United Nations
Educational, Scientific and
Cultural Organization

International Journal on Multicultural Societies (IJMS)

Vol. 11, No. 1, 2009

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The Human Rights of Migrants – Editorial Introduction

KRISTINA TOUZENIS AND RYSZARD CHOLEWINSKI[1]

Migration and human rights intersect at a number of points, starting when the migrant crosses a frontier, the act that defines international migration. While international human rights law recognizes the right to leave one's own country, there is no corresponding right to enter another country, even for a refugee, without that state's permission. This means that where a state decides that a migrant entered the country without authorisation, this decision does not of itself, and if properly taken, conflict with human rights principles. But, more importantly, the fact that a migrant entered or remained without authorisation does not nullify the state's duty under international law to protect his or her basic rights without discrimination, for example against torture, degrading treatment, or forced labour. This complex interrelationship between migration and human rights is multifaceted, and found at all stages in the migratory cycle: in the country of origin, during transit, and in the country of destination. However, some migrants, usually skilled workers who move to take up professional jobs in the formal sector, may have relatively few human rights problems (Grant 2005*a*).

In many situations, there is a disparity between the rights that migrants, both regular and irregular, enjoy under international law, and the difficulties they experience in practice in the countries where they live and work and across which they travel. This disparity between the principles agreed to by governments, and the reality of individual lives, underscores the vulnerability of migrants in terms of dignity and human rights (Grant 2005*b*: 1). It should not be overlooked or forgotten however that the core human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR),[2] apply to both nationals and non-nationals. They adopt all-embracing language such as "everyone", "all persons", and "no one" and also contain non-discrimination clauses requiring each State Party to

[1] The views expressed in this article are strictly those of the authors and do not reflect those of the International Organization for Migration. Editing this issue has been taken on and carried out entirely in their personal capacities.

[2] A few rights in the ICCPR, however, are expressly limited to citizens, such as political rights in article 25. See also article 16 of the ECHR, which reads: "Nothing in articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens". The clauses enumerated are respectively concerned with the rights to freedom of expression, peaceful assembly and association, and the right to non-discrimination. However, article 16 ECHR has been interpreted restrictively by the European Court of Human Rights. See *Piermont* vs *France* (1995) 20 EHRR 301. Moreover, article 16 ECHR remains controversial vis-à-vis the expansive and universal protection afforded by more general human rights instruments.

International Journal on Multicultural Societies (IJMS), *Vol. 11, No. 1, 2009: 1-18*
ISSN 1817-4574, www.unesco.org/shs/ijms/vol11/issue1/intro © *UNESCO*

respect and ensure the rights recognised therein to all individuals within its territory 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. Although nationality is not explicitly remunerated as a prohibited ground of discrimination in these instruments, the non-discrimination provisions are clearly open-ended (Cholewinski 2004). The applicability of the ICCPR and its non-discrimination clause to non-nationals has been confirmed unequivocally by the Human Rights Committee, the body responsible for monitoring the implementation of the ICCPR by States Parties, in its General Comment 15/17 on the Position of Aliens under the Covenant:

> In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness. Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike.[3]

The position of non-citizens under the International Covenant on Economic, Social and Cultural Rights (ICESCR) appears somewhat more limited than the rights enjoyed under the ICCPR and the European Convention on Human Rights (ECHR). Although the ICESCR is also phrased in all-embracing language, there are differences of opinion whether the non-discrimination provision in article 2(2) ICESCR can be of assistance to non-nationals. These differences centre upon the lack of clear open-ended language as to the prohibited grounds of discrimination enumerated in article 2(2) ICESCR. The Limburg Principles on the Implementation of the ICESCR[4] assert unequivocally that "the grounds of discrimination mentioned in article 2(2) are not exhaustive" (Principle 36). Article 2(2) ICESCR should also be read in the context of an explicit restriction on the *economic* rights of non-citizens in the clause that follows, i.e. article 2(3) ICESCR:

> Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals.

The very existence of article 2(3) ICESCR, however, demonstrates that the ICESCR does apply to non-citizens and the practice of the Committee on Economic, Social and Cultural Rights, which monitors the application of the ICESCR by States Parties, confirms this position (Cholewinski 2004). This is very important to establish since it must be clear that economic, social and cultural

[3] UN, ESCOR, Human Rights Committee, 27th Session, 1986, General Comment 15/17 on the Position of Aliens under the Covenant, reproduced in UN Doc. A/41/40, Annex VI, paras. 1 and 2. The Committee is empowered to issue General Comments under article 40(4) ICCPR. These comments are not legally binding, but nonetheless constitute authoritative interpretations of the ICCPR provisions.

[4] Referred to above (UN Doc. E/CN.4/1987/17, Annex), drafted by a group of international experts at Maastricht in June 1986.

rights cannot be subject to discrimination at will. Part of the wording of article 4 of the 1989 Convention on the Rights of the Child (CRC):

> With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation …

is common, and perhaps also a common "problem" to the effective application of the economic and social rights ensured by the ICESCR which in its article 2 states:

> … each State Party undertakes to take steps to the maximum of its available resources to achieve progressively the full realisation of the rights in this treaty. Everyone is entitled to the same rights without discrimination of any kind.

However, as discussed below, States Parties are required to satisfy a minimum core content of the right/s in question and they should also take all necessary steps to find adequate resources to do so, including seeking the assistance of the international community.

The effective access of all migrant workers and their families to social rights is critical in preventing their marginalisation and social exclusion in the host society, thus assisting their integration and enhancing development in the country of employment. Also part III of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW, see below) underlines the application of the principle of non-discrimination and equal treatment between nationals and all migrant workers and their families regardless of their immigration status in respect of access to basic social rights, such as rights to social security (subject however to the fulfilment of requirements in applicable national legislation, bilateral and multilateral treaties), emergency medical care and access to education (Articles 27, 28 and 30 ICRMW respectively).

Further, the ICRMW is obviously applicable to migrants. However, the Convention suffers from a lack of ratifications (Pécoud and de Guchteneire 2004; MacDonald and Cholewinski 2007; Piper and Iredale 2003). Summarising, States Parties undertake to respect and to ensure to all migrant workers and their families within their territory rights without distinction of any kind such as sex, race, colour, language, religion, national, ethnic or social origin, nationality or other status. Migrant workers and members of their families are free to leave any state, including their state of origin; shall have the right at any time to enter and remain in their state of origin. No migrant worker or member of his or her family is to be subjected to torture or to cruel, inhuman or degrading treatment or punishment; no migrant worker is to be held in slavery or servitude or is to be required to perform forced or compulsory labour. Migrant workers and members of their families have the right to freedom of thought, conscience and religion; the right to equality with nationals of the state concerned before the courts and tribunals; and are not to be subject to measures of collective expulsion. Every migrant worker and every

member of his or her family has the right to recognition everywhere as a person before the law; and is to enjoy treatment not less favourable than that which applies to nationals of the state of employment in respect of remuneration overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and minimum age of employment. States Parties recognise the right of all migrant workers to take part in meetings and activities of trade unions,[5] and with respect to social security, migrant workers and members of their families are to enjoy in the state of employment the same treatment granted to nationals in so far as they fulfil the requirements provided for by applicable legislation. All migrant workers and members of their families 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. Each child of a migrant worker has the right to a name, to registration of birth and to a nationality and the basic right of access to education on the basis of equality of treatment with nationals of the state concerned (articles 7, 8, 10, 11, 12, 18, 22, 24, 25, 26, 27, 28, 29, 30). As may be seen, therefore, many of these rights are already covered by the ICCPR and ICESCR. But in addition to underlining many of the traditional civil and political rights found in other more general human rights instruments that apply to all persons, including migrant workers and their families, the ICRMW underscores explicitly that basic economic, social and cultural rights apply to both regular and irregular[6] migrant workers. However, the ICRMW permits states to limit a few of

[5] However, the ICRMW does not expressly afford irregular migrant workers the right to form trade unions (compare articles 26 and 40). While it would appear better in practice for irregular migrant workers to join existing national trade unions rather than to form their own unions, because of the greater influence that established unions can exert on employers and government, and while there are also strong arguments for such unions to unionise irregular migrant workers in the interests of all their members, some of the sectors in which irregular migrant workers are employed, such as domestic work, are largely comprised of non-nationals, or agriculture, where they have little or no union representation, with the result that the clear recognition of a right to form trade unions for irregular migrant workers is particularly important. It is to be hoped that the Migrant Workers Committee, in issuing Concluding Observations to States Parties and eventually in a General Comment, clarifies this apparent anomaly regarding trade union rights in the ICRMW in accordance with the unambiguous position on this question in general international human rights and international labour law. In this regard, in relation to those States Parties that have accepted the higher international standards, the Committee would need to apply article 81 ICRMW, which provides that "[n]othing in the present Convention shall affect more favourable rights or freedoms granted to migrant workers and members of their families by virtue of: (a) the law or practice of a State Party; or (b) any bilateral or multilateral treaty in force for the State Party concerned". See Cholewinski (2005*b*).

[6] Part IV grants more extensive social rights to regular migrant workers and their families on equal terms with nationals, such as the right of access to housing, including social housing schemes, and equal access to social and health services. Importantly, part IV also obliges States Parties to take measures to facilitate the reunion with the migrant worker of close family members. While the ICRMW does not appear to impose a hard and fast obligation on States Parties to admit family members, explicit policies preventing family reunion irrespective of a migrant worker's length of stay, such as those practiced by governments in some countries of employment, would clearly contravene this provision. Moreover, as confirmed by other human rights bodies, such as the European Court of Human Rights under the ECHR and the Human Rights Committee under the ICCPR, restrictions on family reunion and thus the right to respect for family and private life, in the

the rights of certain specific categories of temporary migrants, such as seasonal workers, project-tied workers, or specified-employment workers. It should be noted that the ICRMW lays down rules protecting migrant workers in the entire migration process – and also takes into consideration the necessity to prevent irregular migration through a human rights approach. By explicitly imposing obligations on States Parties to ensure that the human rights of irregular migrants are protected, the ICRMW hopes to dissuade employers and others from exploiting this group. Moreover, article 68(1) ICRMW obliges States Parties, including transit states, to "collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation". The measures foreseen in article 68 ICRMW include the adoption of appropriate safeguards against the dissemination of misleading information relating to immigration and emigration; measures to detect and eradicate illegal or clandestine movements; and the imposition of sanctions on persons, groups or entities who organise, operate or assist in such movements (such as smugglers and traffickers), including sanctions on employers (Articles 68(1)(a), (b) and (c), and article 68(2) ICRMW respectively). The existence of these preventive measures, therefore, dispels the myth sometimes perpetuated about the ICRMW that it encourages irregular migration by granting additional rights to irregular migrants (UNESCO 2003: 4).

The standards of the International Labour Organization (ILO) are generally applicable to all persons in their working environment regardless of nationality or immigration status. There are also ILO conventions that apply specifically to migrants and to migrant workers. The ILO has two legally binding instruments relating to migrant workers: Convention No. 97 of 1949 (C97) concerning Migration for Employment and Convention No. 143 of 1975 (C143) concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers. Both are complemented by non-binding recommendations (Nos. 86 and 151). C97 applies to the whole labour migration continuum from entry to return and covers the conditions governing the orderly recruitment of migrant workers. It also articulates in article 6 the principle of their equal treatment with national workers regarding working conditions, trade union membership and enjoyment of the benefits of collective bargaining, accommodation, social security, employment taxes and legal proceedings relating to matters outlined in the convention. The scope of C143 is broader. Adopted at a time when particular migration abuses, such as trafficking of human beings and smuggling of migrants, were attracting the attention of the international community (which remains the case today), this instrument devotes a whole section to irregular migration and to interstate collaborative measures considered necessary to prevent it. It also imposes in Article 1 an obligation on states "to respect the basic human rights of all migrant workers", confirming its applicability to irregular migrant workers (Cholewinski 2005*a*). Recent judicial pronouncements, in both national

context of admission to the territory or expulsion, can only be justified pursuant to a legitimate state objective and through proportionate means.

and international forums, have interpreted principles of non-discrimination in a way that makes it clear that the labour rights of migrant workers must be equivalent to those of a country's nationals. In September 2003, the Inter-American Court of Human Rights issued a landmark Advisory Opinion on the juridical condition and rights of unauthorized immigrants. The Court held that "the migratory status of persons can never constitute a justification in depriving them of the enjoyment and exercise of their human rights, including those related to work" (Inter-American Court of Human Rights 2003). The Court found that international principles of equal protection and non-discrimination, including those contained in the 1948 American Declaration on the Rights and Duties of Man, the 1969 American Convention on Human Rights, the Organization of American States (OAS) Charter, and ICCPR prohibit discrimination, in that case against unauthorized immigrants, with respect to their labour rights (Smith 2009).

As can be seen from the above very brief introduction to international instruments on migrants' rights, migrants are entitled to fundamental human rights, just as any other persons, without discrimination. Some human rights are of specific relevance to migrants, as a particularly vulnerable group, such as the right to protection from exploitation, employment rights, protection from discrimination and the right to equality before the law. While many rights relevant to migrants are economic and social rights, these are closely linked to the exercise of certain civil and political rights, such as rights to freedom of association and collective bargaining (trade union rights) and to freedom of expression. As shown below, these sets of rights are interdependent and inseparable.

It is with the above background in mind that this issue of the *International Journal of Multicultural Societies* (IJMS) proposes to address diverse but precisely targeted, complementary topics, with a view to clarifying how the human rights of migrants are currently protected in law and practice. The articles gathered in this issue look at human rights of migrants, and problems related thereto, from different angels. They do have one thing in common though – they tend to focus on rights very often overlooked in the migration context – the economic, social and cultural rights of non-nationals. Two articles have broader perspectives examining the general problems relating to respect for economic and social rights of non-nationals and one focuses especially on violations of rights related to work; two have a narrow focus geographically examining integration and the very problematic case of domestic workers in two specific countries; and one focuses on a specific social right – the right to health, especially in cases of migrants with HIV/AIDS. Thus, the articles range from broader analyses to a narrower focus on very specific rights. They all examine the human rights of migrants – which is essentially a legal subject – but not all of them are by lawyers or have a legal approach to the subject, thus providing a broader view of migrants' rights and the violations (Ray Jureidini's article in particular is a good example of a non-legal method of describing and analysing human rights issues relating to domestic workers).

It is clear that non-nationals will often suffer more than nationals when economic and social rights can only be fulfilled up to a certain point. It is thus important to emphasise that the basic prohibition of non-discrimination is of utmost importance for non-nationals when speaking about their right to enjoy economic, social and cultural rights. The Committee on Economic, Social and Cultural Rights (CESCR) has emphasised that each State Party must satisfy the rights contained in the ICESCR at least to a basic level of enjoyment unless the State Party concerned can demonstrate that it simply does not have the resources to fulfil even such a minimum obligation. Thus, for example, a State Party in which any significant number of individuals are deprived of essential foodstuffs, essential primary health care, basic shelter and housing, or the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way so as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. By the same token, it must be noted that any assessment as to whether a state has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(1) obliges each State Party to take the necessary steps "to the maximum of its available resources". In order for a State Party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.[7] Non-discrimination is a universal principle protecting all human beings regardless of citizenship or nationality or legal status. Therefore, the enjoyment of the right to be free from discrimination is not confined to the citizens of a state, but must also be protected in respect of all those persons who come within the state's jurisdiction. Article 4 must thus always be read in connection with the prohibition on discrimination, and such prohibition also applies to discrimination of non-nationals in most cases, also when considering social and economic rights, which is the case with many children's rights. Whenever a state has started to implement certain measures in order to fulfil international obligations, such measures should not only be directed at nationals but should also include non-nationals such as refugees, asylum seekers and migrants.[8]

Despite the fact that ESC rights are very relevant for migrants, little has been written about the particular issues faced by migrants, as non-citizens and as groups especially vulnerable to discrimination and marginalisation, in being able to enjoy effective access to their ESC rights at all stages of their migratory journey – before they leave their country of origin, while en route and in transit, at the border, and within the country of destination. In her article, Pia Oberoi provides a snapshot of the violations of these rights faced by migrants within the context of the

[7] UN, ESCOR, ESC Committee, 5th Session, 1991, General Comment No. 3 on the Nature of States Parties' Obligations (article. 2, para. 1), UN Doc. E/1991/23, para. 2.

[8] See BGE/ATF 121 I 367) Swiss Federal Court (1995); Complaint No. 13/2003, European Committee on Social Rights; South African Constitutional Court 2004(6) BCLR 569 (CC); Reparations for Injuries Case, 1949 ICJ Rep 178.

indivisibility and interdependence of all human rights. The division of human rights into the two Covenants (ICCPR and ICESCR) has long given the opportunity for various voices to claim that either (a) one set of rights is more important than the other; or (b) that the rights in general are only relevant in one form of society – i.e. the one found in the "West". Human rights have been created to protect individuals against an infinitely stronger entity – the state. It must however be understood and underscored that ESC rights are important prerequisites for public and political life and for the full use of freedom rights and political rights. They are seldom claimed for their own sake alone. They are a means to obtain something else. If they are respected, they remove an obstacle on the road to public and political life and to the full use of this set of human rights. ESC rights are important but insufficient because they are part of the package, just as civil rights are important but insufficient if they stand alone. ESC rights guarantee the continuation of life in a decent way and thereby guarantee the possibility of something more, for example a public and political life. They cannot turn this possibility into a reality. Only civil rights and political rights can do so. But freedom rights cannot do so unless ESC rights are respected. The sets of rights cannot be looked upon or implemented separately. ESC rights have a dual function: they serve as a basis for entitlements that can ensure an adequate standard of living and they are the basis for independence and thus freedom. As Oberoi observes,

> The everyday reality for many migrants around the world is a grim battle to eke out a living in dire working conditions, to find a dwelling place in which they can live in minimal comfort, to stay healthy or risk deportation if they visit a health clinic, to find some way of educating their children when schools are barred to them.

These are all violations of basic ESC rights – rights which are important just as it is important to protect from arbitrary detention, but which may often receive less attention. Oberoi gives an overview of the characteristics of ESC rights and of state obligations – especially in relation to progressive realisation of these rights and non-discrimination also briefly mentioned above, and a very pertinent analysis of ESC rights issues that have been addressed by treaty bodies and special procedures in the context of the rights of migrants: the right to an adequate standard of living; housing, water and sanitation, the right to education, the right to health, the right to work and work-related rights, and the right to social security. Analysing implementation of ESC rights, Oberoi justly states:

> … migrants are entitled to much the same protection of their ESC rights as citizens. This applies equally to migrants in an irregular legal status, in countries of transit or destination. However, a range of factors prevents migrants from enjoying effective access to these rights in practice, These factors are often underlined by de jure and de facto discrimination, and are exacerbated by the situation of invisibility and vulnerability in which migrants will often find themselves. Irregular migrants in particular are often unable effectively to assert their ESC rights.

From early on, the ILO and the World Health Organization (WHO) have played important roles in advocating economic and social rights. The ILO has protected

workers' rights and related rights since 1919. Its Constitution preamble recognizes that "universal and lasting peace can be established only if it is based upon social justice". In the inter-war years, the ILO developed and adopted international minimum standards on a wide range of issues relating to economic and social rights (Steiner et al. 2007: 269). As trade across borders concerns labour relations in other countries due to the fact that differences in wages and social security influence the cost of production, the ILO used such worries in its work to internationalise concern for labour rights. In addition, there exists a marked solidarity between workers and labour movements across borders. Internationalisation in this field emerged as a result of the wish to harmonise standards.

Moreover, the Universal Declaration of Human Rights (UDHR), which is a non-binding instrument, although most of its provisions now form part of customary international law, reiterates that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". It places a number of economic, social and cultural rights side by side with civil and political rights. These include:

- the right to work, to just and fair conditions of employment, and to protection against unemployment;
- the right to form and join trade unions;
- the right to a standard of living adequate for health and well-being, including food, clothing, housing, medical care and social services, as well as security in the event of loss of livelihood, whether because of unemployment, sickness, disability, old age or any other reason;
- the right to education, which shall be free and compulsory in the "elementary and fundamental" stages; and
- the right to participate in cultural and scientific life.

The article by Etienne Piguet goes into further detail regarding the right to work and work-related rights, already mentioned by Oberoi. Originally, the transformation from rural to urban society required an additional and more complex system of protection. Therefore, the right to property has been supplemented with the right to work and to be remunerated for that work for those who can find and are able to work, and the right to social security as a substitute for work for those who cannot find work or are unable to work, or have insufficient income from work or property – insufficient to maintain an adequate standard of living, thus the right to work functions as a basis of independence (Symonides 2002: 141). In the UDHR, article 23 lays down the right to work, the right to equal pay for equal work and just and favourable remuneration, and article 24 provides for a right to rest and leisure, limitation of working hours and periodic holidays with pay. Article 6 ICESCR includes the right to work and article 7 guarantees the right to enjoy just and favourable conditions of work. Part 1 of the 1961 European Social Charter (revised in 1996) stipulates that everyone has the right to earn their

living in an occupation freely entered into and that all workers have the right to safe and healthy work conditions, just conditions of work and to a fair remuneration sufficient for a decent standard of living for themselves and their families.

The right to work is actually a variety of different rights: employment-related rights, employment-derivative rights, equality of treatment and non-discrimination rights and, lastly, instrumental rights. The right to work, as it is normally understood, is the right to employment. Rights derived from employment comprise the right to just conditions of work – such as hours of work, paid holiday, rest periods, and also the right to safe and healthy working conditions, fair remuneration, vocational guidance and training, and, as a last obligation on the state (see below), the right to social security. Instrumental rights include freedom of association, collective bargaining, the right to strike – all closely linked to civil and political rights. Clearly, the right to work is a source of livelihood and income, and a source of dignity and self-realisation.

States must, at the primary level, respect the resources owned by the individual, the freedom to find a job and the freedom to take the necessary actions and use the necessary resources to satisfy his/her own needs. In this regard, group rights become important. ESC rights are often taken away from individuals and communities. The duty to respect means that governments must ensure that such interferences only occur when justified and are carried out in the proper way, with provision of compensation or alternatives where appropriate. Courts or other bodies can monitor this duty by hearing complaints from individuals and communities.[9]

States thus have a primary duty to respect, that is, not to violate or infringe the rights in question by their actions. At a secondary level, state obligations mean the protection of the freedom of action and the use of resources against other, more assertive or "aggressive" subjects, i.e. more powerful economic interests, such as protection against fraud, against unethical behaviour in trade and contractual relations, etc. This is the most important function of the state in relation to economic and social rights. It is very similar to the protective function of states regarding civil and political rights. At a third level, states have an obligation to promote and facilitate opportunities by which the rights can be enjoyed. An example could be the right to health where states should promote education and information on how to avoid disease. Only at this very last level would the state have an obligation to fulfil, which goes beyond a general policy to ensure their progressive implementation as circumstances change and resources permit. This

[9] *ASK* vs *Bangladesh* – eviction of slum-dwellers without notice and without any attempt to find alternative accommodation violates the right to shelter and livelihood, according to the Supreme Court of Bangladesh.

would only occur in the case of a food crisis, for example, or for those who are marginalised.[10]

The most basic state obligation, the obligation to respect, is the freedom from slavery and forced labour in article 8 ICCPR. The obligation to protect will be legislation and perhaps a more active protection against discrimination in respect of access to work and working conditions, against arbitrary dismissals and in enforcing just conditions of work. The obligation to fulfil is obviously not an obligation to give a job to everyone but to pursue policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms of the individual as found in article 6(2) ICESCR (Symonides 2002: 145).

Again, as with many other rights, migrant workers are especially at risk of having their right to work – and all related rights – violated. Migrant workers are marginalised, often do not know their rights and are frequently employed in low-skilled risk jobs. Irregular migrants especially are in danger of being subject to exploitation. Piguet's article provides an analysis of the right to work and rights related to this in relation to migrant workers and their specific problems. It also includes a valuable overview of the number of migrant workers present in the principal countries of destination, thus giving a specific idea of how many individuals are actually affected – or potentially affected – by problems relating to violations of labour rights. Further, he engages in an interesting discussion on what sort of policies would promote better respect for the labour rights of migrants and how decent work can be framed within a migration/rights discourse.

Some of the possible policies Piguet examines in relation to labour rights are on integration, a topical issue that often arises in public debate. However, what is rarely mentioned is how the concept of integration might damage or promote migrants' human rights. The questions of labour migration, irregular migration, asylum and integration have become highly politically contested issues, especially in Europe. Forces in favour of closure often run counter to economic

[10] The Maastricht Guidelines, adopted by the participants of an expert seminar, organised by the International Commission of Jurists, the Maastricht Centre for Human Rights and the Urban Morgan Institute for Human Rights (Maastricht, 22–27 January 1997), on the occasion of the 10th anniversary of the Limburg Principles (see n. 3 above and accompanying text), stipulate in article 6: "Like civil and political rights, economic, social and cultural rights impose three different types of obligations on states: the obligations to respect, protect and fulfil. Failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to respect requires states to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the state engages in arbitrary forced evictions. The obligation to protect requires states to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to fulfil requires states to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of states to provide essential primary health care to those in need may amount to a violation".

considerations, as well as to normative and legal/constitutional commitments to resident migrants and refugees. At the same time, many countries are becoming increasingly multi-ethnic, generating new pressures and incentives to incorporate ethnic minority interests. Again, this tendency can conflict with more populist calls for assimilation. There is an increasing dichotomy between the "wanted", the economically beneficial migrants who enter through regular programmes, and the "unwanted", the irregular migrants, asylum seekers and refugees. Incorporating new minority groups, integration is mostly spoken of in positive terms – but the question of whether integration can have a cost, and too high a cost at that, is seldom raised. It is however raised in this issue by Ruth Farrugia, who pertinently opens her article with the statement:

> The concept of integration as a kind of "forced assimilation" that violates some fundamental rights is rarely examined, as most literature seems to premise that integration is a value to be treasured and promoted.

Integration touches closely upon cultural rights – should integration become a force for assimilation, it would ignore the rights of minorities to have their "own" culture, which is recognised in article 27 ICCPR[11] (though not in the ICESCR, which, however, does guarantee in article 15(1)(a) the right of everyone "to take part in cultural life"), basically promoting that all individuals have the right to be different, to consider themselves as different and to be regarded as such, which is the basis for acceptance, and not, as often feared, for unrest – on the contrary, suppression of differences has more often than not led to unrest and violence.[12] In

[11] Article 27 ICCPR reads: "In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language".

[12] The inherent respect for diversity is also important in the debate regarding the relevance of human rights in various cultures. As mentioned in a background note for the UN on Human Rights and Cultural Diversity (Ayton-Shenker 1995): "Universal human rights do not impose one cultural standard, rather one legal standard of minimum protection necessary for human dignity. As a legal standard adopted through the United Nations, universal human rights represent the hard-won consensus of the international community, not the cultural imperialism of any particular region or set of traditions. Like most areas of international law, universal human rights are a modern achievement, new to all cultures. Human rights are neither representative of, nor oriented towards, one culture to the exclusion of others. Universal human rights reflect the dynamic, coordinated efforts of the international community to achieve and advance a common standard and international system of law to protect human dignity. Out of this process, universal human rights emerge with sufficient flexibility to respect and protect cultural diversity and integrity. The flexibility of human rights to be relevant to diverse cultures is facilitated by the establishment of minimum standards and the incorporation of cultural rights. The instruments establish minimum standards for economic, social, cultural, civil and political rights. Within this framework, states have maximum room for cultural variation without diluting or compromising the minimum standards of human rights established by law. These minimum standards are in fact quite high, requiring from the state a very high level of performance in the field of human rights. The Vienna Declaration provides explicit consideration for culture in human rights promotion and protection, stating that 'the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind'. This is deliberately acknowledged in the context of the duty of states to promote and protect human rights regardless of their cultural systems. While its importance is recognized, cultural consideration in no way diminishes states' human rights

the UNESCO Universal Declaration on Cultural Diversity, article 4 on the defence of cultural diversity[13] is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples. No-one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope. The problems related to protection of cultural rights of minorities also touches upon the collective rights of groups. Contrary to what some theories have tried to promote, group and individual rights not two parallel spheres – there are very few individuals living isolated from society and human rights would not make sense if not seen in a wider context of people living together and interacting. Groups may be self-defining or defined by external actors – membership may be ascriptive (often the case of ethnic groups) or voluntary (e.g. trade unions, political parties); have affective qualities or exist on a purely categorical basis (such as women, children or non-nationals); or vary widely in terms of whether they are constitutive of the identity and agency of their members. Human rights rise in praxis as a response to something which can be called "domination" – the abuse need not be consciously exercised or apparent or immediately felt. In short, domination is wrong, and – in simplified terms – what human rights is all about. People experience domination – sometimes as individuals, sometimes as groups or sometimes exactly because of the fact that they are considered as groups per se – exactly in the same way as when they engage in domination. In this context, some rights are held by individual members and some by the group. These rights may be external or internal, against the broad society or against the individual members, but what can be stated generally is that there is a right not to be dominated and a right to self-determination on equal terms with others – in general, rights of non-discrimination/domination should be presumed to outweigh rights of self-determination.[14] In addition to definitions of culture and subjects who have cultural rights both as individuals and groups, is the question of definitions of "integration". Farrugia refers to the following definition, citing Diaz 1995:

> Full integration into the host society, for example, implies a state of complete similarity between immigrants and native people in their participation in the socially regulated distribution of valuable resources.

obligations. Most directly, human rights facilitate respect for and protection of cultural diversity and integrity, through the establishment of cultural rights embodied in instruments of human rights law."

[13] The Universal Declaration on Cultural Diversity repeats the definition of "culture" from the conclusions of the World Conference on Cultural Policies (MONDIACULT, Mexico City, 1982) of the World Commission on Culture and Development (Our Creative Diversity, 1995), and of the Intergovernmental Conference on Cultural Policies for Development (Stockholm, 1998): "culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs".

[14] Examples: rights of non-domination – traditional dress, prayer, halal food; rights of self-determination – education and prayer-calls. For a detailed and interesting analysis of this with special focus on the Muslim immigrant community in Europe, see Barbieri (1999).

She continues with the significant question of whether migrants should be required to assimilate and how far diversity of cultures and values should be recognised in host countries. Currently, in accordance with international obligations, there *is* a right for migrants to be different and a corresponding obligation on states to respect diverse cultures, even if a balance must be found that also incorporates the benefits of integration and interaction of different groups in a society:

> Integration is a two-way process involving adaptation by migrants to the host community, and the host community welcoming and adapting to the migrants. Well-planned integration policies are essential to social stability and to protecting the rights and dignity of migrants.

Farrugia's article is enriched by a specific case study on integration in Malta, which provides a good idea of the practical factors and problems relating to integration and the rights of non-nationals – and not only cultural rights.

Her article is valuable because it also takes into consideration and is partly based on interviews with refugees, thus giving a sense of the real concerns and problems that non-nationals experience in a specific context. The same applies to Ray Jureidini's article on irregular migrants in Egypt, which is specific in the sense that it focuses on a study undertaken in Egypt, but of broader relevance as it examines a group of migrant workers who face particular problems and human rights violations everywhere: domestic workers, who are also usually women.

It remains a fact that women in the global workforce remain disproportionately in low-paid insecure jobs, despite the increased number of women in the global labour force, and this needs to be taken into account. The Beijing Platform for Action (paragraph 46) refers to the existing barriers to full equality and advancement faced by displaced women, including women displaced within their own countries, as well as immigrant and migrant women, including migrant women workers. It should be added that both physical and sexual abuses against domestic women workers, for example, including the fact that these abuses are often not reported to the competent authorities, are also aspects of migration that serve as barriers to women's full equality and advancement. Although article 16 of the ICRMW states that migrant workers and their families are "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" and that the ICRMW is worded in gender-neutral language, it can be observed that this instrument does not explicitly consider the vulnerability of women migrant workers but arguably to an extended degree reproduces the image of the migrant as an adult male.

Traditionally, economic and social rights have often been considered more relevant for women than civil and political rights – this is a case where misdirected attention (rather than a lack of attention) towards economic and social rights has created problems. It is partially true that economic and social rights are very relevant to women's empowerment, also because women have often been precluded from

owning property or accessing education – rights which are crucial and also the basis for the enjoyment of other rights. Not having these rights influences access to civil and political rights. On the other hand, economic and social rights cannot be respected or be relevant if women cannot access the public space to negotiate these rights – yet again confirming the interdependence of these "sets" of rights. One part of this problem has been the tendency to create a dichotomy between the private and public sphere and conceptualise the discourse of human rights only in the latter context, thus eliminating private life from protection. In this regard, it should not be forgotten that the state does have an obligation to protect – also against violations from other individuals (e.g. with effective criminal laws and processes).[15] This notwithstanding, it is still true that the segregation of women and their lack of economic power hinder the realisation of their civil and political rights as well as being a direct violation of their economic and social rights. Migrant domestic workers are especially vulnerable, and irregular domestic workers are particularly at risk of being abused and exploited. They are vulnerable as migrants, as persons in an irregular situation, as women and as segregated (to various degrees). As observed by Jureidini:

> … in all countries, the main sector for employment of migrants who do not have permission to work is the informal sector where standards of conditions, wages and treatment are often poor and exploitative. State protection of irregular workers usually does not exist and labour unions are absent. The circumstances of migrant domestic workers are important not only because many are employed informally, but also because they are rarely protected by labour law. The domestic work that is undertaken by migrant labour is recognised as an increasingly significant global phenomenon, but few countries … have sought to address the human rights issues relating to the conditions and treatment of many migrant domestic workers.

Jureidini's article gives a valuable analysis of the human rights – and human rights abuses – of domestic and irregular migrant workers, and is also a hands-on impression due to the use of a survey that brings theory and practice together – useful for anyone concerned with the effective respect and implementation of human rights.

A right that can easily be violated, and often is, is the right to health. The right to health is a fundamental part of our human rights and of our understanding of a life in dignity. *The right to the enjoyment of the highest attainable standard of physical and mental health*, as described in the ICESCR, is not new. Internationally, it was first articulated in the 1946 Constitution of the World Health Organization (WHO), whose preamble defines health as "a state of complete physical, mental and social

[15] See for example *A* vs *U.K.*, App. 25599/94, judgment of 23 September 1998, para. 22 (see, *mutatis mutandis*, *H.L.R.* vs *France*, judgment of 29 April 1997, Reports 1997-III, p. 758, § 40). Children and other vulnerable individuals, in particular, are entitled to state protection, in the form of effective deterrence, against such serious breaches of personal integrity (see *mutatis mutandis*, *X and Y* vs *the Netherlands*, judgment of 26 March 1985, Series A No. 91, pp. 11–13, §§ 21–27; *Stubbings and Others* vs *U.K.*, judgment of 22 October 1996, Reports 1996-IV, p. 1505, §§ 62–64; and also the CRC, articles 19 and 37).

well-being and not merely the absence of disease or infirmity". The preamble further states that "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition" (OHCHR/WHO 2008). Irregular migrants especially often face difficulties in obtaining health care even when this is guaranteed by national law, in accordance with international obligations, because of de facto obstacles, such as language barriers and – perhaps more importantly – fear of being reported to the immigration authorities. Migrants' enjoyment of the right to health is frequently limited merely because they are migrants, as well as other factors such as discrimination, language and cultural barriers, or their immigration status. While they all face particular problems linked to their specific status and situation (with undocumented or irregular migrants and migrants in detention being particularly at risk), many migrants will face similar obstacles to realising their human rights, including their right to health. Health policies and programmes can promote or violate human rights in their design or implementation depending on how such programmes respect related human rights such as the freedom from discrimination, individual autonomy, right to participation, privacy and information. The interdependence of rights becomes evident in Alexandre Devillard's article on the principle of non-discrimination and the entry, stay and expulsion of foreigners living with HIV/AIDS. Many human rights are relevant to HIV/AIDS, such as the right to freedom from discrimination, the right to life, equality before the law, the right to privacy and the right to the highest attainable standard of health (OHCHR/WHO 2008). States may, with very few exceptions, decide whom to accept onto their territory and whom to reject. And there are also possibilities for states to take special measures in order to protect public order and *health*. As Devillard emphasises:

> … legitimate grounds for refusal of admission are very broad. Most of them are included in the general and vague notion of public order. Grounds for refusal of admission are typically based on earlier criminal convictions, earlier violations of immigration legislation, national security, public health, risk of irregular immigration, or economic grounds.

Devillard's article provides an interesting analysis of limitations in admission/stay on the basis of being HIV infected/AIDS positive, especially in connection with the prohibition on discrimination in the ICCPR, which, as stated by the Human Rights Committee in its General Comment No. 18, applies to "discrimination in law or in fact in any field regulated and protected by public authorities". As an autonomous right, the principle of non-discrimination takes into consideration the national legislation and imposes on the state the duty of not adopting and implementing a law whose content would be discriminatory. This duty is imposed by international law even when no provision of the ICCPR, nor any other human right, legal right or duty is involved. The article offers a precious insight into the interdependence of rights, but also sheds light, based on extensive case law, on a subject rarely discussed in the rights discourse: the rights of non-nationals and the rights of persons living with HIV/AIDS.

The aim of this issue of the IJMS is to offer analysis and specific examples of how migrants' rights are violated – and of what those rights are in the first place. Rights and groups considered less often than others were chosen in the hope of making a contribution to the general debate and awareness of the issues that migrants face beyond violations in detention and repatriation, as well as other violations which often reach the headlines of the media. Economic, social and cultural rights still suffer from a lack of attention – something that this issue modestly tries to remedy by focusing not only on marginalised rights but also on marginalised people.

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Defending the Weakest: The Role of International Human Rights Mechanisms in Protecting the Economic, Social and Cultural Rights of Migrants

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Across the world, vulnerable migrant communities are denied access to public health care, adequate housing, and essential social security. Migrant children are barred from attending school and migrant workers are often to be found toiling in dirty, dangerous or dull jobs with little or no protection of their labour rights. While the popular media and other critical voices are stridently raised to condemn migrants for taking jobs from national workers or jumping public housing queues, little is said about the myriad ways in which such economic, social and cultural rights are denied to migrants. Migrants, it can often seem, have no ESC rights, only duties. Yet the international regime of human rights norms and standards is quite clear that all migrants, wherever they are and regardless of their legal status, are entitled to enjoy all human rights, including ESC rights, by virtue of their humanity. This article seeks to situate the ESC rights of migrants in the context of the international mechanisms which monitor and interpret international human rights instruments. It examines the reasons why ESC rights have historically been misunderstood and marginalised. Having traced this difficult history, it details recent guidance by the human rights mechanisms on the ESC rights of migrants, and welcomes this relatively new development. It calls on advocates of the human rights of migrants to pay greater attention to their ESC rights, noting that while the "jigsaw" of normative standards that protect ESC rights has achieved greater cohesion and definition in recent years, much remains to be done to ensure that existing standards are clarified and then implemented in order to better protect the human rights of all migrants.

The everyday reality for many migrants around the world is a grim battle to eke out a living in dire working conditions, to find a dwelling place in which

International Journal on Multicultural Societies (IJMS), *Vol. 11, No. 1, 2009: 19-35*
ISSN 1817-4574, www.unesco.org/shs/ijms/vol11/issue1/art1 © *UNESCO*

they can live in minimal comfort, to stay healthy or risk deportation if they visit a health clinic, to find some way of educating their children when schools are barred to them. While dramatic and sickening stories abound of migrants locked up in detention or being deported with brutal force, and suffering or even dying as they make their migratory journeys, less is said about this more mundane, but no less sickening, reality. On the other hand, xenophobic voices in the popular media and elsewhere are stridently raised to claim that migrants enter countries that are not their own in order to usurp jobs, to fill up public housing, and to abuse welfare systems. Migrants are admonished to stay in their own countries, and if they cannot do that, to remain silent, compliant and even unseen in the countries in which they live and work. Migrants, it can often appear, have no economic, social and cultural (ESC) rights; only duties.

Yet the international regime of human rights norms and standards is quite clear that all migrants, wherever they are and regardless of their legal status, are entitled to enjoy all human rights, including ESC rights, by virtue of their humanity, with only very limited restrictions. The challenge for advocates of the human rights of migrants is that while this statement is perhaps axiomatic, in the socio-political climate prevailing in many parts of the world today, it is increasingly necessary to reaffirm it, and also to spell out to duty-bearers precisely how to protect these rights in practice. This challenge is compounded by the relative lack of precision currently surrounding the understanding of these rights in relation to migrants, including in the guidance provided by authoritative bodies.

Around the world, the most severe violations of the rights of migrants can occur in the sphere of ESC rights. In recent years, advocates have detailed the slavery-like conditions of migrant women domestic workers in Lebanon (HRW 2008), the mandatory deportation of migrants with HIV/AIDS from Malaysia[1] and the provision of substandard accommodation to migrant workers in the UK (Anderson et al. 2007). Denial of ESC rights compromises the right of migrants and their families, regular and irregular, to the full development of the human personality and to fulfil their potential as human beings. Violations of ESC rights are both a cause and a consequence of migration. In addition, the denial of these rights can have a direct effect on the ability of migrants to integrate into the country of destination. As a corollary, the full enjoyment of these rights is a key indicator of the successful integration of migrants and their families. The exclusion and marginalisation of migrants, including through the discriminatory or other denial of such rights as housing, health and education, is harmful both to the individual migrant as well as to migrant communities who often experience xenophobic and racist violence and discrimination as a result of this exclusion.

This article seeks to situate the ESC rights of migrants in the context of the international mechanisms which monitor and interpret the instruments that form the

[1] See Coordination of Action Research on AIDS and Mobility, Profiting from Health Testing of Migrants, 26 May 2008 (http://www.caramasia.org/index.php?option=com_content&task=view&id=752&Itemid=346).

core of the international regime of human rights protection. In so doing, they are best placed to provide guidance to states and other actors on the scope, content and implementation of the ESC rights of migrants, and thereby provide a pathway to greater respect, protection and fulfilment of these rights. But what are the challenges in this respect; are these mechanisms providing necessary and sufficient guidance? The article also seeks briefly to explore methodologies of human rights protection, in order to provide some direction to advocates of the ESC rights of migrants.

1. ESC rights – historically misunderstood

ESC rights, broadly, are those human rights which *inter alia* relate to the workplace, to social security, to access to housing, food, water, health care and education. While recognition of the importance of economic and social issues to human societies has a long history, an early expression of these rights in modern history is found in the Constitution of the World Health Organization (1946) where it is declared that "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being". In 1941, US President Franklin D. Roosevelt had recognised the importance of ESC rights in a speech to Congress on the "four essential human freedoms", which he designated as freedom of speech and expression, freedom of worship, *freedom from want*, and freedom from fear. The Universal Declaration of Human Rights (1948) took inspiration from such sources, and contains a comprehensive range of political, civil, economic, social and cultural rights, without making distinctions or hierarchies between them. Yet, in sharp contrast to civil and political rights such as the right to life or freedom from torture, which are seen as fundamental; ESC rights have been conventionally regarded as aspirations or ideals, as needs rather than rights. The ideological divisions of the Cold War were mirrored in the theoretical fault lines that appeared between civil and political rights on the one hand (championed by the market economies of the West) and ESC rights on the other (supported by the socialist Eastern bloc). This led to the negotiation and adoption of two separate fundamental human rights covenants, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) which was adopted by the United Nations General Assembly in 1966.[2] However in subsequent years there has been considerable progress in clarifying the legal content and methods of implementation of ESC rights, and more recent human rights instruments, including the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), have integrated all human rights.

[2] Although it is worth noting here that the United Nations Convention Relating to the Status of Refugees, which was approved in 1951, departed somewhat from this Cold War differentiation between the two sets of rights. Designed primarily to respond to the forced movements of persons in Europe in the aftermath of the Second World War, the 1951 Convention included in its provisions protection of both civil and political as well as (a more limited set of) economic, social and cultural rights of refugees. However, as time went on and Cold War divisions deepened, the two sets of rights were increasingly seen as separate. See Goodwin-Gill (1996: 296–99).

In some ways, then, the struggle to conceptualise the relevance of ESC rights to migrants follows from a general misunderstanding of their nature and scope. According to the Office of the High Commissioner for Human Rights, there has been a "relative neglect of these rights on the human rights agenda" (OHCHR 2008: 1). Misconceptions surrounding these rights include that they require the state to always provide free goods and services, that they make people dependent on welfare, that they are collective rather than individual rights, and that they are not justiciable (i.e. cannot be settled by law or the courts). Given the myths that surround these rights in general, it is perhaps not surprising that states and other actors have been reluctant to recognise their extension to migrants and non-citizens generally. Yet, as many are realizing, the failure to protect ESC rights can have serious consequences for the individual and the group, including severe violations of other human rights. The essential indivisibility and interdependence of human rights means that, for example, homelessness, which is a violation of the right to housing, can have a devastating effect on the right of the individual migrant to protection from arbitrary arrest and detention, to the right to health, to freedom from torture and arbitrary expulsion. The former High Commissioner for Human Rights has noted that "the importance of economic, social and cultural rights cannot be overstated … Even in the most prosperous economies, poverty and gross inequalities persist".[3] In many societies, it is migrants that are most affected by such poverty and inequality; unable therefore to integrate fully into the societies in which they live and work.

The misconception that the ESC rights regime requires states to always provide goods and services free of charge is one of the primary reasons why governments are reluctant to recognise their obligations towards migrants in this respect. Yet while international human rights law places on states the responsibility to ensure that facilities, goods and services required for the enjoyment of ESC rights are available to all at affordable prices, it does not stipulate that services must be provided free of charge in all cases. Subsidised or free services should be provided in those circumstances where the enjoyment of human rights is at risk, and access to social security should have the aim of preventing people from living in desperate circumstances. Government provision of goods and services (to which "everyone" is entitled) when necessary is a means to ensure the enjoyment of ESC rights, but not an end in itself (OHCHR 2008: 15–16). The legal framework of ESC rights also permits the private provision of essential goods and services, noting that this provision must be non-discriminatory in purpose and effect, and must be regulated by the state to ensure that it is not abusive of human rights. Accordingly, states are obliged to ensure that migrants, particularly vulnerable and marginalised groups, are able to benefit fully and equally from the private provision of essential services such as water and sanitation.

[3] Statement by Ms Louise Arbour High Commissioner for Human Rights to the Open-Ended Working Group established by the Commission on Human Rights to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights, Geneva, 14 January 2005.

2. State obligations in relation to ESC rights – progressive realisation and non-discrimination

The primary obligation on states under universal international human rights standards on ESC rights is to achieve, progressively, the full realisation of these rights according to the maximum available resources.[4] This reflects recognition that to some extent the realisation of ESC rights can be impeded by a lack of resources. Similarly, it reflects recognition that some rights can only be achieved over a period of time. However, it is clear that a lack of resources cannot justify indefinite inaction or postponement of implementing measures; even when constrained by a lack of resources, states have a duty to "take steps" including targeting programmes to protect the most disadvantaged, vulnerable and marginalised sectors of their society. In many societies, this group would be migrants, including migrants in an irregular situation. States thus retain certain immediate obligations in relation to ESC rights, including the elimination of discrimination, the duty to take steps, a prohibition on retrogressive measures and ensuring minimum core obligations. Some examples of the latter obligation, which applies equally to *all* individuals present on the territory of the state, include ensuring the right of access to employment, to basic shelter, water and sanitation, to a social security scheme that provides a minimum essential level of benefits, and the provision of free and compulsory primary education to all (OHCHR 2008: 13).

As noted above, the prohibition of discrimination in the enjoyment of ESC rights is an immediate obligation on states. The principle of non-discrimination contained in the ICESCR, for example, is crucial to its correct application, and according to the Committee on Economic, Social and Cultural Rights (CESCR) General Comment No. 9 (para. 15):

> … guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights.

The rights provided in the ICESCR are guaranteed to "everyone", and Article 2(2) indicates a non-exhaustive list of prohibited grounds of discrimination. General Recommendation 30 of the Committee on the Elimination of Racial Discrimination (CERD) asserts that:

> … differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation … are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.

[4] While recognising that other core human rights instruments (including the ICRMW) have incorporated ESC rights provisions relevant to their particular subject, this section focuses on the universal framework provided by the ICESCR. Accordingly, article 2(1) states: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

Crucially, such differential treatment should not impede the enjoyment of other human rights. Irregularity of status thus does not automatically preclude enjoyment of human rights, and in fact with very few exceptions, all human rights are guaranteed to all migrants, regardless of their immigration status in countries of transit or destination. Yet discrimination against migrants is encouraged or even legitimised in countries around the world, particularly when such discrimination is enshrined in national legislation. Such legislation could take the form of excluding migrant workers from protection under domestic labour law, or prohibiting irregular migrant children from access to free primary education. Such violations of ESC rights are a result of unwillingness, negligence or discrimination by the state.

What, then, of the balance between the principle of non-discrimination and any permissible distinctions that may be applied to migrants in relation to ESC rights? One prominent limitation is Article 2(3) of the ICESCR which provides that:

> Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

As an exception to the general rule of equality, note that article 2(3) must be narrowly construed, may be relied upon only by developing countries, and only with respect to economic rights.[5] Thus states may not draw distinctions between citizens and non-citizens as to social and cultural rights, such as the right to an adequate standard of living or the right to health. The Limburg Principles, which provide interpretive guidance on the ICESCR, state that the purpose of article 2(3) was to end the domination of certain groups of non-nationals during colonial times.[6] Accordingly, the Principles assert that the article should be interpreted narrowly. In addition, commentators have made the point that as this article has not been invoked by any developing country to date, it is not currently relevant.[7] Article 4 of the ICESCR provides some further limitations on the application of the Covenant, stating:

> The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the state in conformity with the present Covenant, the state may subject such rights only to such limitations as are determined by law

[5] It should be noted here that there is no universal understanding of the content of "economic rights". While the right to work could be seen as the clearest example of such a right, it could also be considered a social right.

[6] The drafting history of the Covenant indicates that there was a specific historical purpose to the inclusion of this article, which was to protect the rights of the nationals of newly independent former colonies from groups of resident non-nationals who were in control of important sectors of the economy, in order to prevent these groups from maintaining their stranglehold on the economies of these countries. Thus, the Limburg Principles assert that "developing countries" are those which have gained independence fall under the appropriate United Nations definition of the term. Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 1986, paras 42–44.

[7] In addition, CESCR has not addressed this article, either in Concluding Observations or General Comments. See Craven (1997).

> only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

The Limburg Principles have asserted that this article was primarily intended to be protective of the rights of individuals, and was not intended to introduce limitations on rights affecting the subsistence or survival of the individual or integrity of the person. The term "promoting the general welfare" should be "construed to mean furthering the well-being of the people as a whole".[8] Such guidance does not give credence to interpretations that would limit the fundamental ESC rights of migrants, and non-citizens generally. Under the obligation assumed by states under the ICESCR, any restriction or limitation on ESC rights contained in the Covenant must be accomplished for the sole purpose of promoting the "general welfare" rather than, for example, to support state security-related immigration controls.[9]

International human rights law thus places narrow limits on permissible distinctions that can be made between citizens and migrants/non-citizens in the application of ESC rights, and affirms that any potential distinctions should be subject to necessity, proportionality and tests of reasonableness.[10]

3. ESC rights in focus through international human rights mechanisms

The architecture of the international human rights regime consists in part of treaties and their monitoring bodies, as well as independent mechanisms established by the Commission on Human Rights and assumed by the Human Rights Council to address either specific country situations or thematic issues in all parts of the world.[11] The treaty monitoring bodies are committees of independent experts who monitor States Parties' implementation of each of the core human rights treaties and their optional protocols (if these exist). The implementation of each of the

[8] Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 1986, paras 46–56.

[9] Sepúlveda (2003: 278–79) provides the example in this context of state measures to limit social welfare benefits that had previously been provided to asylum seekers in a bid to reduce economic incentives and thus deter future unfounded asylum claims. She argues that this could entail a violation of the Covenant as, under article 4, immigration control and the eradication of misuse of the system, would not be a legitimate justification for restricting the rights set forth in the Covenant. She goes on to conclude that in the example above a state could only legitimately withdraw social welfare benefits to asylum seekers if there were genuine resource constraints, and even then the withdrawal of benefits should be a last resort, and subject to the scrutiny of the ICESCR.

[10] The standard of "reasonableness" has been considered a useful methodology to set a threshold for acceptable state conduct in respect of ESC rights. It has been developed by South African courts, which have asserted that "[a] Court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable". *Government of the Republic of South Africa and Others* vs *Irene Grootboom and Others*, Case CCT 11/00, para. 41. See also Amnesty International (2005).

[11] Other components, which are not addressed in this article, include the Universal Periodic Review mechanism established by the Human Rights Council, and regional human rights mechanisms.

international treaties is monitored by its own committee. The current working methods of these committees include issuing specific recommendations on reports submitted by States Parties (Concluding Observations) as well as interpretive comments on the content of human rights provisions covered by the treaty in question (General Comments). In recent years, most if not all treaty monitoring bodies have begun as a matter of practice to recommend in their Concluding Observations that States Parties should ratify the ICRMW. Research by non-governmental organisations indicates that treaty bodies have increasingly examined the situation of migrants in state reports and "in recent years the different [treaty bodies] have made efforts to give clearer guidance to states as to how and in which area they should improve their performance".[12]

General Comments too have increasingly made more specific their guidance on the particular situation of migrants, including migrant workers and members of their families. For example, CERD General Recommendation No. 30 includes a number of recommendations addressed to state parties on the ESC rights of migrants/non-citizens, including that they "[r]emove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health".

Following is a brief and non-exhaustive exploration of some ESC rights issues that have been addressed by treaty bodies and special procedures in the context of the rights of migrants.[13] It is apparent that there has been increasing general reference to migrants as a vulnerable group, including women and child migrants. However, more interesting from the point of view of protection are the occurrence of detailed recommendations provided to guide state action and monitoring. Yet even a cursory glance at the work of the treaty bodies in the last few years is sufficient to conclude that there is much work still to be done to elicit such specific guidance on the ESC rights of migrants from the various treaty bodies.

[12] December 18, The UN Treaty Monitoring Bodies and Migrant Workers: a Samizdat – updated July 2007, October 2008, p. 27.

[13] A brief note on the terminology used to describe the status of migrants in the following section: various treaty bodies have used a range of different terms to describe migrants who lack legal permission to stay and reside in the territory of the state, including "undocumented migrant", "illegal immigrant", "undocumented non-citizen". With the caveat that advocates of the rights of migrants prefer to avoid usage of terminology that might connote illegality and criminality, the various terms used by the treaty bodies are utilised here to ensure consistency.

3.1. Right to an adequate standard of living; housing, water and sanitation

In terms of general guidance, CERD General Recommendation No. 30 asks states to

> … 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.[14]

The Committee on the Rights of the Child (CRC) has said that states should provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing to unaccompanied and separated migrant children.[15] Perhaps reflecting its date of drafting (1991), CESCR General Comment No. 4 on the right to adequate housing does not specifically mention the situation of migrants. However, it does assert that

> … 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.[16]

Since 2004 in particular, the CESCR has focused some attention on the housing situation of migrants in its Concluding Observations. For example, expressing concern that migrant families are "disproportionately concentrated in poor residential areas characterised by low-quality, poorly maintained large housing complexes" the Committee recommended that France should ensure the "effective implementation of existing legislation to combat discrimination in housing, including discriminatory practices carried out by private actors" and also urged the State Party to improve the housing situation of low-income households, *inter alia* through the construction and renovation of social housing complexes.[17]

The CESCR has also urged States Parties to pay specific attention to the situation of migrants in respect of the right to water, noting also that asylum seekers should have access to adequate water in the same conditions as are granted to nationals.[18]

The former Special Rapporteur on adequate housing, Miloon Kothari, noted the particular vulnerability of women migrant workers to being forcibly evicted from accommodation provided with their work, and mentioned reports he had received of the forced evictions of migrants who had lived for extensive periods of time in unused private and public buildings.[19] He also examined the situation of migrants during his country visits, noting during a mission to Spain that migrants had not

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[14] CERD, General Recommendation 30, Discrimination against Non-Citizens, 1 October 2004.
[15] CRC General Comment 6 on the treatment of unaccompanied and separated children outside their country of origin, CRC/GC/2005/6, 1 September 2005.
[16] CESCR, General Comment 4 on the right to adequate housing (Article 11(1)), 13/12/1991.
[17] E/C.12/FRA/CO/3, May 2008.
[18] CESCR General Comment 15 on the right to water (Articles 11 and 12), E/C.12/2002/11.
[19] Report of the Special Rapporteur on adequate housing E/CN.4/2004/48, 8 March 2004.

been included in the State Plan of Action on Housing, with the result that low-income migrants lived in very inadequate conditions such as informal dwellings, on construction sites, or renting beds by the hour.[20]

In outlining her proposal to focus future attention on the housing rights of migrants, the new Special Rapporteur on adequate housing, Raquel Rolnik, has noted that "migrants are often discriminated against in the housing market", a situation exacerbated by the fact that governments do not enforce minimum housing rights standards in the case of migrants.[21]

3.2. Right to education

CESCR General Comment No. 13 on the right to education notes that the right to technical and vocational education (TVE) should be read to include the setting up of such programmes which promote the right to TVE for children of migrant workers.[22] General Comment No. 6 of the CRC on the treatment of unaccompanied and separated children asserts that every unaccompanied or separated child, irrespective of status, is entitled to enjoy full access to education without discrimination.[23] And finally, CERD General Recommendation No. 30 calls on states to "[e]nsure that public educational institutions are open to non-citizens and children of undocumented immigrants residing in the territory of a State Party".[24]

In its Concluding Observations, the CESCR has recommended that Mexico should increase the education budget in order to strengthen and upgrade schooling programmes for migrant children.[25] The Committee has also noted with concern the restricted access to free, compulsory primary education for migrant children. On the positive side, CERD praised the high number of schools in Saudi Arabia that have been authorised to offer culturally appropriate programmes designed in their country of origin for the education of the children of migrant workers.[26] In addition, the Committee on Migrant Workers (CMW) has recommended that Ecuador should take appropriate measures to ensure that access to education is guaranteed to all migrant children.[27] The Committee also called on Egypt to ensure that all migrant children, regardless of their status, on the territory have access to schools on the basis of equality with Egyptian nationals.[28]

[20] Report of the Special Rapporteur on adequate housing, Mission to Spain, A/HRC/7/16/Add.2, 7 February 2008.
[21] Report of the Special Rapporteur on Adequate Housing, A/63/275, 13 August 2008.
[22] CESCR General Comment 13 on the right to education (Article 13), E/C.12/1999/10.
[23] CRC General Comment 6 on the treatment of unaccompanied and separated children outside their country of origin, CRC/GC/2005/6, 1 September 2005.
[24] CERD, General Recommendation 30, Discrimination against Non-Citizens, 1 October 2004.
[25] E/C.12/MEX/CO/2, 9 June 2006.
[26] CERD/C/62/CO/8, 21 March 2003.
[27] CMW/C/ECU/CO/1, 5 December 2007.
[28] CMW/C/EGY/CO/2, 25 May 2007.

The Special Rapporteur on the right to education recommended on a mission to Germany that necessary action be taken to ensure that migrant children are guaranteed equitable and equal educational opportunities, noting that in many parts of Germany children with an insecure immigration status were excluded from the compulsory school system. He also observed that migrant children with an irregular status did not attend school for fear of being detected and deported, particularly as there was a duty to denounce placed on headmasters. He recommended that studies be carried out to assess the actual situation of access to education for irregular migrant children, and urged the government to consider legislative reform.[29]

3.3. Right to health

CESCR General Comment No. 14 on the right to health stipulates that one aspect of the obligation to respect the right to health is to refrain from denying or restricting the equal access of "illegal immigrants" to preventive, curative and palliative health services.[30] The Committee on the Elimination of Discrimination Against Women's (CEDAW) General Recommendation No. 24 on women and health recommends that

> … special attention should be given to the health needs and rights of women belonging to vulnerable and disadvantaged groups, such as migrant women.[31]

CRC General Comment No. 3 on HIV/AIDS and the rights of the child notes in addition that vulnerability to HIV/AIDS is more acute for certain groups of children, including migrant children. It observes:

> … reducing vulnerability to HIV/AIDS requires first and foremost that children, their families and communities, be empowered to make informed choices about decisions, practices or policies affecting them in relation to HIV/AIDS.[32]

CESCR noted with concern on a recent report of France that in spite of the introduction of the Universal Health Care Coverage (*Couverture Maladie Universelle*) in July 1999, people belonging to disadvantaged and marginalised groups, such as asylum seekers and undocumented migrant workers and members of their families, continue to encounter difficulties in gaining access to health care facilities, goods and services, due to lack of awareness concerning their rights, the complexity of administrative formalities, such as the requirement of continuous and legal residence in the territory of the State Party, and language barriers. It urged the State Party, in line with General Comment No. 14, to adopt all appropriate measures to ensure that persons belonging to disadvantaged and marginalised groups, such as asylum seekers and undocumented migrant workers

[29] Report of the Special Rapporteur on the right to education, A/HRC/4/29/Add.3, 9 March 2007.
[30] CESCR, General Comment 14 on the right to health (Article 12), E/C.12/2000/4.
[31] CEDAW, General Recommendation 24 on women and health (Article 12), 1999
[32] CRC, General Comment 3 on HIV/AIDS and the rights of the child, CRC/GC/2003/3, 17 March 2003.

and members of their families, have access to adequate health care facilities, goods and services. The CMW expressed concern that migrant workers in Ecuador who were in an irregular situation faced difficulties in practice to access the public health system, despite the fact that the domestic legislation of the State Party granted them this right in law.[33] On a positive note, the CRC noted with appreciation an initiative of Malaysia to provide all children of migrant workers with unrestricted access to health services.[34]

The former Special Rapporteur on the right to health asserted the need to identify and analyse the complex way in which discrimination and stigma against migrants had an impact on their right to health.[35] In a mission to Sweden, he noted that undocumented migrants were required by the state to pay the full cost of treatment and medication in public health-care facilities and, because they feared being denounced to the authorities by health-care professionals, would often refrain from seeking medical assistance, even in the most serious cases. He recommended that the state grant all undocumented migrants access to the same health care on the same basis as Swedish nationals.[36]

3.4. Right to work and rights at work

CERD General Comment No. 30 asks states to:

> Take effective measures to prevent and redress the serious problems commonly faced by non-citizen workers, in particular by non-citizen domestic workers, including debt bondage, passport retention, illegal confinement, rape and physical assault.

It recognises 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 freedom of assembly and association, once an employment relationship has been initiated until it is terminated.[37] The CESCR has called on States Parties to devise national plans of action to ensure that migrant workers are able to enjoy the principle of non-discrimination in relation to employment opportunities, as set out in article 2(2) ICESCR.[38]

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[33] CMW/C/ECU/CO/1, 5 December 2007.

[34] CRC/C/MYS/CO/1, 25 June 2007.

[35] Report of the Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health, E/CN.4/2003/58, 13 February 2003.

[36] Report of the Special Rapporteur on the right of everyone to the highest attainable standard of physical and mental health, A/HRC/4/28/Add.2, 28 February 2007.

[37] See also the advisory opinion of the Inter-American Court of Human Rights, OC-18/03 of 17 September 2003, Juridical Condition and Rights of the Undocumented Migrants, which states: "[a] person who enters a state and assumes an employment relationship, acquires his labour human rights in the state of employment, irrespective of his migratory status … the migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights."

[38] CESCR, General Comment 18 on the right to work (Article 6), E/C.12/GC/18, 6 February 2006.

Much of the attention paid to the situation of migrants by the CESCR has focused on the right to work and rights at work. In a recent Concluding Observation, the CESCR recommended that Belgium should step up efforts to reduce unemployment rates of "foreign residents", through targeted measures which included vocational training, and tax incentives for employers.[39] It expressed concern about the excessive use of temporary employment contracts which limited the ability of "foreigners" to enjoy their labour rights.[40] In another example, CESCR recommended that Canada should adopt effective measures, legislative or otherwise, to eliminate exploitation and abuse of migrant domestic workers.[41]

The CMW, with its particular focus on migrant workers, has also provided some guidance to States Parties on the ESC rights of migrants on their territories. It recommended that the Syrian Arab Republic should ensure that employers were prevented from confiscating the passports of migrant workers.[42] Egypt was urged to ensure that migrant workers were able to benefit from equal treatment with nationals in respect of remuneration and other conditions of work and employment.[43] The CMW recommended in the report of Mexico that the State Party should provide migrant domestic workers with mechanisms to bring complaints against employers.[44] In the report of Syria, the Committee recommended that the State Party ensure that private employers comply with the rule that passports of migrant workers may not be withheld for any reason.[45]

Often, the lack of formal permission to work is a strong indicator of vulnerability to exploitation. CERD has noted the lack of labour protections available to undocumented migrant workers, including discriminatory treatment and poor working conditions such as inhumane workload and excessive hours of work. It has called on States Parties to take all appropriate measures, such as "pattern and practice" investigations in the United States, to combat de facto discrimination in the workplace.[46] It has urged States Parties to enact legislation to ensure that undocumented migrant workers are able to obtain remedies for abuse by their employers, [47] and also called on them to consider the regularisation of workers in an irregular situation. It highlighted the "migratory amnesty" put in place by Costa Rica which allowed for the regularisation of a large number of clandestine immigrants in order to ensure their enjoyment of ESC rights, in particular the right to work.[48]

[39] E/C.12/BEL/CO/3, 2008.
[40] E/C.12/FIN/CO/5, 2008.
[41] E/C.12/CAN/CO/4, 2006.
[42] CMW/C/SYR/CO/1, 2 May 2008.
[43] CMW/C/EGY/CO/2, 25 May 2007.
[44] CMW/C/MEX/CO/1, 20 December 2006.
[45] CMW/C/SYR/CO/1, 2 May 2008.
[46] CERD/C/USA/CO/6, 29 February 2008.
[47] CERD/C/ITA/CO/15, 16 May 2008.
[48] CERD/C/304/Add. 71, 7 April 1999.

3.5. Right to social security

CESCR General Comment No. 19 asserts the particular situation of migrant workers in respect to the right to social security, further stating that where migrant workers have contributed to a social security scheme, they should be able to benefit from that contribution or receive their contributions before they leave the country. Non-nationals should be able to access non-contributory schemes for income support, affordable access to health care and family support. It makes clear that all non-nationals, regardless of their immigration status, are entitled to primary and emergency health care.[49]

In its recommendations to the report of Australia, the CESCR called on the State Party to ensure that the two-year waiting period for the receipt of social security assistance for migrants did not infringe upon their right to an adequate standard of living.[50] It expressed concern to the report of Canada that while migrant workers had contributed to state welfare plans, they had "great difficulties" in accessing benefits, and asked the State Party to take steps to ensure that workers in precarious jobs had access to employment insurance benefits.[51]

4. The human rights approach – implementing ESC rights

While the "jigsaw" of normative standards that protect the ESC rights of migrants has achieved greater cohesion and definition in recent years, much remains to be done to ensure that existing standards are clarified, and then implemented. The role of the international human rights mechanisms will be key in this task. Again, though, it is necessary to stress that the protection of the ESC rights of migrants would benefit from greater clarity and precision in the authoritative recommendations and guidance provided by the treaty bodies. For example, treaty bodies could systematically ask states to integrate the ESC rights of migrants into national plans of action on human rights, in addition to sector-specific plans of action (such as national housing plans and national plans of action to implement the right to health). These plans should give particular attention to the elimination of discrimination against migrants, regardless of their legal status. States should also be asked to review specific legislation, such as in the fields of employment, education, access to social security, to ensure that it does not discriminate against migrants in purpose or effect. Where relevant, recommendations of treaty bodies to States Parties should provide specific and detailed guidance on the measures to be employed by states in order to respect (refrain from interfering with the enjoyment of the right), protect (prevent others from interfering with the enjoyment of the right) and fulfil (adopt appropriate measures towards the full realisation of the right) the ESC rights of all migrants, including irregular migrants. This is a task

[49] CESCR, General Comment No. 19 on the right to social security (Article 9), E/C.12/GC/19, 4 February 2008.
[50] E/C.12/1/Add.50, 11 September 2000.
[51] E/C.12/CAN/CO/4, 22 May 2006.

that should fall equally to all treaty bodies, and not just the CMW, particularly given the relatively limited number of states that have ratified the ICRMW to date.

An added challenge for advocates of the ESC rights of migrants comes from the grey areas that continue to surround the scope and content of these rights in the case of non-citizens, particularly when these non-citizens are in an irregular status on the territory of the state. Authoritative guidance could be provided on the responsibility of states in respect of minimum core obligations and the ESC rights of migrants. There is a need, for example, to define the scope of "emergency" health care and its provision to migrants, as there is no universal agreement on what treatment falls within this category. In the UK, medical groups have noted the inconsistencies where a state's overseas development agency is "very actively campaigning for universal global access to anti retroviral treatment", while at the same time vulnerable groups of irregular migrants are denied such treatment in the UK.[52]

In sum, then, migrants are entitled to much the same protection of their ESC rights as citizens. This applies equally to migrants in an irregular legal status, in countries of transit or destination. However, a range of factors prevents migrants from enjoying effective access to these rights in practice. These factors are often underlined by de jure and de facto discrimination, and are exacerbated by the situation of invisibility and vulnerability in which migrants will often find themselves. Irregular migrants in particular are often unable to effectively assert their ESC rights.

The special vulnerability of migrants stems from the fact that they are not citizens of the country in which they live. As one report notes:

> This dissociation between nationality and physical presence has many consequences. As strangers to a society, migrants may be unfamiliar with the national language, laws and practice, and less able than others to know and assert their rights. They may face discrimination, and be subjected to unequal treatment and unequal opportunities at work, and in their daily lives. They may also face racism and xenophobia.[53]

In this context, an advocacy agenda for those looking to promote the ESC rights of migrants could take as one starting point the human rights approach, which highlights disempowerment and exclusion. The principle of empowerment could be understood as an expansion of people's capabilities and freedoms to participate in, negotiate with, influence, control and hold accountable institutions that affect their lives (Darrow and Tomas 2005: 494). Genuine participation in planning and decision-making and effective access to information underpin the concept of empowerment. Individual migrants and their communities have a right to be

[52] UK Parliamentary Joint Committee on Human Rights, The Treatment of Asylum Seekers, 2006-7, paras 125-152.

[53] Council of Europe, CommDH/IssuePaper(2007)1, The Human Rights of Irregular Migrants in Europe, Strasbourg, 17 December 2007.

integrated into decision-making processes that may affect their development. Thus migrants and their communities should, within this approach, be able to participate actively and effectively in policy-making on ESC rights within the country of destination, including monitoring the implementation of this policy to ensure that it does not entrench vulnerability, marginalisation and exclusion. The process of drawing up national plans of action on ESC rights should, therefore, include effective consultation with migrants.

There is growing recognition among commentators and advocates that the access of migrants to adequate housing, health care, education, social security and decent conditions of work is not a matter of charity, and not exclusively dependent on the legal status granted to them by states. Migrants have a right to expect their fundamental economic, social and cultural rights to be respected, protected and fulfilled wherever they are, and for this right to be upheld by the international community. The enduring challenge will be to see the implementation of these principles in the daily lives and realities of all migrants.

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Migration et travail décent

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Cet article propose une synthèse générale des difficultés spécifiques rencontrées par les travailleurs migrants en regard des différentes dimensions du « travail décent ». Le concept de « travail décent » a été mis en avant par l'Organisation Internationale du Travail (OIT) afin de définir des standards minimaux de droits humains qui devraient être garantis aux travailleurs dans les domaines des conditions de travail, de la protection sociale, des droits des travailleurs et du dialogue social. Nous suivons le cadre général proposé par l'OIT et identifions, pour chaque domaine de droits, les raisons théoriques qui expliquent la position souvent défavorable des migrants. Nous proposons ensuite des exemples de tels désavantages principalement en regard du cas suisse, l'un des principaux pays d'immigration en Europe relativement à sa population.

Débarquant dans un pays qui n'est pas le sien, souvent privé de repères et d'appuis, le migrant n'est-il pas la première victime de tous les abus sur le marché du travail ? La question est d'importance car l'ampleur des migrations de travailleurs et le poids économique de leurs activités ne cessent de croître à l'échelle mondiale. Après avoir rappelé l'importance des migrations de travail, cet article ébauche une réflexion sur le lien entre migrations et travail décent. Nous évoquons les différents aspects du travail décent identifiés par l'Organisation Internationale du Travail (emploi, protection sociale, droits de travailleurs et dialogue social)[1] et tentons de comprendre dans quelle mesure les travailleurs migrants se trouvent particulièrement menacés de dérogations à ces principes. Nous évoquons au fil du texte plusieurs études de cas révélatrices de la situation spécifique des migrants en Suisse, un pays qui a connu une immigration de travail particulièrement importante au cours du dernier demi-siècle et se classe, avec un quart de sa population née à l'étranger, parmi les grands pays d'immigration à l'échelle mondiale. Nous évoquons en conclusion les politiques à envisager pour éviter aux migrants des conditions de travail trop désavantageuses en termes de droit au travail décent.

A l'heure actuelle, un habitant du globe sur trente cinq peut être considéré comme un migrant car son pays de domicile n'est pas celui de sa naissance. De 75 millions

[1] Voir à ce sujet le numéro spécial de la *Revue internationale du travail* [International Labour Review] 142 (2), 2003.

de migrants en 1965, nous sommes passé à plus de 200 millions en 2008 dont une moitié de femmes (OIM 2008). Si les flux migratoires restent plus fortement concentrés dans certaines régions du monde, on peut néanmoins clairement parler d'une globalisation des migrations (Tableau 1).

Selon le BIT, on compterait en 2000 environ 86.3 millions de travailleurs migrants (BIT 2004). Entre 1995 et 2006, l'OCDE relève par ailleurs une augmentation de leur nombre dans la plupart des pays membres. La proportion de travailleurs issus de la migration (nés à l'étranger ou de nationalité étrangère selon les pays) dans la population active totale en 2006 est particulièrement élevée en Australie (25,7%), en Suisse (25,4%), au Canada (21,2%), en Autriche (16,2%), aux Etats-Unis (15,7%) et en Espagne (15,1%). Elle dépasse 10% dans de nombreux autres pays (OCDE 2008*a*: 74).

Tableau 1: Population mondiale, migrants et travailleurs migrants (en millions)

	Population totale 2005	Effectif des migrants 2005	Pourcentage de migrants 2005	Travailleurs migrants 2000
Asie	3905,4	53,3	1,4%	25,0
Afrique	905,9	17,1	1,9%	7,1
Europe	728,4	64,1	8,8%	28,2
Amérique latine et Caraïbe	561,3	6,6	1,2%	2,5
Amérique du Nord	303,6	44,5	13,5%	20,5
Océanie	33,1	5,0	15,2%	2,9
Total	6464,8	190,6	2,9%	86,3

Sources : ONU (2006) et BIT (2004).

L'importance économique des migrations de travailleurs est de plus en plus clairement établie, non seulement pour les pays d'accueil dont ils abaissent le coût de la main-d'œuvre et auxquels ils apportent des compétences, mais aussi pour les pays d'origine, par le biais des transferts de fonds. L'ampleur de ces derniers dépasse de loin celle des transferts liés à l'aide publique au développement et totalisait 375 milliards de dollars environ selon la Banque Mondiale en 2008, les principaux bénéficiaires étant l'Inde, la Chine et le Mexique (Banque Mondiale 2008). Ces chiffres démontrent clairement l'importance croissante du travail des migrants pour les économies des pays d'accueil et d'origine. Ils justifient par leur croissance que la question des droits fondamentaux des travailleurs migrants soient appréhendée avec une attention accrue.

1. Les différents aspects du travail décent

Quatre composantes principales du travail décent sont identifiées dans la littérature récente : l'emploi, la protection sociale, le respect des droits de travailleurs et l'existence d'un dialogue social (Ghai 2003).

1.1. L'emploi

La question de l'emploi peut-être subdivisée en trois domaines que nous allons successivement évoquer : l'accès à l'emploi, la rémunération et les conditions de travail.

Tableau 2: Population n'ayant pas dépassé le niveau d'étude primaire (%)

	Immigrants (nés à l'étranger)	Autochtones (nés dans le pays)
Allemagne	45,8	24,2
Australie	41,3	48,5
Autriche	49,4	33,4
Belgique	53,3	46,5
Canada	30,1	31,6
Danemark	36,9	37,6
Espagne	56,3	66,4
Etats-Unis	39,2	20,3
Finlande	52,6	40,3
France	54,8	45,8
Grèce	42,7	52,5
Irlande	29,6	47,8
Italie	54,3	63,6
Luxembourg	36,7	28,7
Norvège	18,3	20,3
Pays-Bas	49,2	40,5
Portugal	54,7	80,0
République tchèque	38,6	22,8
Royaume-Uni	40,6	51,2
Suède	29,5	25,0
Suisse	41,6	25,6

Source : OCDE (2008*b*).

L'accès à un emploi proprement dit constitue une étape fondamentale qui précède toute relation de travail. L'histoire des migrations montre hélas que pour plusieurs raisons, cette étape s'avère généralement plus difficile pour les migrants, ces derniers rencontrant des difficultés ou des handicaps qui les poussent parfois vers

des emplois peu attractifs où les privent de toutes ressources de subsistance. En premier lieu, les migrants sont souvent peu qualifiés ce qui les rend plus vulnérables aux difficultés du marché de l'emploi. Les chiffres de l'OCDE (Tableau 2) illustrent cette situation pour de nombreux pays d'immigration de longue date (Allemagne, Autriche, Belgique, Etats-Unis, France, Pays-Bas, Suisse).

Tableau 3: Taux de chômage des migrants et des autochtones (%)

	Hommes		Femmes	
	Nés à l'étranger	Nés dans le pays de résidence	Nées à l'étranger	Nées dans le pays de résidence
Allemagne	16,6	9,4	15,8	9,3
Australie	4,3	3,8	5,2	4,5
Autriche	9,8	3,3	9,8	4,4
Belgique	15,8	6,2	19,3	8,0
Canada	6,2	6,6	8,0	6,2
Danemark	7,4	3,2	7,7	4,4
Espagne	7,7	6,1	15,8	10,8
États-Unis	4,1	5,8	4,9	4,8
Finlande	16,0	8,6	20,4	8,9
France	15,5	8,5	17,1	9,6
Grèce	5,3	5,8	15,1	13,6
Irlande	6,0	4,4	6,0	3,8
Italie	5,7	5,5	12,4	8,5
Luxembourg	4,7	2,7	8,9	4,1
Norvège	8,9	3,1	7,7	3,0
Pays-Bas	10,4	3,3	11,0	4,3
Portugal	8,2	6,9	11,4	9,3
République tchèque	8,4	5,8	15,3	8,8
Royaume-Uni	7,4	5,5	7,9	4,5
Suède	13,6	6,0	13,3	6,4
Suisse	6,8	2,4	9,4	3,3

Source : OCDE (2008*a*).

On rencontre cependant aussi, en particulier dans les pays d'immigration récente, des niveaux de qualification élevés chez les migrants. Il en découle le classique profil de qualification « en sablier » caractéristique de la migration de travail (Böhning 1978). Le phénomène de faible qualification des migrants domine cependant. En moyenne, les pays de l'OCDE comptent 42% d'immigrants

faiblement qualifiés (niveau primaire), 34% de migrants semi-qualifiés (niveau secondaire) et 24% de migrants hautement qualifiés (niveau tertiaire et +) (OCDE 2008*b*).

Derniers arrivés, moins qualifiés, souvent moins biens défendus sur le plan syndical, et moins à même de se recycler sur un marché du travail qu'ils connaissent mal, les migrants subissent de manière régulière des taux de chômage supérieurs aux autochtones (Tableau 3). Ceci se vérifie aussi bien pour les hommes que pour les femmes.

La différence de taux de chômage et les difficultés d'accès au marché du travail semblent renforcées par la distance de provenance des immigrants. Ainsi dans l'UE, le taux de chômage s'inscrit à 14,3% pour les ressortissants extra-communautaires contre 7,1% pour l'ensemble de la population (Grünell et van het Kaar 2003). Ceci n'est expliqué qu'en partie par les différences en termes de qualifications. La mesure d'un taux de chômage à qualifications égales montre en effet que dans plusieurs pays, d'importants écarts subsistent et s'expliquent par d'autres facteurs, en particulier des discriminations à l'embauche (ICMPD 2003: 50). En Suisse, une étude menée en 2002 laisse à penser que le chômage plus important de certains groupes d'étrangers s'explique dans une mesure non négligeable par des discriminations (cf. à ce sujet l'encadré 1).

L'article 1 de la Convention no. 111 de l'OIT de 1958 définit la discrimination comme « toute distinction, exclusion ou préférence fondée sur la race, la couleur, le sexe, la religion, l'opinion politique, l'ascendance nationale ou l'origine sociale, qui a pour effet de détruire ou d'altérer l'égalité de chances ou de traitement en matière d'emploi ou de profession ». Cette altération de l'égalité des chances peut prendre de multiples formes : discrimination à l'embauche, discrimination salariale, discrimination dans la promotion, discrimination dans le type de tâches, discrimination dans la valorisation du travail, discrimination dans l'accès à la formation continue, discrimination lors de licenciements etc. L'Etat nation s'étant constitué historiquement sur l'idée d'une priorité aux citoyens, les politiques d'immigration s'avèrent toujours sélectives et, en un certain sens, discriminatoires. Seuls ceux des migrants qui ne concurrencent pas de manière trop marquée les autochtones ou dont le pays d'origine a conclu des accords avec le pays d'accueil sont autorisés à immigrer. Force est de constater que cette idée de priorité nationale à l'immigration, généralement acceptée *à l'entrée*, déteint fréquemment sur l'attitude vis-à-vis des migrants *établis* sur le territoire. Les nombreuses études menées ces dernières années convergent en effet dans le diagnostic de niveaux élevés de discrimination, même à l'encontre de personnes issues de la migration mais scolarisées ou nées dans le pays d'accueil (Zegers de Beijl 2000).

Encadré 1 : La discrimination à l'embauche en Suisse

Décrocher un entretien d'embauche représente la première et indispensable étape de la relation de travail. Par le biais d'une méthode expérimentale développée sous l'égide du BIT et baptisée « correspondance testing », l'impact de l'origine sur la probabilité, pour un candidat à l'emploi, de se voir octroyer un entretien peut être mesuré. Cette mesure est effectuée « toutes choses égales par ailleurs » en soumettant à un échantillon d'employeurs potentiels des candidatures fictives ne différant que par l'origine des candidats proposés.

Une telle étude a été menée en Suisse pour des chercheurs d'emploi de différentes origines mais tous scolarisés en Suisse et parlant parfaitement la langue de la région (Fibbi et al. 2003). Un taux de discrimination net basé sur la proportion de cas où l'un des deux candidats seulement a été accepté pour un entretien (nombre de cas où l'autochtone est privilégié moins nombre de cas où l'étranger est privilégié) a ainsi pu être calculé. Il révèle que sur 100 postulations où le candidat suisse a obtenu un entretien, un Turc, à profil rigoureusement identique, s'est vu refuser 30 fois cette chance, un Albanais du Kosovo entre 24 et 59 fois selon les régions.

La rémunération de l'emploi et le respect de la règle, souvent implicite, « à emploi égal salaire égal » constitue le deuxième aspect problématique de l'emploi des migrants. En raison des caractéristiques qui viennent d'être évoquées, les migrants se trouvent souvent dans une situation défavorable pour négocier la rémunération de leur travail. La fragilité éventuelle du titre de séjour[2], la maîtrise parfois imparfaite de la langue, des difficultés à faire reconnaître les diplômes acquis dans le pays d'origine renforcement encore ce désavantage. En Suisse, alors que le salaire moyen des nationaux atteignait 5'525 francs suisses en 2000, il s'élevait à 3'573 francs pour les étrangers titulaires d'un permis saisonniers (permis A), 4'376 francs pour les bénéficiaires d'un permis annuel (permis B), 4,715 francs pour les permis de longue durée (permis d'établissement C) et 5,069 francs pour les frontaliers (permis G). Après contrôle - à l'aide d'un modèle statistique permettant de les maintenir constantes - de la formation et de l'expérience, les différences salariales par rapport aux nationaux demeurent de 3,6% chez les titulaires d'un permis de longue durée, de 4,5% chez les résidants à l'année, de 13,6% chez les saisonniers[3] (de Coulon et al. 2003). Au Royaume-Uni, une étude comparable a mis en évidence une différence inexpliquée par les qualifications de 5% entre la majorité de la population et les minorités de couleur (« Non-white ») issues de l'immigration. Plusieurs autres résultats allant dans le même sens sont cités dans une synthèse de l'International Centre for Migration Policy Development (ICMPD 2003). Si les migrants peu qualifiés sont souvent les premières victimes de ces

[2] Dans de nombreux pays, le titre de séjour est directement lié à l'exercice d'un emploi et la perte de ce dernier implique la nécessité de quitter le territoire. C'est le cas dans 32 pays interrogés par le BIT tandis que dans 47 autres, les migrants ont le droit de chercher un autre emploi (BIT 2004).

[3] Ce statut est désormais aboli en Suisse.

inégalités, certains migrants hautement qualifiés connaissent eux aussi des difficultés à exercer une activité correspondant à leur formation (Pecoraro 2005).

Outre des handicaps individuels en matière de négociation salariale, les migrants peuvent se trouver collectivement perdants en regard des conséquences économiques de l'immigration. La théorie économique nous enseigne en effet que tout accroissement de l'offre de travail, et par conséquent toute immigration, a pour corollaire une diminution de la rémunération relative du facteur travail (les salaires) au détriment du facteur capital (le rendement des investissements) (Simon 2002). Dans le cadre d'un marché du travail totalement flexible, cette conséquence de l'immigration devrait se répartir entre les travailleurs migrants et non-migrants, mais si des rigidités existent sur le marché du travail, les salaires des nouveaux arrivants risquent de supporter une part plus importante de cet ajustement. On assiste dès lors à un phénomène de segmentation de l'emploi qui voit certaines catégories de travailleurs – en l'espèce, les migrants – défavorisés (Piore 1979). Dans ce domaine aussi, il semble que les migrants venus de loin rencontrent plus de difficultés. En Suisse, les personnes de nationalité étrangère avaient, en 2006, une probabilité 2,7 fois plus élevée d'être des « travailleurs pauvres » ou « working poor »[4] (8,5% contre 3,2% pour les Suisses). Alors que seuls 1,7% des travailleurs originaires de pays du nord et de l'ouest de l'Union Européenne sont touchés par la pauvreté, soit un taux inférieur aux Suisses (3,2%), la proportion de travailleurs pauvres parmi les ressortissants de pays du Sud de l'UE s'élève à 7% et à 14,5% pour les autres groupes de nationalité étrangère (OFS 2008).

Le troisième aspect problématique de l'emploi des migrants est constitué par les conditions de travail proprement dites. Pour toutes les raisons évoquées jusqu'ici, les migrants s'avèrent souvent plus vulnérables face à l'imposition de conditions de travail défavorables. On observe dès lors fréquemment une concentration dans des emplois pénibles et/ou dangereux, des emplois avec horaires atypiques (travail de nuit), socialement déconsidérés ou limités dans le temps (« 3D jobs » – dirty, dangerous, dull) (cf. encadrés 2 et 3). Dans une synthèse publiée en 2003, l'ICMPD relève ainsi que « *Dans presque tous les pays, les travailleurs migrants occupent plus fréquemment des emplois peu sûrs, sensibles aux fluctuations du marché du travail, peu payés, basés sur des contrats a durée déterminée, sans prestige social, salissants ou impliquant de longues heures de travail. En résumé des emplois dont les nationaux ne veulent pas.* » (ICMPD 2003: 46, trad. EP). Le plus souvent, on observe, une fois encore, que les migrants venus de pays éloignés sont plus touchés par ces différents phénomènes, l'emploi a durée limitée par exemple (Tableau 4).

[4] Est considéré comme pauvre tout ménage dont le revenu, après déduction des cotisations sociales et des impôts, est inférieur au seuil de pauvreté défini comme le minimum social d'existence dans le pays (OFS 2008).

Encadré 2 : Le travail des demandeurs d'asile

La situation des demandeurs d'asile en Suisse illustre le risque de confinement aux plus bas étages de l'échelle socioprofessionnelle lorsque la fragilité du titre de séjour est trop grande. Le permis temporaire de requérant d'asile ou d'admission provisoire est octroyé dans l'attente d'une décision relative au statut de réfugié ou d'un renvoi vers le pays d'origine. Ce permis peut être retiré dans un délai bref et obliger le demandeur d'asile à quitter le pays. Les demandeurs d'asile et admis provisoires sont cependant autorisés à travailler et près de 8'000 d'entre eux étaient occupés fin 2008. Nombreux sont ceux qui ont vu dans l'exercice d'un emploi une manière de signaler une bonne intégration et d'accroître leurs chances d'obtenir un permis stable. Pour les employeurs au contraire, embaucher un demandeur d'asile est synonyme de risque de départ rapide en cas de rejet de la requête. Il n'est dès lors pas étonnant de constater que cette population se trouve fortement concentrée dans des branches et des professions jugées peu attractives. Une étude menée en 2000 montre que plus de la moitié des 15 000 détenteurs de ce permis étaient actifs à l'époque dans la restauration et l'hôtellerie et qu'ils étaient massivement concentrés à des niveaux hiérarchiques faibles (5 emplois de direction, 9 employés supérieurs, 172 emplois qualifiés, 308 apprentis et 14 921 emplois non qualifiés...) (Piguet et Ravel 2002; Piguet et Wimmer 2000). Les demandeurs d'asile connaissent par ailleurs des salaires inférieurs de 45% par rapport aux travailleurs de nationalité suisse (Kuster et Cavelti 2003) ce qui peut s'expliquer, outre leurs qualifications inférieures, par la fragilité de leur statut, des difficultés exacerbées pour la reconnaissance des diplômes ou des discriminations.

Encadré 3 : Les conditions de travail des danseuses de cabaret

Une approche de la question du travail décent ne saurait faire l'impasse sur les secteurs économiques dans lesquels les conditions de travail sont potentiellement les plus critiquables. Le marché du sexe est de ceux là.

Au nombre de 1300 environ en 2008, les danseuses de cabaret bénéficient en Suisse de l'un des rares permis destinés à des ressortissants de pays non membres de l'Union européenne. La plupart ont entre 20 et 25 ans et sont originaires d'Ukraine, République Dominicaine, Russie, Roumanie, Moldavie, Bélarus et Thaïlande. Valable pour un séjour de 8 mois par an au maximum, ce permis n'autorise ni le regroupement familial – certaines danseuses ont un ou des jeunes enfants – ni un changement d'emploi. Seuls les 300 cabarets environ que compte la Suisse peuvent bénéficier de cette main-d'œuvre. La nature des prestations demandées aux danseuses (strip-tease, consommation d'alcool avec les clients, horaires de nuit) et le fait que la durée d'activité dans chaque établissement excède rarement un mois, ce qui implique des déplacements constants à travers la Suisse, imposent par ailleurs des conditions de vie particulièrement pénibles. Tout changement d'activité est prohibé et il serait même impossible à une danseuse d'accepter une place de serveuse dans l'établissement qui l'emploie. Une durée sans engagement de plus d'un mois oblige la danseuse à quitter immédiatement la Suisse.

Tableau 4: Proportion de contrats de travail a durée limitée dans le temps

	Ressortissants de l'UE	Ressortissants hors-UE
Autriche	8,1	8,8
Belgique	8,6	18,5
Danemark	9,3	18,6
Finlande	17,8	32,5
France	14,7	20,8
Allemagne	12,2	17,0
Grèce	12,3	21,8
Irlande	3,6	4,5
Italie	9,5	11,2
Pays-Bas	13,8	32,4
Portugal	19,7	55,6
Espagne	31,2	58,2
Suède	13,9	35,3
Royaume-Uni	6,3	17,9
Total UE	13,0	22,0

Source : EUROSTAT (2001).

1.2. La protection sociale

Contrairement au domaine de l'emploi, la protection sociale relève plus des politiques mises en place par l'Etat d'accueil que de l'attitude des employeurs. Elle recouvre en particulier la santé et les accidents de travail, la protection en cas de chômage ainsi que l'assurance vieillesse. De nombreux Etats ont pris à cet égard des engagements explicites visant à ne pas prétériter les migrants par rapport aux autochtones. Depuis 1952, la Convention 102 de l'OIT concernant la sécurité sociale, ratifiée par 41 pays, prévoit pour tous les travailleurs des normes minima dans neuf domaines (soins médicaux, indemnités de maladie, prestations de chômage, prestations de vieillesse, prestations en cas d'accidents du travail et de maladies professionnelles, prestations aux familles, prestations de maternité, prestations d'invalidité et prestations de survivants).

Des risques subsistent cependant que les migrants soient traités de manière plus défavorable que les nationaux. Le premier est lié aux caractéristiques des migrants déjà évoquées car il est plus aisé pour les employeurs de leur refuser les droits fondamentaux sans risque de poursuites. Le second est lié au caractère « temporaire » du séjour car le système d'assurance sociale est en général conçu pour des personnes exerçant une activité durant l'ensemble de leur vie et les modalités de couverture en cas de départ du pays sont loin d'être toujours claires. Le troisième risque, corrélatif du précèdent, est lié aux difficultés « techniques » de la protection. Le versement des rentes peut en effet s'avérer problématique dans certains pays ou si les montants accumulés sont faibles. Enfin, le risque d'échapper

à toute protection sociale est maximal dans le cas d'une migration de travail illégale. Un phénomène dont on sait qu'il a une grande ampleur et qu'il est plus ou moins toléré dans de nombreux états d'accueil. L'Organisation International pour les Migrations, mentionne une estimation de 20 à 30 millions de migrants se trouvant en situation illégale dans le monde soit 10% à 15% de la population totale de migrants (OIM 2008: 209). Ces chiffres doivent cependant être considérés avec les plus grandes précautions en raison de la nature par définition cachée du phénomène.

1.3. Les droits des travailleurs et le dialogue social

S'il semble rare que les migrants soient explicitement et individuellement tenus à l'écart en matière de droit des travailleurs au sein d'une entreprise, on peut craindre que la concentration de migrants dans certains établissements ou certains secteurs tendent à faciliter les abus de la part des employeurs. Comme dans le domaine du travail et de la protection sociale, les migrants sont en effet souvent dans une position peu propice aux revendications sociales. Ne disposant le plus souvent pas des droits politiques dans le pays d'accueil, ils ne sont pas en mesure d'être représentés politiquement et ne constituent pas une clientèle privilégiée pour les milieux de défense des travailleurs, traditionnellement orientés vers les autochtones.

Dans certains pays, des limites sont posées à la participation syndicale des travailleurs migrants (BIT 2004: 52 et ss.) et de manière générale le taux de syndicalisation des étrangers semble inférieur à celui des nationaux en Europe (Grünell et van het Kaar 2003: 7). Néanmoins, en raison d'une culture politique différente ou d'une nécessité plus grande de défendre des droits collectifs, les migrants peuvent apporter aux mouvements de travailleurs un regain d'énergie important. C'est le cas par exemple dans les syndicats suisses (Steinauer et von Allmen 2000).

1.4. Synthèse intermédiaire

Nous venons d'évoquer les différents aspects du travail décent et les mécanismes qui peuvent rendre les migrants plus vulnérables aux abus dans ce domaine. Ces mécanismes ont trait à l'origine et aux discriminations qui peuvent lui être liées, à des qualifications plus faibles, une moins bonne maîtrise de la langue, des codes sociaux, des lois et des usages, à la fragilité des titres de séjour ou encore à l'absence de droits politiques. Au travers des trois études de cas évoquées, discrimination à l'embauche, travail des demandeurs d'asile et statut précaire des « artistes de cabaret », nous avons montré que même dans un pays comme la Suisse, économiquement favorisé et signataire de la plupart des Conventions internationales, il n'est pas inutile de poser la question du lien entre travail décent et politique migratoire. La dernière partie de notre texte va permettre de préciser les options ouvertes aux pays d'immigration pour répondre à ces défis.

2. Quelles politiques migratoires pour promouvoir le travail décent ?

Deux distinctions nous semblent devoir être faites par les pays cherchant à garantir aux immigrants un travail décent. La première différencie les politiques « universalistes » visant l'ensemble de la population et les politiques « spécifiques » ciblant explicitement les migrants[5]. Nous ne traiterons pas ici en détail des politiques universalistes. Il peut s'agir de programmes de formation continue au sein des entreprises, d'information des travailleurs sur leurs droits, de promotion du dialogue sociale par la sensibilisation des employeurs ou la médiation, etc. Ces politiques présentent l'avantage de toucher indifféremment migrants et non-migrants. A ce titre, elles évitent d'isoler, voire de stigmatiser involontairement, un sous groupe de population. Dans certains cas cependant, des politiques spécifiques doivent être mises en oeuvre car elles répondent de manière plus ciblée aux difficultés des travailleurs migrants. Une seconde distinction doit dès lors être faite entre l'instrument de la politique d'*immigration* (« immigration policy » c'est à dire les critères d'entrée sur le territoire) et celui de la politique des *immigrants* ou d'*intégration* («immigrant policy » appliquée aux immigrants présents sur le territoire)[6].

2.1. Politiques d'immigration

Quatre principes nous semblent devoir guider les politiques d'immigration dans la perspective du travail décent.

- La conception des critères d'immigration devra prendre en considération l'ensemble de l'économie et de la société. On devrait ainsi éviter d'accepter une immigration de main-d'œuvre avec pour seul motif l'intérêt à court terme de certaines branches risquant de déboucher ultérieurement sur des difficultés d'intégration.
- Une distinction claire devrait être conservée entre une politique d'immigration à visée économique et une politique à visée humanitaire. Dans le cadre de la première, les perspectives d'emploi et la qualification des migrants devront être considérées afin d'éviter un confinement dans des activités qui ne satisfont pas aux critères du travail décent. Dans le cadre de l'immigration à vocation humanitaire, des appuis spécifiques et conséquents à l'intégration économique devront être envisagés.
- La stabilité des titres de séjour ou, au minimum, la clarté des critères de stabilisation devrait être recherchée afin d'éviter la constitution d'une population détentrice de permis fragiles et défavorisée sur le marché du travail. Afin de promouvoir la compréhension des conditions de séjour par les employeurs, une minimisation du nombre de statuts différents est souhaitable.

[5] Au plan international, la Convention 102 de l'OIT sur la sécurité sociale peut être citée comme exemple d'une politique universaliste tandis que la Convention 97 sur les travailleurs migrants cible plus particulièrement ces derniers.

[6] Nous reprenons ici la distinction classique proposée par Hammar (1985).

– Dans tous les cas, la transparence des critères utilisés pour octroyer ou non un droit d'entrée devra être garantie afin de permettre une évaluation progressive des conséquences de la politique migratoire.

2.2. Politiques d'intégration

S'il est généralement accepté qu'un Etat est souverain pour définir les critères d'immigration en fonction de l'intérêt nationale, une toute autre logique doit prévaloir vis-à-vis des personnes légalement présentes sur le territoire national. Dans ce domaine, le principe d'égalité des droits pour tous est le seul à même d'éviter une fragmentation sociale et l'émergence de sous-groupes défavorisés. Si une politique d'*immigration* peut donc se permettre d'effectuer une sélection, une politique d'*intégration* se doit de s'adresser indifféremment à tous. La politique d'intégration au marché du travail devrait dès lors avoir les objectifs suivants :

– Lutter contre la discrimination sur le marché du travail.
– Promouvoir un traitement identique pour les immigrants et les autochtones dès l'acquisition d'un droit de séjour.
– Appuyer ponctuellement les immigrants rencontrant des difficultés spécifiques (cours de langue, mise à niveau des compétences professionnelles, passerelles permettant l'acquisition de compléments de formation, information sur les modalités de reconnaissance des diplômes, etc.).
– Contrôler les secteurs économiques « à risque » en termes d'abus des employeurs (secteurs avec une importante main-d'œuvre peu qualifiée, marché du sexe, etc.) et veiller au respect des normes en matière de conditions de travail.
– Lutter contre l'économie souterraine et clandestine.
– Promouvoir la négociation de conventions collectives et/ou de conditions cadre dans certains secteurs fortement marqués par la présence d'immigrants et encourager la participation de ces derniers au dialogue social.

3. Une définition du travail décent dans le cadre des migrations internationales

Le présent article ne propose qu'une première ébauche de réflexion sur le lien encore peu étudié entre migration et travail décent. Chacun des aspects du phénomène que nous avons évoqués pourraient et devraient faire l'objet de recherches spécifiques. Il nous semble cependant déjà possible et utile d'énoncer, en résonance avec le travail d'ensemble mené par le BIT sur le thème (BIT 2004)[7], une définition opératoire du travail décent dans le cadre des migrations internationales :

[7] Les textes des Instruments de l'OIT déjà en vigueur au sujet des travailleurs migrants (Conventions et Recommandations) sont présentés dans le Rapport de la 92e Conférence internationale du travail (BIT 2004).

– Absence de discrimination entre étrangers résidants et nationaux en matière de possibilité d'emploi, de rémunération, de conditions de travail et de mobilité professionnelle.
– Absence de ségrégation massive et durable dans le sens d'un confinement de certains groupes dans des activités particulières, surtout si elles présentent des conditions de travail défavorables.
– Possibilités de mobilité sociale indifféremment de l'origine.
– Absence de mise en danger de la santé.
– Droits et protection sociale identiques à ceux des autres travailleurs.
– Représentation des migrants garantie dans le cadre du dialogue social.

A l'image de ce qui a été proposé pour le travail décent en général, une série d'indicateurs relatifs aux facettes de la définition ci-dessus pourront être envisagés pour permettre une observation de l'évolution du phénomène et une comparaison internationale (Anker et al. 2003; Ghai 2003).

Il s'agit d'un travail de longue haleine, indispensable cependant afin que, migrant ou non, « *chaque femme et chaque homme puissent accéder à un travail décent et productif dans des conditions de liberté, d'équité, de sécurité et de dignité* » (BIT 1999: 3).

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Integration at What Cost? Research into What Refugees Have to Say About the Integration Process*

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When refugees leave their country they are frequently assumed to be prepared to forgo their culture and history and embrace that of the receiving country. Scant attention is paid to the trauma caused by expecting or implicitly forcing refugees to shut the door on their former life in embracing a new alternative. This paper looks at the research carried out by the IntegraRef project which aimed to develop an understanding of refugee integration from a range of different perspectives. The main purpose of the research was to gain some insight into how local stakeholders, refugees/asylum seekers and those with subsidiary protection, and host communities themselves, perceive the phenomenon of integration, and what they see as evidence of its achievement. Although there were a number of difficulties in accessing information, the overall results seem to indicate a clear expectation that refugees are to assimilate into the host community wherever possible. Where this is not feasible, because of issues such as skin colour, language and religion, the refugees, service providers and local population affirmed that problems ensue. This paper seeks to report the perceptions described in the project by highlighting the way such perceptions frequently run parallel to each other and rarely cross. Responses showed how people could easily live alongside one another having no idea of the aspirations and hopes of others. Finally, while the need to integrate may be vital to a minority of refugees, it should not stand as a requirement for all. The conclusion invites states to consider alternative options when entering into the integration discourse.

The concept of integration as a kind of "forced assimilation" that violates some fundamental rights is rarely examined, as most literature seems to premise that integration is a value to be treasured and promoted (Farrugia 2008*b*).

* Based on research carried out under the auspices of the European Refugee Fund (ERF) and coordinated by the International Organization for Migration (Farrugia 2008*a*).

The EU Justice and Home Affairs Council has declared:

> The failure of an individual Member State to develop and implement a successful integration policy can have in different ways adverse implications for other Member States and the European Union. For instance, this can have an impact on the economy and the participation in the labour market, it can undermine the respect for human rights and the commitment to Europe fulfilling its international obligations to refugees and others in need of international protection, and it can breed alienation and tensions within the society (Justice and Home Affairs Council 2004).

Meanwhile, across Europe, asylum seekers are increasingly being locked up in detention, prevented from making their asylum claim in the country most conducive to their eventual integration and excluded from language classes, vocational training and the labour market.

> For centuries, refugees have enriched Europe culturally, economically and socially. Yet, today's systematic social exclusion of asylum seekers fuels racial tensions, leaves vulnerable people isolated and risks alienating future citizens. If ministers were serious when they declared integration to be a two-way process, they now need to shift their focus from the newcomers and take action to build inclusive societies that welcome refugees (ECRE 2007).

Whether such strategies result in spurring discrimination against migrants rather than their inclusion in society remains a moot point. Meanwhile, the EU Commission has established a set of Common Basic Principles for Immigrant Integration Policy in the EU (ECRE 2007).

1. Integration

Literature on refugee integration reflects a wide range of differing roles and perspectives on the issue (Chrissanthaki and Østby 1997). Such an approach allows a broad thematic analysis of common features of integration definitions – and areas of controversy regarding such definitions. However, only a small proportion of the available literature explicitly attempts to provide a specific definition of refugee integration (Castles et al. 2002).

1.1. Definitions

Integration is defined and described in relation to the complex participation of the immigrant in more-or-less organised and also institutionalised fields of social, economic, occupational, residential and communicative systems of social action in the host society.

> Full integration into the host society, for example, implies a state of complete similarity between immigrants and native people in their participation in the socially regulated distribution of valuable resources (Diaz 1995: 202).

This definition is influenced by Bernard (1986) and also by Scandinavian researchers who find that integration is the immigrants' adaptation to the

institutions, norms and culture of the "majority society" to the extent necessary for the group's members to function in the society, while at the same time keeping intact its own ethnic identity (Alund and Schierup 1993: 439–41).

It has been said that early integration based on equal treatment and the prohibition of discrimination is in the best interests of both migrants and of the community in which they live (Grant 2005). The degree of integration depends on a number of factors. These include language, the availability of work generating sufficient income, legal status, participation in civil and political life, access to social services, family reunion, and access to citizenship through naturalisation. Human rights play an important role in the integration process and, conversely, where migrants, whether regular or irregular, are excluded from rights – for example from social services which protect social and economic rights – this contributes to their marginalisation, and also fuels negative attitudes towards them from the local people. Respect for the basic human rights of all persons in each society is also an essential basis for addressing and resolving the tensions and potential conflicts between people who have different interests and socio-cultural backgrounds.

Integration raises a number of difficult policy questions. Should migrants be required to assimilate and how far should diversity of cultures and values be recognised in host countries? Does formal integration lead to assimilation of values, in the case – for example – of Islamic communities in Western European countries? How should a migrant's duty to respect the cultural identity of the host state be interpreted where there is a clash of values?

Integration is a two-way process involving adaptation by migrants to the host community, and the host community welcoming and adapting to the migrants. Well-planned integration policies are essential to social stability and to protecting the rights and dignity of migrants. UNDP's 2007/2008 *Human Development Report* recommends three policy principles: respect diversity, recognise multiple identities, and build common bonds of belonging to the local community (UNDP 2007).

A central issue in integration studies has been the attempt to identify a set of factors explaining progressive, regressive, or stable patterns in the process of integration of immigrants in the host society (Berg 1997). In this context, it is pertinent to ask whether the most important factors are individual motivation, social or economic background, or language abilities. Perhaps the various conditions existing in the new environment might be the most important factors for explaining successful integration.

National policies often reflect different definitions of what is meant by "integration". While the term itself means "joining parts (in)to an entity" its practical interpretation and social connotation may vary considerably: "assimilation" as well as "multicultural society" may be considered synonyms or descriptions of (successful) integration. Thus, all forms of cultural or social

behaviour ranging from completely giving up one's background to preserving unaltered patterns of behaviour are covered by the term of integration. This problem of definition, however, is that it has a bearing on measuring integration, because the requirements for success in assimilation are much more difficult to meet than requirements for multicultural coexistence in a society which remains indifferent to other people's rites or customs.

Whatever definition or concept of integration is applied, it can be agreed that the integration of migrants into their respective host societies has at least three basic dimensions concerning the social, economic and cultural role they play in their new environment (Werth et al. 1997). While these three dimensions are indisputably important fields of integration, a fourth dimension, the role migrants play in political life, very much depends on whether the host government allows political participation or even grants voting rights. The political dimension of integration is often rejected as irrelevant by states disliking the idea of granting political rights to migrants with a foreign passport.

1.2. Indicators of integration

As integration concerns complex phenomena and refers to a very widespread field, the evaluation of progress (or non-progress) in integration cannot be restricted to one single unit of measurement. There is no such thing as "one kilo of integration" or "five metres of integration" which would make comparisons over time and/or between two countries an easy task. We can only try to identify facts and phenomena giving an impression of the current social, economic, cultural and political role migrants play in a given society as well as changes occurring over time.

These indicators of integration can be selected from all four dimensions of integration. But in addition the host society is very important, because public opinion – although often measurable against marked scepticism – can for example give some indication of willingness to accept immigrants. Sometimes, violent attacks on foreigners are taken as an indicator against integration. While they are certainly an indicator for the xenophobic tendencies of a certain group of people, the question remains whether such people are representative of the entire society. On the other hand, they might be a small extremist fragment with opinions contrary to the mainstream. Much depends on the media portrayal of such incidents and their actual numbers and frequency.

Although identifying indicators of integration sounds simple in theory, the practical dimension makes it a very difficult task. Statistics on migrants are only very rarely available in the form, quality and exactness desirable. "They are not up to date or simply do not exist, because it would often be too difficult to gather the information" (Council of Europe 1997). Researchers can, for example, only find out about migrants' housing situation by carrying out an expensive survey among them, because the housing market is predominantly in private hands and

information on the nationality of the persons renting is simply not being gathered anywhere and is therefore not accessible.

Even where the necessary data are available, evaluating migrants' integration will continue to pose a major problem relating to reference data. This question touches on one of the core problems in the field – indicators alone do not mean much. In order to become meaningful they have to be compared over time and, more importantly, with reference to other sets of data.

Furthermore, although this is common practice, an additional question is whether it is really useful to compare the migrants' characteristics to those of the indigenous population. Is the average of the non-immigrant population really a good point of reference? Does this kind of comparison neglect central characteristics of the migrants and other important factors determining the indicator in question?[1]

Finding a telling unit of measurement becomes even more difficult when assessing the degree of cultural integration. Apart from language skills, which are relatively easy to evaluate, it seems almost impossible to find indicators for cultural integration that everyone can agree with. The question of political integration is only slightly less complex. One frequently used indicator in this context is naturalisation. It is true that naturalisation does make a statement about an individual migrant's willingness to become an equal part of the new home country.[2] Here, the statistical basis is more or less reliable because naturalisation data are readily available. However, statements concerning the development of naturalisation rates over time or comparisons of naturalisation rates in various countries are of limited use when serving as indicators of integration (Bauböck et al. 2007).

When it comes to assessing the social integration of migrants the availability of data remains a major problem. Almost all relevant data are the result of small-scale surveys, if they exist at all. Binational friendships, housing or outer appearance (clothing, hairstyles) are as difficult to evaluate as leisure activities or social status within a certain group of people. Therefore, statements concerning the migrants' social integration are often limited to speculation.

1.3. Measuring integration

In these circumstances, it is debatable whether a set of indicators can be reliably identified pointing at progress in integration (or the need for further measurements) and covering all dimensions of integration at the same time in order to supply a complete impression of the state of integration in a given country (Hofinger 1997).

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[1] This is highlighted by labour statistics: can the high unemployment rate among migrants in many European countries really be considered an indicator for lack of integration? Could it rather be an indicator for lack of qualifications? In other words, is unemployment due to poor integration efforts or to lack of skills?

[2] This is fundamental to the EU proposal for a future European asylum system. See European Commission (2007).

The destinies of immigrants are widely determined by national legal systems (Bauböck 1994). Legal integration is often perceived as a necessary condition for social integration. The systematic prolongation of legal differences between citizens of a state and immigrants reinforces social discrimination against the latter. Usually, empirical analyses of the integration of immigrants are based on demographic data and try to investigate the extent of social integration of immigrants (Coussey and Christiansen 1997). Studies that take the share of settled immigrants as an indicator for integration frequently neglect the legal impacts of a settlement permit. The granting of an unlimited residence permit may put the immigrant in a position close to a citizen of the country, but might reduce security by possibly revoking the permit in case of unemployment.

2. The IntegraRef project

2.1. Methodology

The IntegraRef project was a fifteen-month research study by the International Organization for Migration (IOM) in Rome, the University of Malta Department of Civil Law, the Berlin Institute of Social Comparative Research (BIVS) in Germany and the Queen Margaret University Institute for International Health and Development (IIHD) of Edinburgh in the United Kingdom.

The project was led by the Psychosocial and Cultural Integration Unit of the IOM, jointly with the Central Service of the Protection System for Asylum Seekers and Refugees run by the National Association of Italian Municipalities (ANCI), the municipalities of Rome, Turin, Venice, Sessa Aurunca and Syracuse for Italy. It also brought together the work of the European Refugee Fund (ERF) projects in twenty-four EU Member States. The project was made possible through funding within the framework of the European Commission, ERF Community Actions.

The research aimed to develop an understanding of refugee integration in the local context from a range of different perspectives in selected EU countries. It was set within a wider programme to develop indicators of integration for policy and practice carried out in collaboration with service providers and policy-makers. The main purpose of the research in the implementation phase was to gain some understanding of how local stakeholders, refugees/asylum seekers and those with subsidiary protection, and host communities themselves, perceive the phenomenon of integration, and what they see as evidence of its achievement.

2.2. Country teams

The research was carried out by three teams, one from each of the following EU states: Italy, Malta and Germany. Each team had a core area of research which employed the same methodological approaches and sample groups across each participating state. Coordination and consultancy was provided by Queen Margaret University, Edinburgh, which had already completed a similar project (limited to

the UK) in 2004. The project highlighted a strong European dimension envisioned through a double partnership, the first limited to the four European countries (Germany, Italy, Malta, United Kingdom), the other embracing ERF national programmes of twenty-four EU Member States.[3]

3. The Maltese experience

3.1. Asylum policy and legal framework

Background

Malta is a small country in the EU with an area of just 122 square miles (316 km^2) and a population of 402,700 (INTI 2007),[4] located in the mid Mediterranean 93 km from Sicily and 290 km from the Libyan Arab Jamahiriya. In the 1990s, 2,822 refugees came to Malta from Iraq and Yugoslavia and 1,968 of them were resettled in Australia, Canada and the United States. Very few were given Maltese citizenship. In recent years there has been a marked increase in irregular migration flows, stemming mainly from North Africa, and Malta has been confronted with a steady influx of immigration and asylum seekers. This is also partly due to its exposed coastline and geographical position as Europe's southernmost point of entry (European Refugee Fund 2006).

In the context of migration, the government describes Malta as:

> the smallest EU Member State, possessing very limited resources, and, to complicate matters, having one of the highest population densities in the world … [Malta] cannot be expected to adequately address this complex and multifaceted problem having roots beyond its shores by itself … The reality that our labour market can only absorb a small number of people on a yearly basis and accommodation and Open Centres built specifically for persons granted protection are under considerable strain to cater for the ever increasing numbers of people cannot be ignored (MJHA 2005).

Legal basis of asylum and refugee system

Malta has been a signatory to the 1951 Geneva Convention relating to the Status of Refugees since 1971 and enacted its own Refugees Act in 2001 (Laws of Malta Chapter 420). Prior to 2001, asylum applications were heard by the UNHCR in Rome or through UNHCR's operating partner in Malta, the Malta Emigrants

[3] Ministry of Internal Affairs, Austria; Fedasil, Belgium; Ministry of Internal Affairs, Cyprus; Ministry of Internal Affairs, Czech Republic; Ministry of Internal Affairs, Estonia; Ministry of Labour, Finland; Ministry of Labour, France; Federal Office for Migration and Asylum/Ministry of Internal Affairs, Germany; Ministry of Health and Social Solidarity, Greece; Ministry of Internal Affairs, Hungary; Agency for Reception and Integration, Ireland; Ministry of Internal Affairs, Latvia; Ministry of Social Security and Labour, Lithuania; Ministry of Family and Integration, Luxembourg; Ministry of Internal Affairs, Poland; Ministry of Labour, Portugal; Ministry of Internal Affairs, Slovakia; Ministry of Internal Affairs, Slovenia; Ministry of Labour, Spain; Migrationsverket, Sweden.

[4] The population density of Malta is 3,000 per square mile, whereas in Australia and Canada it is 10 per square mile, and in Libya 7 per square mile.

Commission. Malta has also ratified the Dublin Convention (Council of the European Union 2003).

The international obligations of Malta's asylum procedures are defined by the UN 1951 Convention and the New York Protocol of 1967, which Malta ratified in 1971. Until 1 January 2002, Malta applied the geographical reservation of Article 1B(1)a of the Geneva Convention, obtaining full national management of asylum seekers after this date. This reservation was lifted following accession to the EU.

The Immigration Act was implemented in 1970; the Refugees Act was enacted in 2000 and came into force on 1 October 2001, forming the basis of the rights and duties of asylum seekers, supplementing the Immigration Act. In December 2002, Malta decriminalised entrance without leave to its territory. However, the Immigration Act specifies that every migrant without leave – irregular or asylum seeker – should be detained on the basis of an administrative decision. The Act provides that any person on Maltese territory without the rights of entry, transit or residence shall be considered as a prohibited immigrant and therefore be detained "in some place" until deportation.

Amendments to the Refugee and Immigration Acts in August 2004 provided for an increase in the resources available to the decision-making bodies and for inmates of detention centres to submit a request for conditional release on grounds that continued detention would be "unreasonable as regards duration or because there is no reasonable prospect of deportation within a reasonable time". Undocumented asylum seekers are also treated as prohibited migrants as the Refugees Act does not exonerate them from such detention. At the time of the project, the detention period had been reduced to a maximum of twelve months.

In the first seven months of 2007, the Refugee Commission had registered 1,072 arrivals. The majority of people originated from Somalia (351), Eritrea (162) and Ethiopia (106). The rest of the asylum seekers were mainly from other sub-Saharan African countries, including Côte d'Ivoire, the Democratic Republic of the Congo and Nigeria (RefCom Statistics 2007). There are three types of irregular immigrant: those who enter the country legally but remain beyond their authorised stay, those who arrive in Malta without proper documentation, and those who arrive in an irregular manner (usually by boat). Most of these immigrants eventually apply for refugee status.

An irregular immigrant must lodge an application for refugee status within two months of arrival in Malta. The Commissioner may, only for special and exceptional reasons, consider valid an application made after this lapse of time. The Refugees Act states that asylum seekers should be interviewed within a week of their application. An administrative measure has been put in place in order to circumvent this procedural issue. The first form filled in by the asylum seeker is considered only as an 'indication of their intention to apply for asylum' and not the proper Asylum Application. Once this application is handed in to the

Commissioner's office, the detainee enjoys all the protection that the law provides to asylum seekers. It is only when asylum seekers are actually called for interview that they are requested to fill in the Preliminary Questionnaire.

Applicants in fact may be interviewed weeks or even months after they have filled in the first "application". Asylum seekers very often complete this application, issued only in English, on their own. Those who have no knowledge of the language very often have to rely on a fellow detainee or NGO personnel visiting detention centres to help them. Variances of information or inaccuracies between the two applications have been viewed by the Refugee Commissioner as untruths.

National law makes no provision for the material reception conditions of asylum seekers. Under article 10 of the Refugees Act, they have a right to state education, training in Malta and medical services free of charge. Detainees should enjoy access to basic conditions, health services, and freedom of religion and customs in detention centres.

Article 8 of the Refugees Act provides for setting up the Office of the Refugee Commissioner, a first instance body, and the Refugee Appeals Board. The Immigration Officer is expected to inform those seeking asylum in Malta of their right to apply for refugee status and of the right to have legal assistance during all the phases of the asylum procedure. In practice, it is the NGOs visiting the detention centres that first explain the asylum process to detainees, provide information regarding their rights, and in particular, how to apply for asylum.

Detention is a matter of national policy, considered as an "administrative requirement in the interest of national security and public order" (MJHA/MFSS 2005). Responsibility for detention lies with the police, although the armed forces have shared this duty since 2002. At the time of the project, until August 2007 there were three detention centres in use: Hal Safi Detention Centre consisting of two warehouses and a supplementary block in which 567 persons were living, Hal Far Lyster Barracks Detention Centre consisting of an area with tents and another indoors with prison zones detaining 734 persons run by the army, and a smaller detention centre run by the police in Ta' Kandja (Médecins du Monde 2007).

Since 2004, the Immigration Act (Laws of Malta, Chapter 217) grants the right to review of the detention period. Minors, families[5] and vulnerable persons[6] are in principle not placed in detention centres although alternative accommodation is not always available.

In 2003, the Commissioner for Human Rights, Mr Alvaro Gil-Robles, visited Malta and publicly noted that these detention centres are "totally inadequate" (Council of

[5] The policy document defines families as spouses and their minor children.

[6] Defined by the policy document as comprising elderly persons, persons with a disability, lactating mothers and pregnant women.

Europe 2004).[7] In particular, he referred to the problem of overpopulation, lack of activities offered to migrants and inadequate sanitation in the detention centres. He compared the detention centres to a "microwave in summer and a fridge in winter" (ibid.: 6), noting that "the overall situation is all more shocking if compared … to entirely acceptable conditions to be found in the Corradino Prison" (ibid.: 7). Conditions remain questionable.

The Ministry for the Family and Social Solidarity (MFSS) is responsible for the social welfare of all irregular immigrants, including asylum seekers in the community, refugees and people granted Humanitarian Protection. An Inter-Ministerial Committee[8] has been set up, through which the ministries involved in social welfare support are expected to collaborate. The MFSS, in order to help refugees and persons holding Humanitarian Protection status to integrate with the rest of society, is responsible for assisting them in four main areas: education and training, financial entitlements, accommodation and employment. The MFSS also hosts a monthly NGO Forum to facilitate an exchange of views and proposals. In 2004 the Minister for Justice and Home Affairs set up a Task Force composed of himself as chair, the Minister for the Family and Social Solidarity, the Commissioner of Police and two NGO representatives to draft a national immigration policy. The drafting group has been suspended since 2006.

Open Centres

Once asylum seekers are released from detention, they are allocated temporary accommodation in one of the Open Centres against presentation of documents issued by the Principal Immigration Officer and/or the Refugee Commissioner. The MFSS is responsible for the social welfare of all irregular immigrants, including asylum seekers in the community, refugees and people granted Humanitarian Protection. Such service provision is coordinated by its subsidiary, the Organization for the Integration and Welfare of Asylum Seekers (OIWAS).[9]

There is one main Open Centre in Marsa. At the time of the project it hosted nearly 800 people, mainly single men, from different nationalities, backgrounds and religions. The building is a former school, abandoned because of serious flooding and an environment of criminality, situated on the edge of the port with an industrial zone nearby and cut off from the main population. Another much smaller centre for families is at Hal Far, close to a detention centre, also in a remote part of the island. There are two hostels (housing up to fifteen) for unaccompanied minors, providing good-quality care and support.

[7] The report refers to the situation in 2003. Today, the number of detainees living in these detention centres has increased considerably.

[8] Representatives from the MJHA, MFSS, Ministry of Education, Youth and Employment, Ministry of Health, Elderly and Community Care, and Ministry of Foreign Affairs.

[9] Mission statement: "To provide social welfare services to irregular immigrants in order to help them meet their basic needs with dignity and respect and enhance their quality of life, to prioritize the most vulnerable cases, and assist their integration in to Maltese society where appropriate, in accordance with Government Policy" (http://www.appogg.gov.mt/adultandfamily_refugeeservices.asp).

The Malta Emigrants and Refugees Commission, a Church NGO, runs two centres in Balzan housing approximately 300 people. One is for single men and another for single women with children, and families. These centres are in the heart of a prime residential area, close to all amenities and schools. The Emigrants Commission also provides accommodation in a number of apartments scattered all over the island.

4. Public perceptions

4.1. International appraisal of public perceptions

According to results from a poll taken by Eurobarometer in 2003, echoed by a survey on discrimination in the EU in 2006, Malta is one of just four countries where only a minority thinks that ethnic diversity enriches the national culture (31.7 per cent). The Maltese are consistently the least supportive of migrants' rights in the EU-27, whether polled about equal social rights, family reunion rights or facilitated naturalisation. Also the Maltese are the most supportive in the EU-25 of deporting all legally established third-country nationals (35 per cent), especially if they are unemployed (63.6 per cent). Over two-thirds of Maltese believe ethnic discrimination is fairly widespread and the majority thinks it worsened from 2001 to 2006. The population is divided over whether the country should do more to combat discrimination. Just 18.7 per cent were aware of a law punishing ethnic discrimination.

Key Findings listed in the MIPEX – an annual study of twenty-five EU countries and three non-EU countries, produced by a consortium of twenty-five universities, research institutes and think tanks – show that in Malta, citizens of other EU countries outnumber legally resident non-EU citizens at a rate of 2 to 1. The legal immigration of third-country nationals was just 1,913 in 2004. The government estimates that in 2005 about the same number came to Malta irregularly. Malta's growing asylum-seeker and refugee population is modest in raw numbers, but one of Europe's highest as a percentage of the population.[10]

Irregular migration flows and the law of the sea have fuelled rather alarmist media and public debates.[11] Malta recently introduced integration policies, largely aimed at refugees, mainly in response to the legal obligation to transpose EC Directives on anti-discrimination and long-term residence. The local press comments that

[10] The population stood at 413,609 in December 2008 (National Statistics Office). At the beginning of October 2008, 2,500 irregular immigrants had landed in Malta during the previous nine months. During this time the number of births was just under 3,000.

[11] Camilleri (2007), quoting the Minister for Justice and Home Affairs at an EU summit on immigration "Let me make it clear to everyone. Malta will not allow itself to be anointed as the only sentinel of the EU's southern borders." Speaking to the international press following the meeting, Dr Borg said Malta was determined that, until a burden sharing agreement on the proportional distribution of asylum seekers or illegal immigrants is reached between EU member states, the island will not accept to take upon itself the responsibility of taking to its territory all the illegal immigrants saved in the Mediterranean.

"Malta appears reluctant to step up the pace of integration of immigrants into the workforce, with results that may be eroding the country's competitiveness while at the same time encouraging illegal worker exploitation" (Vassallo 2007). Access to nationality is shown to rank 24th out of the 28 MIPEX countries, with only one country scoring worse than Malta on both labour market access and anti-discrimination. Political participation is the lowest-scoring strand for Malta, as for several other European countries. MIPEX graded Malta's efforts to integrate foreign workers into the labour market at only 30/100: a statistic well below the EU average of 56.

4.2. Local appraisal

There have been sporadic attempts to address the integration issue. In 2007, the University of Malta's Centre for Labour Studies (CLS) issued a memorandum urging local political parties to regularise the position of immigrant workers, among other measures aimed at improving competitiveness and addressing social injustice. The CLS memo observed that immigrant workers "are filling a gap in the supply side of labour" by taking on jobs unwanted by the Maltese. It also warned that the situation "may eventually create an underclass or a ghettoisation of relatively deprived persons". The CLS concluded that "[t]he best solution may be to regularise their position by issuing temporary work permits to immigrants from third countries, or by letting them register as guest workers". MIPEX also highlighted a general lack of specific infrastructure governing the entire integration process.

Malta's integration policy is the responsibility of the MFSS, which runs a government agency, OIWAS, specifically for this purpose. In an interview in the local press (Vassallo 2007), the ministry's communications coordinator defended Malta's performance on the grounds that immigration is still a new phenomenon to which the country is gradually adapting.[12] The ministry spokesperson contends that efforts to integrate irregular immigrants after detention are often problematic for two reasons: because those who do not intend residing in Malta permanently are not particularly interested in legal employment, but only in saving up enough money for their next step; and because unscrupulous employers exploit the vulnerability of immigrants and do their utmost to evade the legal regime and employ immigrants illegally. This questions the dubious presumption that all immigrants wish to integrate.

4.3. Context of research and methodology

Given the small size of the island, Malta was treated as one local community. A preliminary hurdle concerned the status of the people to be interviewed. It has already been shown that in legal terms the position of the refugee is advantaged

[12] "In Malta's case, we could say that we have just started discovering the roadmap for the first generation of integration policies as compared to other European countries which are dealing with third generation immigrants. It is a steep learning curve which we are embarking on whilst facing significant operational challenges."

vis-à-vis the person with Humanitarian Protection status and that Malta has a very small number of refugees. It proved extremely difficult to track down refugees, mainly because they are not generally housed in Open Centres in receipt of ERF funding.[13] Also they are invariably the first to benefit from resettlement and leave the country. For this reason, the research sample is predominantly composed of people with Humanitarian Protection. The term refugees in the text therefore loosely refers to those with some form of protection and excludes asylum seekers whose application has been rejected at appeal stage. Use of this term was eventually agreed by all national research teams, given their very different social and political contexts.

Interviews with people having Humanitarian Protection were held within two focus groups, one at Balzan and the other at Marsa Open Centre and in fourteen individual interviews. Women refused to be interviewed in the presence of men so did not participate in any focus group discussion (FGD) and only accepted to be interviewed separately. Two further focus group discussions were held: one with the host community and another with service providers.

Interviews were conducted in a semi-structured manner concentrating on a number of key issues such as employment, education/vocational training, language, health, social relationships (leisure, cultural differences), safety, property, worship and political participation. The focus group discussions proved an excellent way for people to engage in debate, highlighting a number of similarities and differences in outlook and opinion.[14]

5. Main findings relating to local integration

5.1. Safety and stability

Initial reception procedures, discriminatory behaviour and media influence can lead to refugees feeling unsafe. The refugees' need for safety is echoed throughout the interviews: "I always searched for a safe place" (refugee, Somalia). In the Marsa focus group with refugees, the participants mention that the feeling of insecurity that started in their country of origin has been with them throughout their journey and some still feel it in Malta. For example, refugees interviewed are scared to go out at night and they are simply afraid to be in the wrong place at the wrong time. Others however do feel safe in the local communities where they now live. There have also been instances of conflict between different ethnic communities, particularly within the confines of detention and the overcrowding of some Open Centres.

Asylum seekers are also looking for a stable place to live and some shared the concern that they cannot integrate until they know they can stay in Malta. "If I have

[13] The project was directed to beneficiaries of ERF funding.

[14] However, it is important to point out at this stage that refugees are not a homogeneous group and it is difficult to represent them as using one voice.

refugee status I can live here in Malta, but [I] know I'm worried to go back to Somalia. That's made me hide in my hat" (individual interview, Somalia). It is pertinent to note that skin colour seems to be felt to directly affect safety and stability.[15]

5.2. Reception

Asylum seekers entering the country in an irregular manner were formerly detained for a maximum of eighteen months (now reduced to twelve months). This makes it obvious to the refugees that "they are not welcomed from day one" (FGD service providers). Once in detention they are handcuffed when leaving the centre, even to go to hospital. "It was very difficult, anyway it was very difficult for me. Because we spent the time under the tents, maybe for six, seven months under the tents, when the rain was falling under the tents" (individual interview).

One of the service providers confides: "It's a very jaundicing experience, influencing their integration prospective. Because they know that Maltese don't want them" (FGD service providers). A small number of asylum seekers, however, did not seem unduly troubled by a spell in detention and expressed their relief at being somewhere safe, no matter what the conditions might be. This raises the question as to the availability and quality of responses on offer relating to psycho-social issues within the reception phase (Balzan FGD refugees).

The general perception is also that most asylum seekers end up in Malta by chance and most, if not all, had no idea that Malta existed before landing on its shores (individual interviews). Their disappointment in not reaching mainland Europe through Italy is also telling. However this raises an argument central to this paper. Refugees indicated that when they sought protection, their country of choice was never Malta. A number had no intention of remaining in Malta and viewed it simply as a transit country.[16] The state response is that it is therefore futile to invest in integration, as integration must be reciprocal. However a number of refugees are

[15] In contrast to the position of black-skinned asylum seekers, Malta receives another group of refugees that service providers labelled as "invisible". They tend to be those refugees with white skin or those that overstay their visas. This groups tends to integrate better, they have Maltese friends, go out in the evening, go shopping in the same places as local people, go sight-seeing and go to the beach. One service provider comments: "They lead a normal life, they don't have issues, they're not very afraid to go anywhere." Service providers attribute this to the whiteness of their skin and because in most cases the local community mistakes them for tourists. However they still have issues with the temporariness of their status. "You still have the documents, you're reminded you're an outsider, you're not one of us" (FGD service providers). Service providers worry about the group that overstay their visas because they do not contact NGOs because of the fear that they will be reported to the police, hence they only have limited access to social services. This is corroborated by research carried out by Amore (2005) and Texeire (2006).

[16] This is echoed in previous research by Farrugia (2006).

happy in Malta and want to settle permanently, notwithstanding their initial position.[17]

5.3. Status

The temporariness associated with the status that "refugees" are given, especially the Humanitarian Protection status which is renewable annually, is a factor that hinders integration. "They know they cannot ever get a permit (citizenship), they know it. And that for them is extremely frustrating. It causes great anxiety for them" (FGD service providers). The anxiety caused by the temporary status undermines the refugees' sense of stability in the community.[18] Service providers argue that it is not "according to human rights" for people to build social connections in their country of asylum, only to be sent away once the conflict is over. They feel that when planning integration policies, there is a need to focus on permanent solutions such as citizenship. In Malta refugees can apply for Maltese citizenship after ten years, but the grant is discretionary.[19]

5.4. Alienation

Refugees in Malta find it hard to settle, partly because in Malta there are no diverse ethnic communities. Therefore refugees might feel alienated when surrounded by people that have a different cultural heritage and language from them. A refugee from Somalia explains his feelings when he arrived in Malta; "… first time I was new in the society and it was very difficult and I was alone, the only person who was different." This sense of alienation can be exacerbated by the unwelcoming reception methods, such as the period most have to spend in detention, discrimination, and negative media coverage.

5.5. Discrimination/racism

Service providers suggest that the Maltese fear integration because of misconceptions about refugees, citing the fear that the price of the property in their neighbourhood might be negatively affected. The local community group was unanimous in its concern about the threat to the jobs of local people and the general

[17] The fact that they are precluded from moving on to another EU country because of Dublin II restrictions also strongly influences their choices.

[18] INTI (EU funding programme promoting integration) National Meeting, "The Integration of Third Country Nationals", Malta, 2007: Mr G from Somalia and who has Temporary Humanitarian Protection in Malta said that the Maltese are very kind, but that life for him and those like him here is very difficult and uncertain. "There is no future; it is like being in a dark room. It is difficult to know what is going to happen to you with Temporary Humanitarian Protection," he said. "You have left your family behind, and you cannot bring them here, but also you cannot go there to be with them." Living in an Open Centre for an indefinite time is difficult and as it is isolated from Maltese society it is difficult to integrate. Migrants have problems gathering information on Malta and their rights.

[19] Ibid.: Mr M from Eritrea said that it is very hard to integrate with Temporary Humanitarian Protection as you only have the security of a one-year residence permit, which makes it impossible to make plans for education, work or housing. The primary issue is the law and the policy because if migrants are given refugee status this helps them with everything.

impact on their own place in the community. “Today a roadsweeper, tomorrow instead of me …” and “At hospital we have to wait in a queue behind them. They eat and drink at our expense.” “Everywhere is full of them. Soon they will take over” (FGD local community).

5.6. Media coverage

Discriminatory behaviour and fear has been fuelled by media representation of refugees, which is counteractive to the process of integration. The service providers mentioned that the media often focus on negative aspects of immigration such as crime and disease. In the service providers focus group discussion there was a debate as to whether the media fuel discrimination or whether they are simply reflecting what society wants to hear.

The important point to note is that the refugees stated that they also read articles that are against them or not particularly welcoming. One most wonder what effect this might have on their desire to integrate into Maltese society. However most refugees seem to recognise that the Maltese population is diverse and not all are racist and against them, although their feelings of security may be shaken.

5.7. Accommodation

Private purchase or renting of housing is very expensive in Malta.

> Housing in Malta is one of the major problems faced by both citizens and government. The number of households exceeds the number of dwellings available, at least at reasonable prices (Tabone 2001).

Refugees have the right to apply for social housing but must compete with locals on a lengthy waiting list. Those leaving detention are automatically given temporary shelter in an Open Centre but they must attempt to find a permanent solution to their housing needs. Rents are often prohibitive and, even where money is available, a number of property owners are reported to have been dismissive of any requests for rentals by immigrants. In the past, a number of North African males who had entered Malta legally were reported to be using the country as a base for criminal activity and this prejudice seems to have persisted indiscriminately.

Furthermore, the urgency of moving out of the Open Centre depends on a number of factors. Families are usually reasonably well accommodated and when they try to find private alternatives they receive substantial support. Single males in overcrowded centres may find it too much of a strain to remain there, however. Students trying to study find it impossible to live in such surroundings but are faced with equally impossible financial burdens if they leave. One interviewee explains that they are living with nine people in one bedroom but with a “beggars cannot be choosers” attitude he does not comment negatively on this. The interviews show that, in the main, refugees endure the direst situations as best they can, hoping to save enough money to leave Malta and travel to mainland Europe.

5.8. Employment

Some of the refugees feel destitute; they for example consider the bus fares in Malta expensive (a bus ride costs 47 euro cents). As one of the refugees interviewed said: "We have financial problems. We have escaped from our country to be in a better situation, but here we still are in a poor situation." This financial hardship is due to the lack of access to well-paying jobs. Service providers comment that refugees are treated in a different way, working longer hours, and with no regular contract: "They are faced with a problem with having to accept working conditions and jobs that are most of the time not accepted by the local population."

These temporary jobs add to the sense of instability in Malta. Service providers also point out that single parents find it very difficult to work because they cannot find suitable childcare. Refugees complain that often they do not find a job suitable to their qualifications, while a number of jobs are inaccessible to them owing to their lack of knowledge of Maltese. Other issues concern language and the recognition and certification of documents which some refugees produce to accompany their job application.

5.9. Education

Some of the refugees have participated in free courses offered by the Malta College of Arts, Science and Technology, part of the Ministry of Education, and others have followed courses offered by the Malta Institute of Computer Science. In addition, one of the refugees started a degree at the University of Malta but found it difficult to balance work and education. On the other hand, some of the refugees said that they do not want to stay in Malta because of the lack of educational opportunities.

Children are automatically entitled to free schooling but must first master Maltese in order to be able to successfully integrate (or at least communicate) with their classmates. For older students the language issue can be a serious handicap, although at tertiary level the teaching medium is English. A number of refugees undertake English language instruction so as to be able to follow the courses of study they wish to pursue.

Post-secondary education (school is compulsory until age 16) is not free to refugees but in practice university and college fees have been waived to encourage further education. However as there is no stipend or accompanying financial support, students must fund their living expenses through separate employment, which often proves extremely challenging.

5.10. Health

Besides lack of specialised care, refugees have problems in accessing health services due to culture differences and language barriers. The Balzan Open Centre, run by an NGO, has an arrangement with a local doctor who provides care free of

charge. The local hospital is used in case of emergency but feedback seems to show that the local public health centres are not frequented, although theoretically these are accessible.

"Life becomes very hard, from the first day that we get here we have to think about how to get a job, how to get money and cope with life" (Marsa FGD refugees). Mental health issues frequently go untreated although they are a concern. The difficulties that refugees encounter seem to further contribute towards their anxieties and therefore, to be able to integrate, refugees need their own coping strategies. One of the refugees mentioned that he puts a lot of effort into socialising and is careful how he acts around others. Others mentioned that ambition for a better life drives them forward. One interviewee said that he likes to go to Birzebbuga, which is where he first landed by boat and he likes to tell the story to his friends. The service providers mentioned the importance that refugees maintain hope that their situation will improve. However service providers point out that there is a lack of specialised care for those already traumatised from the experiences in their country of origin and the voyage to Europe, especially those who pass through Libya and detention in Malta

6. Social connections

A large part of integration comes about through the social connections that people are able to form. According to the *Indicators of Integration Framework* (Ager and Strang 2004) these types of social connection can be divided into social bonds, social bridges and social links (Tabone 2001).

6.1. Social bonds

Most of the refugees living in residential housing form strong social bonds among themselves. One interviewee in the focus group discussion held in the Balzan Open Centre stated: "We think that we are brothers". Another said; "I have no problem inside, all the people know me, sometimes we consult each other, so they respect me and I respect them." Once they live in the community they invite their friends over and sometimes they go out for lunch or dinner at the Marsa Open Centre where there are a few restaurants. Service providers mentioned that it would be beneficial for refugees to visit those in detention and share practical information about what they would need once they are released.

6.2. Social bridges

It seems to be difficult in Malta for refugees to form social bridges in the form of relationships with the host community. From those refugees interviewed, none participated in local events or local politics because, as mentioned previously, they do not feel welcome in the community and they prioritise work and education. Most have no contact with the Maltese local population and it would seem that more than half interviewed in the Marsa focus group discussion do not leave the centre unless they have to, for safety reasons.

Some mention that they would feel guilty to go out and have fun without their families (that are left behind) and so a refugee from Somalia spends his free time inside the centre. The few friendships made with Maltese people were through education or work, but they seem fragile and stop once the course or work ends.[20] Maltese colleagues at work sometimes invite them out for drinks and most refugees interviewed were not keen on drinking or were precluded from doing so by their religion. However they do read newspapers, some would even like to be involved in local politics, and they do receive letters from service providers such as the university and the local council.

Service providers say that Maltese people come to the centres to donate clothes and other things. The NGOs try to facilitate social bridging by providing tea at the centres so that people can see who they are donating to. But, as one service provider states: "Charity is good for what it is … but very few Maltese willingly take an active step to help integration". In terms of language barriers, the majority of Maltese can speak in Maltese and English, a few also speak French. Refugees that speak neither Maltese nor English have a serious communication problem. The great majority of Maltese are Roman Catholic. Refugees practising the same religion seem to find it easier to integrate than those with a different religion.

6.3. Social links

NGOs play a crucial role in helping refugees to build social links, i.e. links with institutions and government. At some of the residential homes, courses and advice are offered to refugees to prepare them for work and help them to integrate. The refugees are given information on education and work, and helped to access health care and make connections with the local population. Some refugees search for information on the internet on their own initiative, for example for courses on offer, before asking the relevant people for help. NGOs also help refugees with legal issues and some are comfortable enough to appeal against their status decisions and write letters of complaint, with the help of local lawyers working *pro bono*.

6.4. Plans

Family reunification

Besides the distant prospect of gaining citizenship, another major drawback for integration in Malta is the position relating to family reunification. Whereas refugees have the right to family reunification, persons with Humanitarian Protection status do not. Even for those who have the right, the procedure is unclear and costly. Both those with Humanitarian Protection and their service

[20] Ibid.: Mr A from Somalia with Temporary Humanitarian Protection said that there is a sense of fear between the migrant and host community in Malta but that this can be eased through the learning of the local languages, the achievement of the basic human needs and the interaction of cultures. These integration activities can begin in detention centres and can include sports, arts, festivals, education, training and interaction of people.

providers emphasise the importance of family reunification as a factor affecting integration. The refugees miss their families, and for some of them the family is the most important thing. As the service providers point out: "Refugees have a right to bring the family over, but nobody knows how to do it, no one in the government, nobody knows how to make it happen, because there are no procedures … and they have to pay for it."

Service providers also comment on the hardships that people face when they are separated from their families. Married women who arrive on their own feel they are losing time not being able to have children while married men on their own are anxious about their wives left alone, worried that they might want to start a new family back home. Some refugees even want to leave Malta in order to improve prospects of being reunited with their families. In contrast, those who are in Malta as a family view Malta and the Maltese in a much more favourable light and seem to be happier. A refugee from Somalia says he has friends in Malta that are also immigrants. One in particular has been in Malta five years and works and lives in a hotel. He fails to understand why immigrants are not happy in Malta: "I don't know what they're looking for."[21]

Repatriation

Refugees have mixed views about wanting to stay in Malta or moving on to mainland Europe versus returning home. Most refugees do not want to go back home: "I don't like going back to Somalia" (refugee, Somalia). His reason was the lack of safety and stability in his home country. Another refugee liked Malta because there is more respect for the individual, citing the example that people form a queue regardless of their gender and age.

Others want to go back as soon as it is safe: "It is not our intention to stay here or in Europe" (FGD refugees). There are also "those that want to go back to join their family back home … who want to go back because they didn't find anything good here … and they don't want to continue their journey" (FGD service providers). Some want to go back even if they have refugee status. "There was a case of a refugee who came as well and then decided to go back by himself because the process [of family reunification] was taking too much time for him" (FGD service providers). A service provider concludes: "… the people who want to go back, I would say that their integration process did not succeed."

There are those who want to go to other European countries because of historical colonial ties and also because, as one refugee says: "I think there is no future in Malta." They say that Malta is too small and lacks opportunity for them. Many refugees who do succeed in reaching other European countries are often sent back. This is a deterrent for those who want to increase their chances of well-being by moving to Europe. A refugee says that he is afraid to go to Europe only to be

[21] It is worth pointing out that this particular refugee was never placed in detention, as he arrived in Malta as part of a family unit and was in an Open Centre from the outset.

forced back. In addition, refugees confide that they encounter problems receiving travel documents to visit family members in Europe. This can have an impact on their well-being, especially as it might stop them from travelling to be with family members or groups of the same ethnicity. But people such as the refugee from Somalia who arrived with his wife has no intention of leaving: "I am very happy and it's very nice in Malta." He finds the Maltese "very kind people, a very nice nation". He thinks the fact that Maltese people are religious has an impact on their morality. "Malta is a religious country, so if the person has religion, he knows the wrong from the right. I would like to stay in Malta. I want to stay here in Malta and start my family here in Malta. I don't like to go anywhere. I like the climate of Malta … I really like the Maltese nation. That's why I like to stay in Malta."

7. Integration policy and recommendations

The lack of a clearly formulated integration policy remains an issue for concern. During the focus group discussion with service providers, the meaning of integration was based around equality of access to services. Refugees also think that there should be more emphasis on service provision rather than the current outlay on military services which provide for detention. It was felt that NGOs are making a huge contribution in Malta with regard to refugees but service providers complain that there are still no formal integration policies, leading to considerable confusion about service provision and responsibilities. This lack of knowledge frequently means that the services offered are subject to the individual provider and not always clearly identifiable to the refugee.

The issue of options relating to integration as a process were not addressed in the project. It seems that all those who participated assumed that integration was about being subsumed into the local culture and environment. Concerns focused on the inability of refugees to do just that, rather than exploring the possibility of retaining and sharing personal views, beliefs and culture. In the current context in Malta which has been delineated above, this is hardly surprising.

8. Conclusion

Research to further elicit the opinions of people seeking to integrate or be integrated is crucial if we are to gain any insight into the realities of the situation. The notion of cultural diversity, as promoted in UNESCO's Universal Declaration on Cultural Diversity, is rarely alluded to so that notions of retention of cultural identity are frowned upon by many, including some refugees who wish for nothing more than the anonymity that integration brings. Perhaps the time has come to truly acknowledge that we are enriched by cultural diversity and that the "one size fits all" approach does not work. Certainly from a human rights viewpoint there is no other option if human rights are to be protected.

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Irregular Workers in Egypt: Migrant and Refugee Domestic Workers*

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Unlike most other countries in the Arab region, Egypt does not have a regular or significant intake of migrant workers who are contracted to perform the domestic chores of Egyptian households. The legal history of domestic work in Egypt is best characterised as one that denies the validity of paid domestic work as an employment relationship and so it is explicitly excluded from local labour law. While most domestic workers are Egyptian, obtaining work visas for migrant domestic workers is difficult, if not impossible. However, many irregular migrants, refugees and asylum seekers are employed as domestic workers. This study looks briefly at the history of legislation and regulation of domestic work in Egypt, including the government's position in relation to its ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. There follows a brief and selective summary of the results of a survey of Egyptian, Eritrean, Ethiopian, Nigerian and Sudanese, as well as Filipina and Indonesian, domestic workers in Cairo. As found in other Arab countries, there are reports of significant rights violations, including racial and sexual abuse.

Currently, the Middle East region has the highest share of migrant populations in the world, if regular and irregular migration is included as well as refugees and asylum seekers (Baldwin-Edwards 2005). The region is home to some 20 million migrants and is the source of around 20 million migrants. Until around 1990, the oil-producing gulf countries and the Libyan Arab Jamahiriya constituted the third largest migrant receiving region in the world, after the United States and the European Union (Fargues 2007). In addition, the Middle East is the world's largest source and host of refugees, constituting around 42 per cent of the total world refugee population (ibid.). Furthermore, although the number of refugees has increased in the Middle East, partly because of the demographics of the Palestinian

* Data for this paper are drawn from a survey in Cairo funded by the Development Research Centre on Migration, Globalisation and Poverty at the University of Sussex (United Kingdom).
I am most grateful to the research assistance of Reem Wael, as well as to Gafar Salim and the team of interviewers who participated in the survey. Without their professional dedication to the project, it would not have been possible. Thanks also to Mike Kagan for comments on a previous draft.

refugee population and partly because of the US-led invasion of Iraq in 2003 that created the largest single wave of refugees (over 2 million) who, as of mid 2007, fled to the Syrian Arab Republic (1.2 million), Jordan (750,000), Egypt (80–140,000), Iran (54,000), Lebanon (40,000) Turkey (10,000) and various Gulf states (200,000). Only around 14,000 have been accepted by the United States (ibid.).

The history of migration movements in the Middle East is indeed complex, particularly in the Gulf states following the fourfold price increase of oil in the aftermath of the October Arab-Israeli war of 1973. The windfall in profits after that oil price increase has resulted in a unique situation in the Gulf States where the migrant workforce outnumbers nationals. As of 2000, for example, the proportion of migrants in the workforce of Bahrain was 60 per cent; Oman, 64 per cent, Saudi Arabia, 74 per cent; Qatar, 82 per cent; Kuwait, 83 per cent and the United Arab Emirates, an extraordinary 88 per cent. By contrast, migrant labour in Jordan was around 39 per cent; Lebanon 18 per cent, Syria 6 per cent and negligible in Egypt (see Jureidini 2002).

Of particular interest is the number of women involved in migration today. Of around 90 million migrant workers internationally, about half are women (Moreno-Fontes Chammartin 2005). Women are migrating as independent individuals rather than appendages of their husbands and are usually the major breadwinners of their families. In the Middle East these women come mainly from Nepal, India, Pakistan, Bangladesh, the Philippines, Sri Lanka and Indonesia – and they are a significant part of the so-called feminisation of international migration. The largest proportion of these women who migrate to the Middle East do so to find jobs as domestic workers in Arab middle-class households.

The worldwide demand for female domestic workers is a phenomenon of middle-class demand, and so it can be found in almost every country, from Amsterdam to Lusaka, from Dubai to New York, Singapore, Hong Kong and Tel Aviv. Middle class families do not want to perform domestic chores but prefer, and can afford, to employ others. Sometimes having someone do the domestic work and care for children enables female employers to enter the workforce at higher salaries; for others it allows them greater freedom to spend time with their children, helping them with their homework; for some it is also a part of social status maintenance.

With 1.2 million migrant domestic workers employed in Saudi Arabia (HRW 2008) and 600,000 in the United Arab Emirates (IRIN 2006) alone, it can be estimated that there are well over 2 million migrant domestic workers in the Middle East. Although the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) has broad coverage that includes the rights of irregular migrants, it has been mainly ratified by migrant-sending countries rather than migrant-receiving countries. Significantly, however, five of the thirty-seven countries which had ratified the Convention as of June 2006, were Arab states. Egypt, the first to ratify in February 1993 was followed by Morocco in June 1993. More recently Libya (June 2004),

Algeria (April 2005) and Syria (June 2005) have also ratified the Convention. There is great pressure on Lebanon to sign also. In addition to the reluctance to provide legal coverage, there are no bilateral agreements between the recipient Arab states and the migrant-sending countries to establish the required protections of migrant workers, although many attempts have been made.

Migrant domestic workers are also a difficult population to address, because they are largely invisible by working and living in the "sacred" realm of the household that law-enforcement agencies are reluctant to intrude upon. They are often quite ignorant of the country and family they are going to work in and rarely speak the language. Thus they are very vulnerable and many get caught up in a set of structural conditions that can be seen as akin to slavery, or labour indenture, with three major elements that violate basic human rights: (a) violence or the threat of violence; (b) restriction of the freedom of movement; and (c) economic or work exploitation (see Jureidini and Moukarbel 2004).

As in all countries, the main sector for employment of migrants who do not have permission to work is the informal sector where standards of conditions, wages and treatment are often poor and exploitative. State protection of irregular workers usually does not exist and labour unions are absent. The circumstances of migrant domestic workers are important not only because many are employed informally, but also because they are rarely protected by labour law. The domestic work that is undertaken by migrant labour is recognised as an increasingly significant global phenomenon, but few countries in the Arab world (and more generally) have sought to address the human rights issues relating to the conditions and treatment of many migrant domestic workers.

The kind of pastoral care that is required for so many migrant domestic workers in and returning from the Middle East has led some governments of sending countries to impose bans on the receiving countries. For example, in January 2008, the Philippines Government banned migration of Filipinas to Jordan because of the excessive abuses being reported. In 2007, some 775 documented and undocumented Filipinas "in distress" required assistance by the Philippine Overseas Labour Office in Amman, including having to pay for medical assistance and repatriation to the Philippines (*Pinoy Abroad* 2008). They were also banned from going to Lebanon following the war in July–August 2006. In addition, earlier in 2006, the Philippines Government introduced the requirement of a minimum salary of US$400 per month for all Overseas Filipino Workers and for contracts not exceeding two years and banned the payment of wages to placement agencies in the host country for Filipina domestic workers. This was in order to reduce the attractiveness of Filipinas to the Middle East labour market. Similarly, in 2007, the Sri Lankan president Mahinda Rajapaksa stopped Sri Lankan housemaids from going abroad from the end of 2008, arguing that preference should be given to the out-migration of skilled workers such as nurses. Just prior to this ban, the government released a plan to ban the migration of all women with children under 5 years of age. And those with children of 5 and over had to register an explanation

of proper care for their children before they would be allowed to leave the country. Human Rights Watch lodged a serious complaint against this practice, arguing that it was discriminatory against women under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and it was subsequently withdrawn (HRW 2007).

In Egypt, as well as Saudi Arabia, Kuwait, Lebanon and the United Arab Emirates, labour laws exclude domestic workers (HRW 2007). In addition, in Egypt and Lebanon domestic work is not only ignored by labour law, it is explicitly excluded because it is classified as a "personal" relationship, not an employment relationship (see Section 1).

According to employment agents interviewed in Cairo, the most numerous of domestic workers in Egypt are Egyptian women, whether local or from Upper Egypt. Foreign domestic workers are mainly Sudanese (including some men), Ethiopian, Eritrean and Nigerian. In our study of domestic workers in Cairo, most Sudanese, Ethiopians and Eritreans were refugees or asylum seekers, but Nigerians, although without work permits, were "economic migrants". Those who had been brought into the country under some contractual arrangement, more akin to the systems operating in other Mashriq countries and the Gulf, were only workers from the Philippines and Indonesia.

1. Legal position of domestic workers in Egypt

Egypt differs from most Arab countries hosting organised migrant contract labour. In recent years it has been the repository of many thousands of refugees from sub-Saharan Africa, the most numerous from Sudan, particularly since the recent crisis in Darfur. The number of refugees from Sudan and other sub-Saharan countries is generally unknown, with estimates ranging from tens of thousands to millions. Although Egypt has restricted foreign worker access to local labour markets, particularly for secondary jobs, because of the high levels of poverty and unemployment of its own nationals, there is a general tolerance for refugees and other African residents who are working without permission, notwithstanding recent deportations and *refoulement* of Sudanese and Eritreans from the country (see Amnesty International 2008).

In Egypt, it seems that there was never specific legislation to facilitate the entry of migrant domestic workers into the country. Law No. 91, passed in 1952 following the Nasser revolution, prohibited foreigners from obtaining work permits as long as the labour market had Egyptians to fill the positions. However, the Ministry of Internal Affairs at the time was lenient on this restriction and migrant domestic workers were allowed in as "exceptions". Many entered on tourist visas. In September 1984, the Ministry of Labour and Immigration issued a decree (not a law) specifically prohibiting foreign maids from entering Egypt. With a lot of pressure, by the late 1980s/early 1990s, the Ministry of Internal Affairs changed its position from one of leniency to one of strict adherence to the restriction of foreign

domestic workers. In 1987 it launched a campaign to arrest those without proper work visas.

Domestic maids were not mentioned in Egyptian law until 2003. Labour Law 2003 (article 28) stipulated that foreign workers must have a work permit *before* entering the country. This applied to all occupations including, it specified, domestic work.[1] This article replaced article 27 of the previous Labour Law of 1981, which stated that a foreigner could work if he or she had the right to live in Egypt, but did not have a specific right to work.[2] Of more interest in the Labour Law of 2003 is article (4G), which states:

> **Domestic work is an exception to labour law**. This is because of the strong relations that grow between the servant and the employer which enables the former to know many secrets and personal issues of the employer [emphasis added].

The legislation also stipulates that normal "restrictions on terminating the work contract do not apply to the employer in this case". What is important about the above clauses is the explicit recognition of the private and personal nature of the relationship within the household. Paid domestic work is not a "proper" form of labour (perhaps it was also not accepted as "productive" labour), so labour law does not apply; nor does the law of contract. In this regard it is worth noting Anderson (2000), who argues:

> … [the role of] the paid domestic worker, even when she does the same tasks as the wife/daughter/mother, is differently constructed. The domestic worker is fulfilling a role, and crucial to that role is her reproduction of the female employer's status (middle class, non-labor and clean) in contrast to herself (worker, degraded and dirty). It is the worker's personhood, rather than her labor power, which the employer is attempting to buy and that the worker is thereby cast as unequal in the exchange (Anderson 2000: 2).

On refugees' rights to undertake paid domestic work: Egypt's reservations to the 1951 Convention relating to the Status of Refugees on articles 22 (elementary education) and 24 (labour legislation) has been generally understood as not granting rights of refugees to employment in Egypt, resulting in refugees being forced to rely on the informal sector and thus easily exploited. However, open to exploration is article 17 of the 1951 Convention, to which Egypt did not enter reservations. Paragraph 1 states:

> … the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.

[1] In practice, this requirement was not always adhered to (for Westerners as well as Africans), either because the Egyptian ministries were slow to adopt new rules and/or because the rules were easily circumvented.

[2] I am not sure I understand this distinction.

In other words, on the issue of employment, refugees are to be treated in the same manner as regular labour migrants. Egypt's Labour Law 2003, article 28, concerns the employment of foreigners in Egypt and the conditions required by foreigners for a work permit from the Ministry of Labour. Thus refugees must obtain work permits from the ministry, but in practice they are difficult to obtain.

In 2006 the Egyptian Government placed strict control on the formal entry of foreign domestic workers. Decision (700), article (11) states:

> It is prohibited to request a work permit for foreigners for the occupations of house manager or a similar position such as nanny, cook, maid, etc. of any nationality. It can only be obtained in writing from the central administration of labour from the ministry and in cases where humanitarian and social circumstances necessitates and after consulting with the minister.[3]

The latter concession presumably applies to refugees who need to undertake such work to survive and consistent with the Four Freedoms Agreement in 2004 (signed in May, ratified in September) that granted Sudanese in Egypt the freedom of movement, residence, work and property ownership (Egyptian Government 2007). In reality, however, according to many observers, the Four Freedoms Agreement has not been seriously implemented (Azzam 2005) and few, if any, work permits are applied for and granted, as shown by our Cairo survey.

2. UN Migrant Workers Convention

Egypt was one of the first countries to ratify the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), which came into force in 2003. The government's initial report by the Human Rights Affairs Department of the Ministry of Justice was submitted to the UN Committee on Migrant Workers in August 2006.[4] Generally, it was asserted in the report that all the rights and freedoms of the ICRMW (excluding its reservations) are protected and enforced under the Egyptian Constitution and are a part of Egyptian law where violations will be dealt with by the courts (Egyptian Government 2006: para. 17).[5]

In its explanations of local legal coverage in respect of each article in the Convention, many government responses were confusing. For example, in addressing the issue of slavery, servitude or forced labour (ICRMW, article 11), the

[3] This is curious because, in its response to article 25 of the UN Migrant Workers Convention, the government stated that: "Under the Labour Code (law No. 12 of 2003), Article 28 of the Code provides that every such person is required to obtain a permit from the Ministry of Labour. Under the Code, these persons have the right to enter the country for the purpose of gainful employment, including employment in domestic service." (Egyptian Government 2006: para. 144)

[4] With two relatively minor reservations on article 4 and article 18, para. 6.

[5] The report also states: "Egypt was one of the 50 States that drafted and signed the Universal Declaration of Human Rights in 1948, and it has become a party to all subsequent international and regional human rights instruments."

government only refers to violations committed by the state or government officials (Egyptian Government 2006: para. 85). On the other hand, it was noted that, under article 375 of the Penal Code,

> Every person who directly or indirectly uses force, the threat of violence or the threat of the use of force against another person or his wife or children for the purpose of intimidation in a manner that jeopardizes his security, peace and serenity, puts his life or safety at risk, causes damage to any of his property or assets or detracts from his personal freedom, dignity, good name or free will commits a criminal offence (ibid.).

It is unclear whether this provision would apply to independent female domestic workers, migrant or otherwise as literally, it seems rather gender-specific. However the spirit of the law does include them, for the report goes on to emphasise clearly that:

> These legal provisions are of universal validity. Aliens enjoy the same legal protection as citizens under the above-mentioned statutory instruments and other legislation, regardless of the nationality of offenders and victims (Egyptian Government 2006: para. 89).

More direct reference to labour conditions draws upon the Egyptian Labour Code (Law No. 12 of 2003) that relates to "all terms, benefits, safeguards and rights laid down in the Code, together with such matters as the minimum age of employment, wages, permits and occupational safety." These conditions "are applicable to non-Egyptians employed in all private or governmental establishments, subject to the condition of reciprocity" (Egyptian Government 2006: para. 144). When asked by the Committee on Migrant Workers why the protection of migrant workers by the Labour Code is subject to a reciprocal agreement and not equal with nationals, the government replied:

> The principle of reciprocity, which is recognized by many international agreements, grants exemptions to the nationals of the particular states concerned with regard to the legal process for obtaining work or residence permits. These benefits are provided by agreements between states in order to improve the situation of migrant workers in those same states. This condition is applied in the framework of international labour agreements in order to achieve balance and to benefit from improvements in the situation of Egyptians abroad (Egyptian Government 2007: para. 17).

Referring to foreigners employed by the government, public institutions and the civil service, articles 224 to 226 of the Labour Code provide that:

> [g]uarantees of equal treatment for migrant workers in an irregular situation with regard, in particular to, remuneration, hours of work, weekly rest, holidays with pay, safety, health and other conditions of work, are implemented by means of inspections of enterprises by the Ministry of Labour, and legal action is taken against employers who breach the law (ibid.).

It would seem, however, that these provisions do not apply to migrant domestic workers employed in private households. Such inspections do not take place

because the Labour Code excludes their recognition as employees and thus their protection.

The Committee on Migrant Workers made specific reference to this:

> The Committee notes that article 4(b) of the Labour Code stipulates that the provisions of that law shall not apply to domestic service workers, including foreign domestic workers. It also notes with concern the rising number of migrant domestic workers and the absence of legal protection afforded to them.
>
> The Committee recommends that the Labour Code be amended in order to apply to domestic workers, including migrant domestic workers, or that new legislation be adopted to provide protection to them. It also recommends that the State party should take appropriate measures to protect migrant domestic workers, particularly women domestic workers. It also recommends that migrant workers in domestic service should have access to mechanisms for bringing complaints against employers and that all abuses, including ill-treatment, should be promptly investigated and punished (CMW 2007*a*: paras 38, 39).

The Egyptian Government's reply to the Committee on Migrant Workers ignored the UN concern and recommendation altogether. However, in the subsequent Geneva meeting between the Committee and government representatives on 24 April 2007, Ms Abdel Hady noted:

> Domestic work was not covered by labour law, and labour inspectors were not allowed to enter homes, out of consideration for privacy. In large part because of the low esteem in which domestic workers were held, there was a shortage of Egyptians in that field, and many foreigners were hired to fill the gaps. The Government was looking into ways of modifying the Labour Code to enhance the status of domestic workers, to give them more dignity and to provide a formal framework for such work (CMW 2007*b*: para. 41).

3. Survey of domestic workers in Cairo

Throughout 2007 a survey of 633 migrant and refugee domestic workers was conducted, funded by the Development Research Center of the University of Sussex. The sample consisted of 116 Filipinas (15 per cent of the sample), 62 Indonesians (8 per cent), 125 Sudanese (16 per cent), 129 Ethiopians (16 per cent), 118 Eritreans (15 per cent) and 82 Nigerians (11 per cent).[6] An additional 149 (19 per cent) Egyptian domestic workers were included as a control group. The aim of the survey was to gather demographic details and ask about their work circumstances and human rights issues.

Only the Philippines, Indonesian and Sri Lankan embassies responded to our request for an estimation of numbers of their nationals working in Egypt. According to the Philippines embassy, as of February 2007, the number of Filipinos in Egypt was around 4,300; those in domestic service was estimated at

[6] The different numbers were due to the ability to conduct the interviews within the time deadlines of the study.

2,143. Thus the survey sample was around 5.4 per cent of the population of Filipinas in Egypt. We interviewed ten women at the embassy who had run away from their employers, without their passports. Almost all of these domestic workers had been victims of trafficking by an agent in Jordan and entered Egypt without work permits.

According to the Indonesian embassy, the total number of Indonesians in Egypt was 5,808, comprising 4,241 students (mainly at Al Azhar University), 158 skilled workers (in factories, textiles, oil companies and hotels) and 498 domestic workers. Thus the sample was around 12.4 per cent of the population of Indonesians in Egypt. Again, like the Filipinas, there were a number of cases of Indonesians entering Egypt from Jordan.

According to the Sri Lankan embassy, less than 100 of their nationals are employed in Egypt as domestic workers, whether Tamil or Sinhalese. Because there were so few, Sri Lankans were excluded from the survey.

We do not know the populations of Egyptian, Eritrean, Ethiopian, Nigerian or Sudanese domestic workers in Cairo. But for thousands of refugees in Cairo, domestic work is the only type of employment available to them and it has proved to be a crucial source of income for their survival. Indeed, it has typically resulted in more work for women, who have become the main breadwinners for their families. Local agencies in Cairo operate to place migrants, refugees and Egyptians into domestic work. Indeed, almost half of the interviewees in the survey said they were placed into their household by an Egyptian agency. One of these is a programme for refugees and asylum seekers at All Saints Church. Here they not only operate as an agency to place workers, but they also offer a two-week course on domestic work, using various apartments of willing friends to train them (mainly Sudanese and Ethiopians).

3.1. On method

Note that the methodological limitations of surveying domestic workers and the lack of population statistics makes it difficult to determine whether the sample was representative or not. English-speaking interviewees from each of the nationalities surveyed were employed. The sample was drawn with a snowball technique beginning with those known personally to each of the interviewers. The interviewers were trained over two weeks to conduct the interviews for the project in their own language and translated into English. Interviews were conducted whenever and wherever it was most convenient and private, which included the homes of respondents' employers when they were absent. Egyptian workers generally refused to be interviewed at their place of work, so most interviews were conducted with them at public places such as parks and bus stops. Most Filipinas were interviewed at the churches they attended, in the houses where they worked or at their own apartments in the case of freelancers. Indonesians were interviewed at an Indonesian restaurant with the permission of the owner. Ethiopians and

Eritreans were interviewed before or after church services and in their own homes, while Nigerians were mostly interviewed during traditional weekend community gatherings at the home of the principle Nigerian interviewer and others.

3.2. Legal status

85 per cent of all foreign workers surveyed stated that they were working illegally. Excluding those from the Philippines and Indonesia, 98 per cent said they were working illegally (i.e. Sudanese, Eritrean, Ethiopian and Nigerian). Over half (57 per cent) of the Filipinas, one-third (34 per cent) of Indonesians, six Ethiopians (5 per cent), two Sudanese, one Eritrean and one Nigerian in the survey said they had valid permits to work in Egypt. Thus, only 15 per cent (n = 96) of the 632 foreign domestic workers interviewed had work permits. Further, if they had a work visa, they were more likely to have a work contract. Some Filipinas and Nigerians were residing in the country with tourist visas. Almost all Sudanese, Ethiopians and Eritreans were refugees with either blue cards (UNHCR registered refugees), yellow cards (UNHCR registered asylum seekers), closed files (refugee status denied by UNHCR) or were appealing. The fourteen remaining were allowed to work because they were married to Egyptians.

3.3. Education

Almost one-quarter (23 per cent) of interviewees had either no formal education, some primary or had just completed primary schooling; 23 per cent had some secondary education; 34 per cent had completed their secondary schooling and one-fifth (20 per cent) had either some post-secondary studies or training or had completed them. Significantly, the Egyptians and Sudanese showed the lowest levels of education – 85 per cent of Egyptians and 66 per cent of Sudanese had not completed high school. This was in contrast to almost half of the Filipinas (47 per cent) and Nigerians (45 per cent) having undertaken some post-secondary studies. One-third of the Sudanese indicated that they could not read or write in their first language.

3.4. Wages

The lowest paid were Egyptians and Sudanese. 43 per cent of Sudanese and one-third of Egyptians earned US$100 or less per month. Over 75 per cent of both these groups earned US$150 or less. By contrast, over 80 per cent of Filipinas, 75 per cent of Indonesians and 51 per cent of Ethiopians earned US$300 or more per month. While not statistically significant, there is a positive correlation between level of education and wage level. However, there is no evidence to suggest that wage levels are determined according to educational attainment.

3.5. Employment status

Roughly half of the interviewees lived within the households they worked and half were freelance. All the Nigerians in the study were live-ins. Interestingly however – and in direct contrast to the findings of my study in Lebanon – freelance workers in Cairo worked more average hours per day than live-in workers – yet, collectively, they earn less.

3.6. Hours of work

75 per cent of live-in domestic workers, on average, work 12 or more hours per day. 44 per cent work 15 or more hours per day and 17 per cent reported working 18 or more hours per day. 80 per cent of freelance workers work 12 or more hours, 45 per cent work 15 or more hours per day and 22 per cent work 18 or more hours per day. This exceeds the hours worked in the findings of live-in migrant domestic workers in Lebanon and, of course, violates international labour standards for hours of work. In addition, over one-third of respondents worked seven days a week (almost equally between live-in and freelance workers). Most of the others had either 24 hours or less during the week to rest. It was surprising to find such a similarity between live-in and freelance workers. The lack of difference between them in terms of hours of work and abuse may be that, because they are in an irregular situation with little or no income or social protection, they are all vulnerable to abuse and exploitation and dependent on the goodwill of their employers (including Egyptian workers). In Lebanon, freelance workers do not report abuse or such long hours (except in reference to previous employment as live-ins). Despite their irregular status as residents, they seem to be in a better position to withdraw their labour if the conditions are not satisfactory.

3.7. Passports

One of the most common complaints of migrant domestic workers and their advocates in the Middle East is the withholding of passports by employers, which is often seen as constituting a violation of their right to freedom of movement. However, perhaps because of the preponderance of refugee domestic workers in Cairo, the study found that only one-quarter of workers had their passports held by their employer. The study in Lebanon found that over 90 per cent of migrant domestic workers had their passports held by the employer. Not surprisingly, live-in workers were more likely than freelancers to have their passports held by their employer. Interestingly, however, most of those whose passports were held were Filipinas (44 per cent) who are more likely to have a contractual arrangement as in other Arab countries, but also Ethiopians (43 per cent). However, those Ethiopians whose passports were being held were those who had come to Egypt specifically to work and were recruited and placed by agents; the remaining were asylum seekers. Of further interest is that no Nigerians reported having their passports held. The large majority (82 per cent) of Nigerians said they had come to Egypt specifically to work (17 per cent said they had come to join other family members) and half had

used the services of an Egyptian employment agency, but it seems they were all able to keep control over their passports.

It is noteworthy here that, in their response to article 21 of the Convention, the Egyptian Government made it clear:

> To destroy identity documents is a criminal offence under Egyptian law. Nor may they be withdrawn or confiscated, except in certain circumstances permitted by law, where there is doubt about their validity. In such cases identity papers may be confiscated by the competent authorities for purposes of investigation, in accordance with the procedures prescribed by law and having regard to the rights of the possessors of the papers in question (Egyptian Government 2006: para. 140).

On other human rights issues, we asked interviewees about abuse by their employers and other members of the household.

3.8. Yelling

We asked: "Are you yelled at?" Overall, 59 per cent (n = 445) said "yes", the most numerous being 82 per cent of the Sudanese and 71 per cent of the Egyptians. Yelling included abuse such as "I'll cut your tongue out" – "I'll kill you" and "*Touf a la rasik*" ("I spit on your head"). While yelling may be seen as a normal response by a supervisor to mistakes made in the workplace, if it is a frequent practice with derogatory intent, yelling becomes a serious form of intimidation and thus abuse. It is all the more hurtful when the recipient originates from a culture that frowns upon and actively suppresses yelling – which is the case in the Philippines, Sri Lanka, Indonesia and Sudan. Indonesians were particularly upset by the loud and abusive treatment, given their level of education and the shock that fellow Muslims would treat them so disrespectfully. While it is often difficult to determine how seriously the above statements are invoked, it is clear that they do constitute threats of violence. In 73 per cent of the cases it was the female employer doing the yelling and threatening.

3.9. Name calling

We asked: "Are you called names?" Overall, 30 per cent said yes (with no significant differences between nationalities) (n = 233). The most common names were *hmara* (meaning donkey or stupid) and *abed* or *abda* (meaning slave).

There were also racist taunts. For example, Africans were called *Kalb Aswad* (black dog), *Ya Khara* (you shit), *Ya Aswad* (you black one), *Bint al Wiskha* (dirty girl), *Bint al kalb* (daughter of a dog) and *Honga Bonga* (no translation). Egyptians were more likely to be called *sharmouta* (prostitute), *hayawana* (animal), *hashara* (insect), *khanzeera* (pig), *sorsa* (cockroach) or *falaha* (peasant). With name-calling, other members of the household seemed to participate more (female employer; 51 per cent; "all of the family", 23 per cent; male employer, 14 per cent; other family, 1 per cent).

3.10. Hitting

Respondents were asked whether they were physically abused. 27 per cent said "yes" (n = 211) (which is more than double the incidence found in Lebanon). 63 per cent of Indonesians (but from a small number, n = 62), 35 per cent of Sudanese and 34 per cent of Egyptians said that they were physically abused. The abuse included slapping, hitting with an object, pushing, punching, kicking, hitting with a shoe, pulling ears and burning with a cigarette. Some also indicated they were spat on. Here the main perpetrator was the female employer (70 per cent) and to a lesser extent the male employer (16 per cent).

Consistent with other studies around the world, most yelling, name-calling and hitting was perpetrated by the "madame" of the household.

3.11. Sexual harassment

Interviewees were also asked if they had experienced any kind of sexual harassment where they worked. Overall, 10 per cent of interviewees complained of sexual harassment (in Lebanon it was 7 per cent), with a larger proportion of Indonesians (27 per cent) and Sudanese (15 per cent) reported sexual harassment. This included demanding sex, verbal harassment (asking, commenting), touching, exposing genitals, showing pornographic films and materials, attempted rape, rape and gang-rape (one case of attempted and one of actual gang-rape). Several said they had lost their jobs when they refused sexual favours. Those who were subjected to sexual harassment were threatened with losing their jobs, physical violence, being sent home or being sent to prison to maintain their silence. One interviewee said: "The husband comes to my room every night for sex. I can't say no because he gives me money and helps me with many things." Because sexual harassment is typically under-reported because of the particular shame attached, respondents were also asked if they knew of others who were sexually harassed. 18 per cent said "yes". Typically, the perpetrators of sexual harassment included the male employer (66 per cent), son of the employers (19 per cent), the brother of one of the employers (14 per cent) and in one case, the father of one of the employers. In three cases the sexual abuser was a single male employer (for this reason, it is illegal for a single male to sponsor a migrant domestic worker in Lebanon (Jureidini 2002).

4. Conclusion

There are three elements to slavery-like practices attributed to the conditions of migrant domestic workers in Lebanon, Jordan, the Gulf states and elsewhere:

- Violence, or the threat of violence;
- Restriction of freedom of movement (not allowing workers outside the house, little or no time off and the withholding of travel documents);

– Exploitation (long hours, low pay and poor conditions) (see Jureidini and Moukarbel 2004; Bales 1997).

While some of these elements are present to various degrees in the employment of migrant and refugee domestic workers and Egyptian domestic workers in Cairo, there are some differences that should be noted. First, while most work very long hours which restricts their freedom of movement, there were not the kind of strict regulations by employers that domestic workers were not allowed outside the house or apartment, as found in other Arab countries – ostensibly to safeguard against absconding and losing the upfront costs of procuring a migrant worker from their home country.

Second, we do not find the same incidence of passports or other travel documents being withheld – again, because few employers are paying large amounts to procure a domestic worker. Unlike other countries, there are no costs for work permits, international travel, insurance, contracts, medical examinations and the like. When asked by the Committee on Migrant Workers about statistics and examples of case law relating to the ill-treatment of migrant workers and the seizure of their identity papers (CMW 2007*a*: para. 14), the Egyptian Government replied that it needed more time "to prepare these statistics and to enable the branches of the Criminal Justice Department and judicial bodies to discover whether or not such measures have been taken" (Egyptian Government 2007: para. 140). Presumably the data will be provided in the government's second periodic report due 1 July 2009.

Third, the *kafala* system of sponsorship found in most other Arab states does not operate in Egypt. This is a major factor in the non-criminalisation of migrant workers. They can leave their employers and seek employment elsewhere in Egypt without having to leave the country, provided that their work permits remain valid. Importantly also, the government has stipulated that migrant workers are not placed into detention for visa violations.

> A migrant worker who contravenes the legal procedures laid down in the Act concerning the Entry and Residence of Foreign Nationals (law No. 89 of 1960 as amended by law No. 88 of 2005) is liable to a monetary fine and required to leave the country. Under the law, he is allowed a period of time in which to leave the country voluntarily, with no restrictions on his freedom and no risk of detention (Egyptian Government 2006: para. 199).

The large majority of domestic workers in the survey did not report abuse or maltreatment, but a significant number did. As has been shown, the information from the survey suggests a need for regulation and legal protection of employees in the domestic sphere. There is no doubt that the lack of protection from the law contributes to making migrant and refugee as well as Egyptian domestic workers vulnerable to exploitation and abuse (and without any legal remedy against such abuse – see Egyptian Initiative for Personal Rights and the International Federation for Human Rights 2007) that violate human rights conventions, the ICRMW in

particular. Among other things, the United Nations Committee on Migrant Workers overseeing the Convention has urged the Egyptian Government to formally recognise domestic work as an employment relation to give workers protection under local labour law, giving it until July 2009 to respond to this request. The formal and contractual nature of this employment relationship needs to be recognised and protected under local labour law, which should also allow freedom of association and self protection through unionisation. Clarification of the regulations relating to refugees' right to work in Egyptian households is urgently needed to account for the de facto circumstances, particularly regarding Sudanese and their rights under the Four Freedoms Agreement.

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The Principle of Non-Discrimination and Entry, Stay and Expulsion of Foreigners Living with HIV/AIDS

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A number of states impose HIV/AIDS-related entry and stay restrictions and have adopted laws and regulations that foresee the expulsion of foreigners living with HIV/AIDS. Such practices raise concerns with regard to their conformity with international law. Although international law does not provide any explicit right of admission of foreigners on a state's territory and recognises, on the contrary, the very wide powers of the state with regard to admission and expulsion, states' practices are nevertheless subject to international law. Indeed the principle of non-discrimination can be seen to be the main international legal norm to challenge such practices. Simultaneously, these states' practices reveal the richness of the principle of non-discrimination. With regard to expulsion, the question is not only whether the HIV/AIDS status of a migrant constitutes a legitimate ground for expulsion, but also whether such status is a possible ground for denying a state's right to expel a foreigner. On the latter point, European Court of Human Rights case law demands specific attention and a critical appreciation due to its extreme strictness.

Before evaluating whether HIV/AIDS-related entry and stay restrictions and the expulsion of foreigners living with HIV/AIDS conform to international law, it is important to recognise that state practices are not always well known. This is mainly because the restrictions are often not laid out by laws or regulations of the respective states. Instead, restrictions of entry and stay are frequently administrative practices imposed by ministerial instructions, which are often unpublished and are thus more difficult to access. Although such restrictions

International Journal on Multicultural Societies (IJMS), *Vol. 11, No. 1, 2009: 91-102*
ISSN 1817-4574, www.unesco.org/shs/ijms/vol11/issue1/art5 © *UNESCO*

deserve in-depth study, no such study has been conducted and the available information is often imprecise and unreliable.[1]

An overview of the practices foreseen can nevertheless be presented. Some states impose an HIV test; others require a certificate of HIV-negativity or a declaration of the HIV status of the individual (UNAIDS/IOM 2004: 3). The scope of the restrictions may also vary according to the state. Some states impose "a blanket proscription against people with HIV entering their country" (ibid.: 4). This blanket type of restriction applies to all those seeking admission, including migrants, tourists, participants in meetings and conferences, etc. Other states distinguish according to the length and/or purpose of the stay. In some cases, restrictions are limited to foreigners applying for temporary stay (for example, more than one month) or permanent residence. In other cases, only foreigners applying for a work permit are concerned; other distinctions are also foreseen according to the type of occupation or the category of migrant, such as beneficiaries of family reunification procedures (Goodwin-Gill 1996: 56, 63).

In sum, state practices regarding HIV/AIDS-related entry and stay restrictions are currently not precisely known, but what can be said is that they vary extensively.

1. The state's broad powers

International law does not specifically envisage entry and stay restrictions based on the HIV/AIDS status of the foreigner. Conversely, it is uncontested that states possess very broad powers in terms of the admission of foreigners on their territory. The competences of the state are primarily defined in the negative, through the absence of a right of foreigners to enter the state's territory. Although the principle of freedom of movement is recognised by international law, its scope is relatively narrow. As stated by the International Covenant on Civil and Political Rights (ICCPR, article 12):

> 1. Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
> 2. Everyone shall be free to leave any country, including his own.
> […]
> 4. No one shall be arbitrarily deprived of the right to enter his own country.

Moreover, legitimate grounds for refusal of admission are very broad. Most of them are included in the general and vague notion of public order. Grounds for refusal of admission are typically based on earlier criminal convictions, earlier violations of immigration legislation, national security, public health, risk of irregular immigration, or economic grounds.

[1] According to the European AIDS Treatment Group, in February 2008 seventy-four countries were imposing HIV-related entry and stay restrictions. Due to the data collection methodology (mainly questionnaires sent to consulates), the reliability of the information is questionable. Moreover, this list does not give full account of the complexity of state practice.

The state's powers are nevertheless subject to the rules of international law. Whereas human rights in general constitute an important framework that limits the action of the state, the impact of human rights on admission matters is particularly poor. As stated by D. A. Martin:

> International law now requires the observance of a range of civil and political rights, as well as (through norms of less precise content) basic economic, social, and cultural rights. Importantly, most of these obligations extend to all persons, citizen or alien, within the jurisdiction of the state, but the norms do not significantly affect the ongoing authority of the state to set its own criteria for deciding who may enter or stay – and therefore who may remain in the circle of beneficiaries of the state's primary human rights obligations. That is, most of human rights norms affect the rights of migrants after entry, not rights respecting migration itself (Martin 2003: 32).

If the presence of international norms in matters relating to the admission and the stay of foreigners is limited, it nevertheless exists, the central norm being the principle of non-discrimination.

2. The principle of non-discrimination

The principle of non-discrimination is twofold. It is an indirect right while at the same time being an autonomous right. It is an indirect right in that it applies first in complementarity with the rights recognised by international human rights instruments, reinforcing their effectiveness. It is also an autonomous right as it can be claimed without reference to any specific right granted by an international instrument.

As an indirect right, the principle of non-discrimination constitutes a common thread among the different rights granted by existing international human rights instruments. It specifies their content and reinforces their effectiveness. According to article 2(1) of the ICCPR:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Here, the principle of non-discrimination does not have an independent character. It is only applicable when applied in conjunction with another article of the convention concerned.[2] In other words, discrimination can only be recognised if related to the exercise of right granted by the convention (Sudre 2006: 254).

[2] See for example article 14 of the European Convention on Human Rights; article 2 of the African Charter on Human and Peoples' Rights; article 1(1) of the American Convention on Human Rights.

As foreigners have no internationally recognised right to enter a country, in order to contest refusal of admission and stay based on the HIV/AIDS status of the applicant, the principle of non-discrimination cannot be used to sustain such an non-existing right. The interest of the individual in admission to a country can nevertheless be protected in an indirect way. In the case of refugees, this indirect protection mainly comes from the principle of *non-refoulement*. In the case of migrants, it is mainly the protection of family and children's rights that can be used as a basis to contest refusal of admission. A number of authors recognise, on the basis of these rights, the existence of a right to family reunification (Jastram 2003: 186), or in other words, a legally protected interest in admission. Goodwin-Gill further mentions additional rights that could be used in an indirect way to challenge rejection of admission, although they nevertheless bear less legal weight than the rights protecting family and children:

> … those rights may include the right of association (for example, with respect to minorities with territorial homelands covering two or more states), the right to access and to share information (for example, through participation in international conferences), the right to education, and the right to employment (Goodwin-Gill 1996: 60).

The autonomous character of the principle of non-discrimination stems from the interpretation given by the Human Rights Committee to article 26 of the ICCPR. This article states:

> 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.

According to the Human Rights Committee, article 26 cannot simply be seen as a duplication of the guarantee provided by article 2(1). The principle is not only a general principle aimed at reinforcing the efficiency of other human rights. As stated by the Human Rights Committee in its General Comment No. 18, "it prohibits discrimination in law or in fact in any field regulated and protected by public authorities".[3] As an autonomous right, the principle of non-discrimination takes into consideration the national legislation and imposes on the state the duty of not adopting and implementing a law whose content would be discriminatory. This duty is imposed by international law even when no provision of the ICCPR, nor any other human right, legal right or duty is involved (Sudre 2006: 262; Nowak 2005: 608).

Regarding the content of the principle of non-discrimination, it can first be noted that the general international instruments protecting human rights contain an

[3] UN Human Rights Committee, CCPR General Comment No. 18: non-discrimination (1989), par. 12.

indicative list of grounds of discrimination.[4] For example, the ICCPR mentions discrimination on the grounds of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Such lists are only indicative and in reality, all discriminations are illegal whatever the grounds are (Sudre 2006: 258). As M. Nowak states: "the distinction criteria of 'other status' is that broad that it may be used even as a general yardstick of reasonableness objectivity and proportionality of legislative acts" (Nowak 2005: 627). The notion of "other status" as ground of discrimination include such grounds as nationality (which is one of the most frequent basis of recognition of a violation of article 26 of the ICCPR) and health status, including HIV/AIDS status (UNAIDS/IOM 2004: 59).

The prohibition of all discrimination does not mean that every distinction of treatment imposed by a state on an individual or group constitutes discrimination. According to the Human Rights Committee, a distinction of treatment is constitutive of discrimination when it is not based on "reasonable and objective criteria" (Nowak 2005: 629).[5] More precisely, as J. Fitzpatrick states:

> … differential treatment is permissible where the distinction is made pursuant to a legitimate aim, the distinction has an objective justification, and reasonable proportionality exists between the means employed and the aims sought to be realized (Fitzpatrick 2003: 172).

3. Measuring conformity to the principle of non-discrimination of HIV/AIDS-related entry and stay restrictions

States that impose HIV/AIDS-related entry and stay restrictions justify their practices primarily on the grounds of protection of public health and the public purse. These two grounds are classical and internationally accepted reasons for a state to refuse admission and stay of foreigners. Consequently the aim pursued by the state in question is legitimate.

Conversely, the reasonable character of the criteria and the proportionality between the means employed and the aims pursued are challenged by numerous international organisations such as UNAIDS, OHCHR (see for example UNAIDS/OHCHR 2006), IOM (see for example UNAIDS/IOM 2004) and the World Bank (see World Bank 2000), NGOs and academics (for example, Carlier 1999; Goodwin-Gill 1996: 50–69). The impact of such measures can be devastating for individuals seeking asylum, wishing to immigrate, visit family members, participate in conferences or conduct business (UNAIDS/IOM 2004: 5).

[4] See for example article 14 of the European Convention on Human Rights; article 2 of the African Charter on Human and Peoples' Rights; article 1(1) of the American Convention on Human Rights.

[5] As stated several times by the Human Rights Committee, any distinction, even based on sensitive grounds such as race, colour, sex and religion may be justified if it based on a "reasonable and objective criteria". Nevertheless, it is doubtful that a distinction based on an explicit racial criterion will meet the "anti-discrimination test" (Martin 2003: 35).

Regarding the grounds of public health, it is often argued that migration and travel of people living with HIV/AIDS does not present in itself a threat to public health. As stated by UNAIDS and the IOM in their joint *Statement on HIV/AIDS-Related Travel Restrictions*:

> Travel restrictions to protect the public health are relevant only in the instance of an outbreak of a highly contagious disease, such as cholera, plague, or yellow fever, with a short incubation period and clinical course, a recent example being severe acute respiratory syndrome or SARS. Entry restrictions relating to such conditions can help to prevent their spread by excluding travellers that may transmit these diseases by their mere presence in a country through casual contact (UNAIDS/IOM: 8).

HIV is not transmitted casually. Moreover, "the risk (or protection from) HIV infection comes not from the nationality of the infected persons, but from the specific behaviours that are practiced" (Goodwin-Gill 1996: 62), the protection being just as well in the hands of the infected persons and in the hands of the non-infected persons (UNAIDS/IOM 2004: 8). It has also been noted that the exclusion of foreigners on the basis on their HIV/AIDS status may have severe consequences in terms of prevention and access to healthcare:

> Moreover, travel restrictions can undermine public health efforts at HIV prevention and care. Travellers and migrants may enter countries and remain there illegally so as to avoid the application of travel restrictions, in which case their clandestine status is likely to prevent them from receiving HIV prevention and care services. On the other hand, travel restrictions may encourage nationals to consider HIV/AIDS a "foreign problem" that has been dealt with by keeping foreigners outside their borders, so that they feel no need to engage in safe behaviour themselves (UNAIDS/IOM: 8–9).

As for the argument of health-related costs, this ground is clearly lacking in value when a foreigner does not intend to reside durably within a national territory. Even when a migrant does intend to reside durably, this justification for HIV/AIDS-related entry and stay restrictions is however contestable. Again from the UNAIDS/IOM joint statement:

> Given the economic benefits of the international movement of people (contributing to national revenue, taxes and productivity; contributing to the labour supply and helping to correct a specific shortage of skills; contributing to cultural diversity), as well as the extended productivity and longevity of people living with HIV/AIDS in light of improved HIV therapies, it is increasingly difficult to be certain that people living with HIV/AIDS will incur more costs than produce benefits over a long-term stay or residency (UNAIDS/IOM: 9).

We can thus challenge the reasonableness of distinctions established by certain states regarding entry and stay of foreigners on the basis on their HIV/AIDS status. Therefore, the discriminatory nature of such practices can be discussed. It should nevertheless be cautioned that each situation must be considered in the context of its specific circumstances; in particular, the specific situation of the foreigner concerned must be taken into account. We have seen that the principle of non-

discrimination can be invoked in an autonomous way. There is nevertheless little doubt that arguments against HIV/AIDS-related entry and stay restrictions would be stronger if human rights such as those protecting family and children were involved. Finally, we must remember that even if solid arguments can be invoked against the existence of HIV/AIDS-related entry and stay restrictions, the state nevertheless has broad discretionary powers in admission and stay matters. In such a context, Martin insists on the fact that the principle of non-discrimination "serves primarily to place a modest burden on the state to come forward with a plausible justification for any distinctions drawn in law or practice" (Martin 2003: 35).

4. Expulsion of foreigners living with HIV/AIDS

The right to expel foreigners is inherent to the sovereignty of the state.[6] The right to expel can be understood as corollary to the right of the state to control the admission of foreigners into its territory (Kamto 2007: 7). As with the non-admission of foreigners, the grounds used by states to justify expulsion are very broad. As stated by Kamto in his Preliminary Report on Expulsion of Aliens for the International Law Commission:

> For example, expulsion may be motivated by the fact that, among other things, the alien is a threat or a danger to public peace; jeopardizes relations between the country concerned and other states; seeks to foment change in the political order through violent means; espouses doctrines that are either subversive or contrary or the established order; is unemployed, without a fixed abode or without livelihood; is a criminal or is being prosecuted; or is suffering from an infectious or serious illness, is mentally deficient, a beggar, a prostitute, an adventurer or an illicit trafficker (Kamto 2005: 7–8).

States have nevertheless fewer grounds available for expulsion than for the rejection of admission (Martin 2003: 34), and the questions posed by states' restrictive practices based on a foreigner's HIV/AIDS status are more complex than in admission and stay matters. With regard to expulsion, the question is not only whether the HIV/AIDS status constitutes a legitimate ground for expulsion, but also whether the HIV/AIDS status is a possible ground for denying a state's right to expel a foreigner.

In the case of the former, i.e. the legality of expulsion on the ground of the HIV/AIDS status of the foreigner, the elements expressed previously with regards to admission and stay can be transposed. Public health and public purse constitute legitimate bases for expulsion and the principle of non-discrimination is of use to contest the expulsion, as an indirect and autonomous right. As states' powers are weaker with regard to expulsion, these elements will have a stronger legal weight. As noted by Martin (2003: 34), "human rights, such as those protecting family life,

[6] The notion is here understood widely, including all measures for removing foreigners from the state concerned.

have found more of foothold in restricting expulsion than in constraining admission decisions".

In the case of the second question posed by the relations between expulsion and a person's HIV/AIDS status, the problem is reversed: Can the HIV/AIDS status be grounds for denying the possibility of expulsion? More precisely, the question refers to the possibility, with regard to international law, of expelling a foreigner living with HIV/AIDS to a country where they will not benefit from appropriate health treatment. The key principle here is the right to be protected from inhumane and degrading treatment. According to article 6 of the ICCPR:

> 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.

According to General Comment No. 31 of the Human Rights Committee, states are prohibited from expelling an individual to a state where "he would be at risk of irreparable harm or from where he would be transferred to another country in which he would face the same risks" (ILC 2006: 338).

Specific mention must be made of the European Court of Human Rights that has, in a series of important decisions, determined the circumstances in which the expulsion of a foreigner living with HIV/AIDS constitutes a violation of article 3 of the European Convention on Human Rights (ECHR) – equivalent to article 6 of the ICCPR. In terms of expulsion, article 3 primarily applies when the risk to the individual of being subjected to prohibited treatments emanates from intentional acts of public authorities in the country of origin or from non-state actors in that country when the authorities are unable to afford the appropriate protection.[7] In a 1994 ruling, the European Commission of Human Rights already recognised that lack of health care might amount to a situation in which article 3 may be violated.[8]

Nevertheless it was not until 1997 and the *D* vs *the United Kingdom* case that the Court established the landmark of its jurisprudential policy in such matters.[9] In this case, the Court recognised for the first time – and, to date, the only time – that a decision of expulsion constituted a breach of article 3 of the ECHR on the basis of health reasons. The Court acknowledged that the applicant was in the advanced stages of a terminal and incurable disease, namely AIDS, and was depending on the treatment provided in the UK and the care administered by a charitable organisation. The medical treatment he might have hoped to receive in his country of origin (Saint Kitts and Nevis) would have been insufficient and, despite the fact that he might have had a relative in Saint Kitts, there was no evidence showing that this person would have been willing to attend to his needs. In view of these

[7] ECHR, *D.* vs *the United Kingdom*, 2 May 1997, § 49.
[8] ECHR, *Tanko* vs *Finland*.
[9] ECHR, *D.* vs *the United Kingdom*, 2 May 1997.

circumstances, considered "exceptional" by the Court, the expulsion was judged to amount to inhuman treatment in violation of article 3.

While *D* vs *the United Kingdom* is the only case where violation of article 3 has been recognised in such a context, it is worth mentioning the *BB* vs *France* case in which the Commission also concluded that article 3 was violated, before the case was struck out.[10] In this case, the applicant had both HIV and Kaposi syndrome; the infection had already reached an advanced stage necessitating repeated stays in hospital. Given that the applicant was to be deported to a country where he would probably not have been able to benefit from the necessary medical treatment and where he would have had to confront the illness alone, without family support, the Commission concluded that there was violation of article 3.

Following the benchmark decision in the *D* vs *the United Kingdom* case as well as subsequent cases, a number of criteria for the recognition of violation of article 3 on health grounds can be identified. The starting point is that the Court must acknowledge the existence of a "very exceptional situation". The recognition of such a situation is based on three elements: first, the state of health of the person; second, the care facilities in the country of origin; third, the moral and social support in the country of origin (Derckx 2006: 315).

Regarding the first criteria, the individual must suffer from a disease in an advanced or terminal stage. For example, in the *Karara* vs *Finland* case, the applicant's infection had stabilised due to medical treatment and had not yet reached the stage of AIDS.[11] In *S.C.C.* vs *Sweden*, the treatment had just begun and the stage of the infection was not advanced.[12] Similarly, in *Arcila Henao* vs *the Netherlands* and in *Ndangoya* vs *Sweden*, the applicant's illness had not reached an advanced stage, due to the anti-retroviral treatment received in the country concerned.[13] To sum up the position of the European Court of Human Rights, the state of health of the individual constitutes the primary condition for the recognition of a breach of article 3. To date, there has been no case in which the Court has recognised the existence of breach of article 3 when the individual was not in an advanced or terminal stage of the disease.

Regarding the second criteria taken into account by the Court, care facilities in the receiving country, it is notable that in the vast majority of cases the Court does not consider the concrete possibility of access to health care; on the contrary, the Court limits its analysis to the mere existence of treatment in the country concerned. Practical barriers, such as the cost of treatment or the distance to reach a hospital are not taken into account. In *S.C.C.* vs *Sweden*, the application was declared

[10] ECHR, *BB* vs *France*, 9 March 1998.
[11] ECHR, *Karara* vs *Finland*, 29 May 1998.
[12] ECHR, *S.C.C.* vs *Sweden*, 15 February 2000.
[13] ECHR, *Arcila Henao* vs *the Netherlands*, 24 June 2003; ECHR, *Ndangoya* vs *Sweden*, 22 June 2004.

inadmissible on the basis that, according to a report of the Swedish embassy in the country of origin, namely Zambia, the treatment was available although at considerable cost. In *Arcila Henao* vs *the Netherlands*, it was noted that the treatment was "in principle" available in the country of origin, in *Ndangoya* vs *Sweden*, the application was declared inadmissible although the prospects of receiving treatment in the country of origin were slim, given its considerable cost and limited availability in the rural region from which the applicant came. The apparent lightness with which the Court considers the circumstances of a case may seem surprising. Such an approach would perhaps be justified if the Court was ensuring that the individual has relatives in the receiving country that commit themselves to support him or her. We will see that this is not the case. Moreover, it is notable that in the benchmark case, *D* vs *the United Kingdom*, the Court adopts a much more liberal approach: it considered the concept of the right to health in a much wider perspective, taking into account the possible lack of shelter and proper diet of the individual, as well as the exposure to health and sanitation problems that were common to the population of Saint Kitts. Moreover, it took into account that no proof had been shown that the individual would be guaranteed a bed in a hospital in the country of origin. In *D* vs *the United Kingdom*, it must be established that treatment will or will not be practically available to the individual. In the following cases, it is sufficient that the treatment exists in the receiving country, without guarantee that effective access will be provided to the individual.

The third criterion, that is, the existence of moral and social support in the country of origin, can be seen as complementary to that relating to the availability of care facilities. This criterion is also not assessed *in concreto*: it is sufficient that the individual has relatives in the receiving country for the moral and social support to be presumed. For example, in *S.C.C.* vs *Sweden*, the Court simply notes that the applicant's children as well as other family members live in Zambia. Similarly, in *Ndangoya* vs *Sweden*, the Court notes that "the applicant would not be unable to seek the support of his relatives who might be able to help him".[14] As with the second criterion – existence of care facilities in the country of origin – in *D* vs *the United Kingdom*, the Court controls the effective existence of moral and social support in the country of origin: it recognises that while the applicant may have a cousin in Saint Kitts, no evidence has been shown that this person was willing or in a position to support him.

With the exception of the case of *D* vs *the United Kingdom*, the Court treats the criteria of care facilities and of moral and social support in the receiving country with apparent lightness. An explanation of this may be found in the importance given to the first criterion – the state of health of the applicant. It would only be when the individual suffers from an advanced or terminal stage of the disease that the criterion of care facilities and of moral and social support in the receiving country would be considered. Such is the case in *D* vs *the United Kingdom*, but not

[14] ECHR, *Ndangoya* vs *Sweden*, 22 June 2004.

in the cases that followed it. This reasoning shows the strictness with which the Court applies article 3 to cases of expulsion of foreigners living with HIV/AIDS. This took an even stricter form in the last case of this type judged by the Court. In *N.* vs *the United Kingdom*, the applicant presented an advanced stage of the infection: although the treatment received in the UK had led to a stabilisation of her condition "the applicant [had been] diagnosed as having two AIDS defining illnesses and a high level of immunosuppression".[15] However, the Court based its reasoning on the fact that "the applicant [was] not, however, at the present time, critically ill".[16] Based on this assumption, the Court's appreciation of the two additional criteria – the availability of care facilities and of moral and social support in the receiving country – was as basic as in the previously mentioned cases. The Court noted that "according to information collated by the World Health Organisation …, antiretroviral medication is available in Uganda, although through lack of resources it is received by only half of those in need" and that "it appears that [the applicant] has family members in Uganda, although she claims that they would not be willing or able to care for her if she were seriously ill".[17] The Court then naturally concluded that there was an absence of violation of article 3. However, it left no doubt that in case of expulsion, the applicant would face an early death. Given the circumstances of the case, it is arguable that there were substantial grounds for believing that the applicant faced a real risk of treatment prohibited by article 3 in case of expulsion.[18]The extreme strictness of the Court is without doubt worrying; the question can reasonably be asked if such a jurisprudential policy is not likely to deprive of all substance the considerable progress made by opening the application of article 3 to health matters.

5. Conclusion

In its current state, international law does not give a definitive answer to the questions raised by HIV/AIDS-related entry and stay restrictions and the expulsion of foreigners living with HIV/AIDS. We should not be surprised by such a situation given the importance that the principle of state sovereignty plays in the field of international migration.

However, this does not mean that international law remains silent on the issue. On the contrary, it imposes a frame to state activities that is based on the principle of non-discrimination. Entry and stay restrictions based on the HIV/AIDS status of a foreigner may violate this principle as their reasonable and proportionate character is contestable. Such arguments will be stronger if human rights protecting family and children are involved. Such arguments will also be stronger regarding the

[15] ECHR, *N.* vs *the United Kingdom*, 27 May 2008, § 47.
[16] Ibid., §50.
[17] Ibid., §48.
[18] Ibid., Joint dissenting opinion of judges Tulkens, Bonello and Spielmann, §22.

legality of the expulsion of foreigners on the basis of their HIV/AIDS status as state powers are less broad for expulsion than for rejection of admission.

Finally, regarding a person's HIV/AIDS status as a ground for denying the possibility of expulsion, the most important developments arise from the jurisprudence of the European Court of Human Rights that subjects the regularity of the expulsion of foreigners living with HIV/AIDS to the respect of the right to be protected from inhumane and degrading treatment (article 3 of the European Convention on Human Rights). However, in such cases, the Court interprets article 3 with extreme strictness, which raises the question of whether such a jurisprudential policy is likely to deprive of all substance the application of article 3 to the expulsion of foreigners living with HIV/AIDS.

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