



JOINT COMMITTEE OF REPRESENTATIVES OF THE TWO HUMAN RIGHTS COMMISSIONS ON THE ISLAND OF IRELAND

Consultation Paper on the Migrant Workers Convention

December 2009

Introduction

The Joint Committee wishes to consult a wide range of organisations in Ireland and the UK on how to enhance human rights protections for all migrant workers on the island of Ireland.

It is the policy of both the Irish Human Rights Commission (IHRC) and the Northern Ireland Human Rights Commission (NIHRC), and of the Joint Committee of the two Commissions¹, to support the ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (MWC). Both Commissions have

¹ The Good Friday Agreement envisaged the establishment of a Joint Committee of representatives from both the IHRC and NIHRC. The Joint Committee exists as a forum for considering human rights issues on the island of Ireland and also providing an opportunity for both Commissions to cooperate in the pursuit of commonly agreed objectives.

repeatedly made their views known to their respective Governments. Both Commissions have also been active on behalf of the human rights of migrant workers.² At its recent meetings, the Joint Committee has discussed the issues of relevance to the MWC, the ratification of the MWC and the situation of migrant workers in the two jurisdictions on the island of Ireland. It has come to the following conclusions for action:

- To continue to press for ratification of the MWC, but also to use the Convention's provisions as a tool and a yardstick against which to measure law and practice in the two jurisdictions.
- To consult with appropriate agencies and organisations in the two jurisdictions on this approach and also on what their proposals might be for necessary change in law and practice to reach the level of protection contained in the MWC.
- On the basis of the response to this consultation to engage the two governments and all-island bodies on the arguments for ratification of the MWC, in respect of Ireland and the UK, to raise the issue at the EU level and to propose specific changes in law and practice to ensure that the rights of migrant workers are protected at least to the level of the MWC.

This paper raises some of the issues and problems associated with the campaign to ratify the MWC and gives some relevant information as an aid for the consultation process.

Information included for the purposes of the Consultation:

A number of texts that might aid discussion have been brought together as appendices to this paper.

1. A synopsis of the Convention itself, its monitoring system and the number of ratifications.
2. A synopsis of background research commissioned by the IHRC to examine the extent to which Irish and EU law and policy complies with the provisions of the MWC³.
3. A summary of a UNESCO report in relation to that organisation's view on legal obstacles to ratification relating to the UK.

² See for example IHRC, *Observations on Certain Provisions of the Employment Law Compliance Bill*, July 2008; IHRC, *Observations on the Immigration, Residence and Protection Bill 2008*, March 2008; IHRC, *Submission to the Committee on the Elimination of Racial Discrimination in respect of Ireland's First Periodic Report*, March 2005. See also NIHRC report of its investigation into homelessness for non-UK nationals: *No Home from Home: Homelessness for People with No or Limited Access to Public Funds 2009* and report of its recent investigation into immigration detention in Northern Ireland: *Our Hidden Borders: The UKBA's Powers of Detention 2009*.

³ The IHRC commissioned Dr. Siobhán Mullally, Claire Cumiskey and Liam Thornton, from the Centre for Criminal Justice and Human Rights, Faculty of Law, University College Cork to undertake this research which is dated January 2008. This research was commissioned for the purpose of enhancing the Commission's understanding of the implications of the Convention for Irish law. There have been significant developments since this research was first prepared and further updating is required prior to publication.

4. The general arguments for ratification of the Convention are presented, quoted from a Migrants Rights International publication.
5. Edited extracts from the UNESCO report on obstacles to ratification in the European context.
6. A brief analysis of the added value of the MWC in relation to other human rights instruments is included, taken from a newly updated research report from the *December 18* organisation.
7. Statements from the EU Commission and the UK and Irish governments relating to ratification of the MWC.

The following section discusses some arguments and implications arising out of these texts.

Summary of the arguments for and against ratification:

The MWC “repeats” other human rights instruments

One of the main sections of the MWC in effect reiterates “standard” human rights protections in relation to the right to life, liberty, fair trial and so on. The argument is made that these rights are well-protected under other UN conventions and, in relation to the UK and Ireland, the ECHR which has been incorporated into domestic law in both jurisdictions. Against that, it is argued that basic rights need to be reiterated for particularly vulnerable groups, of which migrant workers are one, which practical experience – including in these two jurisdictions – demonstrates (see Appendix 5). And given that both Ireland and the UK are already committed to these rights, since they have ratified the other conventions, ratification of the MWC should not cause any significant problems.

Moreover, many of the rights protected by other ‘specialised’ conventions like CEDAW (elimination of discrimination against women), CERD (elimination of racial discrimination), and CRC (the rights of the child), were also protected by the more general conventions like the ECHR and the ICCPR (international covenant on civil and political rights), but the specialised conventions set those rights in the context of a particular group and its specific problems.

It might be suggested that the MWC – which is not directly justiciable, i.e. enforceable through the courts – is not a particularly strong guarantee for these basic rights compared to, say, the ECHR and the issue is to make sure that existing legislation is properly applied to migrant workers. In response, however, it could be argued that the symbolic significance and the reporting requirements of the MWC would be a powerful reinforcement to existing legislative provisions. States which ratify it are also, in principle, obliged to change any legislation incompatible with the Convention. The requirement to report periodically to the Committee on Migrant Workers which monitors observance of the MWC would focus attention on the current state of national law and provide an otherwise absent monitoring mechanism for the rights of migrants. It would also provide an opportunity to engage in a dialogue with the experts who make up that Committee. This process should be beneficial to

both parties in learning about problems of implementation of laws and emerging best practice in protecting the rights of migrant workers.

The “added value” of the MWC in respect of other rights also needs to be taken into account (see Appendix 6).

The “added value” of the MWC in policy areas

It could be argued that the major extra protections of the MWC arise in areas such as employment rights and social security entitlement that are sometimes viewed as areas of policy and regulation rather than human rights. It might also be suggested that it is generally in these areas that any incompatibility with both Irish and UK law arises (see appendices 2 and 3) and that these are politically contentious matters.

Against that it could be argued that it is precisely in these areas of employment rights and access to social security, which typically are subject to a great deal of executive discretion, that the rights of migrant workers need protection. They often face discrimination and there is a significant potential for associated human rights abuses. Furthermore, in protecting the rights of migrant workers in these areas, the rights of all workers would also be protected as this would help to prevent a “race to the bottom” in employment and associated rights. It can also be argued that protection of minorities and vulnerable groups is a prime purpose of human rights provisions, perhaps especially in politically contentious areas (see also Appendix 6).

The extent of legislative change needed if there were to be ratification

An argument made against ratification is that it would require major legislative change in either or both the Irish or UK jurisdictions. As the UNESCO report quoted below suggests, much of this is based on a misconception about the impact of aspects of the MWC. The UNESCO report speaks of “minor incompatibilities” with UK law and the research study that the IHRC commissioned suggests that there would be no need for wholesale change in Irish law if the MWC were to be ratified.

From one point of view, the fact that extensive legislative change would not be needed is an argument in favour of ratification – that is, it would not be too difficult or radical a change (although small changes in important legislation can make a big difference to people’s lives). In itself, however, that could be taken as an argument against ratification – if it would not mean much change, why bother? Though in fact it has been the practice of both governments not to ratify human rights conventions until all or almost all the necessary legislation has been put in place.

In relation to Appendix 2 (with the proviso that this is only a summary of a detailed legal paper) it seems that the areas of change in law and practice needed if the MWC were to be ratified in the Republic of Ireland fall into three main areas. First, there are some problems of definition of which the most important might be relating to the definition of the family. Clearly,

this is a subject that has implications beyond the circumstances of migrant workers. Second, the authors of the report consider that Irish law and practice fall short of full implementation of some aspects of “standard” or general human rights requirements that impact on migrant workers. Some of these may relate quite specifically to non-Irish nationals (e.g. informing people of their rights in a language they understand), others are more general (e.g. the absence of a clear legal duty to separate convicted and unconvicted prisoners). Third, there are a number of areas where Irish law and practice do not meet the standards of the MWC in relation to documented or regular migrant workers (see Appendix 2 in relation to Articles 36 to 56). However, it would appear that to rectify these shortcomings would not involve major legislative change.

The UNESCO report (see Appendix 3) identifies the main failings in UK law as also relating to conditions for documented migrant workers, although one of the main changes needed for compliance with art 25(3) would be to dispense with the doctrine of illegality within UK employment law; this provision applies to both regular and irregular workers and is referenced in Appendix 3. A broader study would also probably conclude that there are also substantial shortcomings in the enforcement of “standard” human rights in relation to the treatment of migrant workers.

Some conclusions from this cursory examination of the legal situation in the two jurisdictions might be that, firstly, some issues (such as definition of the family) will have to be approached on a broader basis than simply from the perspective of migrant workers. Secondly, that there is a continuing need to ensure implementation of human rights norms in a number of areas which may well involve specific advocacy on behalf of migrant workers. Finally, there are areas of law and practice that relate specifically to the situation of migrant workers that need to be urgently addressed.

The global perspective

At a global level, the need for human rights based approach to labour migration is clear. The arguments in favour of ratification of the MWC by both states of origin and receiver states summarised in Appendix 4 are very strong. This Convention has an important role to play in promoting "sound, equitable, humane and lawful conditions" for the international migration of workers and members of their families.⁴

It must be noted that that the EU is a crucial arena for advancing the arguments for comprehensive ratification. If all the Member States of the EU ratified the MWC it would transform the Convention’s status on an international level and, more importantly, enhance the protection and treatment of migrant workers in a significant portion of the world (the current view of the EU Commission is noted in Appendix 7).

⁴ Part VI of the MWC.

Questions for consultation:

The Joint Committee would like to ask the organisations consulted the following questions:

1. Do you have any comments or contributions on the above arguments about ratification of the MWC or other issues arising from the information contained in the Appendices? In particular, what in your organisation's view would be the "added value" of the ratification of the MWC at the domestic level?

2. Is your organisation in favour of the ratification of the MWC? What are the reasons of your organisation for this position?

3. If your organisation is in favour of ratification, can you give a brief account of what action, if any, you have taken or intend to take to press for ratification or more generally to promote the Convention?

4. What are your views on the approach of the Joint Committee in continuing to press for ratification of the MWC but also using it as a yard stick for relevant law and policy?

5. What do you consider are priorities for changes in law, policy or practice in your jurisdiction (i.e. Northern Ireland or the Republic of Ireland) that would bring the protection of the human rights of migrant workers and their families up to the level required by the MWC?

We would be extremely grateful if you could respond by e-mail to:

Brian Gormally
Joint Committee Service and Policy Contractor
joint.committee@nihrc.org

We would be grateful if you could respond by February 26th 2010 at the latest

Appendix 1: A Summary of the Provisions of the MWC

The MWC and the rights it guarantees apply to all migrant workers⁵ and members of their families⁶ without discrimination of any kind during the entire migration process.

All migrant workers and their families, documented or un-documented, have the following rights⁷:

- Freedom to leave any State and the right at any time to enter and remain in their State of origin;
- The right to life;
- The right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, to be held in slavery or servitude or to be required to perform forced or compulsory labour;
- The right to freedom of thought, opinion, conscience and religion, freedom of expression and for parents to ensure the religious and moral education of their children in conformity with their own convictions;
- The right not to be subjected to arbitrary or unlawful deprivation of property, interference with his or her privacy, family, home, correspondence or other communications, or attacks on his or her honour and reputation;
- The right to liberty and security of person and effective protection by the State against violence, physical injury, threats and intimidation;
- The right to fair trial on the basis of equality with nationals of the State concerned including to be informed in a language they understand of the reasons for their arrest and any charges against them, prompt judicial hearing with an interpreter, a presumption of bail, consular access and legal representation as well as a standard of criminal justice compatible with international human rights norms;
- If deprived of liberty, to be treated with humanity and with respect for their cultural identity, good practice in conditions and regimes of detention or imprisonment and to enjoy the same rights as nationals of those States who are in the same situation;
- The right not to be subject to collective expulsion and the right to be informed of reasons for individual expulsion, to consular access and to appeal decisions;

⁵ Article 2 of the MWC generally defines this term to refer to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national; it does not include diplomats, development workers, refugees, students or seafarers.

⁶ Article 4 of the MWC defines family members to include people married to or in an equivalent relationship with a migrant worker as well as dependent children.

⁷ Part III of the MWC.

- The right to enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and conditions of work and the right to join and take part in the activities of trade unions and any other associations;
- The right to receive any medical care urgently required for the preservation of life or the avoidance of irreparable harm to health;
- The right of access to education for children of migrant workers on the basis of equality of treatment with nationals of the State concerned;
- The right to respect for their cultural identity and to maintain their cultural links with their State of origin.

Documented migrant workers and their families have the following additional rights⁸:

- The right to advance information about the conditions and requirements of migration;
- The right to liberty of movement in the territory of the State of employment and freedom to choose their residence there;
- The right to form associations and trade unions in the State of employment for the promotion and protection of their economic, social, cultural and other interests;
- The right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State;
- The right to participate in decisions concerning the life and administration of local communities in the State of employment;
- The right to equality of treatment with nationals of the State of employment in relation to access to education, vocational training, housing and cultural life;
- The right to the protection of the unity of their families including the facilitation of reunification with their spouses or equivalent persons as well as with their minor dependent unmarried children
- Facilitation of the integration of their children in the local school system and teaching them the local language and their mother tongue and culture
- Fair taxation and the right to transfer their earnings and savings from the State of employment to their State of origin or any other State

⁸ Part IV of the MWC. Special categories of migrant worker such as frontier workers or seasonal workers shall have these rights where it is feasible in their circumstances

- Fair administration of the interaction of work permits and residence authorisation and equal protection of their rights at work, subject to the conditions of their work permits

States should consult and co-operate with a view to promoting sound, equitable and humane conditions in connection with international migration of workers and members of their families, including the prevention of illegal movements of migrants.

The MWC is monitored by a committee of international experts that receives regular reports from States Parties on their implementation of the MWC and discusses these in public session with representatives of the government of the state under review. Where the state in question agrees, the Committee may also consider complaints from other States or from individuals, and may express its views on them.

Nothing in the Convention affects the right of each State Party to establish the criteria governing the admission of migrant workers and members of their families.

42 countries have ratified the Convention. Of these, none are major, developed receiver countries, with the arguable exceptions of Argentina and Mexico. No member of the European Union has signed or ratified the Convention.

Appendix 2: Irish Law and the MWC

The following points are a summary of some aspects of the research commissioned by the IHRC on the compatibility of Irish and EU law with the standards set down in the MWC.⁹ This synopsis should not be regarded as authoritative and has been prepared only for the purposes of discussion. It should be noted that this research is dated 2008 and does not take account of legislative changes or proposed legislative amendments after that date.

Article 1 – Applicability of the Convention to all migrant workers on an equal basis and throughout the migration process

Irish domestic law, the Irish Constitution and the ECHR cover all the equality grounds mentioned in the MWC except, arguably, “economic position.” There are gaps in domestic legislative provision in relation to “preparation for migration, departure and transit and the return of migrant workers” as opposed to the period of stay and remunerated employment in the state.

Article 2 – Definitions of migrant worker

There is no precise definition of migrant worker in Irish law although it appears that most sub-definitions in the MWC have some kind of equivalence in Irish law. The research states, “While the term ‘migrant worker’ may refer to both EU and non-EU nationals, in practice migrant workers are persons who have permission to remain in the state on the basis of an employment permit/green card pursuant to the provisions of the Employment Permits Acts of 2003 and 2006. In order to strictly comply with the MWC a definition of a ‘migrant worker’ should be placed on a statutory footing.”

Article 3 – Exclusions from the scope of the MWC (e.g. students, refugees)

There is no specific legislation in Ireland relevant to the exclusions under the MWC and some of the excluded categories may be allowed to work in Ireland under law or ministerial discretion.

Article 4 – The definition of the family of a migrant worker includes “a relationship that...produces effects equivalent to marriage”

Irish domestic law is in conflict with the MWC in relation to relationships that produce effects equivalent to marriage. The jurisprudence in the European Court of Human Rights (ECtHR) has extended the notion of the family to include relationships which subsist without formal

⁹ IHRC Commissioned Research, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990): Irish and EU Law*, January 2008 undertaken by Dr. Siobhán Mullally, Claire Cumiskey and Liam Thornton, Centre for Criminal Justice and Human Rights, Faculty of Law, University College Cork

legal ties. The Report says “to ensure compliance with the MWC, a more inclusive definition of the family is required in Irish law.”

Article 5 – Definition of “documented and non-documented” migrant workers

There does not appear to be a conflict with Irish law.

Article 6 – Definition of “state of origin” etc

This is an interpretive clause only.

Article 7 – Obligation on States to accord the MWC rights to all migrant workers without discrimination

Ireland has ratified a range of international human rights instruments and has indirectly incorporated the ECHR into domestic law. There is also extensive equality legislation.

Articles 8 to 35 impose obligations to uphold the general human rights of all migrant workers on the same basis as nationals of the host state

In general, it appears that Irish law is in compliance with these articles through the Constitution and domestic legislation, including the European Convention on Human Rights Act 2003 which indirectly incorporated the ECHR. In particular, while the Constitution generally refers to “citizens,” a range of jurisprudence has emphasised that Constitutional and other rights protections normally apply to all persons within the jurisdiction of the State – though it is still argued that this should be made explicit.

The following are some exceptions where Irish law may not be in full compliance with the MWC:

- It is not clear in practice that non-Irish nationals under arrest are always informed promptly in a language that they understand of the nature of the charges against them;
- There is no binding legal duty to separate unconvicted from convicted prisoners;
- There is a lack of rehabilitative provision for ex-prisoners;
- There is no provision in Irish law to prohibit imprisonment on the ground of failure to fulfil a contractual obligation;
- Communication of deportation decisions in a language that people understands is not an absolute right;

- There is no obligation to safeguard migrant workers' employment rights if they become undocumented.

Articles 36 to 56 protect other rights for migrant workers and their families who are documented or in a regular situation

The following are some areas where, according to the research report, ratification and implementation of the MWC might improve the protection of the rights of migrant workers under Irish law and practice:

- Ratification of the Convention would introduce additional rights to migrant workers to take temporary absence from employment without effect upon their authorisation to stay or to work in the State. The entitlement to such leave should take into account the special needs of migrant workers and their families in countries of origin;
- The research asserts that the registration requirements on foreign nationals in Ireland, who are required to register with the Garda National Immigration Bureau where they intend to change residence and where they have changed residence within 48 hours, and where failure to do so results in a criminal offence, extend beyond the scope of permissible restrictions on the right to liberty of movement under Article 39;
- In relation to access to education, the requirement to pay full international fees for third-level education for non-EU migrant workers may be a prohibitive barrier for those who wish to access third level education. On completion of secondary education, dependent children of non-EU migrant workers are required to pay full international fees if they wish to pursue third-level education and so do not enjoy equality of treatment with Irish nationals – ratification of MWC could help to ameliorate this discrepancy;
- Ratification and implementation of the MWC would help to ensure better access to vocational guidance and placement services;
- Ratification and implementation of the MWC could afford migrants greater protection in relation to family reunification, broadening the categories of persons entitled to reunification, limiting the high level of discretion of the Minister of Justice and expanding the scope of reunification rights on humanitarian grounds;
- Separate authorisations to reside and engage in employment are required in Ireland. An employment permit is generally granted for a two year period and a residency permit for one year with a requirement on the migrant workers to present themselves for renewal and to pay a fee. The research states that the discrepancy that currently exists between the duration of employment permits and registration certifications causes “unnecessary hardship” for migrant workers and is not in compliance with the MWC;

- The right to freely choose employment after residency of 5 years as provided for under the MWC is not yet fully protected under Irish law.

Articles 57 to 63 deal with rights and limitations relevant to particular categories of migrant worker

It appears that where the definitions of the various categories have equivalence in Irish law, these rights are protected.

Articles 64 to 71 are designed to promote “sound, equitable, humane and lawful conditions in connection with international migration of workers and their families”

The research report notes that “As yet, the management of migration and, in particular, the recognition of the socio-cultural needs of migrant workers is relatively under-developed in Ireland.” It goes on to list a number of recent initiatives that have been taken to address this gap in Irish policy and practice. This area of the Convention is more about developing good practice than protecting specific rights.

Appendix 3: UK Law and the MWC

No research has been specifically commissioned on the relationship between Northern Ireland/UK law and the MWC. However, the UNESCO ¹⁰ Report contains a brief section on UK legal issues and the MWC – an edited version of which is reproduced below.

The UK Government has argued that “incorporating the full terms of the UN Convention into UK law would mean fundamental changes to legislation”, although some of the major difficulties it envisages are based upon misconceptions of the content of particular MWC provisions. This being said, there do remain a number of minor incompatibilities, which would require either legislative amendment or the lodging of a reservation should the Convention be ratified.

The first of these concerns Article 52 of the Convention, on freedom of employment, which provides that properly documented migrant workers should be allowed free choice of employment after a period of not more than two years; this is at odds with current UK policy, in terms of which work permit holders are formally permitted to work only for the employer specified on their permit. It should be noted, however, that this potential conflict is lessened by the fact that Art. 52(3) of the MWC also permits restrictions on access to employment for up to 5 years in accordance with a preference policy. In the UK, migrants who have been legally resident for five years are then entitled to apply for indefinite leave to remain (i.e., permanent residence), in terms of which their access to employment would, if granted, no longer be restricted.

Another potential area of conflict is the principle contained in the MWC of equal treatment in relation to social benefits. Article 43 provides that documented migrant workers should have equality of treatment with nationals in terms of, *inter alia*, education for their children, housing, social and health services; while Article 54 contains similar provisions with regard to unemployment benefits. Currently in the UK, lawfully employed migrant workers are entitled to health care and equal treatment in education, and are eligible for any other benefits which derive from their contributions to the national insurance system. However, migrant workers from outside the EEA, or who are nationals of the eight Central and Eastern European states that joined the EU in 2004, are not entitled under UK law to any non-contributory benefits in terms of housing, council tax relief, or job-seekers allowance (paid to the unemployed). This is in clear conflict with the provisions of Articles 43 and 54 of the MWC.

There remain two other aspects of UK law that could be viewed as legal obstacles to the ratification of the MWC. The first concerns the provisions in Article 25 relating to the right of

¹⁰ The Migrant Workers Convention in Europe: Obstacles to the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families: EU/EEA Perspectives. Euan MacDonald, Ryszard Cholewinski. UNESCO 2007

equal treatment of irregular workers with regard to remuneration and other conditions of employment; and in particular to Article 25(3), which provides that states must take all appropriate measures to ensure that migrant workers are not deprived of this right by reason of their irregular status, and that such status shall not relieve employers of any contractual obligations to the worker concerned. UK law is certainly incompatible at present on this point, as, where a worker knowingly enters into an irregular working situation, his/her contract is viewed as illegal, and hence unenforceable in law.

The final area of potential incompatibility relates to the MWC's vague provisions on regularisation of undocumented migrants, and in particular its Article 69(1), which requires that "States Parties shall, when there are migrant workers and members of their families within their territory in an irregular situation, take appropriate steps to ensure that such a situation does not persist". While it would certainly be unfounded to read into this provision a right to regularisation of undocumented migrants, it can be read as a "regularise or expel" obligation; that is, a requirement to regularise the situation of all migrants that a state does not intend to expel. To the extent that the Convention is read as placing a regularisation requirement of any sort on states, it is at odds with current UK policy, which makes only limited standing provision for the regularisation of undocumented migrants – mainly, providing in its Immigration Rules for individuals to obtain indefinite leave to remain (i.e., permanent residence) after fourteen years of residence, irrespective of the regularity of that stay, and a Home Office practice according to which parents of a child who has been continuously in the UK for seven years or more are normally granted indefinite leave to remain. The UK has no history of granting collective amnesties in regularisation processes as exists, for example, in Spain and Italy.

Appendix 4: Arguments for Ratification

The following are ten key points about the Convention taken from “Achieving Dignity - Campaigner's Handbook for the Migrants Rights Convention.” Available at:

http://www.migrantwatch.org/Resources/CampaignersHandbook/documents_manual_eng_doc.htm

- The Convention recognizes the critical role which the migration of workers plays in the global economy. This affects a host of political, social, economic, ethical and legal issues for millions of individuals and numerous States which cannot be ignored. Yet migrant workers remain a largely unprotected group in the international community.
- Today, migrant workers and their families are often disregarded by their countries of origin, exploited by individuals, and have limited rights in States of employment where they are non-nationals. The Convention identifies migrant workers and members of their families as vulnerable persons in a global situation who are in need of the protection of their human rights and are entitled to the enjoyment of such rights regardless of their legal status. It extends human rights law to a specific category of individuals who currently lack protection. Its provisions would extend a measure of human rights protection to other categories of vulnerable migrants as well.
- The Convention is the most comprehensive international instrument to date on migrant workers. It provides a set of international standards to address (a) the treatment, welfare and rights of migrant workers and members of their families and (b) the obligations and responsibilities of States involved. These include sending States, States of transit, and host States, all of which benefit from the international migration of workers. Bilateral and regional agreements are important, but insufficient in addressing this global matter.
- The global community has for the first time an international definition of migrant worker, one which recognizes both men and women as migrants. The Convention also provides definitions of certain categories of migrant workers that are applicable to every region of the world.
- Migrant workers are considered more than laborers or economic entities. They are social entities with families. The Convention recognizes that they have rights accordingly, including that of family reunification.
- The Convention emphasizes that all migrant workers, whether in a documented or undocumented situation, are to be accorded fundamental human rights. It is inclusive of all migrant workers regardless of their legal status, but encourages their being in a documented or regular situation. It encourages all workers and employers to respect and comply with the laws and procedures of the States concerned.
- The Convention also extends the concept of "equality of treatment" by calling for

migrant workers and members of their families who are non-nationals in States of employment to be treated equally to nationals in certain situations. It thus reinforces the indivisibility of human rights regardless of nationality and national borders. Non-nationals, however, are not to have more rights than nationals.

- It seeks to establish minimum standards of protection in legal, political, economic, civil, social and cultural rights for migrant workers and members of their families which are universally acknowledged, while enabling States that desire so to provide additional protection in specific areas. Hence it also seeks to address those States that lack national standards of human rights protection and encourages them to bring their legislation in closer harmony with universal standards set forth in the Convention. States retain their right to determine who is admitted to their countries and their terms of residency.
- Overall, the Convention seeks to play a role in preventing and eliminating the exploitation of all migrant workers and members of their families throughout the entire migration process. In particular, it seeks to put an end to the illegal or clandestine recruitment and trafficking of migrant workers and to discourage the employment of migrant workers in an irregular or undocumented situation.
- Finally, the Convention establishes mechanisms for its implementation which provide new opportunities for increased participation from the global community to protect the rights of migrant workers and their families, especially NGOs and individuals.

Appendix 5: Obstacles and arguments against ratification of the MWC in Europe

Below are edited extracts from a UNESCO report¹¹

The two general legal obstacles quoted by European states are, firstly, the claim that the MWC would limit the sovereign rights of states to decide upon who can enter their territory and for how long they can remain; and, secondly, the fear that the MWC would provide for a robust right of family reunification to all migrant workers present in a regular situation in the territory of a state.

In fact, Article 79 of the MWC states: “Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families.”

In respect of family reunification, the relevant provision, Article 44(2), reads as follows: “States Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses...”

In general, most of the rights in the Convention may be reasonably modified or limited by domestic law. However, the above provision is almost entirely discretionary and so cannot be held to enshrine an unfettered right of reunification.

There are three “political” obstacles that are widely quoted: firstly, that the MWC is entirely superfluous in the context of international human rights law; secondly, that the rights it prescribes are already largely guaranteed by national laws and the international norms to which the states concerned are party; and thirdly (and inconsistently with the previous two) that the Convention endows irregular migrants with too many rights, and as a result would hinder both processes of social integration and the struggle against irregular movements of people.

A response to the first obstacle would necessitate a robust defence of the practice of producing group-specific conventions (such as relating to children, women or national minorities) to complement and develop the norms contained in the more general instruments and apply them to the particular situations faced by the vulnerable groups of persons. It would also need to point to the urgent necessity of doing so in the practical context of the protection of migrant workers.

The second, related, objection, that national laws already protect the human rights of migrant workers to a sufficient degree, would seem to call for some sort of cost/benefit analysis for the receiving states in question, who quite properly inquire as to why they should accept the often onerous administrative burdens associated with the ratification and oversight of UN

¹¹ The Migrant Workers Convention in Europe: Obstacles to the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families: EU/EEA Perspectives. Euan MacDonald, Ryszard Cholewinski. UNESCO 2007

Conventions, when to do so would bring no discernible benefit to those that the instrument seeks to protect. An argument of this sort might underline the importance of the prevention of lowering standards in response to political or economic crises, emphasise the symbolic value of developed European nations providing an example in terms of human rights protection, or illustrate the extent to which a dedicated multilateral convention, complete with international oversight, can help to close the gap between rights as they exist on paper and as they are enjoyed in practice.

The third objection, that the Convention endows irregular migrants with too many rights, has no legal basis – in fact the MWC is, in some respects, weaker than other international and European human rights instruments. It clearly, however, has both symbolic and political weight. It develops from the view that most migration is essentially voluntary; which in turn feeds the ideas that, if conditions in the receiving country are not to the liking of the migrants in question, they can and should simply go back to where they came from, and that, far from claiming rights, those accepted into another country should somehow be grateful for the privilege.

Within constructs of this kind, of course, the plight of irregular migrants elicits less, and not more, sympathy, despite their increased vulnerability. Changing these attitudes in order to gain recognition that migrants in general, and those in an irregular situation in particular, are a vulnerable group that are both in need and deserving of protection in the destination country is one of the most important, and one of the most difficult, challenges that any successful campaign for ratification of the MWC will have to confront. The idea that someone may not be deserving of protection is, of course, completely alien to human rights theory; what must be shown, however, is that people who cross international borders do not forfeit any of their basic rights as a result of the “choice” to do so. This, put simply, is the struggle to win acceptance of the idea that migrants’ rights, as specified in the MWC, are human rights.

Note: This UNESCO report contains a detailed analysis of the situation within the institutions and legal processes of the EU. Its first recommendation is: “That efforts be focused, in full cooperation and collaboration with both the European Parliament and the European Economic and Social Committee, on ensuring that the MWC has a major influence on the developing Community legislation on migration.”

Appendix 6: The “added value” of the MWC¹²

What follows is a list of rights elaborated upon in the MWC which are not covered, or only partially so, by other human rights conventions and treaties. Therefore States that have not ratified the ICRMW do not have the obligation to report on these rights to the other six Treaty Monitoring Bodies (TMB).

The MWC contains strong safeguards against collective and arbitrary expulsions. It also protects migrant workers from destruction of identity and other documents. Article 23 provides the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their States of origin or of a State representing the interest of that State, particularly in case of expulsion.

The MWC expands on the protection of human rights of migrants by, amongst other things, widening the grounds on which discrimination is prohibited beyond those initially listed in the Universal Declaration on human rights or elaborated upon in subsequent conventions. Its wording reflects the evolving international context. The MWC Article 1 includes “conviction” as well as religion, “nationality”, “age”, “economic position” and “marital status”. CRC for its part contains disability” as an additional ground. This list contains helpful grounds in view of the trends observed in human rights violations of migrants, as is for instance detailed in annual reports of the United Nations Special Rapporteur on the human rights of migrants.

The Convention also addresses issues of employment and residence authorization. ICRMW Article 25 (3) stipulates: “States Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle [equality of treatment] by reason of any irregularity in their stay or employment. In particular, employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of such irregularity.” This is important inasmuch as, even in an irregular situation, a migrant worker is entitled to receiving remuneration. This is particularly relevant prior to forced expulsions for instance.

Article 38 encourages States of employment to authorize migrant workers and members of their families to be temporarily absent without effect upon their authorization to stay or to work. Article 41 provides the right for migrant in a regular situation to participate in public affairs of their State of origin and to vote and to be elected at elections of that State. Transfer of earnings and savings is guaranteed under the Convention (Articles 32 and 47). This is crucial as remittances often are a main source of support for families in countries of origin. The Convention also prohibits double taxation and refers to exemption of import and export duties for personal effects and the equipment necessary to engage in the activity for which migrant workers were admitted in the State of employment.

The ICRMW gives particular importance to the rights and protection of members of the migrants’ families, for example in the event of the death of a migrant worker or dissolution of

¹² The UN Treaty Monitoring Bodies and Migrant Workers: a Samizdat December 18 vzw
<http://www.december18.net/web/docpapers/doc7039.pdf>

marriage – and potentially where spouses and children require protection in situations of domestic violence. Article 71 relates to States facilitating the repatriation to the State of origin of the bodies of deceased migrant workers or members of their families. Finally, the ICRMW covers categories of migrant workers excluded from other international conventions, such as frontier workers and self-employed workers.

Despite a recent growing interest in obtaining information on the situation of migrant workers by the Treaty Monitoring Bodies for the other human rights treaties, there is still an objective gap in government reporting on implementation of treaties that do not contain provisions specific to the situation of migrant workers and members of their families. The perspective and level of detail of the Migrant Workers Convention can be used to inform other committees and give substance to some clusters of rights when they examine State reports. This however does not replace the added value of actual ratification and implementation of ICRMW.

Appendix 7 Statements of the views of the UK and Irish Governments and the EU Commission

UK

The following statement was given by the Minister, Angela Eagle, in response to a Parliamentary Question on 9 January 2002.

"We have no plans at present to sign and ratify the convention. The Government consider they have already struck the right balance between the need for immigration control and the protection of the interests and rights of migrant workers and their families in the UK. The rights of migrant workers and their families are protected in UK legislation, including the Human Rights Act 1998, and the UK's existing commitments under international law."

Ireland

The following statement was given by Deputy Dermot Ahern at a meeting of the Select Committee on Justice, Equality, Defence and Women's Rights in the course of a debate on 15 May 2008.

"The convention does not distinguish between legal and illegal, or documented and undocumented, migrants. In effect, the convention obliges countries to provide entitlements to workers about whom they have no information and who have entered the state illegally. It has not been ratified by any EU member state, to the best of my knowledge. It has been ratified by very few OECD member states. We do not envisage any circumstances in which Ireland would unilaterally enter into an agreement without our partners doing likewise. The rights of legal migrant workers and their families are comprehensively protected in existing legislation, the Constitution and other international treaties. It would not be appropriate at this point to become party to the convention mentioned by Deputy Rabbitte. Ultimately, it is a matter for the Minister for Enterprise, Trade and Employment, Deputy Coughlan."

European Commission

Answer given by Mr Vitorino on behalf of the Commission to a written question on 5 March 2004

"The Member States are [probably] better placed than the Commission to explain their reasons for not ratifying the United Nations International Convention on the protection of the rights of all migrant workers and members of their families. Nevertheless, one of the main obstacles to ratification seems to be that the Convention recognises rights in respect of all migrant workers regardless of whether they are in the host country legally or illegally. Furthermore, it seems that many of the rights listed in the Convention are also guaranteed at EU level for citizens and third-country nationals alike in other instruments (Charter of

Fundamental Rights of the European Union, European Convention on Human Rights). However, the wide range of provisions guaranteeing the same rights leads to varying interpretations which could prove damaging to legal certainty for individuals. Because of the complexity of the provisions of this Convention, the Commission intends to launch a study on the points in common with - and those on which it differs from - common immigration policy as it has developed at EU level since the entry into force of the Treaty of Amsterdam.

[No reference to such a study has thus far been found]

Note that the European Parliament has frequently expressed its support for ratification, most recently in its resolution of 22 April 2009 on a Common Immigration Policy for Europe.