Advisory Opinion OC-18-03 of the Inter-American Court of Human Rights on the juridical condition and rights of undocumented migrants (17 Sept 2003) when Mexico made a request for an authoritative opinion. The ruling was that the migratory status of a person cannot constitute a justification in depriving him/ her of the enjoyment and exercise of his/ her human rights, including those related to work and that the migrant, upon taking up a work related role, acquires rights by virtue of being a worker that should be recognised and guaranteed independently of his or her regular or irregular situation in the State of employment. See Patricia Palacios Zuloaga, *The Contribution Made by Advisory Opinion 4 and Advisory Opinion 18 by the Inter-American Court of Human Rights to the Concept of Discrimination within the Inter-American System for the Protection of Human Rights*, (http://www.publicacionescdh.uchile.cl/articulos/Palacios/articulo_Patricia_Palacios.pdf), accessed on 15 February 2007.

³⁶ The International Labour Conference 2004 (92nd session), *Resolution concerning a fair deal for migrant workers in a global economy*, (http://www-ilo-mirror.cornell.edu/public/english/protection/migrant/download/ilcmig_res-eng.pdf), accessed on 15 February 2007.

1.4.1 ILO Conventions

There are several ILO conventions that deal with the rights of migrant workers, both documented and undocumented.³⁷ Without recalling them all it is possible however to underline some of the most important instruments provided by the ILO.

Convention on Discrimination (Employment and Occupation), 1958 (C111)

Concerning the above-mentioned principle of non-discrimination, a clear and important reference to this principle is present in the *Convention on Discrimination (Employment and Occupation), 1958 (C111)*.

Article 1 of the Convention states: “For the purpose of this Convention the term discrimination includes any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation [...]”

ILO Convention on Migrant Workers, 1975 (No.143)³⁸

Within the vast context of the protection of labour rights for all workers that characterize the main ILO conventions, the ILO Convention on Migrant Workers (No.143) specifically addresses the rights of undocumented migrant workers.

The convention is divided into three parts:

- 1) Migration in abusive conditions
- 2) Equality of opportunity and treatment
- 3) Final provisions

Among these three parts, only Part 1 of the convention applies to all migrants, including undocumented migrants. This part of the convention is mainly concerned with the fight against illicit and clandestine trafficking in labour, and contains some provisions protecting the human rights of undocumented migrants. Particularly relevant are Article 8 and 9. Article 8 states that “the migrant worker shall not be regarded as in an illegal or irregular situation by the mere fact of the loss of his employment, which shall not in itself imply the withdrawal of his authorisation of residence or, as the case may be, work permit.” Article 9.1 says that undocumented migrant workers shall “enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits.”

³⁷ Among the others of particular relevance are: Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19); Labour Inspection Convention, 1947 (No. 81); Social Security (Minimum Standards) Convention, 1952 (No. 102); Equality of Treatment (Social Security) Convention, 1962 (No. 118); Employment Policy Convention, 1964 (No. 122); Labour Inspection (Agriculture) Convention, 1969 (No. 129); Minimum Wage Fixing Convention, 1970 (No. 131); Nursing Personnel Convention, 1977 (No. 149); Occupational Safety and Health Convention, 1981 (No. 155); Maintenance of Social Security Rights Convention, 1982 (No. 157); Occupational Health Services Convention, 1985 (No. 161); Safety and Health in Construction Convention, 1988 (No. 167); Working Conditions (Hotels and Restaurants) Convention, 1991 (No. 172); Safety and Health in Mines Convention, 1995 (No. 176); ILO Private Employment Agencies Conventions, 1997 (No. 181); Maternity Protection Convention, 2000 (No. 183); and Safety and Health in Agriculture Convention, 2001 (No. 184).

³⁸ As of 15 February 2007, only five EU member states had ratified the Convention: Italy, Cyprus, Portugal, Slovenia and Sweden. To see the status of ratification: (<http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C143>), accessed on 15 February 2007.

Concerning the interpretation and the application of the norms of the ILO conventions regarding undocumented migrants, an important role has also been played by the rulings of the ILO expert committee. Regarding freedom of association, for example, a key rule is the experts committee's rule in the Complaint against the Government of Spain presented by General Union of Workers of Spain (UGT) Report No. 327, Case(s) No(s). 2121. In the rule the expert committee reaffirmed that the right to organize and strike, freedom of assembly and association, the right to demonstrate and collective bargaining, as are granted in 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), are applicable to all workers, without distinction whatsoever, and so also to undocumented workers.³⁹

1.4.2 Non-Binding ILO Instruments

Together with the ILO Convention on Migrant Workers, 1975 (No.143) and all the other various conventions that might partially apply undocumented migrants, the ILO has provided several non-binding instruments for the protection of human rights of irregular migrants. The following are three such instruments.

Migrant Workers Recommendation, 1975 (No. 151)

This recommendation is addressed to regular migrants, but nevertheless there are some provisions also regarding undocumented migrants.

Article 8 states that "Migrant workers whose position has not been or could not be regularized should enjoy equality of treatment for themselves and their families in respect of rights arising out of present and past employment as regards remuneration, social security and other benefits as well as regards trade union membership and exercise of trade union rights."

Resolution Concerning a Fair Deal for Migrant Workers in a Global Economy, 2004

At the 92nd Session of the General Conference of the International Labour Organization in 2004, a resolution on a fair deal for migrant workers in a global economy was adopted.

The resolution states that "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."⁴⁰

³⁹ See Complaint against the Government of Spain presented by General Union of Workers of Spain (UGT) Report No. 327, Case(s) No(s). 2121, para. 559-562, (<http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=1156&chapter=3&query=%28Spain%29+%40ref&highlight=&querytype=bool&context=0>), accessed on 10 December 2006.

⁴⁰ See International Labour Organization, "Resolution concerning a fair deal for migrant workers in a global economy", extracted from the *Report of the Committee on Migrant Workers*, Geneva, 2004, para. 28, (http://www.ilo.org/public/english/protection/migrant/download/ilcmig_res-eng.pdf), accessed on 1 February 2007.

ILO Multilateral Framework on Labour Migration - Non-binding principles and Guidelines for a Rights-Based Approach to Labour Migration, 2006⁴¹

The principal tool that the ILO has developed within its Agenda on Decent Work to promote decent work for migrants is the International Multilateral Framework on Labour Migration. This document is a non-binding framework of principles and guidelines for a rights-based approach to labour migration that develops a comprehensive compilation of relevant principles, guidelines and best practices in relation to labour migration under nine themes.

The objectives of the framework are: better management of migration, the protection of workers, and promoting a stronger relationship between migration and development. For achieving these goals the document enumerated different principles (15 broad principles) and a series of corresponding guidelines.

Within the 15 broad principles of the framework, the three main principles that directly affect the rights of undocumented migrant workers are:

- 1) The protection of human rights of all migrant workers;
- 2) The promotion of social dialogue as the main way for integration;
- 3) The implementation by the government, in consultation with social partners, of measures to prevent abusive practices, migrant smuggling and trafficking in persons.

What this entails is the construction of a managed migration regime which makes the obligation to provide “decent work” a central part of the migration policy agenda – defined as “freely chosen employment,” supported by “fundamental rights at work,” with an income sufficient to “meet their basic economic, social and family needs and responsibilities,” and an “adequate level of social protection for the workers and family members.”⁴²

⁴¹ See *ILO Multilateral Framework on Labour Migration, Non-binding principles and guidelines for a rights-based approach to labour migration*, adopted by the Tripartite Meeting of Experts on the ILO Multilateral Framework on Labour Migration (Geneva, 31 October–2 November 2005), (http://www.ilo.org/public/english/protection/migrant/download/multilat_fw_k_en.pdf), accessed on 10 December 2006.

⁴² See Don Flynn, *Undocumented Migrants - Symptom, Not The Problem*, a PICUM Commentary Paper for the UNITAR/UNFPA/IOM/UNHCR workshop on Irregular Migration, held on 30 August 2006, New York, (http://www.unitar.org/mm/File/PICUM_paper.pdf), accessed on 10 December 2006.

2. European Instruments on Human Rights

On the European level the main instruments for the protection of the human rights of migrants are within the Council of Europe and the European Union.⁴³

Council of Europe (COE):

Convention for the Protection of Human Rights and Fundamental Freedoms (1950) - ECHR
European Social Charter and Its Additional Protocols (Revised 1996) – ESC

European Union (EU):

Charter of Fundamental Rights of the European Union.

The Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the European Social Charter (ESC) have been adopted by the members of the Council of Europe. They both concern the protection of human rights in Europe, but with different approaches and scope.

The Charter of Fundamental Rights of the European Union lists all of the fundamental rights under six major headings: dignity, freedoms, equality, solidarity, citizens' rights and justice. The charter has been incorporated into the second part of the draft European constitution, but the constitution itself has not been ratified by the 27 member states of the European Union. The Charter of Fundamental Rights of the European Union is therefore not a legally binding document.⁴⁴

2.1 Council of Europe (COE)

2.1.1 COE Conventions

Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

The ECHR and its additional protocols guarantee civil and political human rights. The convention sets forth a number of fundamental rights and freedoms such as right to life, prohibition of slavery and forced labour, right to a fair trial, no punishment without law (art 7), right to respect for private and family life, freedom of assembly and association, right to marry, right to an effective remedy, and prohibition of discrimination.⁴⁵

⁴³ The Council of Europe (COE) is an international organization which groups together 46 countries, including 21 countries from Central and Eastern Europe. The European Union (EU) is a supranational and intergovernmental union of 27 independent, democratic member states.

⁴⁴ For general information on the Charter of Fundamental Rights of the EU, see [http://europa.eu.int/comm/justice_home/unit/charte/index_en.html], accessed on 15 December 2006.

⁴⁵ The text of the convention had been amended according to the provisions of Protocol No. 3 (ETS No. 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS No. 55), which entered into force on 20 December 1971 and of Protocol No. 8 (ETS No. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS No. 44) which, in accordance with Article 5, paragraph 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols are replaced by Protocol No. 11 (ETS No. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS No. 140), which entered into force on 1 October 1994, is repealed and Protocol No. 10 (ETS No. 146) has lost its purpose. [<http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>], accessed on 10 January 2007.

Article 1 states that “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” Article 14 recalls the principle of non-discrimination and states that “the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”⁴⁶

Furthermore Protocol No.12 of the convention reaffirms the principle of non-discrimination and Art. 1.1 of the protocol states that “The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” As the first independent non-discrimination guarantee, the protocol would significantly expand the protection afforded by Article 14 of the convention.

European Social Charter (ESC)

The ESC guarantees social and economic human rights, such as the right to housing, health care, education, legal and social protection. It was adopted in 1961 and revised in 1996. The European Committee of Social Rights ascertains that the countries that have ratified the ESC comply to the undertakings set out in the charter.

Each year the states parties submit a report to the European Committee of Social Rights on how they implement the charter into their national law and practice. In the same way as the general comments issued by the UN treaty monitoring bodies, the European Committee of Social Rights publishes its conclusions based on the state parties’ reports. Under a protocol opened for signature in 1995, which came into force in 1998, complaints of violations of the charter may be lodged with the European Committee of Social Rights.

In the appendix of the ESC it is clarified that “[...] the persons covered by Articles 1 to 17 include foreigners only insofar as they are nationals of other contracting parties lawfully resident or working regularly within the territory of the contracting party concerned [...]”⁴⁷

⁴⁶ The European Court of Human Rights has applied explicitly art. 14 as not a stand-alone measure in conjunction with other provisions as for example with Art.1 of Protocol N°1 in the case, *Piorrez v. France*, Application no. 40892/98, see footnote 18.

⁴⁷ The text of the convention together with the appendix is available online at: (<http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm>), accessed on 1 February 2007.

Even though the appendix states that the ESC applies to nationals or other persons residing or working lawfully within the territory of the state parties, the Committee on Social Rights of the Council of Europe ruled otherwise in the Complaint No. 14/2003, *The International Federation for Human Rights (FIDH) v. France*.⁴⁸ In its conclusion, the committee, endorsing the thesis of the FIDH, stated that the changes introduced by the French government with the Act No. 2002-1576 of 30 December 2002 on the restraint of the access to health care for undocumented migrants and especially for undocumented children, constituted a violation of articles 13 and 17 of the charter. Specifically in para. 32 of the decision, the committee stated: “the Committee holds that legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter.”

2.1.2 Other COE Instruments

Together with the two conventions there are some other instruments of the Council of Europe that can be recalled, some addressing the rights of undocumented migrants, others that provide more general instruments of non-discrimination:

Framework Convention for the Protection of National Minorities (1995) - FCNM

The Framework Convention for the Protection of National Minorities (FCNM) was adopted on the basis of the mandate accorded by the Vienna Summit, and as such, is first legally binding multilateral instrument to protect national minorities in general.

This instrument does not directly tackle the rights of undocumented migrants, but does provide a general reference in Article 6.1 for promoting an “intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons’ ethnic cultural, or linguistic identity, in particular in the fields of education, culture and the media.”

This provision has a wide scope of application that includes, “among others, asylum seekers and persons belonging to other groups that have not traditionally inhabited the country concerned.”⁴⁹

Council of Europe Committee of Ministers’ 20 Guidelines on Forced Return (4 May 2005)

These guidelines provided by the Council of Europe regard some sensitive aspects of the forced return of migrants. Among the various provisions include the prohibition of collective expulsion, remedy against a removal order, and judicial remedies against detention (Chapter III).

⁴⁸ See European Committee of Social Rights, *The International Federation for Human Rights (FIDH) v. France*, Complaint No. 14/2003, decision of 8 September 2004, (http://www.coe.int/t/e/human_rights/esc/4_collective_complaints/list_of_collective_complaints/RC14_on_merits.pdf), accessed on 10 December 2006.

⁴⁹ See Advisory Committee on the Framework Convention for the Protection of National Minorities, *Second Opinion on Denmark*, ACFC/INF/OP/II (2004)005, Strasbourg, 11 May 2005, para. 76; also Advisory Committee on the Framework Convention for the Protection of National Minorities, *Opinion on Austria*, ACFC/INF/OP/I (2002)009, Strasbourg, 16 May 2002, para. 32.

Council of Europe Parliamentary Assembly Resolution 1509 (2006) on the Human Rights of Irregular Migrants

With this resolution, the Parliamentary Assembly stated that: “[...] international human rights instruments are applicable to all persons regardless of their nationality or status. Irregular migrants, as they are often in a vulnerable situation, have a particular need for the protection of their human rights, including basic civil, political, economic and social rights.”⁵⁰

European Commissioner for Human Rights

Mr. Thomas Hammarberg (Sweden, 2006-2012)

The Commissioner for Human Rights of the Council of Europe has taken a particular interest in the rights of irregular migrants. In a statement presented by the Commissioner at the Council of Europe conference on social cohesion in a multicultural Europe in November 2006, he specifically addressed the question of minimum rights for both regular and irregular migrants.⁵¹

“Migrants are especially exposed to the risk of poverty and marginalisation. Irregular migrants are doubly excluded. Irregular migrants are easy victims for the black market and they will be deprived of social rights connected to employment. One alarming consequence is that we now have situations in Europe where migrants are exploited in forced labour. Access to minimum rights for migrants is limited by fear of denouncement. An irregular situation exacerbates exclusion and the risk of exploitation.

There is a gap not just between international standards and national policies, but also between national legislations and the real practice of social services. Equality achieved at policy level, may not filter down to equality at local level. We talk of minimum rights, but are these rights a reality or just an illusion for those who need them most?”

European Commission against Racism and Intolerance (ECRI)

ECRI’s task is to combat racism, xenophobia, anti-semitism and intolerance at the level of greater Europe and from the perspective of the protection of human rights. Within this general mandate the Commission has often tackled the rights of undocumented migrants with specific provision given in various country reports.⁵²

Council of Europe Convention on Action against Trafficking in Human Beings (2005) (CETS No. 197)

Finally, another convention to be mentioned, which addresses the rights of undocumented migrants, but not yet in force, is the CETS No. 197.

⁵⁰ See Council of Europe Parliamentary Assembly, *Resolution 1509 (2006) on the Human Rights of Irregular Migrants*, text adopted by the Assembly on the 27 June 2006, para.5, (<http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta06/eres1509.htm>), accessed on 1 February 2007.

⁵¹ See “*Migrants have rights*,” *Presentation by the Commissioner for Human Rights, Council of Europe conference on social cohesion in a multicultural Europe*, CommDH/Speech (2006) 22 Original version, 9 November 2006, (<https://wcd.coe.int/ViewDoc.jsp?id=1064105&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FC679>), accessed on 15 February 2007.

⁵² See for example European Commission against Racism and Intolerance, *Third report on Italy*, CRI (2006)19, para. 114-120 “Immigrants without legal status”, (http://www.coe.int/t/e/human_rights/ecri/1-ecri/2-country-by-country_approach/Italy/Italy_CBC_3.asp#TopOfPage), accessed on 1 February 2007.

2.2 The European Union

2.2.1 European Union Convention

Charter of Fundamental Rights of the European Union

One of the main purposes of this charter was to assemble already existing rights in many of the international human rights instruments. It was therefore not the purpose to create new rights but rather to clarify and highlight already existing human rights. Contrary to other international human rights treaties (such as the ICCPR and the ICESCR), the Charter of Fundamental Rights of the European Union does not distinguish between civil and political rights and social and economic rights, but includes all rights in one document.

The charter lists all of the fundamental rights under six major headings: dignity, freedoms, equality, solidarity, citizens' rights and justice. Equally, it affirms the universal nature of rights, in so far as those in the charter are, for the most part, accorded to everyone regardless of nationality or place of residence. This means that all articles in the charter apply to undocumented migrants unless it is specified otherwise in the particular articles.⁵³

The charter has been incorporated into the second part of the draft European constitution, but the constitution itself has not been ratified by the 27 member states of the European Union. The Charter of Fundamental Rights of the European Union is therefore not a legally binding document.

2.2.2 Other EU Instruments⁵⁴

Besides the Charter of Fundamental Rights, there are few legislative initiatives that have upheld the rights of undocumented migrants in the EU. The approach that has been adopted until now in the area of migration has almost completely focused on the control of the flows and repression of irregular migration and little attention has been devoted to the protection of the human and labour rights of undocumented migrants.⁵⁵

The following section lists some recent proposed and adopted Council Directives which concern the human rights of undocumented migrants.

Council Directive 2000/43/EC of 29 June 2000, Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin

This directive reaffirms the principle of non-discrimination and marks a major advance in European anti-discrimination law, for the first time providing broad legal protection against discrimination on grounds of race or ethnicity.

⁵³ Chapter 5 on citizens' rights does not apply to undocumented migrants. Furthermore even if the charter has not entered into force, it already appears to be problematic for some of the rights where the scope is specifically limited to lawfully resident migrants, as this does not conform with internationally recognized human and labour standards (e.g. Article 34 on social security and social assistance, and particularly the second paragraph of that provision).

⁵⁴ For an overview of European policies on the themes of free movement of persons, asylum and immigration, see: (<http://europa.eu/scadplus/leg/en/s17000.htm#ASILE>), accessed on 1 February 2007.

⁵⁵ On the shortcomings of the developing EU law and policy in this area see Ryszard Cholewinski, "Control of Irregular Migration and EU Law and Policy: A Human Rights Deficit" in S. Peers and N. Rogers, (eds), *EU Immigration and Asylum Law: Text and Commentary*, Martinus Nijhoff, Leiden, 2007, p. 899-941.

Even if this directive does not specifically relate to undocumented migrants, the European Commission has declared that this directive forms part of the Community “acquis” (the body of law which candidate countries are expected to implement prior to accession).⁵⁶ Even if such provisions do not affect undocumented migrants directly (discrimination based upon status is not included here), including strong legal protection against discrimination on grounds of race within the communitarian “acquis” could represent an important step forward for the conditions of all migrants, those who are documented and undocumented.

Council 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

The preamble of the directive (para.9) clarifies the aim of this instrument: “[...] This Directive introduces a residence permit intended for victims of trafficking in human beings or, if a Member State decides to extend the scope of this Directive, 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 competent authorities while including certain conditions to safeguard against abuse.”

European Commission Proposal for a Directive on common standards and procedures for returning illegal residents (COM (2005) 391, 1 Sept 2005)⁵⁷

With this proposal the Commission wants to establish clear, transparent, and fair rules for the return policy of illegal residents. The human rights of undocumented migrants are promoted by “establishing a rule that illegal stay should be ended through a fair and transparent procedure (....) Addressing the situation of persons who are staying illegally but who cannot (as yet) be removed (....) providing for a minimum set of procedural safeguards.”

This proposal is currently being discussed within the European Parliament and is still to be approved. Many concerns on the contents of the proposal have been expressed by NGOs.⁵⁸

⁵⁶ “Any legislation to combat discrimination will of course form a part of the Community acquis, and as such, the candidate countries will be required to implement equivalent provisions before accession. This will make a substantial contribution to increasing the protection afforded to the victims of discrimination in the candidate countries.” See *Communication on measures to counter racism in the candidate countries* (COM (1999)256 final dated May 26, 1999), p.6.

⁵⁷ See also Platform for International Cooperation on Undocumented Migrants (PICUM), *Comment on the Green Paper on a Community Return Policy on Illegal Residents (presented by the European Commission COM(2002) 175 final)*, p.1: “PICUM regrets the Commission’s approach to the issue of return from the standpoint of “the fight against illegal migration,” which compromises every notion of voluntary return that is used further on,” (<http://storage.paxchristi.net/RE11E02.pdf>), accessed on 15 February 2007.

⁵⁸ See the joint position by PICUM and other organizations, “Common principles on removal of irregular migrants and rejected asylum seekers,” August 2005, (<http://hrw.org/english/docs/2005/09/01/eu11676.htm>), accessed on 15 February 2007, and more recently the comments issued jointly by Caritas Europa, CCME – Churches’ Commission for Migrants in Europe, COMECE – Commission of the Bishops’ Conferences of the European Community, ICMC – International Catholic Migration Commission, JRS-Europe – Jesuit Refugee Service Europe, QCEA – Quaker Council for European Affairs, *Comments on the European Commission’s Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals COM (2005) 391*, March 2006, (http://www.jrseurope.org/news_releases/March%202006%20return%20directive%20-%20final%20Chr%20comments1.pdf), accessed on 15 February 2007.

- **Part II**
Rights Specified in Articles

3. Human Rights of Undocumented Migrants

3.1 Table of Rights

The following table is an overview of the human rights that apply to undocumented migrants as they appear in the relevant core human rights treaties and in the universal declaration of human rights.

The table exemplifies the human rights that all undocumented migrants enjoy, as they are granted in the seven core UN human rights treaties, ILO conventions and in the different European conventions.

The table is divided by general area of rights and all of the relevant articles relating to these rights in the different areas are listed.

Area	Rights	UN Conventions and Declarations	ILO Conventions	European Conventions
PHISICAL AND MENTAL INTEGRITY	Right to life	UDHR, Art 3 ICCPR, Art 6(1) CRC, Art 6(1) ICRMW, Art 9 Declaration on Individuals Who Are Not Nationals, Art 5(a)	C143, Art 1	ECHR, Art 2(1)
	Right not to be tortured	UDHR, Art 5 ICERD, Art 5(b) ICCPR, Art 7 CAT, Art 16(1) CRC, Art 19, 37(a) ICMW, Art 10 Declaration on Individuals Who Are Not Nationals, Art 6		ECHR, Art 3
	Right not to be enslaved or in forced or compulsory labour	UDHR, Art 4 ICESCR, Art 10(3) ICCPR, Art 8(1, 2, 3a) CEDAW, Art 6 CRC, Art 11(1), 32(1), 34, 35, 36 ICMW, Art 11(1, 2)	C29, Art 1(1) C105, Art 1(e), 2 C182, Art 1, 3	ECHR, Art 4(1, 2)
HEALTH CARE	Right to health care	UDHR, Art 25 ICERD, Art 5(e-iv) ICESCR, Art 12(1) CRC, Art 24(1), 25, 39 CEDAW, Art 14 (2b) ICRMW, Art 28		ESC, Art 13 ECHR, Art 3

ADEQUATE STANDARD OF LIVING	Right to adequate housing	UDHR, Art 25(1) ICERD, Art 5(e-iii) ICESCR Art 11(1) CEDAW Art 14(2-h) CRC, Art 27(3)		ESC, Art 31
	Right to family life	ICESCR, Art 10(1,2) ICCPR, Art 23(1) CRC Art 9(1), 10(1), 20(1)		ESC, Art 16, 19(6)
	Right to a minimum subsistence	UDHR, Art 25(1) ICESCR, Art 11(1)		
FAIR LABOUR CONDITIONS	Right to fair conditions of employment	ICESCR, Art 6, 7 CRC, Art 32(1) ICRMW, Art 25(1)	C143, Art 9(1, 2)	
	Right to join trade unions and other associations	UDHR, Art 20, 23(4) ICERD, Art 5(e-ii) ICESCR, Art 8(1) ICCPR, Art 22(1) CEDAW, Art 14(2-e) ICRMW, Art 26(1)	C87, Art 11 C98, Art 1(1)	ECHR, Art 11(1)
	Right to social security	UDHR, Art 22 ICERD, Art 5(e-iv) ICESCR, Art 9 ICRMW, Art 27(1)	C143, Art 9	
EDUCATION	Right of the child to a name and identification	UDHR, Art 15 ICERD, Art 5(d-iii) ICCPR, Art 24 CRC, Art 7, 8 ICRMW, Art 29		
	Right to education	UDHR, Art 26(1) ICERD, Art 5(e-v) ICESCR, Art 13(1, 2), 14 CRC, Art 28(1), 29(1) ICRMW, Art 30 UNESCO Convention, Art 3		ESC, Art 17(2) ECHR, Protocol XI, Art 2

EQUALITY BEFORE THE LAW	Right not to be arbitrarily arrested	UDHR, Art 3, Art 9 ICERD, Art 5(a) ICCPR, Art 9(1) CRC, Art 37 ICRMW, Art 16(1-6) Declaration on Individuals Who Are Not Nationals, Art 5(1-a)		
	Rights during detention or imprisonment	ICCPR, Art 9(2, 3, 4, 5) CRC, Art 40(1) ICRMW, Art 17(1)		
	Right of equality with nationals before the courts; right to due process	UDHR, Art 7, 8, 10, 11(1) ICERD, Art 5(a), 6 ICCPR, Art 14(1), 16, 26 CAT, Art 12, 13, 14 CRC, Art 12(2) ICRMW, Art 18(1) Declaration of Individuals Who Are Not Nationals, Art 5(1-c)		ECHR, Art 6(1)
	Prohibition of collective expulsion	CAT, Art 3 ICRMW, Art 22(1, 2)		ESC, Art 19(8) ECHR, Protocol IV, Art 4

Legend

- UDHR – Universal Declaration of Human Rights, 1948
- ICERD – International Convention on the Elimination of All Forms of Racial Discrimination, 1965
- ICESCR – International Covenant on Economic Social and Cultural Rights, 1966
- ICCPR – International Covenant on Civil and Political Rights, 1966
- CEDAW – Convention on the Elimination of All Forms of Discrimination Against Women, 1979
- CAT – Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
- CRC – Convention on the Rights of the Child, 1989
- ICRMW – International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990
- UN Declaration on Individuals Who Are Not Nationals of the Country in Which They Live, 1985
- UNESCO Convention against Discrimination in Education, 14 December 1960
- ESC – European Social Charter (Revised), 1996, and its Additional Protocols
- ECHR – Convention for the Protection of Human Rights and Fundamental Freedoms, 1950
- C 29 – Forced Labour Convention, 1930
- C 87 – Freedom of Association and Protection of the Right to Organise Convention, 1948
- C 98 – Right to Organise and Collective Bargaining Convention, 1949
- C 105 – Abolition of Forced Labour Convention, 1957
- C 143 – Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, 1975
- C 182 – Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Form of Child Labor, 1999

3.2 List of Articles Divided by Theme

3.2.1 Physical and Mental Integrity

Right to life

UDHR, Art. 3: Everyone has the right to life, liberty and security of person.

ICCPR, Art. 6(1): Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

CRC, Art. 6(1): States Parties recognize that every child has the inherent right to life.

ICRMW, Art. 9: The right to life of migrant workers and members of their families shall be protected by law.

Declaration on Individuals Who Are Not Nationals, Art. 5(a): Aliens shall enjoy, in accordance with domestic law and subject to the relevant international obligation of the State in which they are present, in particular the following rights: (a) The right to life and security of person; no alien shall be subjected to arbitrary arrest or detention; no alien shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law; (...).

C 143, Art. 1: Each Member for which this Convention is in force undertakes to respect the basic human rights of all migrant workers.

ECHR, Art. 2(1): Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

Right not to be tortured

UDHR, Art. 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

ICERD, Art. 5(b): (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.

ICCPR, Art. 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

CAT, Art. 16(1): Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in Articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

CRC, Art. 19(1): States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

CRC, Art. 37(a): States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.

ICMW, Art. 10: No migrant worker or member of his or her family shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Declaration on Individuals Who Are Not Nationals,

Art. 6: No alien shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment and, in particular, no alien shall be subjected without his or her free consent to medical or scientific experimentation.

ECHR, Art. 3: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Right not to be enslaved or in forced or compulsory labour

UDHR, Art. 4: No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

ICESCR, Art. 10(3): Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

ICCPR, Art. 8(1, 2, 3a): No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
 2) No one shall be held in servitude.
 3-a) No one shall be required to perform forced or compulsory labour (...).

CEDAW, Art. 6: States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

CRC, Art. 11(1): States Parties shall take measures to combat the illicit transfer and non-return of children abroad.

CRC, Art. 32(1): States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

CRC, Art. 34: States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:
 (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
 (b) The exploitative use of children in prostitution or other unlawful sexual practices;
 (c) The exploitative use of children in pornographic performances and materials.

CRC, Art. 35: States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

CRC, Art. 36: States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

ICMW, Art. 11(1, 2): No migrant worker or member of his or her family shall be held in slavery or servitude.

2) No migrant worker or member of his or her family shall be required to perform forced or compulsory labour.

C 29, Art. 1(1): Each Member of the International Labour Organisation which ratifies this Convention undertakes to suppress the use of forced or compulsory labour in all its forms within the shortest possible period.

C 105, Art. 1(e): Each Member of the International Labour Organization which ratifies this Convention undertakes to suppress and not to make use of any form of forced or compulsory labour: (...)
 (e) as a means of racial, social, national or religious discrimination.

C 105, Art. 2: Each Member of the International Labour Organization which ratifies this Convention undertakes to take effective measures to secure the immediate and complete abolition of forced or compulsory labour as specified in Article 1 of this Convention.

C 182, Art. 1: Each Member which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.

C 182, Art. 3: For the purposes of this Convention, the term the worst forms of child labour comprises:

- (a) All forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- (b) The use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (c) The use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
- (d) Work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

ECHR, Art. 4(1, 2):

- 1) No one shall be held in slavery or servitude.
- 2) No one shall be required to perform forced or compulsory labour.

3.2.2 Health Care

Right to health care

UDHR, Art. 25: Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

ICERD, Art. 5(e-iv): In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (...) (e-iv) The right to public health, medical care, social security and social services.⁵⁹

ICESCR, Art. 12(1): The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.⁶⁰

⁵⁹ The Committee on the Elimination of Racial Discrimination on the extension of this provision stated" (...) Ensure that States parties respect the right of non-citizens to an adequate standard of physical and mental health by, inter alia, refraining from denying or limiting their access to preventive, curative and palliative health services (...)", See CERD, *General Recommendation 30: Discrimination Against Non Citizens*, 01/10/2004, para.7.

⁶⁰ For an understanding of the extensions of the provisions granted in Art. 12, see the Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health*, 11/08/2000, para.9, 34: "(...) Consequently, the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health. (...) In particular, States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services."

CRC, Art. 24(1): States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

CRC, Art. 25: States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

CRC, Art. 39: States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

CEDAW, Art. 14(2.b): States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: (...) b) to have access to adequate health care facilities, including information, counseling and services in family planning.

ICRMW, Art. 28: Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment.

ESC, Art. 13: With a view to ensuring the effective exercise of the right to social and medical assistance, the Contracting Parties undertake:

- 1) to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;
- 2) to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights;
- 3) to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want;
- 4) to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Contracting Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11th December 1953.⁶¹

ECHR, Art. 3:⁶² No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

⁶¹ On the extension of the provisions of this article to undocumented migrants see footnote 48.

⁶² The European Convention on Human Rights under Article 3 may in certain exceptional circumstances protect those denied health care if they may as a consequence suffer inhuman or degrading treatment or punishment. In the case of *Pretty v. the United Kingdom*, the Court held that "the suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible." See Eur. Court of Human Rights, *Pretty v. United Kingdom*, judgment of 29 April 2002 (Application No. 2346/02), para. 52.

3.2.3 Adequate Standard of Living

Right to adequate housing

UDHR, Art. 25(1): Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

ICERD, Art. 5(e-iii): In compliance with the fundamental obligations laid down in article 2 of this Convention State Parties undertake to prohibit and to eliminate racial discrimination in all its form and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
(...) (e-iii) The right to housing.⁶³

ICESCR, Art. 11(1): The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and *housing*, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.⁶⁴

CEDAW, Art. 14(2-h): States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: (...)

h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

CRC, Art. 27(3): States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

ESC, Art. 31: With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:

1. to promote access to housing of an adequate standard;
2. to prevent and reduce homelessness with a view to its gradual elimination;
3. to make the price of housing accessible to those without adequate resources.⁶⁵

⁶³ The Committee on the Elimination of Racial Discrimination stated that the States parties to the Convention, as appropriate to their specific circumstances, should: "(...) Guarantee the equal enjoyment of the right to adequate housing for citizens and non-citizens, especially by avoiding segregation in housing and ensuring that housing agencies refrain from engaging in discriminatory practices", See CERD, *General Recommendation 30: Discrimination Against Non Citizens*, 01/10/2004, para.32.

⁶⁴ The Committee on Economic, Social and Cultural Rights clarified that "The right to adequate housing applies to everyone...Individuals, as well as families, are entitled to adequate housing regardless of age, economic status, group or other affiliation or status and other such factors. In particular, enjoyment of this right must, in accordance with Article 2 (2) of the covenant, not be subject to any form of discrimination." See CESCR, *General Comment No. 4, The right to adequate housing (Art.11 (1))*, 13/12/91, para.6.

⁶⁵ For the extension of this provision to irregular migrants one would need to argue the significance of the right for the preservation of human dignity, along the lines argued in the case of IFHR (International Federation of Human Rights) v. France. See footnote 48.

Right to family life

ICESCR, Art. 10(1,2): The States Parties to the present Covenant recognize that the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.

2) Special protection should be accorded to the mothers during reasonable period before and after childbirth. During such a period working mothers should be accorded paid leave or leave with adequate social security benefits.

ICCPR, Art. 23(1): The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

CRC, Art. 9(1): States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

CRC, Art. 10(1): In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

CRC, Art. 20(1): A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

ESC, Art. 16: With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means.

ESC, Art. 19(6): With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Party, the Parties undertake :[...] 6) to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory; [...].

Right to a minimum subsistence

UDHR, Art. 25(1): Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

ICESCR, Art. 11(1): The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

3.2.4 Fair Labor Conditions

Right to fair conditions of employment

ICESCR, Art. 6: The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2) The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

ICESCR, Art. 7: The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- (a) Remuneration which provides all workers, as a minimum, with:
 - (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
 - (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
- (b) Safe and healthy working conditions;
- (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
- (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays

CRC, Art. 32(1): States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

ICRMW, Art. 25(1): Migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and:

- (a) Other conditions of work, that is to say, overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and any other conditions of work which, according to national law and practice, are covered by these terms;
- (b) Other terms of employment, that is to say, minimum age of employment, restriction on home work and any other matters which, according to national law and practice, are considered a term of employment.

C143, Art. 9(1, 2): Without prejudice to measures designed to control movements of migrants for employment by ensuring that migrant workers enter national territory and are admitted to employment in conformity with the relevant laws and regulations, the migrant worker shall, in cases in which these laws and regulations have not been respected and in which his position cannot be regularised, enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits.

2) In case of dispute about the rights referred to in the preceding paragraph, the worker shall have the possibility of presenting his case to a competent body, either himself or through a representative.

Right to join trade unions and other associations

UDHR, Art. 20: Everyone has the right to freedom of peaceful assembly and association.

2) No one may be compelled to belong to an association.

UDHR, Art. 23(4): Everyone has the right to form and to join trade unions for the protection of his interests.

ICERD, Art. 5(e-ii): In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (...) (e-ii) The right to form and join trade unions; (...).⁶⁶

ICESCR, Art. 8(1): The States Parties to the present Covenant undertake to ensure:

- (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
- (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;
- (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

ICCPR, Art. 22(1): Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

CEDAW, Art. 14(2.e): States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: (...)

(e) To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self employment;

ICRMW, Art. 26(1): States Parties recognize the right of migrant workers and members of their families:

- (a) To take part in meetings and activities of trade unions and of any other associations established in accordance with law, with a view to protecting their economic, social, cultural and other interests, subject only to the rules of the organization concerned;
- (b) To join freely any trade union and any such association as aforesaid, subject only to the rules of the organization concerned;
- (c) To seek the aid and assistance of any trade union and of any such association as aforesaid.

C 87, Art. 11: Each Member of the International Labour Organization for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.

⁶⁶ See CERD, *General Recommendation 30: Discrimination Against Non Citizens*, 01/10/2004, para. 35: "Recognize that, while States parties may refuse to offer jobs to non-citizens without a work permit, all individuals are entitled to the enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated."

C 98, Art. 1(1): Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.

C143, Art. 9: Without prejudice to measures designed to control movements of migrants for employment by ensuring that migrant workers enter national territory and are admitted to employment in conformity with the relevant laws and regulations, the migrant worker shall, in cases in which these laws and regulations have not been respected and in which his position cannot be regularised, enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits.

ECHR, Art. 11(1): Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

Right to social security

UDHR, Art. 22: Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

ICERD, Art. 5(e-iv): In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (...) (e-iv) The right to public health, medical care, social security and social services.

ICESCR, Art. 9: The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

ICRMW, Art. 27(1): With respect to social security, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfill the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. The competent authorities of the State of origin and the State of employment can at any time establish the necessary arrangements to determine the modalities of application of this norm.

3.2.5 Education ⁶⁷

Right of the child to a name and identification

UDHR, Art. 15: Everyone has the right to a nationality.

2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

ICERD, Art. 5 (d-iii): In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (...) (d-iii) The right to nationality.

ICCPR, Art. 24: Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2) Every child shall be registered immediately after birth and shall have a name.

3) Every child has the right to acquire a nationality.

⁶⁷ Generally speaking it might be useful to recall the Declaration of the Rights of the Child of 20 November 1959 and, among the various principles declared, *principle 3* on the right to a name and nationality, *principle 4* on the right to enjoy the benefits of social security, *principle 7* on the right to education and *principle 9* protecting the child from any form of exploitation.

CRC, Art. 7: The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
2) States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

CRC, Art. 8: States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2) Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

ICRMW, Art. 29: Each child of a migrant worker shall have the right to a name, to registration of birth and to a nationality.

Right to education

UDHR, Art. 26(1): Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

ICERD, Art. 5(e-v): In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in

the enjoyment of the following rights: (...) (e-v) The right to education and training.⁶⁸

ICESCR, Art. 13(1, 2): The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for the human rights and the fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2) The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

- (a) Primary education shall be compulsory and available free to all;
- (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
- (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
- (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
- (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.⁶⁹

⁶⁸ See CERD, *General Recommendation 30: Discrimination Against Non Citizens*, 01/10/2004, para.30: "Ensure that public educational institutions are open to non-citizens and children of undocumented immigrants residing in the territory of a State party."

⁶⁹ See CESCR, *General Comment No.13: The right to education (Art.13)*, 08/12/99, para.34: "The Committee takes note of Article 2 of the Convention on the Rights of the Child and Article 3 (e) of the UNESCO Convention against Discrimination in Education and confirms that the principle of non-discrimination extends to all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of their legal status."

ICESCR, Art. 14: Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

CRC, Art. 28(1): States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education compulsory and available free to all;
- (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
- (d) Make educational and vocational information and guidance available and accessible to all children;
- (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

CRC, Art. 29(1): States Parties agree that the education of the child shall be directed to:

- (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
- (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

- (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
- (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
- (e) The development of respect for the natural environment.

ICRMW, Art. 30: Each child of a migrant worker shall have the basic right of access to education on the basis of equality of treatment with nationals of the State concerned. Access to public pre-school educational institutions or schools shall not be refused or limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child's stay in the State of employment.

UNESCO Convention against Discrimination in Education, Art. 3: In order to eliminate and prevent discrimination within the meaning of this Convention, the States Parties thereto undertake:

- (a) To abrogate any statutory provisions and any administrative instructions and to discontinue any administrative practices which involve discrimination in education;
- (b) To ensure, by legislation where necessary, that there is no discrimination in the admission of pupils to educational institutions;
- (c) Not to allow any differences of treatment by the public authorities between nationals, except on the basis of merit or need, in the matter of school fees and the grant of scholarships or other forms of assistance to pupils and necessary permits and facilities for the pursuit of studies in foreign countries;

- (d) Not to allow, in any form of assistance granted by the public authorities to educational institutions, any restrictions or preference based solely on the ground that pupils belong to a particular group;
- (e) To give foreign nationals resident within their territory the same access to education as that given to their own nationals.

ECHR, Protocol XI, Art. 2: No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

ESC, Art. 17(2): With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed: (...)
 2) To provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools.

3.2.6 Equality Before the Law

Right not to be arbitrarily arrested

UDHR, Art. 3: Everyone has the right to life, liberty and security of person.

UDHR, Art. 9: No one shall be subjected to arbitrary arrest, detention or exile.

ICERD, Art. 5(a): In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (a) The right to equal treatment before the tribunals and all other organs administering justice; (...).

ICCPR, Art. 9(1): Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

CRC, Art. 37: States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
- (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

ICRMW, Art. 16(1-6):

- 1) Migrant workers and members of their families shall have the right to liberty and security of person.
- 2) Migrant workers and members of their families shall be entitled to effective protection by the State against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions.
- 3) Any verification by law enforcement officials of the identity of migrant workers or members of their families shall be carried out in accordance with procedure established by law.
- 4) Migrant workers and members of their families shall not be subjected individually or collectively to arbitrary arrest or detention; they shall not be deprived of their liberty except on such grounds and in accordance with such procedures as are established by law.
- 5) Migrant workers and members of their families who are arrested shall be informed at the time of arrest as far as possible in a language they understand of the reasons for their arrest and they shall be promptly informed in a language they understand of any charges against them.
- 6) Migrant workers and members of their families who are arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that while awaiting trial they shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings and, should the occasion arise, for the execution of the judgment (...).

Declaration on Individuals Who are Not Nationals,

Art. 5(1-a): Aliens shall enjoy, in accordance with domestic law and subject to the relevant international obligation of the State in which they are present, in particular the following rights:
 (a) The right to life and security of person; no alien shall be subjected to arbitrary arrest or detention; no alien shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law;

Rights during detention or imprisonment⁷⁰**ICCPR, Art. 9 (2, 3, 4, 5):**

- 2) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
- 3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
- 4) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
- 5) Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

⁷⁰ It is possible to recall here also as general principles the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment of 9 December 1988. Particularly relevant are: principle 1) All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person; principle 2) Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose; principle 14) A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in principle 10, principle 11, paragraph 2, principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.

CRC, Art. 40(1): States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

ICRMW, Art. 17(1): Migrant workers and members of their families who are deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and for their cultural identity.

***Right of equality with nationals before the courts;
Right to due process***

UDHR, Art. 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

UDHR, Art. 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

UDHR, Art. 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

UDHR, Art. 11(1): Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence (...).

ICERD, Art. 5(a): In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

ICERD, Art. 6: States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.⁷¹

ICCPR, Art. 14(1): All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

⁷¹ See CERD, *General Recommendation 30: Discrimination Against Non Citizens*, 01/10/2004, para.18: "Ensure that non-citizens enjoy equal protection and recognition before the law and in this context, to take action against racially motivated violence and to ensure the access of victims to effective legal remedies and the right to seek just and adequate reparation for any damage suffered as a result of such violence."

ICCPR, Art. 16: Everyone shall have the right to recognition everywhere as a person before the law.

ICCPR, Art. 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

CRC, Art. 12(2): For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

CAT, Art. 12: Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

CAT, Art. 13: Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

CAT, Art. 14: Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2) Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

ICRMW, Art. 18(1): Migrant workers and members of their families shall have the right to equality with nationals of the State concerned before the courts and tribunals. In the determination of any criminal charge against them or of their rights and obligations in a suit of law, they shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Declaration of Individuals Who Are Not Nationals, Art. 5(1-c): Aliens shall enjoy, in accordance with domestic law and subject to the relevant international obligation of the State in which they are present, in particular the following rights: (...) (c) The right to be equal before the courts, tribunals and all other organs and authorities administering justice and, when necessary, to free assistance of an interpreter in criminal proceedings and, when prescribed by law, other proceedings; (...).

ECHR, Art. 6(1): In the determination of his civil rights and obligations or of any criminal charge against him, *everyone* is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Prohibition of collective expulsion

CAT, Art. 3: No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2) For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

ICRMW, Art 22(1, 2): Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually.

2) Migrant workers and members of their families may be expelled from the territory of a State Party only in pursuance of a decision taken by the competent authority in accordance with law.

ESC, Art. 19(8): With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Party, the Parties undertake: (...)

8) to secure that such workers lawfully residing within their territories are not expelled unless they endanger national security or offend against public interest or morality; (...).

ECHR, Protocol IV, Art 4: Collective expulsion of aliens is prohibited.

List Of Websites for Additional Information

UNITED NATIONS

UN High Commissioner for Human Rights (OHCHR): <http://ohchr.org/english/>

UN High Commissioner for Refugees (UNHCR): <http://www.unhcr.ch>

Texts of UN treaty bodies on human rights: <http://ohchr.org/english/law/index.htm>

Status of ratification of the treaty bodies: <http://www.ohchr.org/english/bodies/docs/RatificationStatus.pdf>

Different rules of procedures and mechanisms of each treaty body: <http://ohchr.org/english/bodies/>

OHCHR Migration and Human Rights task force:

<http://ohchr.org/english/issues/migration/taskforce/index.htm>

Special Procedures assumed by the Human Rights Council: <http://ohchr.org/english/bodies/chr/special/index.htm>

INTERNATIONAL LABOUR ORGANIZATION

ILO declaration and conventions: <http://www.ilo.org/ilolex/>

ILO and migration: <http://www.ilo.org/public/english/protection/migrant/>

COUNCIL OF EUROPE

European Committee on Migration (CDMG): http://www.coe.int/t/dg3/migration/default_en.asp

European Commission against Racism and Intolerance (ECRI): http://www.coe.int/T/E/human_rights/Ecri/

European Court of Human Rights: <http://www.echr.coe.int/echr>

Text of the Convention for the Protection of Human Rights and Fundamental Freedoms:

<http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>

Text of the (revised) European Social Charter: <http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm>

EUROPEAN UNION

On the Charter of Fundamental Rights of the EU: http://www.europarl.europa.eu/charter/pdf/text_en.pdf

On free movement of persons, asylum and immigration: <http://europa.eu/scadplus/leg/en/s17000.htm#ASILE>

Court of Justice of the European Communities: <http://curia.europa.eu/>

European Monitoring Centre on Racism and Xenophobia (EUMC): <http://www.eumc.eu.int/eumc/index.php>

OTHER

International Organization for Migration (IOM): <http://www.iom.int>

Organization for Economic Cooperation and Development (OECD):

http://www.oecd.org/topic/0,2686,en_2649_37415_1_1_1_1_37415,00.html

Global Commission on International Migration (GCIM): <http://www.gcim.org>

UNESCO, International Migration and Multicultural Policies homepage: www.unesco.org/migration

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**PICUM - Platform for International Cooperation
on Undocumented Migrants**

Gaucheretstraat 164

1030 Brussels

Belgium

tel. +32/2/274.14.39

fax +32/2/274.14.48

www.picum.org

info@picum.org



PLATFORM FOR INTERNATIONAL COOPERATION ON UNDOCUMENTED MIGRANTS