# THE LEGAL ASPECTS OF INTERNATIONAL LABOUR MIGRATION: A STUDY OF NATIONAL AND INTERNATIONAL LEGAL INSTRUMENTS PERTINENT TO MIGRANT WORKERS IN SELECTED WESTERN EUROPEAN COUNTRIES

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"THE EARTH WAS DESIGNED TO FEED ITS INHABITANTS; AND HE WHO IS IN WANT OF EVERY THING IS NOT OBLIGED TO STARVE, BECAUSE ALL PROPERTY IS VESTED IN OTHERS."

E.D.Vattel, The Law Of Nations.

## Abstract

The focal point of this study is the legal rules which govern international labour migration. It attempts to explore and critically analyse the relationships between international labour migration as an economic phenomenon and the legal norms which affect and influence this process. Firstly, it underlines the importance of the legal thinking in providing adequate protection to migrant workers and members of their families. Secondly, it argues for establishing an international legal framework to regulate and harmonize the national immigration policies of States.

Chapter Two examines the economics of international labour migration, the economic function and the social status of migrant labour in the receiving States. The focus is on the post Second World War migratory flow to France, the Federal Republic of Germany, the Netherlands, Belgium and Switzerland.

Chapter Three analyses the national laws of the receiving States. It concentrates on the issues of residence, work permit systems, family reunification and the social security systems of the receiving States.

Chapter Four is concerned with the international recruitment agreements which have been concluded after the Second World War period and registered with the UN Secretariat. The provisions of these treaties are compared with the provisions of investment treaties which have also been concluded between the same parties, and with the ILO model agreement on temporary migration for employment.

Chapter Five explores the relations between the existing international human rights instruments and the immigration laws of the selected States and the adequacy and the capacity of these instruments in protecting migrant workers. The Chapter goes further to investigate the provisions of the Universal Declaration on Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Covenant on Elimination of All Forms of Racial Discrimination and the European Convention on Human Rights.

Chapter Six scrutinizes the provisions of the International Convention on the

Protection of the Rights of All Migrant Workers and Members of Their Families. The provisions of this Convention are compared with the ILO Conventions Nos. 97 and 143 concerning migrant workers.

Chapter Seven concludes the study by arguing for the rethinking the concepts of sovereignty, citizenship and the function of international labour migration. International labour migration must be viewed as a factor to alleviate the economic and social inequality between North and South and as a process of individual self-determination.

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**Chapter Three: The Legal Aspects of International Labour Immigration: The National Laws of the Labour Importing States**

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## Abbreviations

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|---|---|
| *A.A.A.P.S.Sc.* | *Annals of American Academy of Political and Social Science.* |
| *A.J.C.L.* | *American Journal of Comparative Law.* |
| *A.J.I.L.* | *American Journal of International Law.* |
| *B.Ybk.I.L.* | *British Yearbook of International law.* |
| *C.M.L.R.* | *Common Market Law Report.* |
| *C.M.L.Rev.* | *Common Market Law Review.* |
| *Col.J.Trans.L.* | *Colombia Journal of Transnational law.* |
| *C.D.* | *Collected Decisions of the European Commission of Human Rights.* |
| *Comp.L.Ybk.* | *Comparative Law Yearbook.* |
| *Corn.Int.L.J.* | *Cornell International Law Journal.* |
| *D.J.I.L.* | *Denver Journal of International Law.* |
| *D.R.* | *Decisions and Reports of the European Commission of Human Rights.* |
| E.C.H.R. | European Convention on Human Rights. |
| *E.H.R.R.* | *European Human Rights Reports.* |
| *E.J.I.L.* | *European Journal of International Law.* |
| EEC | European Economic Community. |
| *Eth.Ra.Stud.* | *Ethnic and Racial Studies.* |
| *Eur.Indu.Rel.Rev.* | *European Industrial Relations Review.* |
| G.B. | Governing Body, International Labour office. |
| *H.R.L.J.* | *Human Rights Law Journal.* |
| *H.R.Q.* | *Human Rights Quarterly.* |

| | |
|---|---|
| I.C.C.P.R. | International Covenant on Civil and Political Rights. |
| I.C.E.A.F.R.D. | International Convention on Elimination of All Forms of Racial Discrimination. |
| I.C.E.S.C.R. | International Covenant on Economic, Social and Cultural Rights. |
| I.C.J. | International Court of Justice. |
| *I.C.L.Q.* | *International and Comparative Law Quarterly.* |
| *I.L.M.* | *International Legal Materials.* |
| *I.L.R.* | *International Law Report.* |
| *I.M.* | *International Migration.* |
| *I.M.R.* | *International Migration Review.* |
| I.O.M. | International Organization for Migration. |
| ILO | International Labour Organisation. |
| *Jud.Prot.* | *Judicial Protection.* |
| *Mod.L.Rev.* | *Modern Law Review.* |
| *N.So.* | *New Society.* |
| *Neth. Q.H.R.* | *Netherlands Quarterly on Human Rights.* |
| *Neth.Ybk.Int.L.* | *Netherlands Yearbook of International Law.* |
| OECD | Organisation for Economic Co-operation and Development. |
| P.C.I.J. | Permanent Court of International Justice. |
| *Pol.Sc.Q.* | *Political Science Quarterly.* |
| *Pub.L.* | *Public Law.* |
| *Rev.I.C.J.* | *Review of the International Commission of Jurists.* |
| *Rev.Euro.Mig.Int.* | *Revue Européenne Des Migrations Internationales* |

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|---|---|
| *S.Illl.U.L.J.* | *Southern Illinois University Law Journal.* |
| *Tex.Int.L.J.* | *Texas International Law Journal.* |
| *Tur.Ybk..H.R.* | *Turkish Yearbook of Human Rights.* |
| U.D.H.R. | Universal Declaration of Human Rights. |
| U.N.Doc. | United Nations Documents. |
| U.N.T.S. | United Nations Treaty Series. |
| UN. | United Nations. |
| *Ybk.E.C.H.R.* | *Yearbook of the European Convention on Human Rights.* |

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## Notes on Terminology

Different terms are used in this work to describe individuals who work and live in States other than the States of their nationalities.

The terms "foreign workers", "migrant labour", "guest workers", "non-national workers", "recruited workers" and "immigrant workers" are synonymous and are to be understood as such.

The terms "host countries", "States of employment", "receiving States", "recipient States", "immigration countries" and "labour importing States" are used interchangeably.

# CHAPTER ONE

## Introduction

### The Object of the Thesis

The migration to Western European countries after the Second World War differs remarkably in form and consequence from earlier large scale migration. Foreign workers did not enter Western Europe for the purpose of permanent settlement which is the ultimate purpose in classical or traditional migration. Yet, it is evident that the potential emigration toward Western European countries is continuing to increase. The factors which have caused the earlier waves of migration are still in place: political instability, poverty, job creation capabilities, global imbalances in population growth and the widening economic and social economic inequalities between industrialized and developing countries which create a migratory pressure into Western Europe.

According to a recent estimate, the world's population will increase from 5.3 billion in the 1990 to 6.25 billion by 2000, and 8.5 billion by 2005.[1] The population of industrialized countries is growing at an average annual rate of 0.5 per cent as against 3 per cent in some poorer countries.[2] In some countries, like Germany, the population will decline from 61 million to 47 million by the year 2030.[3] The labour force of the European Community will decline by 5.5 per cent, *i.e.* from 145 million in 1990 to 137 million over the next three decades.[4] An OECD report states that:

> Important changes are taking place in the demographic structure of the

> industrialised countries. The combination of low fertility and mortality rates means the population growth is slowing down and there is going to be a substantial increase in the proportion of elderly people.[5]

This demographic structure of the industrialized countries, low fertility and the ageing population, will reduce the economic productivity of those countries and consequently reduce incomes and tax revenues which are necessary to pay for social and medical care for their ageing population. Therefore there will be a need for additional labour force in Western European countries.[6]

The recent developments in Eastern European countries and in the States of the former Soviet Union will generate massive migratory movements. It is estimated that 1.3 million people during 1991 have migrated from the former countries and that an annual flow of 800,000 of regular migrant workers to Western Europe is expected:

> The trend, which continued in the 1990, portends to persist in the future. As economic structuring and privatisation gather momentum in east and central European countries, redundancy and unemployment will generate further pressure for outmigration before new employment opportunities are created.[7]

Given the former facts and the declining income growth and job creating capacity of the developing countries, one can objectively say that the main feature of contemporary migration is a non-traditional one, in the sense that migrants will move to other countries seeking work rather than for the purpose of settlement:

> Contemporary international migration flows are taking place in a world characterized by increasing political, economic, and social interdependence among nation states. Today's global context differs significantly from that which existed at the turn of the twentieth century when permanent migration from Europe to the Americas was at its peak. Yet, the concepts, theories, and approaches used to study international migration remain those developed

during the heyday of permanent migration. While permanent migration continues to be a significant type of migration for four countries-Australia, Canada, New Zealand and the United States- the bulk of contemporary migrants move to another country with only temporary permission to stay in order to work, study, carry out business, find refuge, retire, etc. The importance of temporary migration and the growing linkages between migration policies and other state objectives call for new theories and approaches to migration.[8]

The contemporary migratory movements are taking place in substantially different international contexts. The world today is characterized by increasing political, economic and social interdependence, by the growth of more restrictive immigration policies, by the unemployment problems in Western Europe, by the wide spread of xenophobic and racist movements against foreigners, and by the mounting social and ethnic tension in several Western European countries.

All the above reasons have pushed the immigration issue from the periphery to the centre of heated arguments. The magnitude of immigration, the competing national and individual interests, the economic and non-economic impacts of immigration and the foreign affairs implications make the topic of immigration a subject of great importance for years to come. It is not surprising that the immigration issue is one of the few subjects that has caused such passion.

Migrant workers and their families are frequently faced with unique and serious problems which justify a particular study. First, immigration is in itself a source of discrimination between nationals and non-nationals. Migrant workers who are competing with nationals for jobs are likely to suffer from discrimination more than other groups of aliens especially during an economic depression. Second, the problem of the reunification of migrant workers with their families. Third, the issue of the insecurity of their residence in the receiving States is one of fundamental

importance. Fourth, due to their lack of high skills, they are allocated the jobs which cannot be filled by nationals. Some writers compare the status of migrant workers in the receiving States with those who are under foreign occupation:

> The problem of the status of foreign workers in highly industrialized countries, principally in Western Europe, is on the way to becoming one of the major issues of our time. It has taken the place that of the fate of the peoples under foreign domination. The demand for the independence of the colonies has been replaced by the call for the dignity of migrant workers.[9]

For the purpose of this study, the focus is on the majority of migrant labourers who have moved from third world countries to Western Europe in search of whatever work they can find. Excluded from the scope of this work are individuals with high professional skills such as doctors, academics and executives of companies. The complicated issue of the status of undocumented migrant labour makes it worthy of special study. But this issue will be discussed only in part and in the light of the UN Convention on the Protection of All Migrant Workers and Members of Their Families.

The status of migrant workers will be investigated in Belgium, France, Germany, the Netherlands and Switzerland. The choice of these countries is justified on the following grounds:

- They have received large numbers of foreign workers from third world countries.

- The immigration regulations of these countries offer a high degree of variety in the treatment of 'guest workers'.

- These countries vary in their political traditions and their welfare ideologies.

- These countries have concluded recruitment treaties with the main labour exporting countries.

The United Kingdom represents a different case which does not fit with the general framework of this study which is exclusively concerned with the 'guest workers' phenomenon. Britain had received large numbers of workers mainly from its former colonies, these people were not considered 'migrants' because they were admitted into the country as British subjects who came to live permanently.[10]

The exclusion of other countries does not suggest that the issue of migrant labour is confined to the former countries. The status and the treatment of foreign workers in the Persian Gulf States, Saudi Arabia and other oil exporting countries, are subject to extensive studies and have aroused sharp controversy. The focus on Western European countries is justified by the fact that 20 million immigrants are presently living in Western Europe some 35 per cent of whom are from developing countries.[11]

**The Methodology and the Purpose of the Thesis**

The intricate problems caused by international migration have prompted a considerable body of research literature with different approaches and methodologies. The writings on international migration have predominately adopted economic, sociological and political approaches to analyze and explain the causes and the implications of international migration.

Major trends can be identified; Kindleberger deals with international migration as a process which is basically governed by economic terms. The Western European economic expansion after 1945 absorbed the native labour force and created labour shortages in certain sectors of employment. Faced with competition for labour, employers could either offer higher wages to attract additional labour force or to recruit foreign labour. The choice to recruit foreign labour was justified on economic

grounds. The increase of wages in order to attract additional labour force would cause inflation and reduce the margin of profits.[12] The economic approach explains international labour migration as the result of "push" and "pull" factors: the economic expansion of Western Europe created labour shortages which would hamper the economic reconstruction of these countries, and at the same time, countries outside Europe, which were suffering from unemployment, found that the outward migration of their labour would ease their unemployment problem and provide them with hard currencies earned by their migrant labour.

Castles and Koack represent the Marxist concept of the reserve army. They argue that the concept of a reserve army of labour is useful in explaining the latent reserve function of foreign workers as an external potential labour force, and the influence they have on the labour market once they are present in the receiving countries:

> Immigrants have an important effect not only on economic and social developments, but also on the political situation, and hence on class structure, class consciousness, and class conflict.[13]

Miller's studies on foreign workers in Western Europe focus on the political behaviour of migrant workers and its impact on the receiving States. The theory of the foreign worker political quiescence does not correspond with the emerging political force of migrant workers and he calls for the reassessment of the political role of Western Europe's foreign labour:

> Foreign workers' political life is considerably more variegated and extensive than generally thought. They have already emerged as a political force of importance to the understanding of contemporary European politics, and their political significance will likely increase in the future.[14]

Other groups of writers stress the point that the volume and the extent of postwar migration into Western Europe has rendered the concepts of nation-state and citizenship vacuous concepts. The prime concern of these groups of writers is the implications of immigration for theory and practice of citizenship. The *de facto* settlement of millions of migrant workers with different cultural backgrounds has transformed the receiving States into multi-cultural and multi-national societies and questioned the traditional European States' tradition of citizenship. The concept of nation-state has been challenged by regional groupings such as the European Community and the Nordic Union and by the settlement of migrant workers.

They argue that the concept of citizenship should be defined in functional terms by reference to the place of residence and the contribution of migrant workers to the economy of the receiving States.[15]

The purpose of the preceding review is to illustrate the insuperable problems, the implications of international migration and the different approaches and methodologies of the research literature.

It is evident from the perusal of works on international migration that the studies have been predominantly of an economic and sociological nature and there is a lack of legal work on the phenomenon of international labour migration. The sporadic legal research on international labour migration and its implications clearly show that the subject has attracted little attention from international legal writers. This lacuna can be explained by various reasons. The migratory phenomenon has been understood and explained in economic terms as economic factors play a much more important role than humanitarian considerations in formulating immigration policies. Duyssens observes that the involvement of legal writers and lawyers in the formation of migration policies can be considered as a recent phenomenon.[16]

Thomas points out that the role of law in immigration has been limited to

regulating the economic considerations which shape immigration laws. Consequently the laws are altered and changed in response to economic imperatives. The exact impact of the economic approach on immigration laws is not critically explored.[17]

This study approaches and analyses the legal principles and rules which regulate the process of international migratory labour and the status of migrant workers in the receiving States; the legal rules which permit individuals to move from one country to another and regulate their access to employment and social services, their residence and expulsion, cultural rights and family reunification. This shows the fundamental importance of the legal rules and principles which govern and regulate immigration at both national and international levels.

Three fundamental points will be stressed throughout this study. First, legal rules and principles have a fundamental role in the area of international labour migration. Second, the issue of international labour migration directly affects the life, work and the families of millions of human beings. This alone places it high 'in the hierarchy of global issues'. Third, is that only global approach and international corporation can tackle the problem of the international migratory labour:

> The migrant worker phenomenon has international, political, economic and social implications as well as humanitarian considerations. The recruitment of migrant workers and their remittances to their homelands comprise a type of global interdependency for the receiving and sending countries that many States have yet to fully acknowledge.[18]

The principle purpose of this study is to explore the place and the impact of a legal theory in the field of international migration, and to stress the importance of legal norms whether at a national or international level to provide a foundation for an effective protection for migrant workers.

Labour migration cannot be dealt with as a factor of production. Its value as a

human resource makes it different from other economic exchanges which are conducted in an equivalent monetary value of commodities or other factors. The humanitarian considerations in dealing with migrant labour do not arise with respect to other global flows.[19]

Economic reasoning alone cannot provide a coherent and normative framework to explain and solve the humanitarian problems which are associated with international labour migration. Economics is surrounded by controversial and often conflicting theories regarding very fundamental concepts like inflation, recession, and how to deal with unemployment. This nature of economics undermines its normative rule: "the economic approach has significant limitations especially as a body of normative principles."[20]

The development of the immigration policies of the studied European States clearly establishes that non-economic considerations are now fundamental to any decisions regarding their immigration policies. States regulate the migratory flow for cultural, demographic and political reasons irrespective of the labour market demand. The *de facto* settlement of millions of third world migrant workers has raised the issue of their impact on the national identity and the cultural character of the citizens of the receiving States:

> The most immediate consequences of this immense infusion of people from so many varying ethnic, religious, and cultural backgrounds into the northern countries is that these countries have now become mosaics. Where they were once relatively homogeneous and their citizens easily identifiable, they have now become heterogeneous and pluralistic. It is but one example of the magnitude of this transformation, in absolute numerical terms as well as in its cultural manifestations.[21]

If migrant labour is treated as another factor of production which is subject to

free market economic theory of supply and demand, then, the logic of this approach is to remove barriers to the free circulation of labour. The liberal economic theory cannot justify the exclusion of labour from the free circulation:

> Within a capitalist world economy founded on free-market principles, the persistence of barriers to population movement between countries constitutes an anomaly. As Bhagwati (1984: 678) observed, 'A somewhat remarkable hierarchy obtains in terms of the extent to which the operation of liberalism in the economic sphere is considered to be acceptable in modern national states.' International trade in goods, governed by the rules of the General Agreement on Tariffs and Trade (GATT), comes closest to operating according to unfettered dynamics of the market, with only limited intrusion of what Bhagwati terms 'political considerations'. In the sphere of services (notably finance), political considerations are somewhat more passive. But with respect to labour, practices shift decisively away from liberalism.[22]

International migration, until recently, is not considered a crucial issue by the writers on international law and international relations. From an international relations perspective, three main reasons explain this oblivion: international relations studies have focused on what is termed"high politics"; war, peace, strategy, the balance of power and the use of force.[23]

The second reason is that the link between foreign policy and international migration is played down by politicians. This despite the fact that the issue of migration has been regulated by numerous international agreements and it never ceased to cause strains in States' relations, for example the relations between France and Algeria, and the USA and Mexico.

The third reason which explains the neglect of studying international migration by international relations' students, is related to the lack of consensus among the students on the role of ethical and normative considerations in international

relations.[24]

Another explanation for the relative neglect of international labour migration by international legal writers lies in the fact that a considerable legal work has focused on the legal aspects of the economic institutions and the rules which have been created by Bretton Woods system. These rules and institutions are primarily concerned with international trade and investments. The Bretton Woods system does not envisage neither the establishment of an international agency to oversee international migration, or attempt to lay down any rules on the subject of international migration:

> Thus it is noteworthy that the Bretton Woods infrastructure simply did not address questions pertaining to international migration: no institutions, no codes were considered. No such infrastructure blessed the growth of international migration, nor did it seek to define the economic and social principles that should govern the process.[25]

A major reason that hampered the development of international legal theory regarding international migration lies in the assumption that the sovereign enjoys an absolute power regarding the admission, conditions of residence and work for foreigners and their exclusion. Some classical writers on international law argue that it is an ancient and fundamental principle of international law that States enjoy an absolute discretion in deciding on the admission and exclusion of aliens:

> Among the principles commonly advanced in the older textbooks on international law is the rule that States are free to control at will the entry and residence of aliens. Fenwick claimed that by inference from the sovereignty of States, it was a well established general principle that a State might forbid the entrance of aliens into its territory or admit them only in such cases as might commend themselves to its judgment. That sentence was quoted with approval by Pitt Cobbett. Hyde and Jessup are among those who wrote in expansive terms of the State's discretion in control of

aliens. Hackworth asserted that in the absence of treaty obligations, a State might admit aliens on such terms and conditions as it might deem to be consonant with national interests and deport from its territory those whose presence it might regard as undesirable. Kelsen stated that it was an accepted maxim of international law that every sovereign nation had the power to

> admit aliens only in such cases and upon such conditions as it might see fit to prescribe and to expel them at any time.[26]

The above writers argue that the notions such as the notion of self-preservation, national interests, and sovereignty justify the legal rules that the admission of aliens falls exclusively within the domestic jurisdiction of a State.

While it cannot be disputed that States are equipped by an extensive power in deciding on their immigration policies; international law, the norms of human rights and the realities of the economic and political interdependence of the world place various restrictions on the exercise of this power. The writings of Plender, Nafizger, and Goodwin-Gill provide a persuasive theoretical framework to dismantle the wide-spread belief that States' freedom of action regarding admission, residence and exclusion of aliens is unfettered. The above group of writers argue that the development of human rights norms, the growth of the economic and political interdependence of the modern world, and the proliferation of international treaties, which regulate the issues of international migration and migrant labour, limit the States' freedom in controlling immigration, and that immigration policies can be operated as methods to achieve a more equitable world:

> Above all, the global community should seek, by the operation of law, to facilitate natural processes of human migration as a means of accommodating basic human needs and dignity.[27]

**The Structure of the Thesis**

Chapter Two of this study examines the economic functions and the social status of migrant workers in the receiving States. The combination of demographic structure and the economic expansion of the receiving States has resulted in labour shortages in certain sectors of employment. These States have had two options to increase their manpower, either by encouraging foreign workers to come and work and stay indefinitely, or by admitting foreign workers for a limited period of time with the option of renewing their permits to stay, depending on the requirements of the national labour market. The second option has various economic advantages to the recipient States since it provides them with flexible labour units without entailing social expenditure. In other words the labour receiving States were "buying man hours":

> Instead of admitting foreign workers as immigrants with the moral and socio-political obligations to them that as such an option implies, countries are increasingly "buying man hours"(Appleyard, 1988: 11.). Swami (1981) notes that countries prefer to pay for a rotating stock of temporary labour that is exactly the right type, available when needed, and disposal when not, and whose demand on social expenditure and integration within the host society is minimal.[28]

The increased competition for foreign labour, the desire to reduce the costs of recruiting new labour and the need for more stable labour force have eroded the rotation principle and started the process of minority formulation in the labour receiving States. At this stage international labour migration has been understood and perceived in purely economic terms which benefits both labour sending countries and labour importing countries. For the latter, it has relived tension on the labour market, enabled upward movement of indigenous workers and provided these countries with

flexible supply of manpower. For the former, it has provided a relief of unemployment, foreign currency and the acquisition of industrial skills.

This perception of the international labour migration was fundamentally changed by the end of 1970. Prolonged residence by migrant workers and their families in the receiving States with their social expenses and the economic recession of the late 70th of this century compelled the labour receiving countries to evaluate the impact of the existence of millions of foreign workers with different social, ethnic, cultural, and national backgrounds not only in economic terms but also in a non-economic perspective. The existence of millions of foreign workers has raised the questions of national identity and cultural homogeneity of labour receiving States:

> The twin issues of immigration and integration are fundamental to any nation's political character because they are central to so many of its essential reasons for being: maintaining a national identity, facilitating growth, cultivating political consciousness and participation, sustaining the fabric of society.[29]

Questions have been raised in relation to the economic benefits of international labour migration for labour exporting countries. The *de facto* settlement of migrant workers with their families in the receiving States reduced their remittances to their countries of origin and deprived those countries of skilled labour forces. International labour migration cannot be viewed as a mechanism that benefits the countries with a surplus of labour force and countries which suffer from labour shortages, but rather as a process that enhances the economic inequality between the immigration and emigration countries. Bohning explains this change in the understanding of the international labour migration:

> The normative bias in favour of immigration countries and their calculated economic approach went unquestioned for many years. Consequently, the

preferential satisfaction of the needs of the immigration countries-richer or more developed as they were than the emigration countries- reinforced the inequality predating migration. The reasons for this are several. First, the demand-determined hiring of migrants produces-besides income accruing to land, capital and labour-additional goods or services for private and public consumption, all of which are and by large internalised in the immigration country. Nothing comparable happens in the migrant sending countries. Their possible gains in real product and income cannot match those of migrant receiving states. Second, the candidates for migrants are selected so as to match requirements and minimise non-productive aspects, which does not stop short of sending migrants home when they are no longer needed. Furthermore, the labour-demand approach proceeds from the assumption that labour adjust internationally to historically derived economic differentials, that is, it reacts to the symptoms of international imbalances in the distribution of income and employment opportunities rather than to their causes.[30]

Chapter Three focuses on the legal systems of the receiving States concerning migrant workers, particularly regarding their admission, residence, expulsion, work and residence permits, family reunification and family rights, as well as social security rights.

Three major points will be emphasized in this chapter: firstly, the impact of the former economic and non-economic considerations on the formulation and the development of the immigration laws; secondly, the characters of these legal rules, and thirdly, the effects of non-legal considerations on courts' decisions involving immigration cases.

The objective of Chapter Three is to show the importance of the legal rules in improving the economic and social status of migrant workers and to advance the concept of legal security to migrant workers and members of their families.

The analysis of the legal systems of the recipient States establishes that these laws have been closely linked to the national requirements of labour markets and to the perception that the existence of migrant workers is a temporary phenomenon. Migrant workers have been admitted and issued with temporary work and residence permits to perform specific jobs for a limited period of time. Their work and residence permits can be renewed according to the needs of the labour market. As a result of this perception, the immigration laws of the receiving States have oscillated between a permissive liberal implementation of immigration laws to being restrictive in accordance with the needs of the labour market regardless of the impact of the laws on migrant labour. This swing in the implementation of immigration laws asserts the absence of any coherent immigration policy:

> Immigration policy was therefore formulated, as a function of economic imperatives, to the detriment of demographic and socio-cultural considerations. The major preoccupation has therefore been the provision of an adequate, flexible supply of man power. Immigration was, first and foremost, economic in nature and intended (at least initially) to be temporary. Composed at the beginning of largely young, single men or married men unaccompanied by their families (and therefore characterised by a high rate of turnover), this immigrant labour force was neither conceived of nor desired as settlement immigration.[31]

Despite the *de facto* settlement of millions of migrant workers and members of their families, the law makers of the receiving States still view their existence as a temporary one. This attitude exasperates the legal insecurity of migrant workers and their families.

As this study shows, the immigration laws of the receiving States are characterized by the vagueness of their wording, by the considerable discretionary powers of the bodies enforcing these laws, and by the multiplication of legal texts:

circulars, regulations and interpretations. Some of these circulars and regulations are not published and not even known to lawyers. These laws regulate many issues vital to migrant workers such as residence, expulsion, renewing work permits and family reunification in broad equivocal terms. The result of these features of national immigration laws is that migrant workers are at the mercy of bureaucrats executing immigration laws:

> Consequently, it left foreign migrants at the bureaucratic mercy of those sitting in state ministries and preparing such specific circulars, or those in the alien bureaus who are using their discretion on a case by case basis.[32]

The insecure legal status of migrant workers and members of their families is further aggravated by the fact that courts' decisions in immigration cases are liable to be influenced by external non-legal factors such as judges' attitudes to immigration, public opinion, economic and political factors and the notion of State interest.[33] To cite an example, a German court's justification to deny further residence to a foreign worker on the ground that a foreign worker's sojourn of more than five years was a sufficient ground to deny further residency authorization as each longer residency authorization would tend towards settlement which ordinarily runs counter to State interests because the Federal Republic of Germany is not an immigration country.[34]

The focus in Chapter Four is on the recruitment treaties which were concluded between labour importing States and labour exporting States, in the post Second World War period. Although these treaties were unilaterally terminated by labour receiving States during the period 1970-1972, their study is important because it reveals first, the unbalanced structure of these treaties, and secondly, the rights to be accorded to labourers who were recruited under the terms of these treaties.

According to the provisions of these treaties, the labour importing States

control the number of workers, the nature and the duration of their jobs, family reunification, their residence employment and repatriation. The sending countries had little influence on the selection of their emigrants. The chapter is divided into two main sections. The first section examines the recruitment procedure and the provisions of the international recruitment treaties regarding equality of treatment, employment, residence and repatriation of migrant workers, family reunification and family rights, transfer of wages and social security rights.

The second section compares the provisions of these treaties with the provisions of the investment treaties concluded between the labour sending States and labour importing States.

Chapter Five attempts to explore first, the relevance of human rights conventions to migrant workers, and secondly, the impact of human rights conventions -with particular reference to the European Convention on Human Rights- on the immigration laws of the receiving States.

Various provisions of human rights instruments deal with issues which are of paramount importance to migrant workers, such as the right to protection from discrimination,[35] the right of everyone to choose freely his employment and the right of everyone to just and favourable conditions of work,[36] the prohibition of unlawful interference in family life,[37] the right of everyone who is lawfully present in a State's territory to liberty of movement, to choose freely his/her residence and that the expulsion of an alien is to be made according to the law of the expelling State.[38] In this connection Goodwin-Gill writes that:

> Notwithstanding human rights linkages, migrants and refugees are often on the periphery of effective international protection. State sovereignty and self-regarding notions of community are used to deny or dilute substantive and procedural guarantees...Migration and refugees will go on, and the developed world, in particular, must address the consequences-legal,

> humanitarian, socioeconomic and cultural. Racism and institutionalized denials of basic rights daily challenge the common interests.[39]

The implementation of the human rights provisions in immigration policies and laws raises very complicated legal issues. The rules of international law and States' practice consider the admission, residence, exclusion and the economic activities of non-nationals as issues which fall within their exclusive domestic jurisdiction. The concept of sovereignty categorically establishes that it is within the discretion of the sovereign to decide on these issues. Goodwin-Gill further adds:

> However, except in those areas in which treaties or peremptory norms operate, such as that of non-discrimination, it is not easy to bring matters of entry and exclusion within the bounds of international law. The preponderant view remains that these matters are essentially within the reserved domain of domestic jurisdiction.[40]

Yet the jurisprudence of the European Commission and the European Court on Human Rights, in many applications and decisions, has established that the States Parties to the European Convention on Human Rights are obliged to observe the principles of the Convention in their immigration laws:

> Under general international law a State has the right, in virtue of its sovereignty, to control the entry and exit of foreigners into and out of its territory; and whereas it is true that a right to or freedom to enter the territory of States, Member of the Council of Europe, is not, as such included among the rights and freedoms guaranteed in Section I of the Convention; whereas, however, a State which signs and ratifies the European Convention on Human Rights and Fundamental Freedoms must be understood as agreeing to restrict the free exercise of its rights under general international law, including its right to control the entry and exit of foreigners, to the extent and within the limits of the obligations which it

has accepted under the Convention.[41]

The absence of an authoritative definition regarding key concepts of human rights laws such as the concepts of discrimination, equality and "unlawful interference" in family and family life has prompted different views and interpretations.

The lack of agreement as to the nature of States' obligations regarding the rights enumerated in these conventions, particularly regarding social and economic rights, reflects the traditional division between two categories of rights: civil and political rights, and economic, social and cultural rights.

Chapter Six studies the provisions of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which was adopted by the General Assembly of the United Nations on 18 December 1990, and the International Labour Organisation's Conventions: Convention No. 97 Migration for Employment (Revised), 1949, and Convention No. 143 concerning Migrant Workers (Supplementary Provisions), 1975.

Various reasons are advanced to vindicate the adoption of the UN Convention; the inadequacy of the existing human rights instruments in protecting migrant workers, the need to make an explicit reference to the human rights of migrant workers and their families, and the need to protect migrant workers and their families who are undocumented or in an illegal situation.

The adoption of the UN Convention recognizes the growing importance of the issue of international labour migration and the need for international framework to protect migrant workers. Yet, as this study shows, the adoption of the UN Convention will create more legal problems. Firstly, many provisions of the UN Convention are modelled or copied from the provisions of other human rights instruments, particularly the International Covenant on Civil and Political Rights and

the International Labour Organisation Conventions. This is bound to produce a different or even conflicting interpretations of the same legal texts. Secondly, the UN Convention hardly introduces or creates new rights for migrant workers and members of their families. It is true that the UN Convention expands the category of migrant workers who are protected by the Convention, as self-employed workers, and confers limited rights upon migrant workers and their families' members, who are in an undocumented situation, and regulates the substantive grounds for expulsion of regular migrant workers. But such new rights can hardly justify the adoption of a new international legal instrument. It would have been a more effective and rational approach to revise the existing International Labour Conventions. Thirdly, some provisions of the UN Convention provide lesser rights to migrant workers than the International Labour Organisation's Conventions, such as the social security rights.

I shall argue in the conclusion (Chapter Seven) that the issue of offering adequate protection to migrant workers requires redefining fundamental legal concepts of international law particularly the concepts of sovereignty, citizenship. I shall emphasize the need for a coherent framework of legal rules to regulate international migration with a particular reference to the UN Convention on the Protection of Migrant Workers.

The fundamental changes in the international relations especially with regard to the growth of economic and political interdependence, and the development of human rights laws undermine the States' claim that they enjoy an absolute power in deciding on their immigration policies without regard to the implications of these policies on other States and on the migrant workers who are already present in their territories.

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# CHAPTER TWO

## The Social-Economic Aspects of the International Labour Immigration into Western Europe

### Introduction

This chapter analyses the economic and social status of migrant workers in the receiving States. The focus is on the post Second World War migratory flow to France, the Federal Republic of Germany, the Netherlands, Belgium and Switzerland. The receiving States are industrialized and class structured societies. France, the Federal Republic of Germany, Belgium and the Netherlands were ravaged by the war which had an adverse and profound impact on their economic and demographic structures. Switzerland is the only country whose economic infrastructure remained intact by the Second World War and is not an EEC member. These countries are also different in their constitutional forms: the FRG and Switzerland are federal States, France and Netherlands are unitary States, Belgium has aspects of these two systems.

These countries initiated liberal immigration policies to facilitate and encourage the temporary admission of economically active foreigners into their territories. All these countries adhered to the "rotation principle": foreign workers were admitted on a temporary basis and were expected to return home when their employment contracts expire. The exception to this rule is France which, due to the demographic imbalance of its population structure, encouraged the permanent

settlement of migrants. However, this policy was short-lived. The other common factor between these labour importing States is that they concluded agreements to recruit foreign labour.

By migrant workers I refer to foreign nationals who have crossed the national boundaries into the receiving States to take up employment. Excluded from this definition are foreign nationals with high professional skills, and also the nationals of State members of the EEC. The freedom of movement of migrant workers who are EEC nationals is ensured by Regulation no. 1612/68, 15 October 1968, which came into force on 8 November 1968. The inter-European migration, in quantitative terms, is a modest phenomenon. Migrant workers who are nationals of the EEC enjoy a privileged legal position in contrast to non-EEC workers. They are not subject to various restrictions regarding work permits, choice of employment, residence permits, social security benefits and family reunion. This privileged status of the EEC workers justifies concentrating this study on non-EEC migrant workers especially on foreign nationals who are considered socially and culturally different.[1]

An economic consensus on the benefits of such migration for both labour importing and labour exporting countries, was developed after the Second World War. The migration of labour was projected as a simple economic process:

> In the post war climate of European reconstruction there was a certain measure of agreement between ethical and legal principles and the practical interests of international community, that manpower shortages which were holding up the repairs to the productive apparatus should be alleviated by improving the use of human resources and transferring these from "surplus" countries to "deficit" countries.[2]

The economic and social structures of the receiving States which militated against migrant workers during the early years of migration have fundamentally changed. Non-economic considerations are largely responsible for the decisions of

the governments of the receiving States to ban further recruitment of foreign labour. At the same time, the policies of the receiving States have contributed to the formation of under-class ethnic minorities, who are considered to be below the lowest classes of the receiving States.

**The Economic Function of Migrant Labour**

The characteristics of the migratory flow which occurred during the second half of the twentieth century are fundamentally different from another migratory phenomenon. This was migration towards Western Europe motivated by economic incentives. Unemployed and unskilled workers from former colonies, in particular, the Mediterranean and North Africa, crossed national borders towards Europe seeking employment. Foreign workers viewed their migration as temporary: their target was to stay as long as necessary to save enough money and return home. Hence foreign workers did not plan for permanent settlement which is the ultimate purpose of migrants in the classical or traditional migration. It was an economic migration for a transitory period. Western European countries, due to their economic revival and demographic structures after 1945, experienced labour shortages which could hamper their rapid economic growth.[3]

Domestic labour supply is determined by three main factors[4]:

A- The natural rate of increase: the working population of the FRG, that is, persons aged between 15-64 decreased by 6.6 per cent during 1962-72. The FRG and France suffered gaps in their male working population. The problem was aggravated by the serious losses of an economically active population and the low fertility during the years of the war.[5]

B- The participation age: the improvement of public education has raised the

compulsory school-leaving age. As a result it reduced and postponed the participation of youth in the rapid industrialization of the European countries.[6]

C- The FRG, Netherlands and Switzerland experienced a substantial outward migration of indigenous workers after the Second World War.[7]

The above three factors determine not only the national labour supply but also the elasticity of the labour supply. The elasticity and mobility of the national labour force was further reduced by the housing shortages and by the type of enterprise, like in France where the family enterprise model reduced the mobility of labour.[8]

The production model in the post Second World War intensified the need for additional unskilled labour. It was dependent on intensive labour: assembly line, continuous shift working hours and the splitting of the production process into simple operations.

The aggregation of these factors resulted in acute labour shortages in certain industrial sectors and prompted the governments to adopt special policies to overcome labour shortages. These policies were the relaxation of immigration laws and the conclusion of international recruitment treaties.

International labour migration was considered economically beneficial for the exporting and the importing States. For the sending States, it would allow them to export a certain amount of unemployment, the remittance by migrants would serve as a base of earning hard currencies to finance capital importation and the acquisition of industrial skills. For the recipient States, migrant workers would provide flexible labour force to fill specific jobs, reduce upward pressure on wages and increase profits, and since the presence of migrant labourer is a temporary one they did not entail extra social costs. At this phase of international labour migratory process, the immigration of workers was viewed as a balancing mechanism: labour shifted from

areas where it was in excess of demand to those where it was needed.

The migratory process is explained as a result of "pull" and "push" factors. The push factors "which caused workers to leave their countries are: unemployment, poverty and underdevelopment." The "pull factors are the combination of economic, demographic and social development in Western Europe during the postwar period."[9]

These suppositions are explicitly stated in an OECD study:

> 1- By allowing manpower to move from countries where it is in surplus to countries where it is in deficit, migration entails general benefits for both groups of countries.
>
> 2- At the individual level, migration enables a migrant worker to obtain a job at a fair wage and the possibility to improve his work skills and chance of social promotion especially if he returns to his own country.
>
> 3- Compared with these advantages, the collective and personal disadvantages are regarded as of minor importance; in any event, activities in the field of adaptation, training, housing, and more broadly, social welfare should help to reduce if not eliminate them all together.
>
> 4- Freedom to emigrate should therefore be recognised and normalized as a natural right and the formalities for entering and residing in the country of immigration should be simplified and relaxed.
>
> 5- With regard to employment, the workers should be free to accept offers from abroad provided this freedom does not jeopardise the interest of the (national or foreign) workers already on the immigration country's own market.[10]

The main character of this model of international labour migration is its rotating nature. Foreign workers are contracted for a fixed period to perform specific jobs and they are expected to return home after the expiry of their contracts. Those who return home are to be replaced by other workers. The principle aim of the rotation is to keep the social costs to a minimum and to prevent workers from permanent settlement:

> The rotation implies that foreign workers should not under any circumstances be permitted to remain in the host country beyond a limited period of time and that when this period has expired both the sending and the receiving countries should expect them to return from where they came. In this way, it is argued, no misconception will occur over the point that foreign workers are "guests" in the host country and should harbor no expectation beyond this.[11]

These assumptions of the temporary nature of the presence of migrant workers and their economic functions are best expressed in Harabach's model:

> The presence of foreign workers in the host countries is only of a temporary phenomenon. They are only there to work and there is no need for closer contact with the indigenous population, and no need to facilitate the reunification of these workers with their families.[12]

The foregoing considerations have constituted the economic "infrastructure" upon which the national laws regarding the employment of foreign workers are based.

It is an established phenomenon that an industrial process on a national scale generates two different types of jobs. The first category includes jobs which require occupational training and industrial skills. The second category is the "secondary sectors' jobs" which do not require industrial skills and are characterized with low pay, low social status and employment instability. It is logical that the nationals of an employment country will be given priority in re-training.[13]

During this period of economic expansion and full employment, national workers leave the socially undesirable jobs and move towards jobs which are socially highly rated and more secure. In contrast to national workers, migrant workers who moved into Western Europe were not interested in long term careers and they showed

no reluctance to accept secondary sector jobs. This economic setting explains why labour shortages first occur on the lowest rung of the employment ladder and explains the essential role of migrant workers who took up jobs which were shunned by indigenous workers. In Switzerland three quarters of male foreign workers were concentrated in five occupational groups: building (33.7%), engineering (23.5%), hotels and catering (18.1%), wood and cork (4.4%), and (3.5%) in agriculture.[14] In the FRG, 1973, more than 90 per cent of guestworkers were concentrated in three occupations: manufacturing, construction and services. In 1975 the total number in these three areas was 84.4% which means that the movement of guestworkers into other economic and employment sectors was very low.[15]

This occupational distribution of migrant workers is not surprising. Doctors in German recruitment centers were instructed to test the functioning of muscles for lifting and transporting weights.[16] In France 90% of unskilled jobs which were created between 1962-1968 were taken up by foreign workers.[17] In Belgium, the recruitment of migrant workers essentially aimed to compensate for the steady exodus of Belgian workers from mines.[18] The employment of foreign workers in the Netherlands developed in a similar pattern: migrant workers were employed in the coal mines of the south and in the textile industry, both sectors were expected to close in the near future. The industrial structure of the Netherlands economy is dependent on light industry. This created the need for foreign workers to "do the heavy and dirty work that the original population shied away from."[19]

The overall emerging picture is that the occupational distributions of foreign workers were concentrated in physical jobs which require little intellectual effort and a low level of training. The percentage of foreign workers increased in industrial sectors which require long working hours, repetitive jobs and decreased in sectors which require shorter working hours. These industrial sectors are characterized by

their sensitivity to economic cycles. Economic data indicates that car manufacturing auto and building industries are the worst affected by economic recession.[20] This explains the high percentage of unemployment among migrant workers during the time of recession. Migrant workers occupy not only the socially "outcast" jobs but also jobs which are highly vulnerable to economic fluctuation.

A question which might arise in this context is does a wage increase in sectors induce nationals to take up employment in these branches? This option is neither politically nor economically viable. In economic terms a wage increase in certain sectors will spark wages increase in other sectors and as a result will decrease profits and increase inflation. Politically, as Bohning explains, the receiving States are capitalist societies. This means that the reward structure assigns the highest pecuniary to the social elite and the lowest pecuniary and social rewards to unskilled manual workers, regardless of the true social or historical value of the work performed. A wide scale rearrangement of the social structure of jobs is required to make it acceptable to pay a dustman the same as an accountant.[21] A study by the OECD concludes that:

> It would be idealistic to pretend that the domestic labour force would occupy the jobs left vacant by restrictions on the recruitment of foreign workers without there being any change in the scale of social values at least as long as such jobs display the same features as they do when they are occupied by foreign workers.[22]

Indeed, the French government's attempt to persuade national workers to take up jobs occupied by migrant workers was met with very limited success.[23]

The restrictions on the employment of foreign workers may result in the reduction of the number of jobs which are available to nationals. The final output of a production process entails the employment of a certain number of workers during the

different stages of a production process. The output is liable to fall if it is impossible to recruit the required number of workers. The fall of production in one sector leads to a similar reduction in other sectors since the production in one cannot be completely isolated from other sectors. As a result, the employment in this sector is bound to be reduced.[24]

The employment of migrant workers helps to keep jobs for nationals and create other jobs like transportation.[25] However, this "side effect" of the employment of foreign workers is conditioned by the fact that the migrant workers are non-competing groups. The transfer in the nature and composition of migration in the late 60s negated this side-effect.

The employment of foreign workers allowes an increase in the productive capacity of the receiving States without inflationary pressure, thus keeping the wages down and enhancing the competitiveness of the receiving countries. When labour shortages occur and no foreign recruitment is permitted, the only alternative for a local employer is to increase or offer higher wages to attract labour. The wage increase will not be confined to the newly recruited workers, but it will be extended to all workers. This in turn, will lead to a competition between different employers in order to attract the needed labour. Even if this competitive process does not happen, employers cannot resist their workers' claim to higher wages in the case of labour shortage. The increase in wages leads to a reduction of the profits of the invested capital, because a considerable part of the profits is channelled to meet wage increases.[26] A report by the German Institute For Economic Research concludes that:

> Although opposition to the continual inflow of foreign workers is to be found here and there it is necessary to realize that with a labour market cut off from other countries the pressure of wages in the FRG would become considerably stronger due to the increased competition by employers for the domestic labour potential, this increased pressure of costs could hardly

> fail to affect the competitiveness of the West German enterprise both in the export market and at home.[27]

Foreign workers, by taking up employment in sectors classified as low paid sectors, actually subsidize many activities that benefit nationals. Working for low wages means that a large proportion of national income could be directed to meet demands other than paying wages bills. A study in France asserts that migrant workers with five or six years service in the same firm are paid the lowest wages.[28]

The migration of an economically active male with low social costs subsidizes and frees a substantial part of the national income of the receiving States which otherwise would have to be channelled towards investment in human capital.

It is estimated that the costs of raising a child to a working age in France is 150,000 francs. The availability of "ready made labour" through labour importation subsidizes the French economy 22.5 billion francs per year. The total sum over 4 years amounted to three times the amount France gave in aid to the third world.[29] This subsidy rises in parallel with the rise of the living standard:

> It has been estimated that the up-bringing, the price of survival till the age of twenty of a migrant worker has cost the national economy of his own country $2,000 with each migrant who arrives, an underdeveloped economy is subsidizing a developed one to that amount. Yet the saving for the industrialized country is even greater. Given its higher standard of living the cost of producing an eighteen year old worker is between $ 8,000 to $16,000.[30]

A substantial part of migrant workers earnings is spent in the receiving countries. A survey in France showes that 65.2 per cent of migrant workers' wages is spent on the purchase of consumer goods. The remittance amounted to 21.2 per cent of their wages and 13.6 per cent of their wages is in the banks of the receiving

countries.[31]

## The Social Status of Migrant Labour

Keeping the social expenditure on migrant workers to a minimum is a fundamental part of the rotation policy. The housing situation of migrant workers is a good example. The type of housing which is provided by an employer (Volkswagen) in Germany allocated a twelve foot by six room to three men, which is equivelant to 2.23 $m^2$.[32] The German law stipulates that the space for each adult is 12 square meters.[33] This type of housing sparked the famous 'suit cases' strike. The protest against the housing situation of migrant workers exploded in 1974. The violence is described by German newspapers as a "brutal terror in Frankfurt, like a civil war."[34] Data about housing conditions of the migrant workers in the Ruhr region confirms that:

> Migrant workers were alloted the oldest housing: 84 per cent had no baths in their flats, 68 per cent had no lavatory of their own and 10 per cent did not even have one in the house, 8 per cent lived in lofts, 6 per cent in cellars, 4 per cent in barracks and 2 per cent in sheds. 16 per cent of the families lived in one room and as many as 39 per cent lived in two rooms. This while the Germans in the area averaged 0.79 person per room. Despite this accumulation of deprivation, the immigrant population of the Ruhr region was paying on the average one third more rent than the nationals.[35]

In France it is estimated that one million immigrants were living in shanty towns; "shanty huts made of carboard and old car doors."[36] A United Nations report states that:

> Men were sleeping in huts on folding beds smaller than themselves and no room to stand up. From their pay of 900 to 1,000 francs per month 120 francs is deduced when they are 8 men to a room and 190 francs when they are 2 men to a room.[37]

The regulations which govern access to government housing in France place migrant workers in a disadvantaged position. As a rule, a long period of residence is required before the family of a migrant worker can register on the waiting list. Due to their mobility migrant workers cannot fulfil this condition -minimum residence period- even if they have been resideing in France for a long period. In order to get on the waiting list an applicant must meet two requirements: to have a secure job and adequate income.[38] Other conditions explicitly discriminate against migrants. Castles mentions that a local council will not provide a grant to a housing society if there are any Algerians to be housed. Other councils set a limit on the number of Algerians: their proportion is to be less than 15 per cent maximum.[39] The protests against the housing situation of migrant workers in France erupted in 1960 when the French government attempted to remove the shanty town"bidonvilles" without offering adequate replacement.[40] In 1974 there was a famous strike, the sonacotra strike, which involved 20,000 foreign workers.[41]

A study by the Lausanne Centre de Contact entre Suisses et Etrangers establishes that 90 per cent of migrants are housed in places which do not meet the low canton requirements for space and facilities; one shower and one toilet for each ten workers.[42] The problem of migrant workers' housing is worsened by the fact that the federal government of Switzerland does not directly participate in providing for the social needs of migrant workers.

The workers' low wages, housing shortages and their concentration in industrial sites and run down areas of inner cities which lack basic amenities bred the

resentment of the natives, and subsequently led to social segregation and to the formation of "ghettos". The laws of the receiving countries enhance this social-economic setting. This point will be further illustrated when we study national laws regarding the employment of foreign workers.

The continuance of the profitability of the migratory flow of labour is conditioned on the sustenance and the retaining of the economic functions of migrant workers as flexible labour units, to perform specific jobs and without social expenditure.[43]

These assumptions which constitute the rationale of the European immigration policies, enabled the receiving States to gain the economic advantages of migrant labour and employers to have greater control over foreign labour:

> It took a year for foreign workers to acquire basic knowledge of the language and of the work conditions in other parts of West Germany. During their first year, foreign workers were extremely obedient and hard-working. They even refrained from membership in trade unions, and in all level labour activity. At the end of their first contract year, however, many bargained with the firm for a wage raise and become aware of their rights to demand such a raise. Needless to say, these were undesirable demands from the viewpoint of the firm. Less problem-prone labour, fresh from foreign lands was preferred.[44]

**From Temporary Migrant Workers to *De Facto* Permanent Settlers**

The formation of ethnic communities started with family reunification which was dictated by economic considerations. The receiving States restricted the admission of migrant workers' families in the period of low economic growth. These restrictions

were related to the age, the narrow definition of family and their access to the employment market. Migrant workers believed that if their families joined them as workers rather than dependents this would speed their return home. Employers, faced with increased competition for labour in the international labour market, pressurised their governments to adopt policies which would provide them with stable labour forces, and to avoid the costly process of a new recruitment of labour. For the governments of the importing States the volume of work was less onerous if constant rotation did not occur.[45]

Earlier migrant workers were classified as non-competing groups. After many years of residence and with migrant worker's children attending schools in the receiving countries, the non-competing character of migrant workers transferred into competing groups. As a result the economic profits of the international migratory process was reduced by other factors. These factors were:

1- The extended stay of migrant workers and their families produced pressure on social services, education and housing. A part of firms profits and governments' budgets had to be channelled to meet the these needs. This meant a reduction in the profits of the invested capitals and expansion in government expenditure which might lead to inflationary pressure. As a result, the international competitiveness of a receiving State would be affected.

2- The increasingly diminished flexibility and mobility which migrant workers provided for the national labour markets. The mobility of migrant workers enabled the receiving countries to export their unemployment in the period of slow economic activities.[46]

3- The mobility of migrant workers declined when their dependents were brought in. This motivated migrant workers to consider, when accepting offers of employment, the long term interests of their families. Castles observes that:

> The mobility and flexibility of migrant labour was declining as non-working dependents were brought in. As migrants became settlers, demand for expenditure on housing, schools, medical and social facility increased. Such costs were rarely met by employers, but where the state did make the social capital available, the effect was inevitably to divert investment from industrial to social purposes. This, in turn was expected to stimulate inflationary pressures and harm international competitiveness.[47]

The financing of these social services for migrant workers gave rise to differences between various groups; tax payers, enterprises and governments.

4- Economists began to be incredulous about the advantages of the availability of cheap labour. They raised the question of the economic risk of the dependency on migrant labour. Moreover, they argued that the dependency on foreign cheap labour directed the industrial process towards labour intensive production rather than capital intensive.[48] Politicians and trade unionists questioned the economic benefits and the economic function of migrant labour.[49]

The change in the nature of the migrant labour from temporary workers to permanent settlers was synchronized with both the establishment of the free movement of labour in the EEC, and with the change of the perception of the rule and the function of migrant labour in the receiving countries. The high concentration of migrant labour and their families in the industrial sites and inner cities gave rise to social tension between the population of the receiving States and non-national minorities with different cultural habits and languages.

The governments of the receiving States started to be apprehensive about the political, demographic and social impact of the millions of non-national minorities, underprivileged and residing indefinitely in the importing countries. In Switzerland, in 1970, 13 per cent of the school children were foreign; in 1975 that figure became

25 per cent, and in 1980 it reached 30 per cent.[50] It is worth quoting the following:

> Last year there were 426 foreign births for every 1,000 Swiss births. In the most foreign dominated (übefremdeten) towns even more foreign babies were born. (In Winterthur for example, in the first six months of 1971, there were 580 foreign babies for every 1,000 Swiss babies.) Most of these foreign children born in our country stay in Switzerland... Since the creation, the cuckoo has laid its eggs in other birds' nests. Their foster parents care for the baby birds together with their own offspring. The young birds grow and are fed together until there is no more space in the nest. Then the young cuckoo manages to throw the other young birds out of the nest. Are we in Switzerland, on our way to becoming a cuckoo's nest? Looking at the growing number of foreign children and the simultaneously declining number of Swiss children, we find that it seems to be the case.[51]

In Frankfurt one in every two births is now from a foreign worker's family.[52]

The governments of the importing States realized that the presence of an estimated 15 million migrant workers in their societies cannot be viewed any more in economic terms but in demographic and political terms.[53]

The cultural and ethnic heterogenesis of Switzerland has produced anti-immigration attitudes: 74 per cent of the Swiss population is German-speaking, 20 per cent is French-speaking and 1 per cent is Romansh-speaking, 4 per cent is Italian-speaking.[54] A continuing flow of migrants into small and rich Switzerland will agitate "the delicate balance between the different linguistics and religious groups", "disturb the political structure", and "the cultural pluralism."[55] of the country:

> Unless the foreign worker population was immediately reduced, Switzerland was in mortal danger of massive socioeconomic and political disruption at the hands of foreign worker radicals and communists.[56]

A similar situation exists in Belgium. Most migrant workers finding jobs in Brussels or Wallonia become French or Dutch-speaking. The continual migratory flow will upset the linguistic compromise between the Dutch, Flemish and French.[57]

The term migrants in France refers to foreigners even if they have acquired the French nationality. The French believe that their superior social and political values will speed the assimilation of foreigners into the French way of life, but the diverse structure of the migratory flow in France resisted the assimilation process[58]. This, in return, has increased the hostility of the French populace towards migrants.[59]

The *de facto* permanent settlement of culturally different workers with inferior economic-social status, has brought into focus the political dimension of their presence. The theory of foreign workers' "political quiescence" is proven to be misleading. Miller extrapolates that:

> One of the most remarkable developments in the Western European politics over the past decade has been the ground swell of protests by foreign workers against racism and socioeconomic discrimination: their involvement in work stoppages, rent and hunger strikes, riots, factory and housing occupations, and other forms of what many in Western Europe now simply refer to as "foreign workers struggles".[60]

The receiving States, with the increasingly growing issue of national identity, now view migrant workers from an entirely different perspective. Algerian workers in France are not seen as factors of production: they constitute a "veritable fifth column threat to national security. Italian communists working in Switzerland similarly are seen as a potential national security threat".[61]

The aggregation of the above factors led the governments of the importing countries to impose bans on further recruitment of foreign workers and to adopt restrictive immigration policies. At a later stage, the labour receiving States initiated

repatriation policies.[62] The governments of the receiving States claim that their decisions to ban further immigration of foreign workers are based on economic considerations. However, it is evident that non-economic considerations are largely responsible for the adoption of restrictive immigration policies. The growing resentment against "foreignization", the preservation of national identity and the concern about political stability and cultural homogeneity in the receiving societies have , in addition to economic reasons, pushed the governments of the receiving States to pursue restrictive immigration policies; the economic crisis was a "convenient pretext for doing so"[63]:

> In all 'host' countries, hostility to the immigrants has been exacerbated by the worsening of the economic situation over the past two or three years. At the same time, officials in a number of countries, including Holland and West Germany, told me that the immigration stop was precipitated by the oil crisis rather than caused by it. Growing domestic hostility to immigrants would have made a slow-down in immigration necessary even without an economic crisis.[64]

## Concluding Remarks

To sum up this review of the economic function and the social status of migrant workers in the receiving States some points need to be emphasized. The international labour migration has gone through three major phases.

First, it was viewed in economic terms: balancing mechanism to transfer surplus labour from the exporting countries to deficit counties. It was assumed that this process is transitory and beneficial for both labour exporting counties and the importing countries. For the recipient States the employment of foreign workers was

instrumental in overcoming labour shortages, and above all:

A- It provided elasticity in the national labour market.

B- It activated upward movement of national labour towards socially more desirable and better paid jobs leading in consequence to the re-orientation of native workers.

C- It preserved the social structures of jobs.

For the labour exporting States, it was assumed that migration would alleviate unemployment problems, provide these countries with hard currencies, and workers would acquire industrial skills.

The second phase is the erosion of the rotation principle which started the process of forming non-national ethnic minorities in Western Europe. Economists began to question the economic benefits of migratory labour. The labour exporting States found out that the migration of workers neither alleviated the unemployment problem nor they made use of the industrial skills acquired by their nationals. The foreign currency earnings declined as migrant workers were joined by their families. At the same time, the labour exporting countries did not encourage the return of their nationals which is bound to aggravate the economic and the social problems.

The third stage is the voluntary repatriation policies. The receiving States have initiated programmes to induce migrant workers to return home by offering cash for migrant workers who in return give up their residence or any claim related to their employment. The success of these programmes has proven to be very limited.

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# CHAPTER THREE

## The National Laws of the Labour Importing States

### Introduction

This chapter analyses the national laws of the receiving States. It focuses on the issues of residence, the work permit systems, family reunification and the social security systems of the receiving States. It attempts to lay stress on the fundamental importance of legal norms regarding the migratory process. The national legal systems have sustained the inferior socio-economic status of migrant workers.

The legal instruments which govern the employment of foreign workers reflect a narrow economic approach. The laws of the receiving States allow the entry of migrant workers in order to perform specific jobs in certain sectors for a limited period of time, and, accordingly, they are issued with temporary work and residence permits.

Some initial observations must be made before examining in detail the laws of the receiving countries:

A- These laws are based on national, and narrow economic considerations.

B- They are constructed to empower the concerned executing bodies with extensive discretionary power. The executing bodies can strictly or liberally implement the existing rules according to the needs of the national labour markets and their fluctuations.

C- The influence of the perceived temporariness and the economic character of

labour immigration has not only shaped the legal texts governing the immigration laws in the receiving societies, but also played a part in courts' decisions. A Bavarian court refused a father application to join his migrant worker daughter on the ground that:

> The applicant has no real function to perform in the life of his daughter. Because of age and infirmity he is unable to work actively for the welfare of his daughter in Germany. Instead by his own admission he needs her care which he could only receive in her time off work. The daughter's labour would therefore be in use even during her free time. This is not provided for in the German-Spanish labour agreement.[1]

D- A major defect of the laws of the receiving States is that these laws are based on the assumption that the presence of foreign labour is a temporary one. The erosion of the rotation policy has transformed the status of migrant workers as temporary residents into permanent settlers and activated the process of the formation of the ethnic minorities in the receiving countries. These fundamental changes are not recognised by the laws of the receiving States.

The chapter will attempt to advance the concept of the legal vulnerability of migrant workers, as a class, in the receiving States.

The situation of migrant workers in the receiving States raises questions as to the effectiveness of the fundamental legal norms which regulate the issue of migrant labour.

**The Objectives of the National Legal Systems**

The study of the laws of the receiving States is of vital importance in understanding the legal status of migrant workers in the receiving States, and in explaining the precarious legal position of migrant workers in the importing States. The objectives

of the national legal systems regarding the employment of migrant workers are:

A- The protection of the national labour force.

B- The regulation of the employment, residence of migrant workers and their families, and their entitlement to social security benefits.

C- The demarcation of their civil and political rights.

The Ordinance of 2 November 1945 is the basic legal text which regulates immigration into France. The recruitment of foreign workers is subject to this condition that neither a national nor an EEC worker is available for a job being advertized. A French employer, for instance, must wait for five weeks after the advertisement of a job before he can apply for the recruitment of foreign workers.[2]

The employment of foreign workers in Belgium is regulated by the Royal Decree no. 285, 31 March 1936, which is reaffirmed by the Royal Decree no. 34, 20 July 1967.[3] The issuance of a work permit is a precondition for recruiting any foreign worker. The work permit for a foreign worker can be issued only in the absence of either a national or an EEC worker for a job. A sixty day period should be given to the Ministry of Labour and Employment to find a national or an EEC worker before authorizing an employer to recruit a foreign worker.

The German law (The Employment and Promotion Law), stipulates that the admission of foreign workers is dependent on the situation and the outlook of the labour market. The law does not provide for a certain period of time to elapse before issuing an authorization to employ a foreign worker.[4]

The Netherlands law, 9 November 1978, does not depart from the above mentioned rules. The employment of a foreign worker is permitted only when "no reasonable alternative is available". The decision to authorize an application for recruiting a foreign worker must be taken within 30 days of placing such an

application.[5]

The Federal Law of Abode and Settlement of Foreigners in Switzerland, states that a decision to admit migrants must be considered in the light of the nation's cultural and economic interests, the situation of the labour market and the degree of over-foreignisation.[6]

The protection of the national labour force is well safeguarded through these legal provisions. The fundamental and well established legal rule which has been emphasized by the above laws is that the admission of foreign workers for the purpose of employment into the receiving countries is contingent on the situation of the national labour market, and on the non-availability of national or EEC workers. This last condition does not apply to Switzerland which is not an EEC member. Taking these legal provisions into account with the jobs which have been created by the rapid economic reconstruction of the receiving States explains the type of employment which is available to migrant workers.

The second component of the national laws regarding migrant workers is the provisions governing the work and residence permit.

**The Work Permit Systems**

In France the Decree of 21 November 1975 is the basic legal text which regulates the conditions of issuance work permits to foreign workers.[7] It provides for three types of work permits. They are designated as: Temporary Work Card (A), Ordinary Work Card (B), and the Privileged Work Card (C).[8] The holder of Card A is entitled to work in specific occupations within specified areas. It is valid for one year and is renewable. Card B is issued to the holder of card A. Geographical and occupational restrictions are attached to it. An applicant for card B must meet the following

condition:

A- An applicant for card B must prove that he has been employed for one year, and that he has not been in breach of the conditions which are attached to Card A. Card B is valid for three years. On requesting its renewal, the holder of Card B must present evidence that he actually exercised the occupation or occupations which are specified in card B. Any change in the designated occupation or occupations, or in the geographical areas requires an authorization. The holder of card C can engage in any occupation and without geographical restrictions and is valid for ten years. The issuance of this card is also dependent on the state of the labour market.[9]

The Minister of Labour is empowered to decree categories of aliens who cannot not be refused work permits on the grounds of the labour market situation.[10]

The Belgian law has developed a similar system of work card.[11] Card B is issued to a foreign worker when he takes up his first employment in Belgium. It is valid for one year and restricts the holder to specific employment. Upon the expiry of the one year period, the migrant worker must apply for a second card B, which also has a validity period of one year and restricts the worker to the same occupation in which he was first employed. The renewal of card B is dependent on the state of the labour market. Work card C is issued to workers whose jobs require mobility for occupational purposes, and to workers whose jobs require them to have several employers. It is valid for one year and is issued to foreign workers after four years of continuous and regular work and residence in Belgium. The state of the labour market does not constitute a ground for the refusal of the issuance of this card but the decision to issue this type of card is dependent on the presence of the family of the migrant worker in Belgium and on his nationality. The holder of this card is entitled to take up any employment without geographical restrictions.[12]

The Employment Promotion Act in the FRG provides two types of work

permits: a General Work Permit, and a Special Work Permit.[13] The General Work Permit is valid for one employer and for one specific occupation. The period of its validity is, as a general rule, for two years but this period can be longer or shorter. The competent administrative authority examines each application individually. If the applicant can prove that he has been continuously and legally self-employed for the previous two years, the time validity of the general work permit can be for three years. It bears geographical restrictions. The issuance of this type of work permit is dependent on the state of the labour market. The regulation of Autumn 1974 gives instructions to the local labour offices not to issue General Work Permits to foreign workers who are residents in the FRG during "times of unemployment." The groups of foreign workers who are affected by this regulation include:

A- Foreigners who wish to take up employment in the FRG for the first time.

B- Any foreign worker who has lost his job and the new job which he is considering taking up can be filled by a German worker.

The Special Work Permit can be issued to a foreign worker if he meets the following conditions:

A- A foreign worker must have been legally employed during the last five years, or,

B- He is married to a German national whose habitual residence is Germany.

The 1978 amendment of the Employment Law terminates the right of a migrant worker's spouse to obtain a Special Work Permit. The children of a migrant worker who is a holder of the Special Work Permit can obtain it if they prove that they have been continuously and legally residents in the FRG during the five years preceding their eighteenth birthday. This right does not lapse if the children do not exercise this right immediately after reaching the age of eighteen. The children can exercise this right at a future date provided that they continues to be legal residents in

the FRG.[14] The Special Work Permit bears no occupational or geographical restrictions. It is valid for five years and the situation of the labour market cannot be invoked against the applicant who fulfils the legal conditions for obtaining a special work permit.

The Work Permit Act in the Netherlands makes provisions for two types of work permits: the Temporary Work Permit (ordinary), and the Permanent Work Permit. The Temporary Work Permit is valid for one year and it names the employer and the type of employment. Any subsequent change in the specified employment requires a new permit. An application for or the renewing of the Temporary Work Permit can be declined on the following grounds:

A- The labour market situation.

B- Failure to submit the requested documents.

C- Failure to submit a work contract.

D- Failure to provide information on the applicant's housing conditions.

The holder of the Temporary Work Permit is entitled to unemployment benefit as long as his work permit is valid. The holder of the Temporary Work Permit, after five years of consecutive and legal employment, can apply for a Permanent Work Permit which is valid for all occupations and for the whole territory of the Netherlands.[15]

The dual function of the Permit of Abode is a distinguishing feature of the Swiss system.[16] A Permit of Abode authorizes the holder to work in Switzerland. It is usually valid for one year, for a specific job and is limited to one canton. An advance authorization is required whenever a foreign worker wants to change the specified employment and whenever there is a change in the post occupied by a migrant worker within the same specified employment. The authorization is obtained from the police for foreigners. An authorization is also required when a foreign

worker is engaged in an additional job.[17] A migrant worker has to renew his one year residence permit for four consecutive times before becoming eligible to a residence authorization which is renewable every two years. Ten years of legal and continuous residence in Switzerland qualifies the migrant worker to apply for a permanent residence permit. The Permanent Residence Permit must be renewed every three years. The Permanent Residence Permit ends employment restrictions but its geographical validity can be limited to one canton. The Ordinance on the ninth of July 1975 has reduced the minimum period for not changing a foreign worker's employment and his place of residence to one year.[18]

**The Residence Permit Systems**

The French law establishes three categories of residence permits.[19] The Temporary Residence Permit which is valid for one year, the Ordinary Residence Permit which is valid for three years and the Privileged Resident's Card which is valid for ten years. The CRT or the temporary residence permit is renewable but it can be cancelled if the holder does not fulfil the conditions which are attached to it. The CRO, the Ordinary Residence Card can be cancelled on the following grounds:

A- The holder has left France for a period exceeding six months.

B- The holder has been without work or regular income for six months.

C- The work permit has not been renewed. The holder of the CRO must place an application for its renewal within three months before its expiry date.

The CRP, the Privileged Resident's Card, can be cancelled if the holder is subject to an expulsion order or by a decree issued by the Minister of Interior. The CRP is automatically renewable.[20] Refusal to renew, extend or withdraw a work permit, has a direct effect on the residence permit. This effect varies according to the

type of the residence permit: a Temporary Residence Permit is immediately withdrawn; in the case of an Ordinary Residence Permit, it is withdrawn by the date of its expiry. The Privileged Resident's Card is not influenced by the withdrawal or the cancellation of work permit. All three kinds of residence permits are valid for the whole French territory.[21]

A new law of 1984 has introduced two types of residence permits. The first type is valid for only one year, the second type is valid for ten years and is granted to foreigners who have resided in France for three years.[22]

The Belgian law provides two types of residence permits: the "Certificate of Entry in the Alien's Register", which is valid for one year, and the "Alien Identity Card" with five years validity.[23] Refusal to renew or extend a work permit does not lead to the withdrawal of a residence permit. A foreign worker with an Establishment Permit can only be expelled by a ministerial decree and the decision to expel a foreigner must be approved by an advisory commission for foreigners.[24] The Establishment Permit is issued to foreigners after five years of legal residence in Belgium. The Belgian law differentiates between two concepts: "sending home" and expulsion. Expulsion is enforced against the foreigners who are holders of the Establishment Permits. However, refusal to renew a work permit may terminate a residence permit if the period of stay is limited for special reasons, or it is limited to the duration of work. The residence permits can be cancelled on the grounds of public order, national security or where there is a violation of the conditions of residence.[25]

The German law establishes three different types of residence permits. The first type is a Residence Permit valid for one year and can be renewed for two years. An applicant for this type of residence permit must be in possession of an Ordinary Work Permit.[26] The second type is a Residence Permit of Unlimited Period. The

issuance of this kind of residence permit is subject to these conditions:

A- The applicant must have completed at least five years of continuous and legal residence in the FRG.

B- The applicant must have obtained a Special Work Permit.

C- The applicant must be able to express him/herself in German.

D- The applicant and the members of his/her family must have adequate housing.

E- Children of the applicant, who are residing with him/her in Germany, must enroll in one of the classes of compulsory education.

Meeting the above conditions does not establish a right to claim the Residence Permit of Unlimited Period. The concerned administrative authorities are empowered with wide discretionary power in this respect. The residence Permit of Unlimited Period is subject to territorial and other conditions.[27]

The third kind of residence permit is the Permanent Residence Permit. A foreigner who is applying for this type of residence permit must fulfil, in addition to the above mentioned conditions, other conditions:

A- The applicant must have completed at least eight years of continuous and legal residence in the FRG.

B- The applicant must take an oral and written examinations in German.

C- The applicant must prove that he/she has adapted to the German economic and social life. The holder of this permit is free from geographical and time restrictions although the permit may bear conditions. The holder of the Permanent Residence Permit can only be expelled from Germany for serious crimes and offences against public order.[28]

The holders of the first two types of residence permits can be expelled from

the FRG on the grounds which are listed in sections (8),(9),(10) of the German Law on Aliens. The law provides that an alien has to leave the country if his residence permit has expired. The German law enumerates eleven grounds for expulsion: security reasons, conviction of aggravated crimes, taxation, customs, import-export control, making any false statements about his personal or economic situation and inability to support himself and his family. The presence of foreigners must not have adverse effects on the interests of the FRG.[29]

The Act of 1965 in the Netherlands provides for two types of residence permits.[30] A Residence Permit which is valid for one year and is renewable for four consecutive periods of one year each. After five years of continuous and legal residence, a foreign worker may apply for a Permit of Establishment.[31] The Permit of Establishment enables the holder to stay in the Netherlands for an indefinite period and the holder is free from the conditions and restrictions which are attached to the residence permit. The grounds for refusing to renew a residence permit are:

A- If the holder of a residence permit involuntarily loses his job. In this case, he is allowed an extension for one year to find a new job.

B- If the passport of a foreigner expires within a year of his residence.

C- If the residence permit is granted for a specific purpose.

D- If the foreigner lacks financial means of living.

E- If he/she endangers public order.

The grounds for the revocation of a Permit of Establishment are much more limited than those applicable to a residence permit. The Establishment Permit may be cancelled if:

A- The holder moves his habitual residence to another country.

B- It is proved that the holder of the Permit of Establishment has made a false representation to obtain it.

The lack of financial means does not constitute grounds for the revocation of an Establishment Permit.[32]

**Family Reunification**

The Ordinance of 1945 in France established a legal right for family unification and laid down conditions for the admission of migrant workers' families. The definition of family includes:

A- Wives.

B- Sons under 18 years of age.

C- Daughter under 21 years of age.

D- Ascendants over 50 years old.

E- Collaterals or in laws if they are over 50 years of age or under 18 for males and under 21 for females.[33]

At the beginning of 1970, with the downturn of the French economy and with growing resentment against migrant workers, the French government in 1974 banned further recruitment of foreign workers and prohibited the admission of family members of legal residents in France. This ban was lifted in 1976 because it contradicted the proclaimed aims of the stabilization and integration policies.[34]

A Decree enacted on 29 April defines the eligible family members of migrant workers to join them. The decree provides that the eligible members of a migrant worker's family should be excluded from France for the following reasons only :

A- The foreigner who places an application for family reunion has not legally resided in France for at least one year.

B- The foreigner's lack of financial resources to support his familey.

C- The foreigner's lack of adequate housing.

D- The medical examinations show that the family members might constitute a danger to public health.

E- The foreigners endanger public order.

F- The motive for entry to France is other than family unification.

The Decree of 10 October 1977 emphasizes the last condition when the new non-work condition to the families of migrant workers was added. The Counseil d' Etat annulled the non-work condition on constitutional grounds. The judgement stated that while the government is entitled to set up conditions for the entry of the families of migrant workers, these conditions should not violate the right to a normal life, and the government may not by general measures forbid the employment of family members of foreign residents.[35]

In the Belgian law, the family members of migrant workers must fulfil specific conditions before they are allowed into the Belgian territory. Migrant workers who request their families to join them must have legally worked in Belgium for at least three months. A foreign worker who is out of employment cannot request his family to join him even if he has worked for three months.[36] The members of migrant workers families who are entitled to join migrant workers are the spouse and minor children under the age of 21, this is provided that the spouse is not divorced or legally separated. The definition of children includes natural and adopted children who are dependent on migrant workers. The access of migrant workers' family members to employment is not granted automatically. The age of the family members and the type of the work card which the foreign worker is holding are usually taken into account. The general rule in this respect is that the members of a migrant worker's family, who are living with him in Belgium and under the age of 15, are entitled to a work permit regardless of the state of the labour market. They are issued with work cards which are classified as A or C. In the case of a member of a migrant

worker family being over the age of 15 when the family has been united, the situation of the Belgian economy can justify the refusal to issue a work card and the child has to wait until his father is issued work card A. Family members of a migrant worker who is a holder of work card A are entitled to the same work card even if they have no intention to work and the children's age is not considered in this case.[37]

The German law stipulates that a foreign worker must have worked legally for three years in order to obtain a residence permit for his family. The three year period is reduced to one year in the case of workers who have been recruited under the terms of a recruitment treaty. The definition of family includes children under the age of 16 and the spouse of a migrant worker.[38] The spouses of foreigners who have immigrated as children or have been born in the FRG cannot make use of the right to family unification, unless the following conditions are met:

A- They have been continuously residing in Germany for at least eight years.

B- They have been married for more than one year.

C- Foreigners' children cannot be admitted to Germany if only one parent lives in Germany except orphans and the children of unmarried couples.[39]

From 1974, it was not possible for a member of a migrant worker family to enter Germany for the purpose of employment. This condition was changed in 1976 when the government permitted migrant workers' families to obtain work permits if they entered Germany before 30 November 1974. This deadline was extended to 31 December 1976. After this date the German government introduced a waiting period of four years before the spouse of a migrant worker could apply for a work permit and two years for the children of a migrant worker, unless they follow a pre-vocational training course. In this case they could obtain a work permit after the completion of their courses. The competent authorities could waive the waiting period according to the need of the labour market.[40]

The Netherlands law permits the spouse of a migrant worker and his minor children to join him provided that they are dependent on him and they live with him.[41] Children over 18 years of age must provide statements about their past record and must go through medical examinations. A migrant worker who requests unification with his family must fulfil the following conditions:

A- He must have been legally working and residing in the Netherlands for the twelve months prior to applying for family unification, and must be able to prove that he has a guaranteed job for another twelve months. This 24 months' employment period does not apply to certain nationalities namely, workers from Finland, Morocco, Norway, Austria, Iceland, Sweden and Switzerland.[42]

B- Adequate housing is a precondition for the admission of a migrant worker's family.

The definition of family according to the Netherlands law, includes three categories: the normal family, the extended family and, the uniting families by permitting the husband of migrant woman to join his wife. The normal family means the wife of a migrant worker and his children whether they are adopted or natural children provided they are part of the family unit in the country of origin. The extended family points to the members of a migrant worker's family who are dependent on him for support and constitute a family unit in the country of origin.[43] Reuniting families means, as has just been mentioned, a family or families reunited by allowing a husband of migrant woman to join his wife in the Netherlands provided that:

A- The marriage has been contracted at least 12 months before the husband's arrival in the Netherlands.

B- The wife has at her disposal the financial means to support her family.[44]

In Switzerland a previous law stipulated 3 years period of residence before a

foreigner can request a unification with his family. This period is reduced to 15 months. The family includes the wife of a migrant worker and his children under the age of 18.[45]

The work and the residence permit systems in the studied countries enable the administrative bodies to control the occupational and the geographical distribution of migrant workers. The extensive discretionary power of these bodies, the vague formulation of the legal texts and the conditions which are attached to the renewal or to the issuance of work and residence permits exacerbate the vulnerability of migrant workers and leave them to the vagaries of either the civil servants in the local labour offices, or to the immigration officers of the receiving States.

The French work card system permits the refusal to renew a migrant worker's work permit after 14 years of legal employment in France. The French system is based on three work cards; card A which is valid for one year, card B with three years validity and card C with ten years validity. The state of the labour market can justify the refusal to renew card C.

According to the Belgian law a migrant worker must accumulate four years of employment in a regular situation, in order that the state of the labour market cannot be invoked as a ground for the rejection of the renewal of a work permit.

In Germany five years of legal employment entitles a migrant worker to apply for a special work permit which protects a migrant worker from the labour market test. The same period of five years is required by the Netherlands law. In Switzerland ten years of continuous and legal residence gives a migrant worker a permanent residence permit which ends employment restrictions.

The bodies which are responsible for the renewal of work permits in the receiving countries can withdraw valid work permits. The Belgian law provides for the withdrawal of valid work permits for the following reasons:

A- If the worker obtains it by means of deception or false statement.

B- If the worker does not comply with the conditions of his work permit.

C- If the worker's employment endangers public order or national security.[46]

The Netherlands law provides grounds for the withdrawal of a valid work permit:

A- If the alien is refused leave to remain in the Netherlands.

B- If the worker obtains his work permit by means of false information.

C- If the work permit is not used.[47]

The German law provides for the withdrawal of a valid work permit if a migrant worker has worked without a work permit.[48] This is in addition to the conditions which relate to the protection of the national labour force.

In France the law does not explicitly provide for the withdrawal of a valid work permit, but a valid work permit can be withdrawn if a worker does not fulfil the conditions which are attached to his work permit or on grounds of public order.[49]

The legal provisions which govern the residence of foreigners are not less equivocal and restrictive than the provisions of the work permits particularly, when there is a link between the work permit and the residence permit. The acquirement of a permanent residence status or an establishment permit does not guarantee non-revocable rights to remain in the recipient country. It confines the expulsion of migrant workers to a non-employment grounds, serious crimes and the notions of public order and national security:

> Immigrants or permanent residents status, it should be noted, does not confer an absolute right to remain in any country. There is no differences between countries of immigration and other countries.[50]

Migrant workers may apply for a permanent residence status but they do not

Migrant workers may apply for a permanent residence status but they do not have a legal claim to this status. An exception to this rule is the new German law which will be discussed at a later stage.

In addition to the fulfilment of a minimum legal and continuous residence in the receiving countries, migrant workers must meet other conditions. In Germany the conditions are related to the adaptation to the German economic and social way of life. A migrant worker applying for a permanent residence status must take an oral and written examination in German, and must prove a sufficient adaptation to German economic and social life, and his children must be enrolled in a compulsory educational class.

The juridical notions of public order, national security and public interests have not been defined in any specific way. They are liable to many different interpretations by executive bodies which are equipped with a very extensive discretionary power.

The insecurity of migrant workers has been further aggravated by the return policies of the receiving States.

The issue of security of residence is of vital importance to migrant workers especially since public international law and human rights declarations do not recognize that a foreigner can claim the right to enter or reside in a country other than the country of his nationality.

**The Social Security Systems**

Migrant workers fully contribute to the social security of the receiving countries, although what they get in return does not correspond with their contribution. The German social security includes old age pension, health insurance, maternity benefits,

unemployment benefits, sick pay and family allowances.[51] Theoretically, migrant workers are entitled to these benefits in the same way as German workers. The migrant workers' entitlement to these benefits cease when they leave Germany. Migrant workers receive child allowances as long as their children are residing in Germany, the child allowances are reduced if the children of migrant workers remain in their home countries. Migrant workers in Germany can claim unemployment relief for one year, a reduced unemployment benefit is granted to migrant workers if they have valid residence permits and legal claim to work permits. Italian, Greek, Yugoslav and Spanish workers retain their unemployment benefits even if they return home.[52]

The Belgian law in this regard makes no distinction between national and foreign workers, but it places restrictions on the payment of unemployment and family benefits. These restrictions concern the number of children who are covered by the social security and the sum which is paid to each child. Child benefits are reduced to the applicable level in the country of origin. The allowances vary according to the branch of economic activity in which the migrant worker is employed. The result of this system is that the children of Tunisian, Moroccan and Turkish workers suffer from this discriminatory law.[53]

The French law has developed similar rules. Migrant workers' benefits from the social security system are dependent on the length of residence in France. If the length of residence in France is less than five years, a migrant worker is entitled to full reimbursement of the contribution he has made. If a foreign worker's residence is between 5-15 years he receives an annuity. And if a foreign worker's residence in France exceeds 15 years he/she is entitled to a pro rata pension.[54] Foreign workers in France lose their right to old age insurance and the industrial injury pension if they leave France. In the former case they receive the equivalent of three years annuity in

capital.[55] The members of a migrant worker's family who remain in the country of origin receive reduced allowances which are determined either by a special agreement or according to the applicable system in the children's country of residence.[56] An agreement between France and Morocco limited the number of children who are entitled to child benefit to four.[57] However, members of migrant workers families who remain in the country of origin cannot obtain sickness and maternity benefits.[58] In addition to satisfying these conditions, migrant workers must fulfil other conditions:

A- They should register as seeking employment at a labour exchange office.

B- They should not have been dismissed for a serious offense or have voluntarily changed their jobs.

C- They should be physically fit.

D- They should be able to prove that they have worked for 150 days over the previous twelve months.[59]

These requirements are restrictive if not discriminatory. Many migrant workers initially accept any job, then they voluntarily give up their jobs and change to more rewarding jobs. This phenomenon is quite noticeable in the building and public work sectors where migrant workers start their employment then they move to metal work and the motor-car industry.[60]

In Switzerland the social security system for migrant workers is more problematic than other European countries. Switzerland is a rich country and the wages are high with low taxes. It is an individual's choice to insure against unemployment and decide the kind of risks which he wants to cover and the extent of coverage. Health insurance was voluntary until 1977. Unemployment insurance was voluntary and when this scheme became compulsory the number of insured days per year is limited to 180 days. The old age insurance came into force in 1984.[61] Only

migrant workers who are the holders of permanent residence permits, for which a migrant worker can apply after ten years of consecutive residence, can join the unemployment and old age insurance scheme. Foreign workers who are the holders of yearly residence permit cannot participate in the above schemes.[62]

The preceding study of the conditions and requirements of the national legal systems regarding the social security systems of the receiving States establishes the fact that migrant workers actually enhance the functioning of these systems and reveal their disadvantaged position.

Migrant workers, while they contribute in full to social security, receive less allowances than the national workers. The size of family allowances is linked to what is paid in the countries of origin. The number of migrant workers' children who are covered is also limited to four in most cases. It is estimated that the French government paid 11 million francs to Algerian families living in Algeria; if these families have been resident in France, the French government would have paid 76 million francs.[63] In 1974 the French government froze the payment of child benefits to Algerians. The condition which the French government stipulated in order to resume the payments was that Algeria renounce any claim to the outstanding amount which had been frozen.[64]

These social security systems permit the receiving States to make a huge saving, particularly in the light of the fact that large families remain in their home countries. It is not surprising that immigration laws stipulate various conditions to hinder family reunion. Many migrant workers lose their social security benefits if:

A- They leave the country where they work.

B- Their work or residence permits have been withdrawn.

C- They do not fulfil the required period of work or residency.

The presence of migrant workers should have prompted changes in the social

security systems of the receiving countries to alleviate the unfair implications of the territorial basis of the social security laws in order to bring the proclaimed formal equality between native workers and migrant workers from its rhetorical phase into its actual practice.

**Freedom of Expression and Association**

The restrictions on migrant workers are not confined to employment, residence and social security benefits. Several restrictions are imposed on the freedom of expression and association. Migrant workers are bound by the concept of political neutrality and must refrain from any acts which are deemed to have a political nature. The different legal provisions of the receiving countries have not established normative criteria to differentiate between political and non-political acts. Freedom of opinion was recognized as a human right as early as 1789, but it was not until 1981 when the French legislator classified associations directed by migrant workers in the same rank as the French associations. Migrant workers who are active members in trade unions will be expelled on the grounds that they do not respect the political neutrality to which all foreigners residing in the French territory are bound. Paul Legard expresses this fact in a straightforward manner:

> Nowhere do the texts formally forbid aliens from engaging in political activities. But here the texts matter little. The practice is the most important. In France no text prohibits aliens from engaging in political activities, but the minister of the interior each time has to justify an expulsion replies that the alien expelled failed to fulfill the obligation of political neutrality imposed on all aliens residing in France.[65]

The Belgian constitution, while recognizing the freedom of opinion for

everyone, reserves the freedom of association to nationals. The Alien Act of 1980 recognizes the freedom of association to aliens.[66]

In Germany the Foreigners' law of 1965 states that:

> Foreigners will enjoy all basic rights except the basic rights of freedom of assembly, freedom of association, freedom of movement and freedom of choice of occupation, place of work and place of education and protection from extradition abroad.[67]

Paragraph 6 (2) of the Alien Act states that the political activities of aliens can be limited or prohibited if this is necessary as a measure of protection against disturbances of public order, security, or against impairment of the formation of the political will in the Federal Republic of Germany, or; for other matters of substantial concern to the Federal Republic of Germany.[68]

Article 9 of the Netherlands Constitution grants the freedom of assembly and associations to every resident alien within the limit of the law.[69]

The Swiss law represents an extremely prohibitive provision regarding the political activities of aliens. It forbids foreigners to speak on political issues at open or private meetings and they must refrain from saying anything that might be interpreted as interference in internal Swiss affairs.[70]

The legal provisions regarding migrant workers in the receiving countries may justify Carré Malberg's statement on the status quo:

> If the police state is that in which administrative authority may arbitrarily and with more or less complete freedom of decision apply all the measures for which it wishes to take initiative, to meet circumstances and to attain at any moment the objectives it chooses, if this police state is based on the idea that the end suffices to justify the means, then it is indisputable that foreigners in France are living under such a regime.[71]

This statement is valid for other recipient States.

The legally and socially inferior status of migrant workers is the legacy of the policies of these States. The legal systems are responsible for this status. The receiving countries are *de facto* immigration countries despite the official statements that they are not immigration countries. The law-makers and politicians of the recipient countries have not accepted this fact. The main focus of these laws is on the employment character of migrants and on the temporariness of migration. Miller comes to such a conclusion and says that:

> By focusing on these avenues, we will consider something perhaps more important than the employment characteristic, remittance, sending propensities, and return plans of migrants, among other habitual themes of studies of foreign labour in Western Europe: How do political systems and migrants themselves react to policies that allow millions of individuals to live and work indefinitely in democratic societies on a discriminatory, legally inferior basis?[72]

## The New German Law on Foreigners' Residency

For 25 years, foreigners' residence in West Germany was regulated by the 1965 Act which marks the beginning of immigration. This Act was distinguished by the broad discretionary powers vested in the State administration. Questions relating to foreigners' residency were therefore the concern of *(Landers)* whose decrees *(Verwaltungsrichtlinien)* were altered to suit the newly arising situations.

The new Act was adopted on April 26 1990 by Bundestag and was confirmed on May 11 1990 by Bundesrat. It came into force within the entire unified territory on 1 January 1991.

This Act, unlike the 1965 Act, seeks to resolve, at a federal level, the questions relating to entry to the territory, residence and deportation. It is also an Act that consolidates the conditions of residence and family life of foreigners in Germany.

Although this Act is mainly concerned with the stabilization of a large number of foreign immigrants in Germany, particularly by introducing an "earlier" naturalization process *(Erleichterte Einbürgerung)* accessible to young foreigners. One can immediately pinpoint that the State control system is broadened and strengthened, and, simultaneously, more measures to ensure obtaining satisfactory stable residence permits, are outlined.

The 1965 Act was enacted at a time when a demand for immigrant labour was emerging, and therefore, it did not make any provisions for many immigration issues which were developed during the last 25 years. Moreover, the Act provided for a relatively unstable immigration status.

**The Recognition of a Right to Reside**

Any foreigner who is neither a national of a member State of the European community, nor employed by a diplomatic authority or an international organization, nor situated within German jurisdiction, has to apply for a residence permit before entering the German territory. This residence permit is in the form of a visa stamped on the applicant's passport. The Interior Minister reserves the right to determine, by a decree, which foreigners are dispensed from the obligation of seeking such an authorization.[73]

Although a residence permit, as a rule, is valid within the whole federal territory, its territorial validity, nevertheless, can be subsequently limited. It is granted for a limited period if, and only if, the conditions required by law are

satisfied. It can also be granted for an indefinite period.[74]

The conditions laid down for its renewal are the same as those required for a first application. The first application, as well as the extension of a residence permit is linked to a certain number of conditions which can be subsequently modified, especially as far as the prohibition or limitation of exercising a professional activity is concerned.[75]

The 1990 Act clearly provides that the residence permit is an absolute right for certain categories of foreigners. The residence permit might be refused only if a foreigner has entered the German territory without the necessary visa, or with a visa but without notifying the appropriate authority beforehand, *i.e.* Overseas Bureau. Other cases when the residence permit is refused are when the entrant is not a passport holder, or there is doubt his national identity, or he/she has no right to enter another country, or has already been deported or refused entry to Germany.[76]

According to the 1965 Act, the residence of a foreigner "should not counter the West Germany interests". This provision was applied for the different existing types of residence permit and was interpreted by the State, using its own discretionary powers, to justify a number of restrictions related to the family life and employment of foreign workers. The 1991 Act has introduced a fundamental change of attitude as regards immigration in Germany; for this provision does not concern, from January 1991, foreigners who have the right to sojourn in the country. It is therefore clear that the right to sojourn is guaranteed to foreigners who have obtained the indefinite residence permits, to foreign spouses and children of German nationals, and to foreigners who have obtained the right to return to Germany. It eventually takes into consideration the permanent settling of foreign workers and their families in Germany.

Any foreigner who wants to reside for more than three months in Germany in

the hope of taking up paid employment can obtain a residence permit by an ordinance of the Interior Minister. The permit, however, might be limited to certain professions, certain jobs and certain categories of foreigners. The legislator also reserves the right to limit the time validity of the permit.[77]

This provision illustrates a situation that has its existence before 1973, the year which marked the end of the labour immigration. This provision permits Germany to recruit foreign labour for temporary period only and, it inhibits the recruited workers from obtaining a permanent residence status. Foreigners entering Germany by virtue of this paragraph are required to leave Germany if they are no longer needed within the labour market. This Act preserves, by virtue of this paragraph, a method which permits the recruitment of (*Gastarbeiter*), in order to institute a genuine rotation system of labour force, if ever the need arises.

**Diversity of Residence Permits**

Unlike the 1965 Act which made provisions for three different types of residence permits: authorization to sojourn for a limited period, or an indefinite period (*befristete und undefristete aufenthaltserlaubnis*), and the residence permit (*Aufenthaltsberechtigung*), the 1990 Act has introduced two more permits: The Residence Permit and Leave to Remain in the country.

**The Residence Permit**

This status permits a foreigner to sojourn for a temporary definite purpose. A residence permit is issued for a period of two years, and can be extended for two years if the purpose of sojourn is not yet achieved. However, a foreigner cannot

renew his residence permit for another purpose without having left the German territory for at least one year.

A foreign spouse of a residence permit holder can obtain a Residence Permit in order to establish and maintain conjugal life on a condition that the spouses should be able to meet their financial needs without recourse to social benefits, and if they have a matrimonial home within the required standard. Their children can also obtain a renewable sojourn permit if one of the parents is either dead or divorced.

**Leave to Remain**

This status concerns foreigners who are unable to obtain other residence permits by reason of the required conditions, but for humanitarian reasons of utmost urgency, or to guarantee German interests, they have the right to enter or reside in Germany. Their children and spouses equally obtain the leave to remain permits in order to establish and maintain their family life.[78]

A leave to remain is only available to foreigners who satisfy asylum conditions as stated by Geneva Convention of July 28 1951. Paragraph 51 of the German law adopts the wording of Article 33 of the Geneva Convention. It states that persons who are politically persecuted should not be refused entry to Germany.

A leave to remain is for a limited period of two years, and it is extended as long as the obstacles that prevented the foreigner from returning to his country of origin persist. A foreigner who has acquired leave-to-remain for eight years can obtain a residence authorization for an indefinite period, only if he complies with the required conditions.

**Gradation of Residence Permits Acquired by Right**

Residence of a foreigner who obtains the permit by right is regulated by a graded system permitting a progressive consolidation of residence according to certain criteria, namely, period of residence, employment and private resources.

**1st Stage:** Residence Authorization for a Limited Period (*Befristete Aufenthaltserlaubnis*)

This type of residence permit is granted in the form of an authorization to sojourn which is a basic permit, if it is not related to a definite purpose. A foreigner who has the right to reside is bound to obtain this status when he arrives in Germany. Access to a more stable status is, however, conditional on compliance with certain legal requirements.

**2nd Stage:** Residence Authorization for an Indefinite Period of Time (*Unbefristete Aufenthalsgenehmigung*)

A residence authorization for a limited period is usually extended to one of an indefinite period of time (*Unbefristete Aufenthalsgenehmigung*) if a foreigner is a holder of a temporary authorization for 5 years, a special work permit, and the other necessary authorizations related to his professional activities, as well as a home within the required German standard; has acquired a good command of at least spoken German and he/she is not subject to deportation.

In cases where a foreigner is neither employed nor has a professional activity, the residence authorization is extended for an indefinite period only if he can meet his needs by his own private means and savings, or he is a beneficiary of unemployment benefit. The residence authorization in the latter case might be again limited if the

interested foreigner is unable to prove within three years that he can meet his needs by a professional occupation. The residence authorization for an indefinite period constitutes a personal status under which deportation is only permissible for serious reasons conducive to the public good.

**3rd Stage:** Residence Permit *(Aufenthaltsberechtigung)*

This residence permit is neither limited in time nor can be subjected to any particular restriction. It is granted after 8 years of residence on the condition that the foreigner complies with certain requirements in addition to those laid down for residence authorization for indefinite period of time, namely, a foreigner should not be unemployed, should have contributed to a pension scheme or an equivalent scheme for at least 60 months, and must not have been convicted for 6 months in prison within the last three years.

The new Act establishes and recognizes a right to reside for foreigners. This right can be obtained through progressive stages and it is subject to integration criteria. A foreigner can obtain a more stable status only if he proves his professional and linguistic integration, and also resides in a reasonable accommodation which satisfies the required standard in German. These criteria are more clearly defined than has previously been the case, and they are applied at the federal level. For this reason, they become even more restrictive; for the 1990 Act has also introduced measures that permit the authorities in charge of applying the immigration laws to obtain information on foreigners either through themselves or the concerned authorities.[79]

The new Act submits, however, every single consolidation of residence to the requirement of not being subject to deportation.[80]

Any foreigner whose residence in Germany jeopardizes the security and

public order or puts in danger major interests of Germany can be deported. However, the deportation decision should take into consideration the length of residence, the personal and economic links in Germany as well as the consequences that decision may have on the interested foreigner family members living in Germany.[81]

Section 46 of the German Law clearly provides for a certain number of major reasons leading to deportation: jeopardy of freedom, democratic and security process in Germany, pursuit of political aims by using or proclaiming violence, procurement and prostitution, use of hard drugs and refusal of treatment, endangerment of the public health or being homeless for a long period of time, resorting to social benefits to meet his and his family's basic needs.

The new Act specifies the categories of foreigners who are beneficiaries of a particular protection against deportation. These categories are: political refugees, foreigners who live family with a German family, foreigners born or who came to Germany when they were minors, holders of the residence authorization for an indefinite period of time and of the residence permit.[82]

However, foreigners concerned by this provision remain, as a general rule, subject to deportation if they are convicted for at least 5 years in prison or, in the case of recidivism, at least for 8 years in prison altogether.[83]

Comparing the permits stated in the 1965 Act with those of 1990 Act, one might suggest that the residence permit of 1965 corresponds henceforth to the rights and the criteria of access to a residence authorization for an indefinite period. The meaning of this is that foreigners are able to acquire, after 5 and not after 8 years of residence, a status which protects them from deportation. Moreover, this permit allows the spouses and children of interested foreigners to acquire a personal and independent status from the family unit.

One might consider, however, naturalization as the ultimate degree of the graded permits system, because it is the only permit that protects the foreigners from deportation, and establishes equality between the naturalized Germans and the native Germans as far as rights are concerned. The right to reside in Germany confers on the foreigner only the right to obtain a residence permit, for the work permit is always granted separately. However, the above status may only become more stable if a progressive integration is clearly established.

Although a foreigner in Germany may henceforth easily obtain a more consolidated status, it is interesting to underline that no changes have been made to the fundamental conception of the German State which permits, only with some difficulties, integration with the national community.

**The Right to Family Unity**

The new Act determines the conditions of family unity in harmony with Article 6 of the Constitutional Law which guarantees the right to a family life. The family members (spouse, children and in exceptional cases other members of the family) of a foreigner, who is resident in Germany, may obtain a residence permit in order to establish and maintain the family unity in Germany. However, the family members can obtain a residence authorization if, and only if, the foreigner is a holder of residence authorization or residence permit, owns a house of the standard required by the German housing authorities, and is able to meet the basic needs of the family by a vocational activity or by his proper means and savings.[84]

The new Act clearly provides that a residence permit cannot be granted if a foreigner resorts to social security to meet his own, or any of his family's needs.

**The Independence of the Spouses' Status**

The foreign spouse of a foreigner obtains a residence permit by right if the general conditions of family unity are respected in these situations: the foreigner is a holder of a residence permit and is married before immigrating to Germany. A foreigner who is born or arrived in Germany at a time when he was a minor, he should be a holder of a residence permit for an indefinite period.

The extension of the permit is not subjected afterwards to the conditions of family unity. After 5 years of residence the spouse's permit can also be extended for an indefinite period, and after 8 years as a residence permit without being a holder of a work permit and without justification of contribution to a pension scheme.

The spouse's status is directly linked to the status of the other party as long as it is not extended for an indefinite period.

The Act clearly defines that the spouse's status may become personal, in case of divorce after 4 (exceptionally 3) years' residence in Germany, or in case of death of the foreigner when the marriage relationship still exists in Germany, if the interested foreigner is a holder of a residence permit and he is not subject to deportation.[85]

Another positive modification consists of abolishing the observation of a period of at least a year after marriage before the foreigner will be able to bring his/her spouse to Germany. This administrative measure, which is enacted to prevent marriages of convenience between foreigners, has been abolished because it contradicts the right to a family life guaranteed by the German constitutional law.

**Foreigners' Children's Right to Reside and Return to Germany**

Children who join their foreign parents residing in Germany have the right to a

residence permit if they are under 16 years of age, one of the parents complies with the conditions of family unity, and the other parent is also authorized to reside in Germany unless it is decided that the parents are not married or divorced.

Children who have been born in Germany or resided lawfully for at least 5 years obtain residence permits without considering the requirements stated in Section 17 of the law, with the exception of the one concerned with resorting to social welfare. The residence permits are extended as long as either the father or the mother who has custody of the child is a holder of a residence permit. The child's residence permit becomes an independent status if it is extended for an indefinite period at the time when the child reaches the age of majority, or he is a beneficiary of the right to return.

The residence permit is extended for an indefinite period without even considering the specific requirements, notably those stated in paragraph 24 if, and only if, the child is a holder of the relevant authorization at least for 8 years by the time he reaches the age of 16.

Section 24 of the new Act requires certain conditions for the extension of a residence permit. These conditions are: the child must be a holder of a residence permit for at least 8 years before reaching the age of 18, should be able to meet his/her basic needs by him/her self, or is receiving a vocational or educational training.[86]

The residence permit for an indefinite period can only be refused in three cases: the child of the foreigner is subject to deportation, he/she is sentenced within the last 3 years to 6 months imprisonment, or he/she cannot satisfy his/her material needs without resorting to social security unless he is a vocational trainee or student.

The residence permits under the 1965 Act were granted only for children at the age of 16. According to the 1990 Act, however, they are obligatory from the date

of birth.

As regards the children who have the right to reside, the permits are automatically granted. The permit should be requested within 6 months after birth if it is not obtainable by right.

The introduction of the residence right and the possibility of obtaining the residence permit for an indefinite period will enable the young foreigners acquire a relatively stable status, a status which makes them independent from their parents from the age of 16.

The new Act institutes resolutely the right of residence to foreign children born and/or studied in Germany. The right to return granted to young foreigners reflects a change of attitude towards foreigner residents in Germany.[87]

Any foreign minor whose residence is regular and lawful in Germany has the right to return to Germany. A residence permit is granted if he has lawfully resided in Germany for at least 8 years and studied in a German school for at least 6 years or obtained a degree. In other respects, he must be able to meet his own needs by a vocational activity or by a financial support of a third person who should commit himself for a 5 year period. The application should be submitted at least 5 years after he has left Germany and after he attains 15 years of age and before reaching the age of 21.[88]

The residence permit might be refused if a foreigner is subject to deportation. The extension of the permit is not contingent on any condition concerning his financial means.[89]

The same section provides that a foreigner who receives a pension from a German institution can obtain a residence permit if he has lawfully resided in Germany for at least 8 years.

The new provision concerns young foreigners who have been born or resided

for a number of years in Germany but are obliged to return home with their parents when the latter decide to go back to their country of origin. It is clear that the legislator, by virtue of the right to return, seems to take into consideration the fact that young foreigners who have attended school in Germany might have established social and cultural links which are indeed affective to the point that they wish to return to Germany independent from their parents.

The process of socialization is gauged in terms of education. The integrating role of extra-family socialization and education are, for the first time in the history of immigration in Germany, recognized from this social-cultural perspective.

**Naturalization**

The new Act provides for the possibility of acquiring the German nationality for two categories of foreigners. The first category includes those who are enrolled for an educational course or degree in Germany. The second category includes foreigners who have been living in Germany for a long period of time. The German word "*Erleichterte Einbugerung*", *i.e.* "early naturalization", represents a procedure of naturalization sooner than was previously allowed and at lower costs.

A foreigner aged between 16 and 23 who applies for naturalization obtains the German citizenship if: he relinquishes his nationality of origin and, he has lived in Germany for eight years and, has been studying for six years four years of which must be in an institution of general education and, he is not convicted of an offence.[90]

The second category includes the foreigners who have been living in Germany for a long period of time. A foreigner who has lived in Germany for 15 years and applies for naturalization till 31/12/1995 gets it if: he relinquishes or loses his nationality of origin and, if he is not convicted of an offence and, he is able to

provide for his family without claiming social security or unemployment benefits.[91] Even if the period of residence is less than 15 years with his wife and children, they can still be naturalized.

The costs of "early naturalization" are up to 100 DM which is relatively small sum of money if one considers that the costs of other naturalization procedures represent, as a general rule, 75% of the monthly salary of a foreigner without exceeding 5000 DM.

One can simply state that relinquishing the nationality of origin is a precondition necessary condition for acquiring the German nationality. However, the new Act states that the possibility of multiple nationalities when relinquishing the nationality of origin is extremely difficult.

Some groups of foreigners who are exempted from such a condition are the political refugees. Finally, a foreign national who completes the military service can be exempted from revoking his nationality of origin, if most of his studies have been completed in Germany, has reached the age of military service while living in Germany and got used to the German life style.[92]

Establishing a right to naturalization for foreigners living in Germany for a long period of time and their children is a significant step forward in the German political and judicial conception. By stressing the residence and/or study variable, the German legislator has expressed his political will not to retain the classical variable of the right to territory, which reserves the nationality to the place of birth.

It is easier for a young foreigner to get German nationality than leave to remain. In the process of naturalization, a young foreigner will not be asked to prove that he is self-sufficient, and whether he has contributed towards his pension. Thus, the law clearly, favours the acquisition of the German nationality for foreigners who are aged between 16 and 23.

The "early naturalization" has concrete advantages for those who want to benefit from it. Naturalization was the exception and implied the adoption of the German identity. With the right to naturalization, it became legitimate to keep the different ethnic identities while enjoying the rights of nationals.[93]

The new Act has introduced important new provisions which reflect a change of attitudes towards foreigners. The first is the introduction of new categories of rights: the right to stay, the right to family unity, and the right to return to Germany. The second is "early naturalization".

The leave to remain does not automatically lead to a permanent stay. It is because of the conditions of access to the consolidated status that the German legislator exerts control on the economic, social and political integration of foreigners. The conditions are clearly stated, thus, allowing little, if any, flexibility. The German State has, according to this new law, the means to observe fulfilling for these conditions. A foreigner has, in one way or another, to prove that he deserves consolidation of his status. The change, therefore, does not extend to the basic German principle of welcoming others.

Introducing the right to naturalization and its low cost for young foreigners and foreigners living in West Germany for a long period of time marks Germany's change of attitude towards foreigners. This change is of significant importance since the measures taken derive from the exclusive ethnic orientation *(volkisch)* of the right to the German nationality. The unity of the German society is no longer based on ethnic unity. The right to the German nationality saw an opening gap, immune since the beginning of the century.[94]

**Concluding Remarks**

The above analysis of the national laws of the recipient States clearly establishes that the national legislators and the policy makers of the receiving States view the presence of migrant workers in economic terms only. The social, cultural and legal problems which have been pointed out in this chapter are, largely, ignored.

Eric Thomas points out that: "The law comes to the assistance of the economy by regulating the mobility of immigrants within the economic structures".[95]

While writers on international migrant labour unanimously agree that "economic factors play a much more important role than humanitarian or social values in the shaping of immigration policy", the exact impact of the economic approach on immigration laws is not critically explored.[96] This is mainly due to the fact that the vast majority of studies regarding the issue of migrant labour are mainly carried out by economists, politicians or sociologists. The involvement of legal writers and lawyers in the formation of migration policies can be considered as a recent phenomeon.[97]

The nature of economic reasoning is essentially different from the legal reasoning; the economy is surrounded by controversial and often conflicting theories regarding very fundamental concepts like inflation, recession and how to deal with unemployment. This nature of economy undermines its normative rule.[98]

The former exposition demonstrates that the changes in the immigration laws of the receiving States are exclusively linked to the speculations about economic requirements and affirms the absence of any planned and well-defined immigration policies:

> Largely as a consequence of economic factors, the last ten years have seen noticeable liberalisation of immigration rules. The rapidity which the

> migratory movement has developed over the last five years provides the most tangible evidence of this trend. However, since these changes did no more than reflect in legal form the increasingly pressing needs of national economies they could not form the basis of an over-all, coherent immigration policy: the most that was achieved was the framing of manpower policies. The fairly widespread failure to foresee the social affects of immigration led to the crystallisation in some countries, Switzerland for example, of situations which today are regarded as particularly serious and even as a threat to the vital interests of the nation...This swing from a liberal but too economic conception to a restrictive conception is in itself a clear sign of the wide range of difficulties in the setting up of a coherent immigration policy.[99]

The muddle about the objectives of immigration policies still persists: assimilation, integration or voluntary repatriation?[100]

The presence of migrant labour in the receiving States cannot be exclusively treated in economic terms; it involves more than the regulation of migrant labour as a production factor. To justify and base migration laws on economic grounds is bound to exasperate the legal insecurity of migrant workers:

> Attempts to explain the behaviour of the legal institutions, and of the people operating or affected by them, on economic grounds must fail because, surely, much more than rational maximizing is involved in such behaviour.[101]

As has emphasized in this chapter, migration always raises complicated issues which cannot be solved by the logic of economics alone. The *de facto* settlement of 15 million migrant workers and their dependents generates ethical and social problems which cannot be solved by mathematical formulae. Miller sees that the settlement of migrant workers and their families in the recipient societies as "micro

homeland societies...transplanted to Western Europe."[102]

The increasing hostility and number of racial attacks on ethnic minorities are mainly attributed to cultural-social factors sustained by economic inputs.[103]

Bohning writes:

> lest the impression arises that I view international migrants merely in functional terms, as another commodity, and in order to point out the peculiarity of international migration, may I say briefly that the movements of people strike deep chords and in doing so touch off conflicting emotions, thus inevitably creating tensions...On the other hand, the appearance of newcomers in a society ordinarily raises material anxieties and often sets off ethnic or racial defence mechanisms or even hostility.[104]

It has been outlined in this chapter that the immigration policies of the receiving States are based on the fundamental assumption that is the temporariness of the migratory process. The receiving States in the post Second World War period sought to alleviate national labour shortages, in specific sectors of employment, by resorting to import foreign labour:

> ...could fill these jobs with foreign workers admitted not for settlement but for the specific purpose of filling the supposedly temporary gaps on the labour market.[105]

These assumptions of the temporariness of migrant labour presence and their employment in the recipient States were enshrined in the national law systems. Migrant workers were issued with temporary work and residence permits, which were revoked or extended at the discretion of the administrative bodies. The erosion of the rotation principle and the fundamental changes in the structure of migration from single men to *de facto* settlement of millions of foreign workers with their dependents hardly introduced corresponding changes in the immigration policies of

the receiving States. The official policies of the receiving States remain what they are: they are not immigration countries and they are not legally or morally obliged to grant foreign labour migrant status:

> It is very paradoxical of European migrations today that millions of people are living in foreign countries but are not designated as immigrants; neither do these countries see themselves as immigration countries.[106]

The receiving countries' policies, despite the *de facto* settlement of migrant workers and their dependents and the formation of non-national ethnic minorities, are still constructed on the proposition that migrant workers will return home. This attitude is employed to resist any changes in the present legal structure and to diffuse the growing anxiety and hostility of the public towards migrants:

> The myth of return is more than a dream; it remains a powerful ideology that serves a useful function for all participants and is reinforced by existing legal and political arrangements between host and sending countries.[107]

The major reason for the insecurity of migrant workers is not attributed to their economic function in the receiving States but to the national legal systems. It is true that the push and pull factors activated international labour migration, but this migratory process could not have occurred without legal rules that permit non-national workers to enter, reside and work in countries other than their own. It has been emphatically maintained in this chapter that the immigration laws of the studied States are characterized by the vagueness of their terminology, by the extensive discretionary powers of the national immigration authorities and the multiplicity of the legal texts which are:

> ...not always accessible for the persons concerned, *in casu* the immigrant and his adviser. Some sources, such as administrative circulars, are not even published, although they sometimes contain important interpretative

> guidelines. It is clear that all these elements do not contribute to legal security, certainly not when it becomes clear from the application of a regulation that one and the same text can at one time be flexibly interpreted, and at another time literally, according to the fluctuations of the political and economic situation. Clarity and transparency of the legal sources, which also implies democratic control of the discretionary powers of the authorities, are a *conditio sine qua non* for the assurance of effective legal assistance to the immigrants.[108]

Bohning points out that the broad discretionary powers enjoyed by the bodies administering immigration laws and the imprecise wording of these laws make them "vulnerable to abuse and inconsistent, unpredictable application".[109] Examples can be cited from the studied national laws; "adequate accommodation", "adaptation to the German cultural and economic life", the non-involvement in "political activities". The last concept *i.e.* the concept of political neutrality is the most equivocal and problematic one. Migrant workers' protests against working conditions and housing situation, are liable to be interpreted as political acts:

> In France, foreign workers are specifically enjoined to maintain "political neutrality." These broad restrictions, which are open to wide, even arbitrary, interpretation by officials (e.g.the police or the ministries of Interior and Justice), render every form of foreign worker political involvement problematical. As what constitutes disruption of the public order or adherence to political neutrality is not formally specified, any act by foreign worker conceivably could be construed as disruption or in violation of political neutrality.[110]

The intricate problem of formulating an adequate definition of political neutrality to limit an arbitrary interference by officials, is exacerbated by two factors:

A- The "politicization of non-political issues":

> ...any foreign workers criticism of housing or working conditions, in the form of a strike, for example, is far more likely to elicit police reaction than it would be the case if citizens were involved. The factor of police intervention politicizes matters that might otherwise be seen as social issues.[111]

B- The decisions taken by the national administrative authorities in exercise of their discretionary powers to deport or restrict aliens' rights, which are claimed to be based on national security or national interests or on public order grounds, are not subject to judicial review.

It is argued in the preceding paragraph that the immigration laws are liable to be abused by the administrative authorities executing these laws for four major reasons:

A- The vagueness of their wording.

B- The extensive discretionary powers of the national immigration authorities.

C- The multiplicity of the legal texts: regulations, guidelines and administrative circulars.

D- The confusion about the objectives of the national migration policies of the studied States.

Legomsky argues that courts' decisions in cases involving immigration laws are profoundly influenced by external non-legal factors: "factors other than legal reasoning formally offered in the opinions frequently contribute to judicial decisions."[112] Among these factors are public attitudes towards immigrants, social, political, and economic factors, judges' personal backgrounds and judges' perceptions of their roles in the legal systems. The "elasticity of the textual language provides even more room in which the mixed ideological attitudes can operate":

> The other set of influences is external...The argument will be a specific

application to the immigration cases of the increasingly well-accepted view that various factors not typically appearing in courts' opinions contribute heavily to the results. Among these factors are several that deserve consideration in the context of immigration: the personal backgrounds and political attitudes of the judges; the judges' own perceptions of their roles in the legal system; and the political forces-'political' here being used in its broadest sense to encompass social and economic forces as well- prevailing in society at the time cases are decided.[113]

Migrant labour now is a major political issue. The success of anti-immigrant political parties in Western Europe, the Front National in France, the neo-nazi National Democratic party in Germany, the Belgian neo-Fascist party, and the Centre party in the Netherlands, is bound to intensify the pressure on both the judiciaries and the administrations.[114]

This chapter has attempted to demonstrate some of the deficiencies and the defects of the national legal systems regarding migrant workers. The precarious and the insecure legal status of migrant workers is chiefly attributed to the legal "fluctuation" of the immigration laws rather than to the economic fluctuation. This asserts the importance of rethinking the principles and the assumptions upon which immigration laws are based.

The next chapter will examine the provisions of the international recruitment agreements which have been concluded between the studied countries and labour exporting States. Can these treaties offer an effective legal protection for migrant workers?

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# CHAPTER FOUR

## The International Recruitment Treaties

### Introduction

A considerable number of foreign workers were admitted into Western European countries under the terms of bilateral treaties which served as legal mechanisms to supply workers to Europe. It was not uncommon States' practice, in the period before the World War II, to compensate for labour shortages by recruiting labour from other countries.[1]

This chapter is concerned with the developments which occurred in the post W W II period. The focus is on the recruitment agreements which were concluded after the Second World War period and registered with the UN Secretariat.[2]

Although the majority of the treaties under discussion were terminated by labour importing countries during the period of 1972-1974, their inclusion in this study will be justified on a number of grounds. Since this work is concerned with the protection of migrant workers, it is important to examine the legal arrangements which are concluded between the labour importing countries and the labour exporting countries. Analysing the provisions of the recruitment treaties shows how the host countries understand the presence and function of migrant labour.

The chapter sets out to examine the following points:

A- The recruitment procedure.

B- The provisions of recruitment agreements regarding the admission,

residence, deportation, employment, family unification and social security of workers recruited under the terms of these agreements.

C- A comparative study between the provisions of these agreements and the provisions of the foreign investment agreements concluded by the same States parties to the recruitment treaties also will be examined.

D- A comparison of the provisions of the recruitment treaties with the ILO Model Agreement on Temporary and Permanent Migration for Employment will be included.

**The Procedural Aspects of the Recruitment Treaties**

A common feature of these agreements is that the recruitment of migrant labour has taken place under the supervision of the governments of the importing and exporting States: only authorized representatives of the concerned governments may take part in the recruitment of foreign labour. The competent body of the labour importing States provide the exporting States with offers of employment. The offers of employment are advanced by the employers who are requesting foreign labour. They contain information about the conditions of work, wages, qualifications, social benefits, taxes, the duration of employment and the conditions of the accommodations. The provisions of the recruitment agreements are varied in this respect. The Netherlands' practice requires that any offer of employment should include precise information. Article 4 (2) of the Netherlands-Turkey Agreement states:

> The offer of employment shall include precise information as to the nature, category and the duration of employment, the gross and the net remuneration, the conditions of work and the facilities for housing and feeding.[3]

Article 2 of the Belgium-Tunisia Agreement provides that:

> The offer of employment shall indicate in addition to the conditions for engagement and the qualification required, the exact number of workers to be recruited, the foreseeing duration, conditions of living accommodation.[4]

The agreements contain provisions that the competent bodies of the importing States will provide the corresponding bodies of the labour exporting States with information, on a periodical basis, about the recruitment needs of the importing States.[5]

The next step in the recruitment procedure is to publicize the offer of employment. The labour authorities in the exporting States make the initial selection of the applicants. The final selection is carried out by the importing States. If an applicant meets the stated conditions, then he will sign a contract. The standard procedure in these agreements is that they provide for model employment contracts which are negotiated by the concerned bodies in the labour importing and exporting States.[6]

The cost of transportation is borne by the employers. Article 12 of the Greece-Netherlands Agreement provides for insurance to cover the travel risks:

> An administrative arrangement shall be concluded between the competent departments with a view to covering the travel risk of the Greek workers. The cost of the relevant insurance premium shall be borne by the employers.[7]

Article 14 (2) of the Netherlands-Italy Agreement provides for the coverage of the risks connected with the journey. This is subject to a separate agreement to be concluded by the competent authorities. The insurance premium shall be paid by the Netherlands employers.[8]

These agreements provide for the setting up of a joint committee for the administration of these treaties and to suggest necessary amendments.[9]

The duration of the agreements is for one year and they are renewed tacitly unless either party to a recruitment treaty decides to denounce or withdraw from its operation by giving a three or six months' notice after the expiry of the initial duration period.[10] This standard provision in the recruitment treaties is in conformity with Article 54 (a) of the Vienna Convention on the Law of Treaties which reads as follows:

> The termination of a treaty or the withdrawal of a party may take place:
> (a) in conformity with the provisions of the treaty; or
> (b) at any time by consent of all parties after consultation with the other contracting States.[10]

In this respect one can make the following observations that:

A- The process of recruiting foreign workers is subject to the supervision of the two governments. The direct recruitment by employers is excluded.

B- The recruitment of foreign labour is determined by the micro-economic decisions of employers.

C- The treaties do not provide for a specific number to be recruited annually.

Foreign workers who are selected according to the above procedures must be able to depart from their countries of origin. The obligations of the home countries to facilitate the departure of the selected workers, under the provisions of the recruitment treaties, exhibit a considerable divergence. The Belgium-Spanish Treaty places an obligation on the contracting States not to "hinder the departure from their territories of workers provided that they possess a contract of employment duly stamped by the consul."[11] The Netherlands-Yugoslavia Treaty stipulate that the passport must be valid for at least twelve months.[12] Article 6 of the Netherlands-Italy Treaty refers

only to the possession of a valid passport without placing an obligation on the Italian authority to provide passports.[13] Article IV of the Treaty between Belgium and Tunisia makes a similar provision.[14] The Greece-Netherlands Treaty includes a similar provision: "An applicant who does not have a valid passport in his possession may not enter on the list".[15]

In contrast to these provisions is Article 10 of the Netherlands-Turkey Treaty whereby the "Kuurm" -Turkish labour office- ensures the issuance of passports to the recruited workers.[16] The agreements between the Netherlands-Portugal, Tunisia-Netherlands and France-Greece do not include provisions as to the sending States obligations to facilitate either the departure or the issuance of passports to the recruited workers.

**The Admission and the Residence of the Recruited Workers in the Receiving States**

The possession of an employment contract and a valid passport does not *per se* create a right to enter or reside in a country, nor does it entitle the holder to take up employment. The provisions of the recruitment agreements state that the authorities of the recipient States shall provide the workers with every facility for obtaining the necessary work and residence permits. The provisions of the treaties provide that:

> Upon the arrival the competent authorities shall facilitate the acquisition of the necessary work and residence permits.[17]

On a perusal of the provisions of the recruitment treaties, in respect of the work and residence permits, one tends to conclude that the legal terminology of these provisions -especially the provisions regarding the residence permits- is misleading and is sometimes is confusing. The treaty between the Netherlands and Italy states

that:

> The competent Netherlands authorities, shall supply the workers, free of charge with all the necessary documents for their residence and employment in the Netherlands.[18]

Article 17 of the Moroccan-Netherlands Treaty provides that:

> The Moroccan workers employed and settled in the Netherlands shall have the right to be joined by their families.[19]

Article 25 of the same agreement provides that:

> The rights and the privileges granted by this convention are extended to the Moroccan workers who immigrated earlier.[20]

International law does not make distinction between either permanent or temporary migration. It does not also impose duties on States to treat differently foreign nationals according to their categorization as permanent or temporary migrants. The status of individuals differs remarkably under national laws. The provisions of the recruitment treaties contain different legal terms: "temporary settled", "permenantly settled", "immigrated", "settled", "permenantly residing" or "temporary residing". The discrepancy of this practice is that the provisions of the treaties are applicable to migrant workers who are in different legal positions: migrant workers who are the holder of resident permits require more protection than those who are the holder of establishment permits.

According to Article 17 of the Moroccan-Netherlands Treaty, only Moroccans who are employed and settled in the Netherlands shall have the right to be joined by their families.[21] If this term is to be interpreted according to the Netherlands immigration law, it includes only Moroccans who have acquired permanent residence

permits, for which a foreigner is entitled to apply after five years of legal consecutive residence. The same Article stipulates that migrant workers are entitled to be joined by their families after they have worked for two years provided that they have accommodation considered suitable for themselves and their families. The Article does not stipulate that the two year period should be consecutive. Article 25 of the same agreement provides that the privileges and the rights granted by this agreement are to be extended to the Moroccans who immigrated earlier. The Articles of the treaty do not elucidate the term immigrated. Is it equivelant to temporary settlement or permanent settlement?

The same discrepancy is applicable to the provisions of the other recruitment agreements. For example, Article 19 of the agreement between the Netherlands and Portugal provides that the competent Netherlands authorities shall endeavour to take the necessary steps to eliminate all forms of migration which are not provided in this agreement.[21]

The Belgian agreements do not differ from the Netherlands' practice. The provisions of the Belgian agreements can be criticized on the same grounds. Article 1 of the Algerian-Belgian Agreement provides that:

> The Algerian authority shall take all measures to facilitate emigration of nationals to settle.

Article 13 of the same agreement provides that:

> Algerian workers who have settled permenantly or temporarily...shall enjoy equality of treatment.

Article 14 of the same agreement states that:

> Algerian workers who are employed and settled in Belgium may be joined by their families on the completion of three months work.

Article 16 of the same agreement explains that:

> The rights of this convention shall be applicable to Algerian workers who immigrated.[22]

The above provisions, however, are less ambiguous than the provisions of the Netherlands agreements. It is logical to interpret Article 14 of the Algerian-Belgium Agreement in these terms: Algerian workers who settled either temporary or permenantly in Belgium shall have the right to be joined by their families.

One of the vital issues to the migrant workers is their status after the expiry of their employment contracts. The question that poses itself at this stage is that, are they allowed to stay any further and under what conditions? The rule which emerge from the previous agreements is that migrant workers are permitted to stay in the host States after the expiry of their initial contracts provided that they either secure new contracts or renew their first employment contracts. But the renewal or the conclusion of new employment contracts do not lead to automatic renewal of the work and residence permits. A migrant worker or his employer must apply to the competent authorities to obtain their approval. Article 12 of the Belgium-Algeria Treaty provides that:

> Upon the expiry of his contract migrant worker may remain in Belgium provided that he is re-employed in accordance with the Belgian law concerning the employment of foreign workers.[23]

According to the agreement between Belgium and Tunisia, a migrant worker may stay in Belgium after the expiry of his first contract only if he is re-employed in the same sector.[24] The Netherlands agreements do not depart from the above stated rule. The common provision in the Netherlands recruitment treaties is that a migrant worker is permitted to stay if his contract is renewed or he agrees to be placed in other

employment subject to the approval of the Netherlands authorities.[24]

**The Power of the Receiving States to Expel Migrant Workers**

Another important issue relating to the security of residence is the power of the receiving States to expel workers recruited by these agreements. The practice which is inferred from the provision of these agreements is that the receiving States can expel migrant workers in accordance with the provision of the national laws. For example, Article 18 of the Netherlands-Portugal Treaty states that a migrant worker might be deported to Portugal by the competent Netherlands authorities on the grounds of public policy, security or health.[25] The French-Greek Agreement provides for the compulsory return of a migrant worker if:

A- His work has been wholly unsatisfactory.

B- He refuses to work or is unable to work for reasons beyond his control.

C- He endangers the public order or the national security.[26]

The Netherlands-Yugoslavia Treaty states that according to the customary rule of international law, States are entitled to send back the unwanted aliens:

> This agreement is without prejudice to the power of the Netherlands to send back the Yugoslavian workers who enter the Netherlands under the terms of the present agreement and who are no longer allowed to stay in the Netherlands.[27]

The home States are required, under an obligation, to re-admit their nationals who have been expelled from another country. However, some of the recruitment treaties have restated this rule thus putting the home States under the obligation to admit their unwanted migrant workers, at all times and without any formality. Another related provision is that the labour exporting States are under an obligation to

adopt all the necessary procedures to prevent their nationals, who are seeking employment, from travelling to a State which is party to a recruitment treaty. Article 18 of the Moroccan-Netherlands Treaty provides that:

> The competent Moroccan authorities shall take all the appropriate steps to prevent Moroccans seeking employment, who have not been recruited under the terms of this convention from travelling to the Netherlands.[28]

Lillich adopts the view that these treaties modify the "unfettered freedom of States to expel aliens and hence represent a progressive development in the law governing the treatment of aliens":

> Provisions of the sort under consideration are admittedly very far from establishing a general right on the part of the migrant worker to remain in the host country. It is important to note, though, that non of the treaties states an absolute time limit for the migrant's stay. Most important yet is the fact that the duration of the migrant's stay, at least to an extent, is determined partly by him and therefore is not wholly within the discretion of the host State. In practice, of course, the position of the worker is likely to be very circumscribed: his ability to conclude a new contract of employment, for example, may be very restricted in times of economic recession. Nevertheless, these treaties do modify the unfettered freedom of countries to expel aliens and hence represent a progressive development in the law governing the treatment of aliens.[29]

Lillich bases his argument on the following grounds that:

1- None of these treaties states an absolute time limit for the migrants' stay.

2- The treaties permit migrant workers to stay after the expiry of their employment contracts, and even this is subject to the conclusion of new employment contracts.

It is a highly contentious view that the studied provisions of these treaties

represent an improvement in the field of the treatment of migrant workers. The admission of a foreigner is, according to the established rules of international law, within the exclusive jurisdiction of States. States are not obliged duty to admit foreigners into their territory. The corollary of this is the right to exclude them and to place restrictions and conditions on their stay. The provisions of the recruitment treaties are clear in asserting that these treaties cannot be interpreted in terms of placing restrictions or constraints on the power of the contracting States regarding the admission of foreigners or their exclusion. The criteria to admit or exclude a migrant worker are determined according to the national laws of the contracting States. The treaties have added nothing to the already existing rules. Migrant workers who are recruited under the terms of these agreements have to satisfy the conditions of the national law regarding their residence and employment: these treaties do not create or establish for migrant workers a different or a favourable legal status that distinguishes them from workers who are admitted into the territory of the contracting States on their own accord. The possession of a valid travel document and work contract does not give the holder the right to enter or reside in the concerned States. They only facilitate obtaining the necessary authorization for residence and employment. The claim that the recruitment treaties, because they do not set a time limit on migrant workers' stay, do not constitute an exception or deviation from the above stated rules. The provisions regarding the expulsion of migrant workers are left to the States' discretion. The treaties, nonetheless, enumerate the grounds for expulsion. The French agreement with Greece provides for the compulsory return of migrant workers if their work is either unsatisfactory, or they are unable to work.[30]

An interesting provision of these agreements is that workers who become a charge on public assistance and are also liable to repatriation. The governments of the recipient States may, through economic measures, force migrant workers into

unemployment since they are concentrated in specific sectors. The question that arises this case is: are such States in breach of their contractual obligation under the recruitment treaty? The provisions of the treaties do not provide an indication to the effects of such an action on the recruited workers. This issue is of great concern to migrant workers because the recruitment treaties do not oblige the government of the receiving States to ensure employment to migrant workers after the expiry of their first employment contracts. One can correctly argue that since the recruitment treaties do not commit the labour importing States to specific economic policies, restrictions on the States' economic freedom cannot be assumed.

The recruitment treaties place an obligation on the exporting States to admit their nationals who are not allowed to stay any longer in the receiving States. This provision is well-founded in international law. The obligation of the States to admit their nationals is based on two grounds:

A- The concept of nationality.

B- The States are obliged not to frustrate the right of other States to expel unwanted aliens from their territory.

The right to return to one's country is embodied in constitutions and in the international human rights treaties. Article 13 (2) of U.D.H.R. provides that everyone has the right to leave any country, including his own, and to return to his country.

Some of these treaties reflect the customary rule of the diplomatic protection. Article 11 (7) of the Netherlands-Yugoslavia Treaty provides that the diplomatic or consular representatives may, without special authorization, extend assistance and protection to the Yugoslavian workers.[31] Article 9 of the France-Greece Treaty states that the rights enjoyed by the Greek consul shall, in no case, be restricted by the

terms of this treaty.[32]

**Family Reunification Provision in the Recruitment Treaties**

The provisions of the recruitment treaties as to the right to family reunification are divergent. Some treaties disregard the whole question.[33]

The Netherlands practice in this field lacks constancy. The two agreements with Italy and Tunisia do not contain any provision regarding the right to family reunification.[34] Article 16 of the Netherlands-Greece Agreement alludes to the question of migrant workers' families by stating that in order to be eligible for the benefits granted by the Netherlands legislation to workers with families, an official certificate indicating the martial status and a document listing the member of his family, who are according to the Greek law dependent on him should be submitted to the Netherlands' authoities.[35] A similar provision is to be found in Article 9 of the Netherlands-Portugal Agreement.[36] The Netherlands-Yugoslavia Agreement provides that the Netherlands authorities shall supply information on changes in the provisions concerning family reunion.[37] In contrast to the above provisions is Article 17 of the Morocco-Netherlands Treaty which categorically points to the right of family reunion and the conditions attached to it. It reads as follows:

> Moroccan workers who are employed and settled in the Netherlands shall have the right to be joined by their families after they have worked for two years, on condition that they dispense of accommodation considered suitable for themselves and their families by the Netherlands authorities. The family shall be taken to mean wife and dependent minors.[38]

The Belgian's practice regarding the reunification of families is more liberal. Migrant workers who are employed and settled in Belgium may be joined by their

families on completion of three months of work provided they have suitable accommodation. The definition of family is akin to the Netherlands' definition. Family means wife and dependent minor children. This is a common provision in the Belgian recruitment treaties.[39]

The French approach differs remarkably. Article 3 of the agreement between France-Greece speaks about those persons who receive an authorization to accompany the head of the family. An administrative arrangement has laid down the following conditions:

A- Families of migrant workers must apply to the National Immigration Office.

B- They must obtain prior authorization from the Minister of Public Health and Population.

C- The availability of acceptable accommodation.[40]

According to the treaties' provisions regarding the right to family unification only migrant workers who are employed and settled can be joined by their families. The term "settled" is liable to very different interpretations according to the national laws. Does this provision apply to migrant workers who are "temporary settlers" or "permanent settlers"? The same ambiguity is applicable to the term "immigrated". The agreements state that the benefits accorded to the workers who are recruited under the terms of these agreements will also be accorded to the workers who "immigrated" earlier. Does this term include the migrant workers who are permenantly residing in a State? Or is it designated to mean foreign nationals who entered a State as migrants? Or is it used to include workers who came to take up employment regardless of their plans to reside permenantly or return home?

**Equality of Treatment**

The recruitment agreements provide for the equality of treatment: foreign workers who are recruited under the terms of these treaties will enjoy equality of treatment with nationals in relation to:

A- Working conditions, wages, benefits, health protection and all rights which are derived from the employment relationship.

B- Access to courts, judicial and administrative bodies in case of labour disputes.

C- Social security benefits in accordance with the conditions of the national laws.[41]

Before examining the equality of treatment clauses in the recruitment treaties, some observations are to be made regarding the period of the contracts, transfer of workers to another sector and the termination of the contracts.

The Netherlands treaties provide, as a general rule, that the duration of an employment contract is for one year. The treaties concluded with Italy in Article 11 (2) provides that the employment contracts shall not be concluded for less than twelve months.[42] The duration of an employment contract in the treaties concluded between the Netherlands Portugal and Turkey can be less than one year but not less than eight months.[43]

The other studied treaties do not stipulate an explicit time limit for employment contracts.

The Netherlands' treaties provide that workers can conclude new contracts with other employers, if their performance during the period of the first contract is satisfactory.[44]

The Belgian treaties with Yugoslavia and with Tunisia allow migrant workers

to conclude new contracts with other employers provided they are employed in the same sector.[45]

The Netherlands treaties provide that the managers of the local labour offices decide, in cases of premature termination of employment contracts, whether the termination is justified or not. It is important to note that in such cases, involving a premature termination of an employment contract, are to be decided by courts rather than by the local labour offices because these offices are endowed with wide discretionary power.[46]

In the Belgian treaties the premature termination of an employment contract is evaluated by a judge:

> A contract concluded between a worker and employer on the basis of this agreement may be terminated prematurely on serious grounds which shall be evaluated by a judge.[47]

The rest of the recruitment treaties do not include special rules regarding the premature termination of employment contracts.

None of the recruitment treaties contains particular provisions regarding industrial accidents.

The recruitment treaties provide for the equality of treatment of migrant and national workers. Migrant workers are to enjoy the same conditions of work, wages, and the same laws which apply to the national workers. Article 11 (1) of the Italy-Netherlands Treaty provides that:

> Contracts shall specify the conditions of employment in conformity with the standards generally applied and shall not in any circumstances be less favourable than these applied to the Netherlands workers in the same category or in a similar job.[48]

Some of the treaties stipulate that migrant workers are only to be recruited

under the same conditions of employment as those which are applicable to native workers. In practical terms, this provision is of limited effect because the majority of migrant workers do not perform the same jobs as the native workers.

The equality provision, nevertheless, does not prevent private employers from discriminating against migrant workers since the provisions of international treaties are not enforceable against individuals. Public international law, as a general rule, does not accord individuals direct rights. The P.C.I.J. held in the Danzig case that:

> While an international agreement cannot, as such, create direct rights and obligations for private individuals, it could not be disputed that the very object of an international agreement, according to the contracting parties' intention may be the adoption by the parties of some definite rules creating individual rights and enforceable by national courts.[49]

No indication can be inferred from the provisions of the recruitment treaties that the intentions of the States parties to the recruitment treaties are to confer such rights upon the concerned private individuals.[50]

The effects of the provisions of the recruitment treaties in the municipal legal systems differ according to the domestic legal principles of the receiving States; whether the States adopt the "dualism" or the "monism" principle.[51] The provisions of international treaties in States which adopt the dualistic concept cannot produce legal effects in its municipal legal systems unless an international treaty is incorporated within the domestic legal system by an act of transformation. The monostic principle gives the provisions of international treaties direct applicability in a domestic law once the treaty is ratified and published.

The issue that becomes important in the context of migrant labour is the laws of the receiving States. Most labour importing countries are members of different regional groupings like the EEC, the Benelux system, and the Council of Europe. By

virtue of these memberships, the national laws of the contracting States give preferential treatment to their nationals. Consequently, these laws constitute *de jure* discrimination vis-a-vis workers from non-member States, because it is noted that these treaties do not provide for equality of treatment between workers recruited under the terms of these treaties and workers from a third party. This point can be illustrated by examining the EEC rules regarding the migrant workers' families. A worker who is a national of an EEC State has the right to bring his family to settle in a host member State. The family includes a spouse, their descendants who are under the age of 21 and dependent relatives in the ascending line of the worker and the spouse. In addition to this right, member States are required to facilitate the admission of any other member of the family provided that they are dependent upon the worker or living under his/her roof in the State of origin regardless of the dependents nationality.[52] According to Directive No. 77/485, a State member is obliged to provide free tuition in its language to the children of a migrant worker. Article 11 of Regulation 1612/68, gives the right to employment to migrant workers' families.

The European Social Charter and the European Convention on the Legal Status of Migrant Workers are applicable only to the nationals of the contracting States. Article 1 of the European Convention on the Legal Status of Migrant Workers, provides that:

> For the purpose of this Convention, the term "migrant worker" shall mean a national of a Contracting Party who has been authorised by another Contracting Party to reside in its territory in order to take up paid employment.[53]

Similarly, Article 1 of the European Convention on Establishment[54], and

Article 1 of the European Convention on Social Security[55], restrict the enjoyment of the rights and benefits to the nationals of the contracting parties.

It has been outlined in Chapter Three of this study that the national laws of the receiving States can restrict the employment of migrant workers to certain economic sectors, reserve specific employment to nationals or withhold issuance of work or residence permits.

It is a controversial provision that recruitment treaties limit the equality of treatment to matters which are considered "labour disputes" only. It is reported in the International Law Report that a plaintiff, Moroccan worker, raised an action for damages against his employer. The defendant requested that since the Moroccan worker was an alien, he must deposit a security towards the costs of the legal suit. The plaintiff claimed that he was exempted from depositing such a security because Article 16 of the recruitment treaty between the Netherlands and Morocco provides for the equality of treatment. His contention was rejected by the court which based its decision on the fact that the agreement provides for the equality of treatment only in matters which are considered to be labour disputes and this is not the case.[56]

**The Social Security and the Recruitment Treaties**

The equality of treatment is extended to include social security benefits. The entitlement of migrant workers to such benefits is subject to the fulfilment of the conditions of the national laws of the recipient States. Social security programmes are public national services. The rights which are derived from them are wholly or partly restricted to nationals. Aliens may be excluded from these benefits like the old age pension in France and the Scandinavian countries. The national laws subject the entitlement of social security benefits to the fulfilment of a minimum residence period

which a migrant worker might not be able to accumulate. The withdrawal of residence permits leads to the loss of such benefits. Other national laws adopt the reciprocity principle. There are other restrictions concerning the number of migrant worker's children to benefit from such allowances and the sum which is to be paid to each child. The Report on the World Social Situation concludes:

> With respect to benefits such as unemployment, maternity, sickness, invalidity and old age most countries afford equal treatment for foreigners in principle, but differences and limitations on the transfer of benefits make for great inequality in practice.[57]

Article 11 (4) of the Netherlands-Yugoslavia Treaty provides that the same legislation is applicable to Yugoslavian workers regarding social security, including unemployment insurance and family allowances, if they meet the conditions of the national law.[58] Of similar effect is Article 16 (3) of the Netherlands-Tunisia Treaty.[59] Article 17 (3) of the Netherlands-Turkey Treaty states that:

> They [Turkish migrant workers] shall enjoy the social security benefits including family allowances enjoyed by Netherlands workers under the Netherlands law, in so far as they meet the conditions laid down by the Netherlands law.[60]

Some treaties, such as the treaty between Italy and the Netherlands provides that the recruited Italian workers, regarding social security, will benefit from the European Community Regulations Nos. 3 and 4.[61] These Regulations establish that migrant workers who are EEC nationals are entitled to social security benefits in respect of sickness and maternity benefits, old age benefits, survivors' benefits, industrial accidents and disease, death benefits, unemployment benefits and family allowances.[62] The purpose of these Regulations is to overcome the territorial limitations of national security systems by, firstly, prohibiting discrimination on the

ground of nationality. Secondly, the Regulations forbid member States from reducing, modifying, suspending or withdrawing social security benefits because the beneficiaries reside in the territory of a member State other than that in which the institution responsible for payment is situated. Thirdly, the Regulations provide for the "aggregation" rule which accounts for periods of employment or residence completed under the legislation of any other member States.[63]

Special provisions should have been included in the recruitment treaties in order to reduce the discriminatory effects of the territorial principle of the national social security programmes. A report by OECD points out that:

> It is pointless, for example, to state that foreigners can enjoy the same advantages as nationals with regard to working conditions, housing, vocational training or social security when the conditions of their employment, their length of residence, the restrictions affecting them and the fact of not knowing the language or of having qualifications that are not recognized prevent them from fulfilling the necessary criteria to benefit from these advantages.[64]

**The Transfer of Migrant Workers' Wages**

Migrant workers have to comply with the different legal systems regarding the transfer of their earnings. The standard provision in these agreements is that migrant workers may transfer their wages in accordance with the laws and regulations in force. Different terms are used in this respect. Article 16 of the Netherlands-Greece Treaty allows the transfer of the entire savings in accordance with the prevailing regulations in the Netherlands.[65] Article 14 of the Netherlands-Yugoslavia Treaty includes a similar provision.[66] Article XV of the treaty between Belgium and Tunisia states:

> Tunisian workers may transfer their savings in accordance with the laws and

> regulations in force.[67]

The French-Greece Treaty provides for a rather different provision. The Greek workers may transfer part of their wages for the needs of their families; the transfer is subject to the conditions and within the limits established by the exchange law.[68]

**A Comparative Study between the Recruitment Treaties and International Investment Treaties**

In contrast to the vague formulations of the provisions of the recruitment treaties is the precise wording of the investment treaties. For example Article 1 of the Sri Lanka-Switzerland Agreement for the Reciprocal Promotion and Protection of Investment defines investment for the purpose of this agreement:

> Investment means every kind of assets and in particular, though not exclusively:
>
> 1- Movable and immovable property and other property rights such as mortgages, lines or pledges.
>
> 2- Shares, stock and debenture of companies or interests in the property of such companies.
>
> 3- Claims to money or to any performance under contract having a financial value.
>
> 4- Intellectual property rights exercised in commercial production and associated with activities carried on in the territory of the contracting parties.
>
> 5- Business and concessions conferred by the law or under contract including concessions to search for, cultivate, extract or exploit natural resources.

The same agreement sets up a clear definition of returns:

> Returns means: the amount yielded by an investment and in particular, thought not exclusively, to include profits, interest, capital gains, royalties or fees.[69]

Similar provisions are to be found in other investment treaties. The Tunisian-Netherlands Agreement for the Encouragement of Investment of the Nationals of the Two States provides that:

> Investment such as property, rights, and interests belonging to physical and juridical persons that are nationals of one of the contracting Parties in the territory of the other shall have the benefits of fair and nondiscriminatory treatment at least as favourable as that recognized by each party with respect to its nationals.[70]

It is useful to compare the equality of treatment clauses of the international recruitment treaties with the equality clauses of the international investment treaties.

In the treaty between Belgium-Luxembourg and Tunisia, the Tunisian government undertakes to ensure in its territory fair and equitable treatment of investment, and to take steps to ensure that the exercise of the right so recognized is not impeded by unjust or discriminatory measures; and these investments shall enjoy the same security and protection granted to its nationals or to the investment of nationals and companies of third States.[71]

Some observations can be made regarding the equality of treatment clauses in the investment and recruitment treaties:

A- The scope of the equality of treatment in the investment treaties is much wider than in the recruitment treaties; it includes rights, property and interests while the equality of treatment in the recruitment treaties is limited to employment relations.

B- The investment treaties prohibit any discriminatory, unjust and unfair

practice regarding these investments. There is no comparable provision in the international recruitment treaties which prohibits unfair and unjust practice against migrant workers. The national treatment standard in the recruitment treaties does not forbid discrimination by national laws against migrant workers. It has been noted that the legal systems of the receiving States place various restrictions on migrant workers regarding employment, change of employment or reserve certain occupations to nationals.

C- The provisions of the investment treaties stipulate that the investments shall benefit from any favourable treatment granted to nationals or companies of third States. The recruitment treaties do not mention that workers recruited under the terms of these treaties will receive equal treatment with third States' nationals.

D- The investment treaties prohibit discrimination against investments in case of nationalization, expropriation, and dispossession. The recruitment treaties do not include provisions that forbid the recipient States from discriminating against migrant workers in case of exclusion or expulsion of migrant workers.

The investment treaties establish the right for the natural or juridical persons of the contracting States to invest and establish enterprises in the territories of the parties. The recruitment treaties do not create a right to employment for the recruited workers. They only refer to the conditions of employment.

The investment treaties provide for just and fair compensation, according to international legal standard, if their provisions are breached. The recruitment treaties are silent on this point and they do not refer to the effect of the termination of a recruitment treaty on rights which migrant workers may acquire. The only exception is the treaty between Spain and Belgium:

> In the event of denunciation, the conditions of this convention shall

> continue to apply to the acquired rights, notwithstanding restrictions imposed by the governments concerned in respect of foreign nationals.[72]

The provisions of the recruitment treaties subject the transfer of migrant workers' remittance to the conditions of the national laws of the receiving States regarding exchange control. It should be noted that the provisions of the recruitment treaties employ different terms: transfer surplus of wages, savings, according to the needs of families in the home States. Furthermore, the recruitment treaties do not include provisions regarding the transfer of lumpsum payments like disability payments, retirement benefits or sums which result from the liquidation of assets owned by migrant workers.

The investment treaties provide for the transfer of:

- Real net profits, interest, dividends and royalties accruing to physical or juridical persons, and nationals of the other party.

- The proceeds of the total or partial liquidation of investments approved by the country in which they are affected.

- Adequate share of the proceeds of the work of nationals of other Parties authorized to undertake activities in its territory.[73]

This brief comparative study of the provisions of the recruitment and investment treaties demonstrates the disparity of the legal structure of these agreements. This confirms the fact that the recruitment treaties have "so far escaped the attention of the international legal community."[74]

**The Recruitment Treaties and the ILO Model Agreement on Temporary and Permanent Migration for Employment**

The studied recruitment treaties are similar to the model agreement which was drafted

by the ILO.[75] However, the recruitment treaties do not refer either to the ILO standards regarding migrant workers or to the model agreement.

The provisions in the ILO model agreement distinguish between two categories of migrant workers: permanent migrants and other migrants such as refugees and displaced persons. The provisions do not also give an explanation as to the exact meaning of "temporary" and "permanent" migration. Does the concept of permanent immigrants include persons who have been admitted to a State as immigrants? Or does this concept include migrant workers who have acquired the status of permanent settlers as a result of their residence in a State? The rights which are accorded to the migrant workers differ according to their classification as permanent workers or temporary migrant workers.

The provisions of the model agreement, in some aspects, offer more rights to migrant workers than the provisions of the recruitment treaties. Article 17 of the model agreement, which deals with the equality of treatment, explicitly prohibits discrimination against migrant workers on the grounds of nationality, race, religion or sex:

> 1. The competent authority of the territory of immigration shall grant to migrants *and to members of their families* with respect to employment in which they are eligible to engage treatment no less favourable than that applicable to its own nationals in virtue of legal or administrative provisions or collective labour agreements.
>
> 2. Such equality of treatment shall apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within the territory of immigration in respect of the following matters...[76]

The equality of treatment clauses in the international recruitment treaties do not enumerate the prohibited grounds of discrimination; they only provide that migrant workers shall enjoy equality of treatment with national workers. The prohibition of

discrimination on the ground of nationality in the model agreement should have been included in the recruitment treaties because it guarantees equal treatment not only to migrant workers recruited under the terms of these treaties and national workers, but also to migrant workers of different nationalities. Article 17 of the model agreement limits the equality of treatment to matters regulated by laws and subject to the control of the administrative authorities and only to migrant workers who are lawfully residing within the territories of immigration countries.[77]

The equality of treatment clause covers access to schools, technical and vocational training. But this clause puts limitations on migrant workers' access to schools, technical and vocational training that access to these institutions should not prejudice the interests of the nationals. It is difficult to specify the circumstances in which such access may prejudice the interests of the nationals.[78]

The other criticism of the equality of treatment clause in the model agreement is that only family members of permanent immigrants benefit from the equality of treatment regarding their employment.

Equality of treatment is extended to trades, occupations and acquisition of property. This provision is only applicable to permanent migrant workers.[79]

The ILO model agreement contains more detailed provisions regarding employment contracts of migrant workers. Article 22 provides that the contracts must contain conditions of employment, to be translated into languages which migrant workers understand and delivered to workers before their departure to the immigration countries.[80]

Special provisions in the model agreement deal with change of employment,[81] employment stability[82] and settlement of labour disputes.[83] According to Article 23 of the model agreement the labour authority in the State of employment undertakes to

find alternative employment for migrant workers if their first jobs do not correspond with their qualifications. Paragraph two of the same Article provides for the maintaining of migrant workers and members of their families during a period of un-employment:

> During periods of unemployment, if any, the method of maintaining the migrant *and the dependent members of his family authorised to accompany or join him* shall be determined by arrangements made under a separate agreement.[84]

Only family members of permanent migrant workers benefit from this provision.

Article 24 of the model agreement provides that if a migrant worker, before the expiry of his contract, becomes redundant, the competent authorities shall facilitate finding a new employment.[85]

With reference to the issue of the social security, the model agreement, recommends the adoption of special agreements regarding social security benefits. These agreements must guarantee equality of treatment of migrant workers and their dependents with the nationals and also protect migrant workers' acquired rights and rights in the course of acquisition. The model agreement does not define the rights which are included in the term of "social security" nor does it provide for special provisions regarding the transfer of social security payments for workers who depart from an employment country.[86]

Article 13 of the model agreement deals with the transfer of migrant workers' wages. The scope of this Article is wider than the corresponding provisions of the recruitment treaties. Paragraph 1 of this Article requests countries of emigration to authorize and facilitate the transfer of sums needed by migrant workers and their family members for their initial settlement abroad. It is explained that the provisions

of the recruitment treaties use various terminology regarding the transfer of migrant workers' wages such as "part of earnings", "entire savings", "surplus earnings", and "part of their wages" and simultaneously subject the transfer of wages to the conditions of national laws. Paragraph 2 of Article 13 of the model agreement has evaded these different terms by stipulating that migrant workers may transfer their savings and "any other sums due in virtue of this agreement". However, the States' obligation according to paragraph 1 of Article 13 is confined to permanent immigrants.[87]

A major defect in the ILO model agreement is that it does not provide for a right to family reunification. It only speaks about the members of migrant workers' families who are authorised to accompany or join migrant workers. Although several Articles of the ILO model agreement deal with the rights of migrant workers' families regarding access to school and social security and the right to work. Article 17 (1) of the model agreement does not explicitly provide for the right to work for migrant workers' families. However, its wording indicates such a right by stipulating that equality of treatment shall be extended to migrant workers and members of their families in respect to employment:

> The competent authority of the territory of immigration shall grant to migrants *and to members of their families* with respect to employment in which they are eligible to engage treatment no less favourable than that applicable to its own nationals in virtue of legal or administrative provisions or collective labour agreements.[88]

Article 27 provides for the avoidance of double taxation on the earnings of migrant workers. Such a provision is not included in the recruitment treaties.[89]

Article 29 states that the parties to recruitment treaties shall determine those provisions which shall remain in force after the expiry of the treaty. Such a provision

is omitted from the recruitment treaties.[90]

Articles 1 (f) (g) and 14 of the model agreement provide that a receiving State has to take the necessary measures to promote the rapid adaptation of migrants, and clarify the procedures for the naturalization of permanent migrant workers.[91]

Article 25 of the model agreement contains an interesting provision regarding the protection of migrant workers from repatriation in case of they are unable to work:

> The competent authority of the territory of immigration undertakes that migrant workers *and the members of their families who have been authorised to accompany or join him* will not be returned to the territory from which he emigrated unless he so desires if, because of illness or injury, he is unable to follow his occupation.[92]

This Article restrains the power of the receiving States to deport migrant workers in case they are unable to pursue their employment.

The model agreement can also be criticized on the ground of drawing a distinction between temporary and permanent migration without providing criteria to identify temporary or permanent migration.

Another issue which the model agreement does not address is the power of the employment States regarding expulsion or repatriation of migrant workers and members of their families. The only exception is the case of permanent migrant workers who are unable to follow their employment.

The model agreement ignores the issues which relate to the cultural rights of migrant workers.

**Concluding Remarks**

The present structures and the provisions of the recruitment treaties give a valid claim

to consider them as no more than functional treaties:

> These treaties, thus, can hardly be considered broad charters of the rights of migrant workers and their families. Basically they are functional in character: their purpose is to secure an orderly flow of labour supply to the industrialised States of Western Europe. They contain little more in the way of human rights guarantees than is necessary to implement this goal in a human fashion.[93]

This view is shared by Maurice Flory: "The treaties were primarily written to ensure the provision of sufficient quantities of foreigners who were young, healthy, and capable of doing often difficult work."[94]

Agreements in international law are supposed to create mutual and reciprocal obligations for the contracting States. Thus the study establishes the unbalanced obligations and rights of the contracting States. The labour importing States determine the number of the workers to be recruited, the nature of their jobs, the working conditions, their wages, the amount of wages that workers can transfer, and reserve the right to expel them or to refuse to admit them or their families. The unilateral decisions of the labour importing States to terminate these treaties emphasize the unbalanced structure of the recruitment treaties and give valid grounds to classify them as unequal treaties.[95]

The recruitment treaties do not consider the interests of the sending States, such as establishing a link between repatriation of migrant workers and development assistance. They remain exclusively concerned with employment relations:

> Basically, they do not contain any guarantees relating to matters outside the employment context. They do not provide, therefore, for any of the traditional civil rights, such as the right of freedom of expression or freedom of religion....Finally on the cultural side there are no provisions for the education of the children of migrant workers.[96]

The treaties do not commit the governments of the receiving States to any specific action in favour of migrant workers or their families nor do they advance any new legal norms regarding the States' powers to admit or exclude foreign nationals.

Lillich criticizes the recruitment treaties for not including a special provision which facilitates the naturalisation of the recruited workers:

> Nor do they contain provisions for the integration of the migrants into the society of host State. Most important, they do not make any special provision for naturalisation. If a migrant wishes to become a national of the host State, then his only option is to go through the normal naturalisation process.[97]

The purpose of the recruitment treaties is to overcome temporary labour shortages. Evidence of this abounds in the texts of these treaties to grant temporary work and residence permits to migrant workers. Other issues like the naturalisation and permanent settlement of the recruited workers remain unprovided for.

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# CHAPTER FIVE

## The Limitations of Human Rights Conventions

### Introduction

The foregoing analysis of the law systems of the receiving countries and the international recruitment agreements establish their deficiency and inadequacy in protecting the rights of migrant workers. The immigration laws of the receiving States have adopted an economic approach in relation to the issue of migrant labour tightening or relaxing the implementation of immigration laws according to the fluctuations in the economy and the requirements of the national labour markets. This approach does not take into consideration the impact of immigration laws on migrant workers.

The economic foundation of immigration laws places migrant workers in an inferior and insecure legal position. The legal terminology of these laws are characterized by vagueness and indefiniteness, thus endowing the administrative bodies entrusted with the execution of immigration laws with a wide discretion. It is an established legal norm, within national immigration laws, to empower the executives with considerable discretion:

> I think that the Minister [Home Office] can exercise his power for any purpose which he considers to be for the public good or to be in the interest of this country.[1]

The terms of the international recruitment treaties fall short of creating or advancing legal norms which might help in improving the legal status of migrant

Given the fact that the prime motive for emigration is the desire of migrants to improve their economic conditions, the issue which this chapter attempts to bring into focus is the extent to which individuals can fulfil this purpose without being discriminated against and placed in an inferior and insecure legal status. The second related point is the peculiar legal status of migrant workers as non-nationals. This fact remains valid although migrant workers through their long residence in the recipient States may have acquired the *de facto* nationalities of the countries of residence. The position of migrant workers as non-nationals shall be examined in relation to human rights conventions. The third point is the impact of the development of human rights norms and the economic interdependence among various sovereign States on certain concepts of international law, in particular the concepts of sovereignty and domestic jurisdiction.

The definition of migrant workers which is adopted in this study refers to individuals who reside indefinitely for the purpose of employment, but do not possess the nationality of the country of their residence. This definition distinguishes migrant workers from stateless persons, refugees, tourists, students, pilots, seamen and border workers. The determination of nationality and residence is made according to the national laws of the receiving countries. Two points are important in this definition: first, migrant workers as non-citizens; second, migrant workers as non-citizens who reside indefinitely for the purpose of employment. This definition assists in examining the legal position of migrant workers as non-citizen under human rights conventions.

We have noted that migrant workers are faced with particular legal problems:

- The problem of discrimination in employment, wages and social security benefits.

- The problem of the insecurity of their residence resulting from the wide

discretionary power of the bodies enforcing immigration laws and the policies of return which have been initiated by the receiving States. The problem of the insecurity of residence to migrant workers is a crucial importance:

> The problem of affording adequate protection to migrant workers is closely related to the question of security of residence in the country of immigration and the risk of arbitrary expulsion. Where the risk is felt by foreign workers they, may be led to accept discriminatory conditions of employment and to refrain from claiming their rights.[10]

- The problem of reunification with their families.

This chapter examines the capacity of human rights agreements in dealing with the above stated problems. These agreements include: the Universal Declaration on Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Covenant on Elimination of All Forms of Racial Discrimination, and the European Convention on Human Right.

## The Status of Migrant Workers as Non-Citizens under the Human Rights Conventions

Reading through various human rights conventions, one can safely conclude that these conventions apply equally to all individuals within the jurisdiction of the contracting parties except where the provisions of the conventions make an express distinction between nationals and non-nationals, or when a contracting party makes reservations regarding certain provisions. Article 2 of the U.D.H.R. states that every one is entitled to all the rights and freedoms set forth in this declaration.[11] The I.C.C.P.R. speaks about the duty of the contracting States to ensure to everyone and

to all individuals subject to their jurisdiction the rights enumerated in the Covenant.[12] Article 5 of the I.C.E.A.F.R.D. provides that the States parties to the Convention undertake to guarantee to everyone the rights set forth in the Convention.[13] The E.C.H.R. does not depart from the above provisions. Article 1 requires the contracting parties to secure to everyone within their jurisdiction the rights and freedoms guaranteed in the Convention.[14]

The States parties to these conventions are under an obligation to ensure to all individuals, national or non-nationals, the rights and freedoms set forth in these instruments, save the case when there is an express provision that permits the contracting parties either to limit the enjoyment of the rights and freedoms by non-nationals or where the provisions of the Conventions allow the contracting parties to reserve certain rights to their nationals. Article 21 (1), (2), of the U.D.H.R. states that everyone has the right to take part in the government of his country and has the right to an equal access to public services in his country.[15] Article 2 (3) of the I.C.E.S.C.R. permits developing countries to determine the economic rights of non-citizens.[16] The I.C.C.P.R. implicitly allows distinction between nationals and non-nationals.[17] Article 1 (2) of the I.C.E.A.F.R.D. expressly permits distinction between nationals and non-nationals by exclusion, restriction or preference.[18]

It is obvious from the provisions of the I.C.E.A.F.R.D. that the Convention does not forbid distinctions based on nationality. Differential treatment is thus permitted on the ground of citizenship or lack of it.[19]

The E.C.H.R. authorizes the contracting parties to impose restrictions on the political activities of aliens which include restrictions on the freedom of expression, on the freedom of peaceful assembly and on the freedom of association with others.[20]

These human rights conventions also establish a category of rights which can

be termed as non-derogatable or absolute rights where the position of non-citizens is identical to the position of nationals. This category includes the prohibition of slavery and servitude [21], the prohibition of torture and inhuman or degrading treatment [22], the right to life [23] and the right to recognition as a person before the law.[24] It is to be observed that the E.C.H.R. does not provide for a specific provision on the right of equality before the law and the equal protection of laws [25], the right not to be imprisoned on the ground of being unable to fulfil a contractual obligation [26], and the prohibition of retroactive offence or penalties.[27] However, these rights constitute "basic humanitarian principles" and are applicable to nationals and non-nationals.[28]

Migrant workers as non-nationals residing indefinitely in the receiving States for the purpose of employment face particular legal problems. They need legal protection against discrimination on the ground of nationality, against discrimination in employment, security of their work and residence and to be able to be joined by their families. The fundamental question is the extent to which these human rights instruments recognize these needs.

**Definition of Discrimination**

Discrimination is a key issue in immigration. The human rights conventions outlaw discrimination and enumerate prohibited grounds for discrimination. Article 2 of the U.D.H.R. states that everyone is entitled to all rights and freedoms set forth in this declaration, without any distinction of any kind. The Article enumerates race, colour, sex, language, religion, political or other opinion, national or social origin, property or other status as prohibited grounds for discrimination. It does not refer to nationality as a prohibited ground for discrimination.[29] Similarly, Articles 2 of the I.C.E.S.C.R., 2 of the I.C.C.P.R. and the I.C.E.A.F.R.D. provide that: "The term

racial discrimination shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin".[30] Article 14 of the E.C.H.R. prohibits discrimination in relation to the rights and freedoms enumerated in the Convention on grounds of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status.[31]

Russo rightly observes that these instruments are silent concerning discrimination due to nationality.[32] McDougal objects to the interpretation that the omission of nationality as a prohibited ground of discrimination enables the parties to these conventions to discriminate between nationals and non-nationals.[33] He bases his objection on the grounds that these conventions provide that "all the rights and freedoms are conferred upon everyone and begin the list of prohibited grounds with "such as" clearly indicating that the list is not intended to be exhaustive."

The *Travaux Preparatoires* of the U.D.H.R. clearly establish that the term national origin is not considered synonymous with nationality and is not used to refer to an individual from a foreign State; rather, the term has sociological significance[34]:

> The Sub-Commission wished to make it clear that the word 'national origin' should be interpreted by taking this conception not in the sense of citizens of a State, but in the sense of national characteristics.[35]

Mckean, explains that "the term national origin referred not to aliens but to different ethnic groups living in a country."[36]

The Human Rights Committee has held that although Article 26 of the International Covenant on Civil and Political Rights prohibits discrimination on "any ground" or "other status", nationality is not included within these two terms. The scope of this Article is limited to cases "involving grounds which are explicitly

enumerated in the Article or which can be said to come within the words "other status", the latter term is undefined."[37] The Committee states that:

> ...nationality as such does not figure among the prohibited grounds of discrimination listed in article 26...Under article 26, discrimination in the equal protection of the law is prohibited on any grounds such as, race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. There has been differentiation by reference to nationality acquired upon independence. In the Committee's opinion, this falls within the reference to "other status" in the second sentence of article 26.[38]

Discrimination on the ground of nationality is explicitly prohibited in the ILO Convention on Maternity Protection No. 103.[39] Article 1.1 (b) of ILO convention No. 111 states that the addition of nationality as a prohibited ground of discrimination may be included by a ratifying State after consultation with employers and workers organization.[40] Article 7 of the EEC treaty provides that:

> Within the scope of application of this treaty and without prejudice to any special provision contained therein, any discrimination on ground of nationality shall be prohibited.[41]

A historical analysis of the development of the concept of discrimination discloses that the main function of non-discrimination is to protect national minorities. The definition of national minorities does not include individuals from other States. Capotorti defines a minority as:

> A group numerically inferior to the rest of the population of a State, in a non-dominant position whose members -being nationals of the State- possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.[42]

The omission of nationality as a prohibited ground prompted the UN to adopt a special declaration to protect the human rights of individuals who are not citizens in the country which they live: The UN Declaration on Human Rights of Individuals Who Are Not Citizens of the Country in which They Live.

The declaration is supposed to address discrimination on ground of nationality and to remedy the loophole in the human rights conventions. It states in Article 4 that States may make a "distinction" between citizens and non-citizens.[43] This distinction is subject to two kinds of limitations. First, the limitations which are provided for in the U.D.H.R. Second, the distinction is subject to non-infringement on the rights which are enumerated in the declaration.

One of the major deficiencies of the human rights conventions is the lack of a definition of discrimination. While these conventions unequivocally delegitimize discrimination, they do not propose a definition of discrimination. The exceptions to this general rule, are to be found in the following human rights treaties: Article 1 of the I.C.E.A.F.R.D. which defines discrimination in terms of distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the effect of nullifying or impeding the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life[44]. Article 1 of the International Convention on the Elimination of All Forms of Discrimination against Women[45]; Article 1 (a) of the ILO Convention Concerning Discrimination in respect of Employment[46]; and the U.N.E.S.C.O. Convention Against Discrimination in Education.[47]

The lacuna, which has been caused by the lack of a definition of discrimination, has prompted a controversy as to what constitutes discrimination and

to the scope of the application of the non-discrimination principle.

The UN Declaration on Human Rights of Individuals Who Are Not Citizens of the Country in which They Live, evades the issue of a definition of discrimination. The declaration states that a State is entitled to make a "distinction" between citizens and non-citizens. But it does not provide for a criterion by which to distinguish between "distinction" and "discrimination".

However, a consensus has been reached regarding the prohibited grounds of discrimination. These grounds are reproduced in the various human rights declarations. They include: race, colour, sex, language, religion, political or other opinion, national or social origin, property or other status. The question which remains is: does an act or abstention, which is based on the above stated grounds and which distinguishes or differentiates between individuals, constitutes discrimination? Mckean deduces, from the studies undertaken by the Sub-Commission on the prevention of discrimination and protection of minorities, and from works of non-governmental organizations and the UN, the general principles which enable one to lay down the criteria to identify whether discrimination exists in a specific conduct or not:

A- A distinction, exclusion, or limitation which is placed on an individual because of his/her classification into a particular group, regardless of individual merits or capacity, or undue preference which is accorded to individuals according to his/her classification.

B- A distinction, exclusion, or limitation which is made on the basis of such classification must adversely affect the legitimate interests of a particular individual and prevent him/her from the enjoyment of equality of treatment.

C- An exclusion, distinction or limitation is not considered discriminatory if it is legitimate, reasonable or justified. An exclusion, distinction or limitation is

considered legitimate, reasonable or justified if it is aimed to achieve equality rather than to prevent equality in the enjoyment of rights.

D- It is not necessary to establish a discriminatory motive if discrimination exists in fact.

E- The human rights instruments do not give priority of one right over another. The principle of non-discrimination is applicable to all rights and freedoms enumerated in these instruments.[48]

The European Court of Human Rights has established criteria to identify discrimination:

> It is important, then, to look for the criteria which enable a determination to be made as to whether or not a given difference in treatment, concerning of course the exercise of one of the rights and freedoms set forth contravenes Article 14. On this question, the Court, following the principles which may be extracted from the legal practice of a large number of democratic States, holds that equality of treatment is violated if the distinction has no objective and unreasonable justification. The existence of such a justification must be assessed in relation to the aims and effects of the measure under consideration, regard being had to the principles, which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised. In attempting to find out in a given case whether or not there has been arbitrary distinction, the Court cannot disregard these legal and factual features which characterise the life of the society in the State which, as a Contracting Party, has to answer for the measure in dispute. In so doing it cannot assume the role of competent national authorities for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the

> Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the requirements of the Convention.[49]

The decision of the Court has firmly established the following principles:

A- Not all different treatment constitutes discrimination.

B- A differentiation or distinction is not discriminatory if it has an objective and reasonable justification and pursues a legitimate aim.

C- The proportionality between the means and the aims.

D- The legal and factual features of the way of life of a Contracting State are to be taken into consideration.

E- The non-discrimination principle is limited to the rights and freedoms set forth in the Convention.

Article 14 of the E.C.H.R. prohibits discrimination as to the enjoyment of rights and freedoms set forth in the Convention.[50]

The jurisprudence of the Commission and the European Court has emphasized that Article 14 of the E.C.H.R. is limited to the rights and freedoms enumerated in the E.C.H.R. In application 3781/68, the Commission held that:

> It is to be observed that the guarantee of Article 14 has no independent existence in the sense that, under the terms thereof, it relates solely to rights and freedoms set forth in the Convention.[51]

This view has been restated in many applications.[52] So, the general rule is that Article 14 of the European Convention on Human Rights has no "independent existence"; it only relates to the rights and freedoms enumerated in the European Convention. In case of a complaint based on Article 14, an applicant must prove that there has been a violation of a right or freedom as set forth in the Convention, and

must also demonstrate that this infringement has violated the non-discrimination principle:

> The dependence of article 14 implies also that some complaints allegeing discrimination must be declared inadmissible by the Commission to the extent that they do not disclose violations of rights and freedoms set forth in the Convention, though these complaints may relate to treatment that is otherwise discriminatory.[53]

Vierdag bases his argument on the fact that Article 14 of the E.C.H.R. is copied from Article 2 of The U.D.H.R. The draft of Article 2 of the U.D.H.R. shows that the scope of the Article is limited to the rights and freedoms enumerated in the Declaration.[54]

The jurisprudence of the Court and the Commission recognizes that Article 14 has no independent existence, and provides that the Article complements and forms an integral part of each of the Articles in the Convention.[55] This indicates that Article 14 has, in some cases, an autonomous existence:

> Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence, since it has effect solely in relation to the "rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of one or more of such provisions- and to this extent it is autonomous- there can be no room for its application unless the facts of the case fall within the ambit of one or more of the latter.[56]

In another decision the Commission stated that:

> The application of Article 14 does not only depend upon a previous finding of the Commission that a violation of another Article of the Convention already exists. In certain cases Article 14 may be violated in a field dealt

> with by another Article of the Convention, although there is otherwise no violation of that Article.[57]

The problem of "dependence" or "independence" of the non-discrimination clauses in human rights instruments has attracted less controversial arguments than Article 14 of the E.C.H.R. The texts of Article 2 of the U.D.H.R.[58], Article 2 of I.C.C.P.R.[59], Article 2 of the I.C.E.S.C.R.[60], Article 1 of the I.C.E.F.R.D.[61], clearly provide that the principle of non-discrimination is confined to the rights and freedoms listed in these instruments. Article 26 of the I.C.C.P.R. reads:

> 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.[62]

The non-discrimination clause of this Article is not confined or limited to any rights. It provides for non-discrimination in general and absolute terms. For this reason it is considered to be autonomous or independent.[63]

The important issue in this context is how to apply the concept of non-discrimination to the immigration legislation of the contracting States. Two points must be illustrated before examining the legal ramifications of the non-discrimination principle on the States' power concerning their immigration laws. Firstly, the States' power regarding the admission of aliens into their territories and, secondly, the legal nature of a residence permit.

**The States' Power and the Admission of Aliens**

The rules of international law regarding the admission of aliens are founded on the concept of sovereignty. Sovereignty is the power of a State to control any object within its territory which includes capital, individuals, legal persons, and trade. The methods of control are mainly implemented by legislation. The legislative powers of sovereign States are unrestricted unless they contravene a customary or positive rule of international law. International law is based on these fundamental concepts: the concept of a sovereign's inherent powers to admit, exclude and to set conditions on an alien's residence, justify the States' wide discretion in immigration laws. Publicists and the legal writers assert the idea that the admission and exclusion of aliens is a matter of domestic jurisdiction and is rooted in the concept of sovereignty: "If a sovereign could not exclude aliens it would be to that extent subject to the control of another power."[64]

International law writers place particular emphasis on a State's power to control the admission of aliens and that the admission of aliens "is a matter of domestic jurisdiction: a State may choose not to admit aliens or may impose conditions on their stay."[65] Oppenheim supports the view:

> No State can claim the right of its subjects to enter into, or reside on, the territory of a foreign State. The reception of aliens is a matter of discretion, and every State is by reason of its territorial supremacy competent to exclude aliens from the whole, or any part, of its territory.[66]

One of the supreme duties of a society organized in the form of a sovereign State is to promote and preserve the interests of its subjects, whether these interests are economic, political, social, cultural or demographic. The concepts of self-preservation and self-interest, which are quite legitimate, justify the wide discretion of

sovereign powers when deciding upon issues which influence their interests. The logical consequences of this perception of the function of Sovereign States is that, when States admit aliens into their territories, their decisions are based on economic, demographic and cultural interests:

> Affluent and free countries are, like 'elite universities', besieged by applicants. They have to decide on their own size and character. More precisely, as citizens of such a country, we have to decide: whom should we admit? Ought we to have open admission? Can we choose among applicants? What are the appropriate criteria for distributing membership?[67]

It has been pointed out that States preserve their interests through legislation; and since the legislation concerning the admission or exclusion of aliens is based on the above mentioned considerations, States cannot be held responsible for losses caused to aliens as the result of changing their laws.

International law places the issue of admission and residence of aliens within the institutions of national laws. The limitation of international law in this aspect has been furthered by the legal nature of residence permits. International law writers view a residence permit as a privilege or concession and the abstract nature of a residence permit makes it difficult to judge objectively whether exclusion of an alien constitutes a wrongful act:

> A general right of entry is too abstract to permit a tribunal to say that a specific individual has been wrongfully excluded. The appreciation of him as a security or racial or moral contamination risk is essentially subjective, and it is difficult to conceive of an occasion when one could with confidence say that the faculty of appreciation has been misused.[68]

**The Legal Nature of a Residence Permit**

Two important issues are linked to the question of residence and admission of aliens: the legal nature of a residence permission and the concept of acquired rights. Does the concept of acquired rights recognize an acquired right of residence? There is a legal confusion over the definition of acquired rights and a lack of agreement regarding the interests which are protected by the concept of acquired rights.

Plender points out that: "To ask whether international law is capable of protecting an acquired right of residence is to pose a fundamental question about the nature of acquired rights"[69] and to assume that the phrase "acquired rights could not be defined."[70]

O'Connell defines acquired rights as "any rights, corporeal or incoporeal, properly vested under municipal law in a natural or juristic person and of an assessable monetary value."[71]

However, it seems that writers on international law have identified two components in the concept of acquired rights: first, acquired rights are contrasted with "legal expectations or expectancies", second, for a right to be protected by the concept of acquired rights, this right must be assessable in monetary value. Kaeckenbeeck explains that:

> The emphasis was laid on "quaesitum", "acquis", "erworben", "vested". It was sought to distinguish between such rights as, deriving only from a statutory provision, could also be taken by statutory provision, and such rights as, resting on a special title of acquisition, could not be thus taken away.[72]

While legal writers disagree over to the precise definition of the term acquired rights, there is a consensus that for a right to be classified as a vested or acquired right it

must have an economic component. In the Oscar Chinn case the P.C.I.J. decided that:

> No enterprise -least of all a commercial or transport enterprise, the success of which is dependent on the fluctuating level of prices and rates- can escape from the chances and hazards resulting from general economic conditions. Some industries maybe able to make large profits during a period of general prosperity, or else by taking advantages of a treaty of commerce or of an alteration in custom duties, but they are also exposed to the danger of ruin or extinction if circumstances change. Where this is the case, no vested rights are violated by the State.[73]

The question that arises here is can a long and legal residence of an alien in a State be protected by the concept of an acquired right? Writers on international law answer this question in the negative. Their arguments are based on the following considerations: an alien residence in a State is a privilege or concession granted to him/her by the law of the State of residence. This residence does not mature into a legal right that can be enforced against the State of residence to confer on an alien a legal position that is immune from subsequent changes of law. An alien cannot claim a legal entitlement to enter or reside in a particular State.[74]

The definition of acquired rights refers to those rights which are based on a special title of acquisition which cannot be destroyed by a new law.[75] Although the legal systems of the studied countries recognize a special status for lawful and long residents, this special status does not mean that the State of residence cannot change its law in this regard and request the resident alien to leave the country:

> A right is not protected as an acquired right unless it is vested, in the sense that the State against which the right is asserted can be said to have taken some unequivocal step to invest the alien with entitlement. From this it follows that prolonged lawful residence by itself cannot give rise to an

acquired right. The possibility could arise (if at all) only in a case in which a State has granted to an alien by some express act the right to reside indefinitely or for a certain period, without reserving the possibility of curtailing the alien's stay.[76]

The other major reason which has been advanced by international law writers on why a residence permission cannot fall within the scope of acquired rights is that a residence permission cannot be assessed in monetary terms:

> From the sparse materials available, it seems that the right of residence lacks the proprietary element or the capability of being assessed in monetary terms that is indispensable for the protection of acquired rights.[77]

It is evident from the preceding paragraph that a residence permission cannot be protected by the concept of vested rights for two major reasons:

A- Public international law places the issue of an alien's residence in the institutions of municipal laws since national legislators cannot be restricted. The concept of vested rights cannot force national legislation to classify a residence permission as an acquired right. The decision to admit aliens is clearly connected with a State perception of its economic and social interests. The national legal systems regarding the admission of aliens are directed towards the protection of States' interests. These interests may change and as a result the legal rules are bound to change. Kaeckenbeeck points out that:

> laws abolishing or changing legal institutions as such, which are closely connected with moral, political and economic motives and purposes, the preservation of vested rights cannot be conceived as a ruling principle, because it would rob these laws of all meaning.[78]

This view is reflected in the following judical decisions;

Niederstrasser *v.* Polish State:

> The licence to exercise a profession is no less than an acquired right than the possession of a concession....Any type of acquired right may be limited or abolished for well-founded reasons of administrative or penal nature.[79]

Jablonsky *v.* Germany:

> ...as a principle, the freedom to use one's working capacity and to exercise a profitable activity which rests on the general principle of industrial liberty does not constitute a subjective vested right. For such a right to exist there must be some title of acquisition by the law of some concrete power.[80]

Although a State may not invoke its municipal law as a sufficient justification for avoiding international obligations, international law does not require States to grant a residence permission or to admit aliens into their territories.

B- Since a residence permit cannot be assessed in monetary value, it cannot be protected through the concept of vested rights:

> It seems, however, that the doctrine has not yet been applied to the protection of a bare right of residence. It would, indeed, be difficult to apply it to such a right, since the licence to live in a certain territory can scarcely be assessed in monetary terms.[81]

A change in this characterization can be deduced from the return policies of the receiving States. In France, the Act No. 84-311, 27 April 1985, provides that foreign workers over the age of 18 and in possession of residence permits are eligible to receive 20,000 FF in addition to another financial aid if they give up their work and residence permits.

Similar laws are enacted in Belgium and Germany. The French law, unlike the Belgian and German law, does not differentiate among migrant workers from

different nationalities or whether workers are employed or unemployed. The German law is concerned only with non-EEC workers. The Belgian law provides that migrant workers who are subject to compulsory visas might benefit from the provisions of this law. In these three countries, migrant workers who choose to receive financial incentives lose their work and residence permits, and are not allowed to return to the receiving countries for the purpose of permanent residence. These laws encourage the return of migrant workers to their countries of origin by providing financial incentives, and in return, migrant workers relinquish their work and residence permits. This link between the loss of residence and work permits and the receipt of a financial aid can be viewed as an implied recognition that a permission to reside in a country can be assessed in monetary terms.

This conclusion, nevertheless, must be considered with considerable caution. We may argue that this limited practice does not nullify the general principle that a residence permission and a work permit cannot be assessed in monetary terms. It is quite difficult to establish or to deduce from these laws that the intention of the drafters of these laws is to confer a monetary value on residence permits. The purpose of these laws is to induce migrant workers to return to their countries of origin.[82]

The conclusion we may draw thus is international law neither protects nor recognizes an alien's right to reside or work in a State.[83]

The significance of the East African practice to international law is that it made clear that the East African States did not accept the principle of vested rights of residence or rights to carry out a business or profession.

The concept of sovereignty permits States to set their own criteria regarding the admission of aliens, according to their perceived interests. Since the admission of aliens and their conditions of residence are dependent on the national legal systems, a

change in the legislation regarding the status of aliens does not entail States' responsibility; "rights created by municipal law are liable to be terminated by that law."[84]

**The Non-Discrimination Principle and Immigration Laws**

The methodological question that cannot be avoided in discussing the non-discrimination principle and immigration laws is how to apply such a principle to the admission of migrant workers. Goodwin-Gill states that:

> However, except in those areas in which treaties or peremptory norms operate, such as that of non-discrimination, it is not easy to bring matters of entry and exclusion within the bounds of international law. The preponderant view remains that these matters are essentially within the reserved domain of domestic jurisdiction.[85]

It is sufficient for the purposes of this section to explore the impact of the non-discrimination principle on rules regarding the admission of aliens. The merits of States' exclusion power will be analysed later.

The jurisprudence of the European Commission and the Court has established a framework to apply the provisions of the E.C.H.R. to the national immigration laws of the contracting States. In the application no. 434/58, the European Commission established the applicability of the provisions of the E.C.H.R. to the immigration laws of the contracting States. The Commission held that:

> Under general international law a State has the right, in virtue of its sovereignty, to control the entry and exit of foreigners into and out of its territory; and whereas it is true that a right to or freedom to enter the territory of States, Member of the Council of Europe, is not, as such

> included among the rights and freedoms guaranteed in Section I of the Convention; whereas, however, a State which signs and ratifies the European Convention on Human Rights and Fundamental Freedoms must be understood as agreeing to restrict the free exercise of its rights under general international law, including its right to control the entry and exit of foreigners, to the extent and within the limits of the obligations which it has accepted under the Convention.[86]

In the Abdulaziz Cabalse and Balkandali's case it was held that:

> The right of a foreigner to enter or remain in a country was not as such guaranteed by the Convention, but immigration controls had to be exercised consistently with the Convention obligations.[87]

These judgments, in addition to other judgments, establish the applicability of the E.C.H.R. to the immigration laws of the contracting States.

Two principles can be deduced from the jurisprudence of the Commission and the Court. First, the E.C.H.R. sustains the traditional rule of international law: States are free to admit aliens into their territories and to set conditions on their admission, economic activities and residence. Second, States' discretion in this respect is not an absolute, but it is circumscribed by the provisions of the E.C.H.R. and the State's international obligations.

The case law of the Court and the Commission establishes that, in principle, States do not breach the non-discrimination provision of the E.C.H.R. if their immigration laws:

A- Exclude or place a restriction on entry or residence of "some individuals". The legal justification for such decisions is based on the wording of Article 14 of the Convention which limits the application of non-discrimination to the rights and freedoms guaranteed by the Convention. Since the Convention does not guarantee a

right to reside or to enter a State, an applicant's claim that he/she has been discriminated against in respect of a right which is not guaranteed by a provision of the Convention is declared incompatible with the provision of the Convention *ratione materiae*. In the application no. 3798/68, the Commission held:

> The Commission has already found that a right of a foreign national to be admitted to a country other than his own is not as such guaranteed by any of the provisions of the Convention or Protocol: whereas it follows that the exclusion or restriction upon entry or residence of foreign nationals cannot constitute discrimination in respect of a right or freedom guaranteed by the Convention.[88]

In application no. 1465/62, the Commission stated that the right of a person to reside in a country of which he is not a citizen is not as such included among the rights and freedoms guaranteed by the Convention.[89] In another application the Commission provided that:

> Whereas in regard to the complaint that the said refusal constituted a violation of Article 14 of the Convention,...it is to be observed that that Article, by its express terms, forbids discrimination only with regard to the enjoyment of rights and freedoms guaranteed in the Convention, and whereas the Commission has already held above that such right is not violated in the present case.[90]

In another application the Commission decided that:

> The exclusion or restriction upon entry or residence of some individuals and not others cannot constitute discrimination in respect of a right or freedom guaranteed by the Convention.[91]

The same arguments were submitted by the U.K. government in its submissions in application no. 4403/70. It advocated that "the action of the U.K. not

to admit the applicants was not a discriminatory within the meaning of Article 14 since it did not discriminate against the applicants in their enjoyment of rights and freedoms guaranteed by the Convention."[92] Indeed the claims in this case, the East African case, were not based on the right to enter but on the claims that the exclusion infringes other rights which are guaranteed by the Convention, namely, the right to family life under Article 8 and under Article 12 of the Convention.

B- The immigration law of a State which grants a preference to nationals of countries which enjoy a close link with that State, cannot be classified as a racist law:

> Most immigration policies restricting, as they do, free entry, differentiated on the basis of people's nationality, and indirectly on race, ethnic origin and possibly their colour. While a Contracting State could not implement "policies of a purely racist nature", to give preferential treatment to its nationals or to persons from countries with which it had the closest links did not constitute racial discrimination.[93]

Immigration laws which restrict the admission or residence of some aliens, or give a preferential treatment to specific nationalities cannot be considered, in principle, as violating the provisions of the Convention. But this general statement is qualified by the facts and circumstances of each case. An immigration law which excludes some aliens may in certain circumstances infringe the provisions of the Convention. In the East African case, the Commission noted the special circumstances of the case and decided that the U.K. government had breached Article 3 of the Convention:

> The Commission recalls in this connection that, as generally recognised, a special importance should be attached to discrimination based on race; that publicity to single out a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special form of

> affront to human dignity; and that differential treatment of a group of persons on the basis of race might therefore be capable of constituting degrading treatment.[94]

The Commission found that the U.K. had violated Article 3 by discriminating against a group of people on the ground of race and colour not in form but in substance and effect:

> The Commission finds it established that the 1968 Act had racial motives and that it covered a racial group. The Commission refers in this connection to statements made in both of Houses of Parliament during the debate on the Bill in February.[95]

The Commission did not accept the United Kingdom argument that the purpose of the Commonwealth Act, 1968, was to achieve a multi-racial society in Britain and that the Act adopted a geographical test rather than a racial one.[96]

The Commission vindicated its decision on a number of grounds. It deduced the racial motive behind the Commonwealth Immigrants Act of 1968 by reference to the statements made during the adoption of the Act:

> The recent upsurge in arrivals from East Africa has been most considered by the government in the light of a great many reports that have been received about what is likely to happen and what effects are at present time.[97]

In addition to the fact that the new Act was racially motivated, the Commission stressed the special circumstances of the case:

A- The speed with which the 1968 Act was passed.[98]

B- The persons who were expelled from East Africa were not aliens but citizens of the United Kingdom and colonies. As such they were entitled to enter and reside in the U.K.

C- Their status as citizens of the U.K. and colonies entitled them to enter the U.K. since no other country was obliged to admit them. The refusal by the U.K. government to admit them meant that they were excluded from the country of their nationality.

The decision of the Commission supports the proposition that the maintenance of immigration law by a contracting State will entail a breach of the Convention if in its effect discriminates on the ground of race against a group of persons. It is not necessary for that group to be nationals of the contracting States.[99]

An immigration law which places restrictions on admission of certain individuals cannot, in principle, be considered as breaching the provisions of the Convention unless an applicant proves the existence of a racist motive:

> The Commission considers that the subjection of the British Overseas Citizens to immigration control for entry to United Kingdom, by way of limited quotas or otherwise, does not constitute racial discrimination or degrading treatment contrary to Article 3 of the Convention. However, this generalisation does not preclude the possibility that the facts of a particular case may raise an issue under Article 3. Accordingly it remains to be examined whether the applicant himself suffered treatment contrary to this provision of the Convention. The Commission notes that there is no indication that the applicant has been refused permission to enter the United Kingdom for racist motives.[100]

The Court and the Commission place special emphasis on the existence of racial motives to determine whether an immigration law can be considered as a racist law that breaches the provisions of the E.C.H.R. An immigration law that excludes or affects certain racial group cannot be classified as a racist law unless the affected persons prove the existence of a racial motive.

The Court in the Abudlaziz's case rejected the argument of the applicants that

the immigration rules of 1980 were racist and explained that the primary purpose of the new rules was to protect the labour market at a time of high employment. It was true that the new rules affected more citizens of India and Pakistan than other citizens of the Commonwealth, but this was not sufficient reason to characterize them as racist rules:

> ...the mass immigration against which the rules were directed consisted mainly of immigrants from the New Commonwealth and Pakistan, and that as a result they affected at the material time fewer white people than others, is not sufficient reasons to consider them as racist in character: it is an effect which derives not from the content of the 1980 Rules but from the fact that, among those wishing to immigrate, some ethnic groups outnumbered others.[101]

The Court did not agree with the minority of the Commission that the 1980 immigration rules were discriminatory since their effects were to prevent immigration from the new Commonwealth.[102]

The interesting point in this context is to compare the reasoning of the Court in the East African case with the Abudlaziz's case. In the Abudlaziz's case the Court noted that the 1980 rules were applicable to all individuals regardless of their race and ethnic origin. The 1980 rules included specific instructions to the immigration officers to carry out their duties without regard to race or colour of the individuals. The Court accepted that the rules had a legitimate purpose that is the protection of the labour market.

**Discrimination on the Ground of Sex**

The Abdulaziz's case raised an important issue regarding the sex equality in the field

of immigration laws. The applicants contended that the U.K. immigration law had discriminated against them on the ground of sex. While a settled man in the U.K. could bring his non-national spouse to join him, this right was denied to a settled woman. The U.K. government submitted that this difference of treatment had an objective and reasonable justification. The purposes of this difference in the legal status of male and female under the U.K. immigration legislation were:

A- To limit primary immigration.

B- To protect the domestic labour force, because men are more likely to seek employment than women.

C- To ensure effective implementation of immigration control.

The Court accepted that the protection of domestic labour force was a legitimate aim, but this legitimate purpose did not *per se* justify the differences in the immigration rules:

A- Equality of sexes is a major goal of the E.C.H.R.

B- The impact of male and female immigrants on the domestic labour market is not sufficiently important to justify the differences in treatment.

C- Public tranquility is best maintained by allowing husbands and wives to live together.[103]

The above section has attempted to study the impact of human rights on national immigration laws. It is evident that the non-discrimination principle can restrain the sovereign power to admit or exclude aliens. The Commission and the Court decisions in this regard signify that what was formerly considered a matter falling within the exclusive jurisdiction of States, can be subject to international scrutiny.

**Expulsion and Human Rights Conventions**

The previous section has, as we have just mentioned, sought to explore the impact of the non-discrimination principle on the States' power regarding the admission and residence of migrant workers. The other issue related to the question of the security of residence is the States' power to deport or to expel migrant workers. The national laws divulge a conspicuous similarity as to the grounds of expulsion. These grounds can be summarized under the following categories:

A- If an alien breaches immigration laws, or conditions of residence or work permits.[104]

B- If an alien becomes a public liability.[105]

C- If an alien involves in criminal activities.

D- If an alien engages in undesirable political activities.

E- If an alien commits acts against public order or national security.[106]

The rules of international law regarding the expulsion of aliens are based on identical legal concepts governing the admission and residence of aliens. There is no need to restate the position of international law in this respect.

Two points have to be stressed. First, the admission and expulsion of aliens falls within the discretion of each State. However, this discretion is circumscribed by the customary norms of international law or by a treaty obligation:

> The right of a State to expel, at will, aliens, whose presence is regarded as undesirable, is, like the right to refuse admission of aliens, considered as an attribute of sovereignty of the State...The grounds for expulsion of an alien may be determined by each State by its own criteria. Yet the right of expulsion must not be abused.[107]

Second, the State of an expelled alien is under an obligation to admit him.

Public international law stipulates conditions to ascertain the legality of an expulsion order: an expulsion does not entail a State's responsibility if it is carried out according to the municipal law of the expelling State, and there must not be "ill-treatment or torture and due regard must be paid to the dignity of the individual and to his basic rights as a human being."[108]

The legality of expulsion is determined in accordance with the national laws of the expelling State but this does not mean that the expelling State can invoke its national legislation to evade the standards of international law: "...the domestic law and the measures employed to execute it must conform with the requirements of international law, and any failure to meet these requirements is a failure to perform a legal duty."[109]

International law imposes on States an obligation to offer procedural guarantees to scrutinize the legality of an expulsion order. However, these guarantees do not include a right to challenge the merits of an expulsion order:

> It is plain that there is no general obligation in international law to afford a judicial review of the merits of a decision to expel an alien. Indeed, relatively few systems of law can be found in which every decision to deport an alien attracts a right of appeal; and in some the courts have expressly refrained from inferring the existence of such a right. Moreover, the distinction between review of merits and review of underlying legality appears insufficiently established in State practice, particularly in civilian jurisdictions, to constitute the basis of a rule of customary law universal in application.[110]

Goodwin-Gill agrees with Plender's statement. He points out that the national courts are not entitled to review the facts or the reasons behind an expulsion order especially if an expulsion is based on public order:

> The judicial tribunals are not entitled to question the occasion for an expulsion order or the reasons which lie behind it. Moreover, the administrative tribunals are not permitted to review the appreciation of fact upon which is based either the conclusion that the alien is a danger to 'ordre public' or the occasion is one of urgency.[111]

The procedural guarantees which international law requires for an expulsion do not include a right to question an expulsion order on its merits. Does this indicate that States are under no obligation to prove the legitimacy of an expulsion order? International law writers answer this question negatively:

> The requirement that the expelling State proves its legitimate grounds for deportation has not, however, persisted in, and the tendency has been to allow States a general competence to allow aliens to leave, but to engage them in international responsibility with respect to the manner of expulsion.[112]

Plender affirms that the expelling State is under a duty to provide reasons for an expulsion if a case is presented before an international tribunal and, there is no corresponding duty to furnish the reasons for the expulsion to the State of the expelled alien.[113]

Goodwin-Gill is of the same opinion: "It is doubtful to what extent the requirement of explicit reasons applies in cases other than those submitted to arbitration."[114]

The I.C.E.A.F.R.D. is silent on the issue of expulsion on racial grounds. It confines the prohibition of racial discrimination to the movement and residence within the border of the State.[115]

However, Article 13 of the I.C.C.P.R. restates the customary rule of international law which provides that an expulsion of an alien must be discharged in

accordance with the law, and that the expelled alien is entitled to submit reasons against his expulsion before a competent authority.[116] These procedural guarantees are limited to aliens who are lawfully residing in the territory of a State party to the Covenant and these procedures may not apply in cases of extreme necessity.

From Plender's point of view, Article 13 presents an additional procedural guarantee to protect aliens which goes further than the requirements of international customary law; States' practice does not disclose any degree of consistency as to the representation of an alien before a competent body:

> The Article as a whole appears to go further than customary law requires. In particular, there is insufficient basis in State practice to maintain that States which are not bound by that Article are obliged to allow aliens to be represented; and the language of the Article implies a greater degree of formality in the review than is required by application of customary law or general principles of law. For this reason the Article represents an important addition to the alien's procedural guarantees, in States that have agreed to be bound by it.[117]

The provisions of the E.C.H.R. do not include explicit guarantees as to the right of admission or residence in a particular State. However, it is evident that the refusal to admit or expel an alien is indirectly prohibited if the expulsion infringes one or more of the rights enumerated in the Convention.

The Articles of the E.C.H.R. which have been frequently invoked in cases which involving national migration laws are: Article 3 of the Convention prohibits inhuman or degrading treatment[118], Article 5 which provides for the right to liberty and security of a person[119], Article 6 which guarantees the right to a fair and public hearing by an independent and impartial tribunal established by law[120], Articles 8 and 12 which safeguard and prohibit an arbitrary interference with family and private

life.[121] The following section scrutinizes the impact of these provisions on the immigration laws of the contracting States.

According to Article 3 of the European Convention, an expulsion is considered contrary to Article 3, if the Commission believes that the expulsion of an alien to a particular State where the alien will actually be subjected to any treatment prohibited by the Article, or there is present the risk of an inhuman or degrading punishment or treatment.[122]

The Commission decided that the deportation of aliens without identity cards or whose countries of origin are not known may amount to a degrading treatment.[123]

In the East African case the Commission rejected the argument of the British Government that: Article 3 of the Convention is concerned only with the prevention of physical or mental maltreatment and could not be interpreted to include a refusal of entry under immigration law. Although the British government admitted that Article 3 of the Convention is relevant only in the case of persons being sent repeatedly back and forth between different countries, the Commission found that the 'shuttlecocking' practice of the U.K. immigration authority amounted to a degrading treatment within the meaning of Article 3 of the Convention.

The Commission established that deportation may *per se* in certain circumstances amount to a treatment prohibited by Article 3 of the Convention. The Commission held that any act by the authorities liable to have direct effects on the applicant's physical condition or endanger his life might be contrary to the Convention, particularly Articles 2 and 3.[124]

The criteria which has been developed by the Commission to determine whether a treatment is considered contrary to Article 3 of the Convention include: the status of human rights in the State of destination and the political regime, the procedural guarantees available in the State of destination, the severity of the penalty

and the risk of persecution by non-government factions.[125]

Three main rules can be deduced from the decisions of the Commission regarding the applications based on the above mentioned Articles:

A- An expulsion is contrary to the Convention if its only principle purpose is to destroy rights and freedoms stated in the Convention.[126]

B- The rights and freedoms set forth in the Convention do not grant an alien the right to stay in a particular State.

C- An alien's rights under the European Convention are independent from his/her right to stay in a particular State.

It must be pointed out that Article 4 of the fourth protocol of the E.C.H.R. prohibits collective expulsion of aliens. This Article does not apply to individuals nor to a group of individuals.[127] Article 4 of the fourth protocol is an important addition to international law since the customary international law does not consider that the expulsion of aliens *en masse* is *per se* illegal. Only a few human rights instruments explicitly prohibit collective expulsion of aliens: the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights.[128]

**Family Life, Immigration and Human Rights**

A fundamental problem which is associated with the international labour immigration is the preservation of family unity and normal family life. The common pattern of the migratory process begins with a husband leaving his country of origin, and after being admitted into an immigration country he requests that members of his family to join him.

The defects of national laws have been pointed out in Chapter Three. The rules of international law place no obligation on the part of the recipient country to

admit an alien or his family.

The provisions of human rights instruments manifest that the contracting States attach a considerable importance to the protection of family life. Article 15 (3) of the U.D.H.R. states that "...family is the natural and fundamental group unit of society and is entitled to protection by society and the State."[129] Article 12 of the U.D.H.R. prohibits arbitrary interferences with family.[130] Article 17 of the I.C.C.P.R. contains a similar provision, but it extends protection to include unlawful attacks on honour and reputation.[131] Article 10 of the I.C.E.S.C.R. provides that the contracting States recognize the widest possible protection to family.[132]

Article 8 of the E.C.H.R. reads:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[133]

The provisions of the human rights agreements do not include any definition of "family". The absence of criteria as to what relationships constitute a "family" raises the controversial issue of providing a definition.

Nafziger observes that: "The definition of family is at least problematic internationally as it may be domestically."[134] The problem of laying down criteria to define the term "family" is explained by Robertson:

> Family life may vary very much with social, economic cultural and geographical conditions, and it is subject to various ideological, religious and

philosophical conceptions.[135]

In the absence of authoritative interpretation of the provisions of human rights instruments concerning the concept of "family",[136] the jurisprudence of the European Commission and the European Court of human rights constitutes a primary source to build up a definition of "family".

Two concepts must be elucidated: first, the meaning of "family life", which differs according to social groups of different nationalities. Second, the definition of "interference" by a public authority. Not all interferences are prohibited in this Article. The interference which contravenes the provisions of Article 8 is the interference which cannot be justified by the requirements of paragraph (2) of Article 8.

The case law of the Commission and the Court stipulates three requirements before an applicant can successfully invoke Article 8:

A- An applicant must prove that there is close, effective and genuine relations between him/her and his/ her family.

B- It must not be possible for the family to live as a family unit in another country.

C- There must be unjustified interference by a public authority.

The Commission established these three stipulations in a number of cases:

The Commission recalls that it has previously held that, apart from any blood relationship, certain links must exist between persons before their relationship can be said to constitute "family life" within the meaning of Article 8. Thus in deciding whether "family life" exists, the Commission has taken into account whether, for instance, persons in fact lived together and whether they were financially dependent on one another.[137]

In the application no. 2992/66, a Pakistani national, Singh, residing in the U.K. applied for an entry certificate for his father to join him. The immigration authorities refused the application on the grounds that Singh failed to prove the family relationship. The Commission found that there was no violation of Article 8 since Singh and his father were two adults who had been living apart for a considerable time.[138]

The approach of the Commission is not only to ascertain that a family relation exists, but also whether this relationship can constitute a family life within the meaning of Article 8.[139]

Storey observes that the Commission "has used this test to exclude complaints in immigration cases involving adult sons and daughters; siblings; grandchildren; nephews and nieces; other relatives and adoptive children."[140] These general criteria are subject to modifications by the existence of financial dependence or strong emotional ties. The concept of family life, according to the jurisprudence of the Court and the Commission, envisages the preservation of the family as a unit:

> The definition of the word 'family', for the purpose of the European Convention, must be based on fact, rather than on unyielding genealogical rules modified by reservations governing age and status of legitimacy or matrimony. The case-law under Article 8 of the Convention is dominated by the concept of family unity, whereby persons who in fact live together as a family are permitted in law to continue to do so.[141]

The Court decided in the Abdulaziz's case that "the exclusion of a person from a State where members of his family were living might raise an issue under Article 8", but this did not mean that the concerned State was obliged to issue a residence permit if the alleged applicant could maintain regular visits to that State unless there were special circumstances. In the application no. 1855/63, the applicant

complained that the refusal of the Danish authority to issue a residence permit had infringed his family life. The Commission declared this application inadmissible and stated that the applicant had the possibility of making regular visits to his relatives and his parents for reasonable length of time. The refusal to issue a residence permit for the applicant did not hinder the effective exercise of the right to family life.[142]

The European Court's judgment in Berrehab's case, elucidated the special circumstances where the refusal to issue a residence permit violated Article 8:

> The refusal to grant the first applicant a new residence permit and his resulting expulsion was an interference with the applicants' right to respect for their family life. Although the first applicant could travel to the Netherlands from Morocco on a temporary visa, the possibility of maintaining family relationships was theoretical in a situation where regular contacts were essential in view of the very young age of the child.[143]

The Court's decision in Berrehab's case has significant legal implications. First, the Court defined family life in board term: the cohabitation of the parents was not a *sin qua non* of family life and it accepted that Mr Berrehab's frequent visits to his child -despite the fact that he was living separately from her mother- constituted family life. Second, the Court established the children's right to family life and the denial of that breached the provisions of the E.C.H.R. The domestic laws of the contracting States must ensure, from the moment of the child's birth, his/her integration into his/her family.[144]

Thirdly, it is noted that the immigration laws require that a non-national spouse, who is issued with a residence permit on the ground of his marriage to a national, to leave the country if the marriage has dissolved. An applicant who can prove the continuation of the family life after divorce can challenge such a decision.

Applicants who base their claims on Article 8 to challenge the decisions of the

national immigration authorities regarding entry and exclusion, must demonstrate that they bear no responsibility for such immigration measures and that it is impossible for them to establish normal family life in another country. Indeed, the jurisprudence of the Commission and the Court establishes that the "voluntary migration of one spouse cannot itself engage any public responsibility under Article 8":[145]

> The Commission notes that the parents have themselves created the present situation by leaving the children behind in the United Kingdom, where the parents had no right to stay...where they apparently found the economic and educational opportunities for their children to be more favourable than Northern Cyprus.[146]

In another application the Commission found that although the refusal to grant a residence permission to the applicant constituted interference with the right to family life, the applicant was responsible for this measure by deliberately entering the U.K. illegally to evade immigration control.[147]

The Commission declared inadmissible applications based on Article 8 because it found that there were no *legal obstacles* for a family to live as a unit in other country unless this other country is unconnected with the family.[148] The Commission did not accept that lower standards of living and the economic conditions in a State of origin, constitute obstacles to family life.[149]

The terms of Article 8 do not guarantee the right of a family to choose a country of residence: "The right to respect for family life does not necessarily include the right to choose the geographical location of that family life."[150] In the application no. 3325/67, the Commission decided:

> It is to be observed that the refusal by the authorities of entry or continued residence of the husband did not prevent the wife and children from joining him abroad, no reason appearing, given the short period of their residence in

> the United kingdom, why they could not do so, therefore; and whereas the refusal would not have constituted a separation of the family by the authorities, if the wife and children as they were entitled and chose to remain in the United Kingdom.[151]

The guarantees in Article 8 are confined to respect the existing family life.[152] The Article does not oblige a State to issue an entry clearance to a foreign citizen for the purpose of establishing a new family relationship.[153] This raises the question of the States' obligation regarding the practice of an arranged marriage. Does Article 8 place an obligation on a State to issue an entry authorization and residence permit to the one party of the intended marriage? The issue was indirectly raised in the Abudlaziz' case . The applicant contended that the U.K. immigration rule interfered with the right to family life by stipulating that parties to the intended marriage should have met before the marriage. This condition could not be fulfilled since the practice of arranged marriage is customary in India. The Court did not directly address the question of whether a State is obliged to issue a residence or an entry permit to a party of the intended marriage. But it stated that the purpose of the above mentioned rule is to prevent evasion of immigration rule by means of a bogus marriage.[154] Nevertheless, it can be assumed from the judgement of the Court that a State Party to the Convention enjoys a margin of discretion to determine whether or not to issue a residence permit in the case of arranged marriage.

Article 8 does not only place a duty of abstention from interfering in family life, but also demands a a positive obligation on the contracting States for maintaing normal family life. In the Belgian linguistic case, the Commission did not uphold the Belgian government interpretation of Article 8 that the obligation resulting from Article 8 possesses a strictly negative character.[155]

The Court has asserted in various cases that the obligation contained in Article

8 is not limited to a passive obligation, *i.e.* States Parties are required to abstain from an unjustified interference in family life, but also obliges States to act positively to ensure effective respect for family life. The Court has referred to the fact that the purpose of Article 8 of the Convention is to ensure effective protection of individuals against arbitrary interferences by a public authority. This obligation cannot be brought about by passivity on the part of a State but necessitates a positive undertaking:

> The Court recalls that although the object of Article 8 is "essentially" that of protection of the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.[156]

States' obligations regarding Article 8 of the E.C.H.R. assert that the fulfilment of obligations of the Convention requires the removal of legal and factual obstacles which hinder the effective enjoyment of the rights enumerated in the Convention:

> ...hindrance in fact can contravene the Convention just like a legal impediment. Furthermore, fulfilment of a duty under the Convention on occasions necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive and there is no room to distinguish between acts and omissions.[157]

Article 8 of the E.C.H.R. places some restraints on the sovereign power regarding its immigration laws. Yet the practical value of this Article in the field of

immigration is limited. According to the case law of the European Commission and the Court, an applicant cannot base his claim on Article 8 unless there is actual and unjustified interference by a public authority in the exercise of this right. The refusal to admit an alien into a country where his wife has taken up residence does not constitute a violation of Article 8 if the concerned family can live together in another country.[158] In the application no. 238/56, the applicant complained that her husband, a German national, was refused entry into Denmark. The Commission declared the application inadmissible because the couple had their common residence in Germany and could continue to do so.[159] The Court decided that an expulsion of the whole family does not raise an issue under Article 8, if the family could continue to live as a unit in their country of origin.[160]

Paragraph (2) of Article 8 is liable to misuse. The Commission recognizes that national authorities enjoy considerable discretionary power especially regards the link between the effective implementation of immigration policies and the maintenance of order.[161] But an interference with the right to family life is justified if it is in accordance with law and necessary in a democratic society, on one or more of the eight listed grounds in paragraph (2). Velu notes that Article 8 of the Convention "did not provide for any restrictions on the safeguard of this interest."[162]

Nevertheless, the decisions of the Court have interpreted paragraph (2) of Article 8 of the E.C.H.R. in a very rigorous way in order to avoid the misuse of the textual elasticity of paragraph (2) of Article 8. The Court and the Commission accept that States are entitled to enjoy a certain degree of discretionary power. However, this margin of discretion is circumscribed by the requirements of Article 8 and by the supervisory role of the Court:

> In the first place, its review is not limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good

> faith. In the second place, in exercising its supervisory jurisdiction, the Court cannot confine itself to considering the impinged decisions in isolation, but must look at them in the light of the case as a whole; it must determine whether the reasons adduced to justify the interferences are relevant and sufficient.[163]

The term "according to law" implies that a norm cannot be considered as law unless it is formulated with enough precision, made accessible to individuals and provides consequences for a given action. In other words, the phrase "according to law" does not merely refer to the domestic law of a State, but also relates to the quality of that law. The discretionary character of law is not inconsistent with the above mentioned requirements:

> The law which confers a discretion is not in itself inconsistent with the requirement of foreseeabitlity, provided that the scope of discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.[164]

It is not sufficient for the purpose of Article 8 (2) that a State refers to its domestic law to justify an interference in family life. The said municipal law must comply with the above mentioned requirements.

An interference in family life can be justified only if its purpose is legitimate. The legitimacy of such an interference is determined by the criteria provided in paragraph (2) of Article 8: the national security, public safety, economic well-being of the country; the prevention of disorder, protection of health or morals, or for the protection of the rights and freedoms of others:

> In order to determine whether these interferences were justified under the terms of paragraph 2 of Article 8, the Court must examine in turn whether

> they are "in accordance with law", whether they had an aim that was legitimate under paragraph 2, whether they are necessary in a democratic society.[165]

Two notions have been emphasized by the Court: the necessity of such an intervention, and the proportionality principle. The notion of the necessity implies the existence of a "pressing social need" for intervention.[166]

The proportionality principle requires a process of balancing the interest of individuals and the general interest provided for in paragraph (2) of Article 8. While it is legitimate for a State to expel or discontinue an alien's residence on the one or more of the grounds provided in paragraph (2) of Article 8, the Court has annulled decisions of national authorities on the basis of the lack of proportionality between the interest which Article 8 protects and the interests of the individuals. In the Berrehab's case, the Dutch immigration authority refused to issue a residence permit for a Moroccan national after his divorce from his Dutch wife on the ground of the prevention of disorder. The applicant claimed that the refusal to issue a residence permit prevented him from keeping regular contacts with his minor child. The Court ruled that the refusal of the Dutch immigration authority constituted a breach of Article 8, and the interference was disproportionate since the Dutch immigration authority did not achieve a proper balance between the applicant's interest in maintaining regular contacts with his child and the general interest allowing for the prevention of disorder.[167]

The Court asserted the proportionality principle in the Moustaquim's case. The case concerned a Tunisian national who lived in Belgium for twenty years with his brothers and sisters. As a result of committing over twenty criminal offences, he was issued with a deportation order. The Court annulled the deportation order stating

that no proper balance was achieved between the interests involved, and the means employed were disproportionate to the legitimate aim being pursued.[168]

**Migrant Workers and Economic, Social and Cultural Rights**

An earlier section of this chapter has attempted to analyse some aspects of the normative ambiguity of the concept of discrimination. The non-discrimination principle proposes to achieve equality. However, this simple statement raises more complicated issues most important of which is whether the aim of the non-discrimination principle is to achieve equality before law (formal equality) or equality in law (material equality), and whether the States parties to human rights conventions are under an obligation to interfere positively to achieve equality?

The principle of equality implies formal and material equality. Formal equality refers to equal treatment while material equality relates to equality in economic, social and cultural fields. The view which can be deduced from human rights instruments appears to be in line with the notion of formal equality. According to this view, the principle of non-discrimination does not protect economic, social and cultural rights since this category of rights requires a State's positive action:

> The non-discrimination principle does not relate, in this view, to the group of human rights that supplements the classic set of freedom rights, namely economic, social and cultural rights. To comply with these rights requires, in the traditional view, not state abstention (as is the case with the freedom rights ) but state action. The non-discrimination principle prohibits only a certain action; therefore it does not relate to such inaction, not even if this inaction would violate social rights and lead to a discriminatory situation at that.[169]

The genesis of this approach can be traced back to philosophical and

jurisprudential concepts which underlie the definition of human rights. The preamble of the Universal Declaration of Human Rights provides for the: "Recognition of the *inherent dignity* and of the equal and *inalienable rights* of all members of the human family". The concept of inalienable rights is derived from the natural law theory. According to this theory, "individuals possessed of rights in nature". And "these rights were not dependent upon a sovereign grant or legislative statue."[170]

The intellectual underpinning of the notion of inalienable rights is ascribed to the "social contract". Men during the period of "transformation" from "primitive state" to "social state" gave up some of their natural rights and at the same time preserved certain rights.[171] These rights are termed as fundamental rights.

The theory of the "social contract" is best expressed in John Locke's writings:

> Locke imagined the existence of human beings in a state of nature. In that state men and women were in a state of freedom, able to determine their actions, and also in a state of equality in the sense that no one was subjected to the will or authority of another. To end the certain hazards and inconveniences of the state of nature, men and women entered into a contract by which they mutually agreed to form a community and set up a body politic. However, in setting up that political authority they retained the natural rights of life, liberty, and property which were their own. Government was obliged to protect the natural rights of its subjects and if government neglected this obligation it would forfeit its validity and office.[172]

These theoretical and philosophical concepts of political liberty are reflected in the provisions of the U.D.H.R. where primacy is given to political rights:

> A perusal of the provisions regarding rights makes it abundantly clear that the overriding philosophy underlying them is the Western concept of political liberty and democracy, inclusive of property rights in

> contradistinction to economic rights or egalitarianism. The rights and freedoms enumerated in the articles are life, liberty, the illegality of torture, equality before law, prohibition against arbitrary arrest, fair trail by impartial tribunal, freedom of travel, the right to marry freely, the right to own property, freedom of assembly, and so on. The primacy of political rights in the Declaration is clear: of the thirty articles only three, one of them dealing with property rights, can be considered as dealing with economic rights.[173]

This view is materialized by the adoption of two separate conventions, the I.C.E.S.C.R. and the I.C.C.P.R. The provisions of the I.C.E.S.C.R. recognize the right of everyone to work in just and favourable conditions, the right to an adequate standard of living and to social security assistance and welfare. The implementation of these provisions can help to overcome some of the deficiencies of national laws in these areas.

There are major obstacles, legal and economic, which disallow the enforcement of the provisions of the I.C.E.S.C.R. These impediments are related, first, to the legal status of the rights enumerated in the I.C.E.S.C.R., and to States' obligations; and, second, to the economic situations of the States parties to the Covenant.

Maurice Craonston argues that the economic and social rights are not universal human rights since these rights "cannot be transformed into universal positive legal rights against some specific person or body and cannot be enforced by an international court."[174]

This view is shared by Siegel who argues that the rights enumerated in the International Covenant on Economic, Social and Cultural rights, cannot be considered as legal claims which are enforceable by individuals.[175] He points out that there exists two major reasons to justify this approach. First, during the process of

drafting the International Covenant on Economic, Social and Cultural Rights, the predominate views are to "sharply limit the legal obligations and entitlements associated with most social and economic rights":

> The outcomes were usually conceptually closer to what Feinberg has termed "manifesto rights" than much more substantial sense in which Henry Shue, among others, advocates subsistence rights.[176]

And, second, the other reason is that the purpose of the International Covenant on Economic, Social and Cultural Rights, is to emphasize the States' duties regarding economic and social rights rather than establishing individual entitlements to these rights:

> Rights do not appear to be the key operative concept in most articles of leading contemporary international documents purporting to prescribe social and economic rights. Statements of welfare rights in such instruments as the United Nations Covenant on Economic, Social and Cultural Rights and the Council of Europe's European Social Charter are designed primarily to highlight the broad context of State responsibilities regarding health, welfare, education, and employment, while only minimally advancing meaningful individual entitlements.[177]

Article 2 of the I.C.E S.C.R. states that:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its 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.[178]

The term "to achieving progressively" is contrasted with the language of

Article 2 (1) of the I.C.C.P.R.: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its jurisdiction...". The full realization of the recognized rights should be achieved progressively, whereas civil and political rights should be ensured *uno actu.*[179]

The granting of civil and political rights is obligatory on the State yet the enforcement of economic, social and cultural rights is to be achieved progressively by the States.[180]

Applying a similar analytical approach on the provisions of the European Convention on Human Rights establishes the strong interaction between the rights and the freedoms of the Convention and the Western European political philosophy. The preamble of the Convention states: "The Governments of European countries which are likeminded and have a common heritage of political traditions, freedom and the rule of law."

A fundamental component of the Western theory on human rights is the protection of individuals' freedom and controlling States' power vis-a-vis individuals. The Convention guarantees a set of rights which protects individuals' liberty and controls States' power by the concept of the due process of law.[181] The rights which are protected by the Convention are: the right to life, freedom from torture, inhuman or degrading treatment, freedom from slavery or servitude, the right to individual liberty, the right to fair trial, prohibition of *ex post facto* criminal legislation, respect for private and family life, freedom of thought, conscience, religion, expression, freedom of peaceful assembly and association, the right to marry and found a family. As it has been noted, the European Convention protects only the rights and freedoms set forth in the Convention. The right to work, the right to receive compensation for occupational diseases and the right to receive social and

medical assistance are not rights protected by the provisions of the Convention.[182]

In the application no. 2380/64, the Commission stated that the applicants cannot claim the right to receive pension under the national insurance schemes of a particular country.[183]

In the application no. 4288/69, the Commission provided that States may impose restrictions on the benefits of national insurance schemes:

> Restrictions of the benefits of national insurance schemes to categories of persons satisfying certain conditions are inherent features of such schemes.[184]

Regarding the right to work, Borchard explains that the labour of aliens is the only exchangeable commodity they possess; to deprive them of the right to labour is to consign them to starvation. An alien cannot live where he cannot work.[185]

Under international law, a State is entitled to control every type of economic activity within its jurisdiction. Since States are not obliged to base their economic policies on the principle of free activity, they may reserve employment to their citizens or prohibit employment of non-nationals. As a result, States can discriminate against non-nationals without violating international law:

> A State may exercise a large control over the pursuits, occupations, and modes of living of the inhabitants of its domain. In so doing, it may doubtless subject resident aliens to discrimination without necessarily violating any principle of international law. According to general international law, the States, members of the international community, are not obliged to base their economic legislation on the principle of free activity and intercourse. They may, consequently, reserve the exercise of economically gainful occupations to their own nationals and exclude aliens.[186]

In the application no. 86/55, the applicant complained that he was unable to

obtain a licence to practise his profession because he was a foreigner and demanded equality of treatment with the Germans. The Commission rejected the applicant's claim of discrimination on the ground that the right to exercise a profession is not included among the rights guaranteed by the Convention.[187]

The E.C.H.R. and the case law of the European Commission and the Court have maintained the liberal traditional division between civil and political rights and, the economic and social rights. The E.C.H.R. in its present structure does not offer adequate protection to migrant workers particularly regarding economic-social and cultural rights. Migrant workers who are nationals of the contracting States benefit from the provisions of the European Covenant on the Legal Status of Migrant Workers. Articles 1 and 34 of the European Covenant on the Legal Status of Migrant Workers limit the enjoyment of the benefits of the rights to the nationals of the contracting States.[188]

The protection of social, economic and cultural rights is an issue of fundamental importance to migrant workers. If the traditional view is accepted without question, the legal and practical value of the provisions of the I.C.E.S.C.R. is curtailed.

The legal gap regarding the protection of the social and economic rights of migrant workers is stressed by the participants in the colloquy on the Human Rights of Aliens in Europe:

> A person living in a foreign country, for instance, normally attaches greater importance to social, economic and cultural circumstances than to the legal provisions in force.[189]

However, this statement cannot be accepted without questioning. It reflects the evolving trend in the European countries members of the Council of Europe to

attach greater emphasis on the economic and social rights.

The merits of the classical division between political, civil, economic and social rights will be discussed at a later stage.

## The Judicial Protection against the Decisions of the National Immigration Authorities

The employment and residence of migrant workers is largely dependent on the administrative decisions taken by the immigration authorities and employment bureaus. As it has been pointed out in Chapter Three, immigration laws are characterized by the vagueness of their terminology and by the wide discretionary power enjoyed by immigration authorities.

The immigration authorities are executive public bodies empowered with considerable latitude as regards decision-making. This legal nature of immigration rules renders them liable to misuse and leaving thus to the immigration authorities a substantial scope for an arbitrary action:

> Moreover, the legislature and the judiciary, apparently assuming that a high degree of administrative discretion is essential for effective implementation of immigration policy, have proved so unwilling to restrict the decision of the administration in this area that the latter has been left with considerable scope to take arbitrary action against all persons subject to immigration controls.[190]

The transformation in the functions of modern governments from protectors of civil and political rights of citizens to active suppliers of social and economic goods necessitates active intervention by public authorities in economic and social fields. This intervention might infringe the welfare and rights of citizens and resident aliens. This explains the importance of offering effective judicial protection against the

decisions of the administration. It is crucial for migrant workers to be protected from the adverse effects of the administrative decisions taken by the public authorities:

> When one considers how the importance of modern administration has shifted from governmental intervention to governmental supply of benefits to help maintain the necessities of life in a broader sense, then this phenomenon becomes self-evident and also of decisive importance for the law of aliens. The failure of the public authority to supply benefits can especially today be considered as a source of discrimination against which judicial protection has become extremely urgent. No modern State can do without a certain dirigisme, without planning or without the distribution of social assistance. Those excluded from such aid are endangered today in their very subsistence. The refusal for instance to grant an alien a business licence can be equivalent to his expulsion, since in many cases he would be deprived of his basis of livelihood.[191]

Public international law and the provisions of human rights agreements recognize the juridical personality of every individual. They confer upon every individual the legal capacity to bring claims before the existing national courts and guarantee procedural rights: the right to access to courts, the right to a fair trial, the right to have particular procedures followed in detention cases and the right to an effective domestic remedy. Article 8 of the U.D.H.R.; Article 3 (2) of the I.C.C.P.R.; Article 13 of the E.C.H.R. provide for the above rights.[192]

However, the wording of these Articles is substantially different. Article 8 of the U.D.H.R. guarantees an effective remedy regarding the rights enunciated in the Declaration and the rights granted in domestic national laws: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law". Articles 3 (a) of the I.C.C.P.R. and Article 13 of the E.C.H.R. limit the scope of an effective remedy to

the rights and freedoms recognized by these two conventions.[193]

Under Article 13 of the E.C.H.R., the right to an effective remedy is limited to the rights and freedoms of the Convention which do not include a right to enter, reside and not to be expelled from a State. An alien cannot claim a right to an effective remedy in national laws against expulsion or refusal of entry. An alien is entitled to this right only if an expulsion or refusal of entry encroaches on the rights and freedoms of the Convention.[194]

The other basic differences of these three Articles is that according to Article 8 of the U.D.H.R., the right to an effective remedy requires a competent national tribunal. While Article 3 (b) of the I.C.C.P.R. speaks of "competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State; Article 13 of the E.C.H.R. simply refers to a "national authority" which does not have to be a tribunal or a court[195] although the Court has expressed the importance of the judicial protection to safeguard individual's rights against acts of the executive.[196]

The importance of an effective remedy is dependent on the substantive rights which it aims to protect. This fact depreciates the practical value of an effective remedy in the field of immigration since the interpretation of human rights conventions and their ideological basis do not recognize a wide range of rights which are the most fundamental to migrant workers.

Lillich adopts the view that the legal confusion surrounding Article 13 of the E.C.H.R. vitiates its categorization as a part of customary international law:

> To date only article 13 of the European Convention has been interpreted and, in Professor Fawcett's words, its interpretation has revealed 'a basic confusion of thought as to the real purpose and the function of the Article'. Is article 13, he asks, 'concerned with the international or the domestic

> implementation of the Convention, with the collective guarantee, or with internal remedies? Does the article, from the claimant's perspective, mandate that an effective domestic remedy be in place ready to consider any alleged violation of the European Convention, or does it become applicable only after there has been a determination (by the Committee of Ministers, the European Court of Human Rights, or a domestic court applying the Convention as part of domestic law) that another, 'substantive' article of the Convention has been violated?[197]

While international law requires States to guarantee the above mentioned rights to aliens as a minimum standard, it is quite difficult to establish that public international law places an obligation on sovereign States to structure their domestic judical systems in order to offer a judicial protection against the decisions of the executive. A general rule cannot be assumed that States must adapt their judicial and legal systems to grant such protection in the absence of express provision regarding the judicial protection against the decisions of the executive.

This conclusion can be reinforced by analysing the provisions of the investment and the recruitment treaties (Chapter Four). The general formula adopted by these treaties provides that the nationals of the contracting parties shall enjoy equality of treatment as regards the protection of laws *i.e.* they have the same rights to bring claims before the existing courts. It is evident that this formula reflects the national treatment standard.

According to this view, the national treatment standard is "a generally recognized rule of international law that a foreigner within a State is subject to its public law, and has no greater rights than the nationals of that country."[198] In Doehring's words: "These agreements do not offer any general legal principle which would go beyond the scope of treaty obligation."[199] Doehring further adds:

> A general principle requiring administrative law to provide judicial protection against all activities of the Executive cannot, however, be detected. This is not surprising because also in classical times of sovereign States the national legal orders only recognized the above guarantees as essential. The notion of *Rechtsstaat* (State based on the rule of law) as it developed during the movement of liberalization (19th century), *i.e.* the civic rule of law which stands in contrast to a modern conception of the rule of law (extensive court protection) comprises mainly of the protection of these guarantees by legislature against the government. Thus, for instance, life and liberty have always been special subjects of protection under criminal law, so that also the alien had to be protected against illegal prosecution; encroachments upon his life and liberty caused by other individuals had to be under the same criminal penalty as provided for gencrally by national law.[200]

Article 6 (1) of the E.C.H.R. is closely linked to the former paragraph. The Article provides for a fair and public hearing by an independent and impartial tribunal in cases involving civil obligations or criminal charges, and it has been invoked by applicants to challenge the administrative decisions of the national immigration authorities.[201]

The concept of civil obligations -as it has been adopted by the Court and the Commission- must be elucidated before appraising the value of Article 6 in immigration cases. Some initial observations must be emphasized:

A- Article 6 applies only to the rights and freedoms enunciated in the Convention.

B- It applies to the proceedings before courts and to the administrative proceedings if they are decisive for relations in civil law between the applicants and third parties.[202]

C- The Court and the Commission do not examine the merits of the

administrative decisions.

D- The Court and the Commission examine the legality of an administrative decision taken by public bodies, if it infringe the rights set forth in the Convention.

The above observations can be deduced from the jurisprudence of the Commission and the Court:

> Whereas, insofar the Applicant alleges a violation of Article 6 of the Convention, it is to be observed that this Article applies only to proceedings before courts of law; whereas the decision taken by the Ministry of justice to suspend the applicant's right of access to her children is an administrative decision, solely within the competence of that Minister, whereas, the Convention, under the terms of Article 1 guarantees only the rights and the freedoms set forth in section I of the Convention and under Article 25 paragraph (1) only the alleged violation of one of those rights and freedoms by a Contracting Party can be subject to application to the Commission; whereas, the right to have a purely administrative decision based upon proceedings comparable to those prescribed by Article 6 for proceedings in court is not as such included among the rights and freedoms guaranteed by the Convention.[203]

The Commission and the Court have constantly stated that the concept of civil rights and obligations must be interpreted independently from the rights existing in the laws of the contracting parties, even though the general principles of the domestic law must be taken into consideration in any such an interpretation[204]. It is incompatible with the provisions of E.C.H.R. that the contracting parties adopt an extensive interpretation of the terms of civil rights and obligations.[205]

The decisions of the Commission and the Court have restricted the concept of civil rights and obligations to private rights and obligations.

This approach has serious implications regarding the admission, residence, deportation and exclusion of migrant workers. The proceedings which regulate the

admission, residence and exclusion of migrant workers fall within the domain of public law and therefore outside the competence of the Commission. The claim to enter a State is a matter of public law and for this reason it cannot be characterized as a civil right in the sense of the Convention:

> Whereas the right to enter and reside in a country is determined by public law, through acts of public administration, from which it follows that the term "civil right", in Article 6 paragraph. I does not include any such right and that therefore neither the decision to grant or refuse entry, nor the proceedings through which that decision is reached are governed by the provisions of Article 6.[206]

Request for an entry clearance or residence permit does not include the determination of a civil right.[207] In Agee *v.* U.K. the Commission held that Article 6 does not apply to a decision to deport an alien, since it does not relate to the determination of civil rights and obligations.[208] Deportation is not considered as a punishment, it is just a refusal by a government to discontinue the residence of an undesired person so that a full due process of law may not apply.[209]

In another application the Commission considered that an alien's right to enter or remain in a particular country is, in principle, independent and separate from the private rights and obligations which may occur to him under the contract of employment in the country concerned.[210]

This view was repeated in the application no. 7902/77 in which the Commission decided: "An authority which decides to terminate a residence permit, does not determine a civil right, even where this decision has consequences in relation to the person's rights and obligations under private law contracts."[211]

Article 6 is not applicable to the administrative proceedings on the prohibition

of entry.[212]

The above constant decisions of the Commission and the Court clearly establish that the refusal of an entry or expulsion of an individual cannot infringe his/her civil rights and obligations for the purpose of the European Convention.

This trend has been narrowly modified by the Commission. The Commission stated that a refusal by an immigration authority to allow an individual to enter a State might in certain circumstances encroach on his/her civil right and obligations.

In the application no. 2991/66, the applicant invoked Article 6 to challenge a decision made by the U.K. immigration authority, whereby a child was refused leave to enter the U.K. to join his father:

> Whereas the determination of the question whether the Applicants had in this respect any civil right under Article 6, paragraph (1), depends substantially upon the determination of the question whether or not the refusal of the immigration authorities to allow the minor child Mohamed Khan to enter the United Kingdom to take up residence with his father Mohamed Alam was unjustified interference with the family life of the Applicants within the meaning of Article 8 may well be considered as the determination of civil right within the meaning of Article 8, whereas the Commission has just held this complaint of the Applicants under Article 8 cannot be declared manifestly ill-founded; whereas the Applicants' further complaint that they were denied a fair and public hearing before an independent and impartial tribunal for the determination of such civil right raises questions of such complexity that their determination must depend upon an examination of the merits of the case; whereas accordingly this further complaint of the Applicants under Article 6, paragraph (I), can again not be regarded as manifestly ill-founded within the meaning of Article 27, paragraph (2) of the Convention.[213]

The Commission held that the refusal of the Swedish authority to grant the applicant an entry permission so that he can take part in custody proceedings raised

the possibility of violating Article 6 of the Convention.[214]

However, in the Singh case, the Commission rejected the applicant's claim that the refusal of the British immigration authority to issue an entry clearance had violated paragraph (2) of Article 6 of the Convention. The interesting point in the Singh case is the Commission's reasoning. The father of the applicant came to the United Kingdom to join his son who was settled in the United Kingdom as the applicant's household but he had been refused admission into the country. The Commission rejected the applicant's claim that there was a breach of Article 6 of the Convention, and went on to state:

> Whereas the Commission has just held that the Applicant failed to establish his right to family life within the meaning of Article 8 of the Convention; whereas it follows that the Applicant had no right to the entry of his widowed father to join him which could be considered as a 'civil right' within the meaning of Article 6, paragraph (I) of the Convention; whereas consequently it is not necessary to consider the substance of the Applicant's further complaint that he was denied a fair public hearing before an independent and impartial tribunal; whereas it follows that this part of Application is incompatible with the provisions of the Convention within the meaning of Article 27, paragraph (2).[215]

According to the Commission's reasoning, if the applicant had successfully established his right to family life within the meaning of Article 8, the decision related to his entry would have come within Article 6. These decisions indicated that the refusal to grant a residence permit right or to enter a State might, in certain circumstances, raise an issue under Article 6 of the European Convention.[216]

The jurisprudence of the Court and the Commission regarding the concept of civil rights and obligations establishes that the administrative decision of a public

authority to withhold a business licence constitutes an interference in civil rights. The European Court judgment in Konig's case stated that Dr. Konig's right to practise medicine constituted a civil right within the meaning of Article 6 of the E.C.H.R., despite the fact that the dispute was concerned with the administrative measures taken by the competent bodies in the exercise of public authority.[217]

In the Benthem case the European Court decided that the refusal of a public authority to grant a business licence to the applicant was an interference in the applicant's civil right.[218]

While Article 6 equally applies to nationals and aliens, and is invoked to negate the administrative decisions taken by a competent public bodies, -if these decisions affect civil rights and obligations- the Commission and the Court refrain from adopting the same view regarding the immigration decisions to terminate residence permits or to deport aliens, even if these decisions have consequences in relation to the person's rights and obligations under private law contracts.[219] The Commission decided that:

> The Commission observes that the right of an alien to reside in a particular country is a matter governed by public law. It considers that where the public authorities of a State falling within the public sphere and that it does not constitute a determination of his civil rights or obligations within the meaning of Article 6. Accordingly, even though the decision to deport the applicant may have consequences in relation to his civil rights, in particular his reputation, the State is not required in such cases to grant a hearing conforming to the requirements of Article 6.[220]

It can be stated that the concept of civil rights and obligations as interpreted in the case law of the European Court and the Commission is synonymous with the private rights and obligations:

> It would appear therefore that "civil rights and obligations" are rights and obligations relating to private law and that Article 6 (1) of the European Convention is applicable to such civil rights and obligations.[221]

This interpretation, which limits the concept of civil rights and obligations to rights and obligations of private law, is questioned by Dijk. He indicates that the legislative history of Article 6 of the E.C.H.R. clearly proves that the intention is to avoid "any restriction which would exclude -a priori- rights other than private rights."[222] This view is shared by the dissenting judge in the Benthem's case. The judge has expressed the opinion that the term civil rights should be interpreted: "To include all rights which are individual rights under the national legal systems and fall into the sphere of individual freedom, be it professional or any other legal activity, it must be seen as civil rights."[223]

Plender explains the difficulty of invoking Article 6:

> Aliens dissatisfied with the determination of their applications or appeals by national administrative authorities are seldom able to avail themselves of Article 6 of the European Convention, given the fact that 'civil rights' are not taken to include administrative redress, for the purpose of that provision, unless(exceptionally) a decision of a public authority affects private rights between individuals.[224]

The preceding section demonstrates the limitations of Article 6 of the European Convention in immigration cases:

A- Article 6 is confined to the civil law and the criminal proceedings referred to in the Convention.

B- Article 6 of the Convention applies to the administrative decisions if these decisions infringe private civil rights and obligations. Excluded from its scope are the rights which fall within the domain of public law, admission, residence and

deportation of aliens.

C- The jurisprudence of the Court and the Commission considers that the private rights which accrue to aliens are independent and separate from an alien right to enter or to reside in a State. As a result, the administrative decisions of the immigration authorities are, even if they infringe the private rights and obligations, not protected by Article 6.

D- Article 6 does not permit the Court or the Commission to examine the merits of the administrative decisions of the national authorities: "The provisions of the European Convention on Human Rights do not equip the Commission or the Court to review the decisions of national administrative agencies on their facts, even when the higher courts of member States refrain from doing so."[225]

E- Article 6 does not compel States to institute a system of appeal courts. A State which does set up such courts goes beyond its obligations under Article 6.[226]

F- The Convention does not guarantee to have the execution of an administrative decision suspended.[227]

G- The jurisprudence adopted regarding Article 6 places serious limitations upon non-nationals' entitlement to substantive and procedural due process.[228]

**Concluding Remarks**

This chapter has exclusively sought two major objectives: first, to probe the influence of human rights conventions on the immigration laws of the studied countries; secondly, to question the capacity of human rights conventions to protect migrant workers. The connection of human rights with migration originates in the very fundamental concept of human rights: rights which are attributed to every individual regardless of his/her classification as an "alien" or "migrant worker".

The intricate problem of re-defining basic concepts of international law is an essential condition which is badly needed before requiring States to take into account human rights norms for the formulation of their immigration policies.

Immigration policies are concerned with the admission, exclusion, residence, deportation and controlling the economic and non-economic activities of foreign nationals within the territory of a receiving State. So, immigration policies are such a vital component of sovereignty. Sovereignty is a legal concept: States are sovereign powers equipped with considerable discretion in immigration issues. However, this discretion does not mean a total freedom from the international law requirements. States are obliged not to act arbitrarily and are bound by the non-discrimination principle when they formulate and enforce their migration laws. So, international law places restraints on the power of a Sovereign. States fulfil these conditions when they act in accordance with their national laws and their international obligations. It is quite permissible under national laws and international law that the host States expel migrant workers who have been working and contributing to its economic development on economic grounds. As it has been established earlier, international law neither protects nor recognizes non-nationals' right to reside or to labour in States other than the States of their nationality. Human rights conventions explicitly permit States to derogate their provisions for the well-being and for the general welfare of the concerned States.

The Staff Report on Immigration published by the International Law Institute, proposed the following three provisions:

Article 6. Free entry of aliens to the territory of State may not be generally and permanently forbidden except for the public interest and for very serious reasons.

Article 7. The protection of national labour is not, in itself, a sufficient reason

for non-admission.

Article 12. Entrance to a country may be refused to any alien if he is a vagabond or beggar, or is suffering from a malady liable to endanger the public health, or strongly suspected of serious offenses committed abroad against the life or health of human beings or against public property or faith. Aliens who have been convicted of any of the above offences may also be refused entry to a State.[229]

It is quite difficult to establish that new concepts regarding the admission or exclusion of foreigners have emerged since 1919 despite the profound changes in the international intercourse and the growth of international interdependence in the world community. On the contrary, these three proposals are more advanced in their principles than many contemporary rules of international laws. States are still unwilling to subject their immigration policies to international scrutiny and to accept specific grounds for the expulsion of individual aliens. One example that can be cited in this regard is the refusal of the Consultative Assembly to accept the proposals of the Committee of Experts regarding individual expulsion. The latter proposed the following provisions:

A- An Alien who is lawfully resident in the territory of a contracting State cannot be expelled unless he endangers national security or public order.

B- An Alien who has been lawfully resident for over two years must have access to an effective remedy before a national authority.

C- An Alien who has been lawfully resident for more than ten years can be expelled only for national security reasons.[230]

While international human rights instruments prohibit discrimination on the basis of colour, sex, race, religion, and national origin, migrant workers as aliens suffer differentiation upon the ground of alienage. McDougal, Lasswell and Chen rightly state that:

> Differentiation upon the ground of alienage is scarcely less invidious to human dignity values than discrimination based upon race, sex and religion. A unique feature of deprivations imposed upon the ground of alienage is, further, that they commonly involve high degrees of transnational impact. The reference of the generic label "aliens" is not to some static isolated group, but potentially to the whole of humanity. Every individual is a potential alien in relation to all the states of which he is not a national; to the extent he moves and engages in activities across state boundaries, this potentiality becomes an actuality.[231]

It has been pointed out, during the proceedings of the Colloquy on the Human Rights of Aliens in Europe, that the impact of 15 million long-term resident migrant workers and their contribution to the economic development of the recipient States requires a rethinking the concept of citizenship in order to assert the universality of human rights and negate the claim that human rights are still, in many cases, citizens rights.[232]:

> Surely the time has come to rethink the concept of 'citizenship' in more functional terms, with particular reference to the individual's place of residence and his contribution to the economy.[233]

Finally, it has been illustrated that the human rights conventions are founded on liberal philosophy. The core of this philosophy is to protect individuals from the power of States:

> The International Covenant on Civil and Political Rights is, of the [four] treaties submitted, the most similar in conception to the United States Constitution and Bill of Rights. The rights guaranteed are those civil and political rights with which the United States and the western liberal democratic tradition have always been associated. The rights are primarily limitations upon the power of the State to impose its will upon the people

> under its jurisdiction.[234]

This concept constitutes the legal backbone of human rights instruments. It is also reflected in the classical division of human rights into 'fundamental human rights' which is interpreted to denote civil and political rights, and a second category of rights which includes economic, social and cultural rights. According to this concept, States' obligations differ according to this classification of human rights. In the case of civil and political rights, States are under an obligation to secure civil and political rights to every individual within their jurisdiction. The States' obligation and its extent regarding economic, cultural and social rights are still debatable.

The protection of economic, social and cultural rights of migrant workers is by no means less vital than the civil and political rights. Economic, social and cultural rights include the right to work, the right to just and favourable conditions of work, the right to social security, the right to an adequate standard of living, the right to protection and assistance to the family, the right to the highest attainable standard of physical and mental health, and the right to education. Chapter Three of this study has established that migrant workers are placed in a discriminatory and inferior status in these fields.

The merits of this traditional division of human rights can be contested on several grounds. The profound permutation in the function of modern States. States are directly involved in economic and social fields; they are distributors, producers of economic resources, and are not just guardian States. These changes must be reflected in legal rules:

> The necessity for the law to deal with the ever increasing complexities of social life is in part the result of the transition from the nineteenth century "night-watch State" - as Lassal dubbed it - to the State that must take into account, and react to, the multiple and diverse social needs of the people.[235]

The other ground upon which one can to challenge this distinction between fundamental human rights and other human rights is that such a distinction indicates human rights are classified hierarchically according to their importance which is challenged by the concept of indivisibility of human rights.[236]

The human rights treaties place the two categories of rights on an equal footing. The United Nations affirms that "...all human rights...are indivisible and interdependent; equal attention should be given to civil and political, and economic, social and cultural rights."[237]

Trubek explains that the adoption of two instruments, the dealing with civil and political rights, and the second with social, cultural and economic rights, is attributed to political factors rather than to the legal nature of the rights:

> The other factor which was influential in the division of the proposed Covenant was more political. There was substantial disagreement over the desirability of a covenant which dealt with social welfare at all. Some states which were prepared to support a covenant guaranteeing political and civil rights were not willing to agree to a document that would commit them to social welfare rights and thus to specific social programs. This led some states to suggest that the proposed covenant be limited to political and civil rights.[238]

Civil and political rights are viewed as non-ideological and compatible with most systems of government. Economic, social and cultural rights are perceived in an ideological context which does not fit into the philosophy of the free market, and they necessarily encroach on the domestic affairs of States.[239]

It has been explained that some writers on international law advance the view that the I.C.E.S.C.R. does not place a legal obligation on States Parties to the Covenant to enforce the rights which are enumerated in the Covenant. They base

their argument on two main concepts. The first is that the rights are not justiciable. The second is the wording of Article 2 (1) of the Covenant.

While it is discernable that the economic, social and cultural rights differ from civil and political rights, these differences -if one accepts the polarized approach of civil- political, and economic-social rights- do not mean that these rights are not justiciable, but that they require special methods for their achievement and their enforcement:

> A government need not ask whether a right is political or cultural, civil or economic. In the last resort, it will divide all human rights, whatever their nature, into the following two categories:
>
> Category 1. Rights which are capable of effectively becoming a reality through immediate legislative or administrative action on the part of each State and which may be expected to be enforced without delay by judicial or administrative processes of domestic law. (This category includes the rights which are already in existence by virtue of action as aforesaid taken prior to the signature of the Covenant.)
>
> Category 2. Rights which, although recognized in principle, cannot effectively come into existence in law until after the execution of programmes, including economic and social programmes, which may vary in duration and feasibility.[240]

The Covenant recognizes this fact and for this reason, it provides in Article 2 (1), that "States will take steps...by all appropriate means..."

Some of the rights which are enlisted in the I.C.E.S.C.R. can be legally and immediately implemented through appropriate judicial means. For example, Article 13 (2) which provides that primary education is compulsory and should be made available to all.[241]

The second point which is raised by the groups of writers who tend to

dismiss or depreciate the significance of the legal implications of the economic, social and cultural rights as enumerated by the Covenant rights, relates to the wording of Article 2 (1) of the Covenant. The Article reads:

> 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 its 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.[242]

They argue that the wording of this Article, particularly the wording of "achieving progressively the full realization", does not place or establish a legal obligation on the States Party to the Covenant to enforce the "goals" of the Covenant. The wording of Article is compared with other Articles of human rights conventions which use the phrases "to guarantee" or "to ensure".

While it is true that the wording of Article 2 (1) of the Covenant is rather moderate or weak, this does not lead to the conclusion that the Article, for a number of reasons, places no legal obligations on States Parties to the Covenant. The Covenant is an international treaty which imposes legal obligations. Treaties in international law create legal obligations for the parties of such treaties.[243] It is clear from the preparatory work of the Covenant that the drafters of the Covenant recognize that the nature of some of the rights cannot be immediately implemented. The implementation of the rights of the Covenant differs from one country to another depending on its economic development and its resources. For this reason the drafters of the Covenant have preferred using the phrase "progressive realization" of these rights:

> Any one who was familiar with social and educational policy could not fail

> to realise that the programme entailed by the acceptance of the provisions concerning economic, social, and cultural rights would be so farreaching that it would take a long time to achieve. He therefore considered the word "progressively" both necessary and valuable. Furthermore, it introduced a dynamic element, indicating that no final fixed goal had been set in the implementation of economic, social, and cultural rights, since the essence of progress was continuity.[244]

As it has been noted earlier, the provisions of the E.C.H.R. have serious implications on the immigration laws of the States Parties to the Convention. The case law of the European Commission and the European Court of Human Rights, has developed substantial rules which affect the implementation and the formation of national immigration laws. It is safe to state that the States Parties to the Convention did not envisage at the time of signing and ratifying the Convention, that the protection of the rights in the Convention, would influence their immigration laws. Article 1 of the Convention categorically provides that everyone within the jurisdiction of the Contracting Parties is entitled to the rights and freedoms of the Convention, irrespective of whether or not he/she is an immigrant.

According to the case law of the Commission and the Court, States are, in principle, free in deciding on the issues of immigration and immigrants; but this freedom of action is limited by the Convention, and it must be exercised in conformity with its provisions. The power of exclusion, admission, granting residence and deportation of aliens contravenes the Convention if it infringes one or more of the rights guaranteed in the Convention.

General principles can be deduced from the case law of the Commission and the Court which represent special value in the field of immigration. The non-discrimination principle is of special significance. Immigration laws are indirectly of discriminatory nature: they are about the admission, residence, exclusion of non-

nationals. Consequently, they differentiate between various individuals or group of individuals on the grounds of race, nationalities and sex. This differentiation occurs when granting a favourable treatment, or refusing admission or extending residence to certain nationals. The question which emerges in this context is: does such an immigration law breach the of non-discrimination principle? The jurisprudence of the Court and the Commission has established that although the Convention does not guarantee a right to enter or to reside in a country member to the Convention, an immigration law which excludes or refuses to extend the residence of certain nationals, or gives them a preferential treatment, cannot be considered as breaching the non-discrimination principle unless a racist motive is proven. The racist motive can be deduced form the legislative history of that law and from the factual circumstances of each individual case. This was the case of the 1968 Act as it has been explained in this chapter. However, the Court and the Commission do not regard granting certain nationals a preferential treatment in relation to their admission and extending of their residence as a breach of the non-discrimination principle, especially if these individuals have certain links with the concerned country such as emotional ties, economic interests, previous long legal residence, or their countries have historical links with the concerned State.

The important implication of the non-discrimination principle relates to discrimination on the ground of sex. It has been noted in Chapter Three of this study that some immigration laws permit a non-national male who is granted a permanent residence permit to bring his wife while this right is denied to a settled non-national female. This issue was raised in the East African Asian cases and in the Abdulaziz's case. The Court and the Commission upheld the applicants' claims and decided that an immigration law which differentiated between male and female as regards their

admission into a territory of a State involved discrimination against male immigrants and contravened Article 14 of the Convention.

It has been observed that many applications before the Commission and the Court are based on Article 8 of the E.C.H.R.which guarantees to everyone the right to family life and prohibits arbitrary interferences in the exercise of this right. Despite the fact that the Convention does not guarantee to individuals a right to enter or reside in a particular country, the decisions of the Court and the Commission have placed several obligations on the member States to the Convention to protect the effective exercise of this right. These obligations relate to the preservation of family unity and normal family life and States' obligation to ensure an effective protection against an unjustified interference by public authority in family life. The fulfilment of these obligations requires a positive action on the part of a State. The Court and the Commission have stipulated rigid conditions regarding paragraph (2) of Article 8 of the E.C.H.R. which permits States to interfere in family life. Such an interference is only justified if it pursues legitimate aims as they are provided in this paragraph, or it is according to the law. Three fundamental legal norms have been established by the Commission and the Court regarding paragraph (2). First, an intervention by public authority in family life is only justified by the existence of a pressing social need. Secondly, the term "according to the law" implies that this law should not limit or derogate any of the rights established by the Convention, and the term itself requires that this law should have been enacted through a normal legislative process registered and published in official records, and its provisions are clear and provide foreseeability. Thirdly, the proportionality principle is an important legal norm which has been developed by the Court and the Commission and is not directly based on the provisions of the Convention. It provides that a decision of an immigration authority to exclude an alien or to discontinue his/her residence is not considered in conformity

with the Convention because it is based on one or more of the grounds listed in national legislation, or on the grounds provided in the Convention, and that the decision pursues legitimate aims. In addition to the fulfilment of the above two conditions, such a decision must achieve a proper balance between, first, the interests of the individual and the legitimate purposes which the decision seeks to protect; and, secondly, there must be a proper balance between the legitimate purposes and the means which are employed to protect these legitimate purposes. The proportionality principle and the conditions which are attached to it are emphasized by the Commission and the Court especially in the Berrehab's case and in the Moustaquim's case which have been already examined. The proportionality principle and the Court's interpretation of the term "according to the law" provide additional guarantees for immigrants because they are not only confined to laws which affect the right to family life, but their scope of application also includes any national law which limits any of the rights established by the Convention.

It is evident from the former analysis that human rights instruments, as they stand, fall short of offering adequate protection for migrant workers. They primarily reflect the legal philosophy which was prevailing at the time of their adoption. During that period, the problem of international labour migration did not exist.

The next chapter will deal with the UN Convention on the Protection of Human Rights Migrant workers and Their Families. The Provisions of this convention will be compared with the ILO Conventions regarding migrant workers.

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# CHAPTER SIX

## The U N Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

### Introduction

The preceding chapters have examined so far the legal systems of the receiving States, the international recruitment treaties, the U.D.H.R., I.C.E.S.C.R., E.C.H.R., I.C.C.P.R., and the I.C.E.A.F.R.D. I have argued that the provisions of these instruments cannot adequately safeguard non-citizens' rights when they are employed in countries other than their own.

Immigration laws based on national and narrow economic considerations relate exclusively to the short-term requirements of the labour markets and their fluctuations. This economic approach undermines the normative value of the provisions of immigration laws. It has been demonstrated that the immigration laws of the receiving States are characterized by the vagueness of their texts, and by the considerable latitude of discretion that the executing bodies enjoy in enforcing these laws. This discretion makes it possible for the executing bodies to practise either a strict or liberal application of these laws in accordance with the needs of the labour market. The weakness of the national legal systems is exacerbated by the fact that the decisions of the courts and the executing bodies in cases involving migration laws are vulnerable to non-legal factors such as public attitudes and political and economic factors.

The provisions of the international recruitment treaties reflect the receiving States' approach to international labour migration. Workers are recruited for a short period of time to perform specific jobs. The recruitment treaties embody the national treatment standard whereby the status of the recruited workers regarding their employment, residence, expulsion, family reunification, transfer of their wages and social security is governed by the national laws of the receiving States. The recruitment treaties do not advance new legal norms or commit the labour importing States to a positive action in favour of the recruited labour.

Human rights instruments on migration disclose serious theoretical and normative limitations. It is said by Erem:"The Universal Declaration of Human Rights of 1948 and the European Convention on Human Rights have today acquired the status of classical texts"; and "at the time the declarations of human rights were proclaimed there was no such thing as migrant workers' question."[1]

On the 18 December 1990, after ten years of negotiations, the General Assembly adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

The U N Convention consists of nine parts. Part I sets forth the scope and definitions of the Convention. Part II lays down a non-discrimination clause regarding the rights enumerated thereafter. Part III spells out the rights of migrant workers and their families. Part IV includes additional rights which are applicable to migrant workers and their families who are in a regular situation. Part V specifies which provisions of Part IV are applicable to six of the eight categories of migrant workers as defined in Article 2 of the Convention. Part VI deals with the illegal migration and the illegal employment of non-nationals. Part VII focuses on the supervisory arrangements and complaints procedure. Part VIII contains a number of general stipulations on, for example, the preservation of acquired rights, the

provision of effective remedies and implementation, and finally part IX includes procedural matters.

The main purpose for the adoption of the U N Convention is to protect the human rights of migrant workers. This chapter questions whether the provisions of the Convention introduce new international legal norms or are they merely a repetition of the already existing human rights provisions?

It has already been pointed out in the course of this study that migrant workers face particular legal problems which are related to their admission, work, residence, equality of treatment, family reunification and social security. The question which raises in this context is: do the provisions of the UN Convention advance new legal concepts regarding the former issues? The provisions of the U N Convention will be compared with ILO Convention No. 97, Migration for Employment Convention, and Convention No. 143, Migrant Workers.

The points which are going to discussed in this chapter are:

- Scope and definitions.
- Equality of treatment.
- Family reunification.
- Residence and Expulsion.
- Employment.
- Social security.

**Scope and Definitions**

The U N Convention adopts a general definition of the term "migrant worker" in Article 2 (1) and other definitions of particular categories of migrant workers in

paragraph (2). Article 2 (1) defines "migrant worker" in general terms. The definition includes any person who is to be engaged, is engaged or has already been engaged in a remunerated activity in a State of which he or she is not a national.[2] Article 2 defines particular categories of migrant workers, frontier workers, seasonal workers, workers on an offshore installation, itinerant workers, project-tide workers, specified-employment workers, and self-employed workers.[3]

Excluded from the above definitions are personnel of international organizations, persons who are employed by a State outside its territory, investors, refugees and stateless persons, students, trainees, seafarers and workers on an offshore installation provided that they have not been admitted to take up residence and engage in a remunerated activity in the State of employment.

During the process of drafting the Convention, objections have been raised regarding the inclusion of self-employed migrant workers and seafarers. It has stressed by some delegations that the purpose of the new Convention is to protect the vulnerable groups of migrant workers and self-employed persons who are in higher economic positions are protected by other human rights instruments:

> Since the mandate of the Working Group was to draft an instrument for the protection of vulnerable groups of migrant workers, by extending such protection to self-employed persons or investors the Working Group would deviate from its purpose. They stressed that self-employed persons are in a higher economic position, such as restaurant owners or other investors or other categories of workers who are in higher economic positions and are already protected by other human rights instruments.[4]

The French delegation has referred to the difficulties of setting up criteria to distinguish between self-employed persons occupying high economic positions and those in average or weak economic positions.[5]

We can say that the term "self-employed worker", as defined in Article 2 (h) of the Convention, refers to a person who is engaged in small-scale economic activities other than those who are employed by a contract of employment, and to a person who is recognized as self-employed by the legislation of the State of employment, or by bilateral or multilateral agreements.

According to Article 3 (f), non-resident and non-national seafarers fall outside the scope of the Convention, whereas non-national resident seafarers are protected by the Convention. The formulation of this Article is adopted in order to satisfy several European countries with international ship registers who pay non-resident and non-national seafarers lower wages than national seafarers.[6]

Accordingly, this Article permits States Parties to this Convention to pay different wages for the same jobs for workers of different nationalities if they are classified as non-residents.

The provisions of the UN Convention protect regular migrant workers and their families as well as migrant workers in an irregular situation. But the extent of the protection varies according to the regularity or irregularity of the concerned migrant workers and their families. The Convention distinguishes between the rights to be enjoyed by all migrant workers (Part III), and the rights applicable only to migrant workers whose status is considered lawful in the country of employment (Part IV). The rights in Part IV of the Convention apply only to migrant workers in a regular situation. These rights include: the right to political participation[7], the right to equality of opportunity and treatment regarding social and economic matters[8], the right to the free choice of employment[9], the right to establish unions[10] and the right to substantive guarantees in case of expulsion.[11]

Article 11 (1) of the ILO Convention No. 97, defines a migrant worker as a person who migrates from one country to another for the purpose of employment.

This definition includes any person who is regularly admitted as a migrant for employment. The Committee on the Convention No. 97 points out that managers, executive staff, enterprise administrators and highly qualified technicians are migrant workers within the meaning of Article 11 of the Convention.[12] Article 11 of the Convention No. 143 contains a very similar definition.

As the two Conventions are not based on the principle of reciprocity, a migrant worker does not have to be a subject of the State which has ratified the Conventions or guaranteed identical treatment to the subjects of the country of emigration or employment in order to benefit from the protection they provide for.

The definitions in the two Conventions apply to migrant workers regardless of the lengths of their stay or their occupations.[13] It must be noted that certain provisions apply only to migrant workers whose admission is on a permanent basis such as Article 8 of the Convention No. 97 which protects migrant workers and their families from expulsion on the ground of incapacity to work.

Excluded from the scope of the two ILO Conventions are frontier workers, members of the liberal professions whose entry is for a short-term; artists and seamen.[14] The Convention No. 143 excludes two more categories of workers: persons who come specifically for the purpose of training or education,[15] and employees of organizations or undertakings operating within the territory of a country at the request of their employers to undertake specific duties or assignments.[16] Both Conventions do not apply to both self-employed and frontier workers.

As a general rule, the provisions of the two Conventions apply to regular migrant workers and members of their families. However, Part I of the Convention No. 143 is specifically adopted to solve the special problems of irregular migrant workers.

The UN Convention definition of migrant workers expands on the term

"migrant workers" to cover wider categories of workers. The inclusion of self-employed workers recognizes the fact that self-employed workers have become a major source of migration. The Convention extends and defines rights applicable to certain categories of migrant workers, such as frontier workers who are excluded from the coverage of ILO Conventions Nos. 97 and 143.

The second advantage of the UN Convention is in detailing the extent to which rights are applicable to certain categories of migrant workers. Article 2 defines particular categories of migrant workers. These categories include: frontier workers, seasonal workers, itinerant workers, project-tied workers, specified employment workers and a particular group of self-employed workers.[17]

However, the expansion of workers who benefit from the Convention should not be over-valued for two main reasons. First, by specifying that certain rights are applicable to certain groups of migrant workers, the Convention runs the risk of establishing two sets of rights: rights which are applicable to migrant workers in a regular situation, and rights which are applicable to migrant workers in an irregular situation. The existence of two sets of rights contradicts the purpose of the Convention which is the establishment of human rights which can apply to all migrant workers.[18] Second, the reservation clause in Article 88 enables the contracting States to exclude entire categories of migrant workers by unilateral statements. Article 88 of the UN Convention provides that:

> A State ratifying or acceding to the present Convention may not exclude the application of any Part of it, or, without prejudice to article 3, exclude any particular category of migrant workers from its application.[19]

Regarding the reservation clause, we need to emphasize that the ratification of ILO conventions cannot be accompanied by reservations.[20]

**Family Reunification and Family Rights**

One of the major humanitarian issues which is associated with international labour migration is the problem of divided families. The migratory process usually begins with a husband departing from his home country and after being admitted into an immigration country, he applies to the national immigration authority in the State of employment for his family members to join him.

It has been pointed out that the concept of "family" and the conditions of admitting a family differ from one State to another according to national laws. While the human rights agreements, which have already been mentioned, recognize the importance of preserving the unity of the family and the right to normal family life, these instruments have not documented a definition the term "family". As they stand and state, they do not place an obligation on the Contracting States to admit families of migrant workers. This section examines the provisions of the UN Convention regarding family reunification and the rights which are accorded to the members of migrant workers' families.

Article 44 (1) of the Convention restates the principles of Article 16 of the Universal Declaration on Human Rights, and Article 23 of the International Covenant on Civil and Political Rights emphasizes the importance of protecting the unity of the "family". However, the preparatory works of the UN Convention reveal a substantial divergence of views between labour sending countries and the States of employment in relation to the following:

- Regarding the definition of the term "family", the labour exporting States always endeavour to adopt a wide concept of the term "family", while the States of employment press for a more restrictive concept of the term.

- With reference to the rights of migrant workers' families, the employment States link the status of migrant workers' families with the status of the migrant workers themselves insofar as their residence and access to work is concerned.

- As regards the obligation of the employment States to admit members of migrant workers' families, the labour exporting States argue that the States of employment are under an obligation to admit members of migrant workers' families, whereas the latter state that the provisions of the Convention, in this regard, are recommendatory and do not affect the sovereigns' right to establish their own criteria to admit migrant workers' families.

**The Definition of the Term Family**

A document by the International Council on Social Welfare points out that different societies attach different meanings to the concept of family:

1- The nuclear family, refers to husband, wife and unmarried children residing in the same household.

2- The extended family, referred to as a composite or joint family, includes three or more generations: grandparents, their married children and wives, their grand children as well as other relatives residing frequently in a common household.

3- The modified extended family, is a common form of family organization in modern industrialized societies which refers to three or more generations residing in separate households, but maintaining bonds of affection, support and social interaction.[21]

Article 4 of the UN Convention which defines the term family reads as follows:

> For the purposes of the present Convention the term "members of the

family" refers to persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned.[22]

Several options have been suggested during the process of drafting this Article. The initial proposal includes a very broad definition of the term "members of the family".[23] It includes the spouse, the dependents, the parents of the migrant workers, and any other persons who are recognised as members of the family by any relevant bilateral or multilateral treaties between the employment States and the emigration countries.

This broad definition of members of a migrant worker's family reflects the fact that different legal and cultural systems give various definitions of the term family. The important issue is that the diversity of the concept family should not lead to establishing discriminatory criteria. This view is reflected by the objections of some countries to the words "as equivalent to marriage" and the question of polygamy.[24] These countries argue that while the provisions of the Convention make it clear that the applicable legislation which governs the status of the family is the law of the State of employment, the law of the foreign worker's State should not be dismissed all together, and reference must be made to the rules of private law.[25] This view is partially approved by the Chairman of the Working Group who explains that the expression "applicable law" in the present Article of the Convention is meant to include the rules of conflict which might permit the application of foreign laws.[26]

While Article 44 (2) of the Convention states that unmarried minor dependent children of migrant workers are included in the concept of family, Article 4 does not

stipulate that the children of migrant workers should be unmarried and minor. The only qualification which is mentioned in Article 4 is the dependence status of migrant workers' children. This difference might be explained by two reasons. The first is that while Article 4 of the Convention provides for a definition of family, Article 44 (2) defines members of migrant workers' family who might be entitled to family unification.

Secondly, Article 4 of the Convention is adopted in response to the labour exporting States' demand to adopt a wider concept of the term "family" by deleting the qualifying words: minor and unmarried. Labour importing countries have insisted on retaining the above qualifying words. They have argued that it is important to retain a restrictive definition of the family of a migrant worker, since migration for employment is a "transitory phenomenon and not a permanent one, there is a necessity in their view to keep a restricted definition of the family of a migrant worker."[27]

The second point which is raised in opposition to the adoption of a broad definition of the family of a migrant worker is that such a broad definition would place "migrant workers in a more privileged status than nationals of the State of employment."[28]

The foregoing discussion discloses the difficulties of setting up a definition of the term "family" at an international level. This is mainly due to the legal and cultural diversity, and to the conflicting interests of the labour receiving countries and the labour sending countries. Article 4 permits States to adopt different concepts of family, and the reference to the national legislation of the State of employment in this regard also permits these States to impose restrictive practices.[29]

Article 8 of The ILO Convention No. 97, evades the problem of providing a definition of a migrant worker's family and speaks only about members of a migrant

worker's family who have been authorized to accompany or join him, thus placing the issue of a definition within the national legislation of the States of employment. Similarly, Article 13 (2) of the ILO Convention No. 143 states that for the purpose of family reunification, members of a migrant worker's family include the spouse and dependent children, father and mother provided that the migrant worker is legally residing in the State of employment.[30]

A more useful legislative technique for the drafters of the UN Convention would have been not to attempt to lay down a general definition of a migrant worker's family; but, rather just to identify the persons who are entitled to apply for family reunification.

**The Admission of Members of Migrant Workers' Families into the Employment States**

It has been explained in the preceding chapters that the admission of members of migrant workers' families is subject to the national laws of the States of employment. The States invoke the sovereignty doctrine to show their unwillingness to subject their immigration policies to international scrutiny. The exception to this general rule is the jurisprudence of the European Court of Human Rights which has categorically established the applicability of the provisions of the E.C.H.R. to the immigration laws of the contracting States.

Article 44 (2) and (3) of the UN Convention deals with family reunification and specifies the persons who are covered by its provisions:

> 2. States Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a

relationship that, according to applicable law, produces effects equivalent to marriage, as well with their minor dependent unmarried children.

3. States of employment, on humanitarian grounds, shall favorably consider granting equal treatment, as set forth in paragraph 2 of this Article, to other family members of migrant workers.[31]

The provision of the second paragraph of Article 44 covers both the States of employment and the States of emigration. It is obvious from the wording of this Article and from the statements which are made during its formulation that this Article does not establish a right to family reunification. The only obligation contained in Article 44 is that the States Parties to the UN Convention should take measures which they "deem appropriate" to "facilitate" family reunification.

During the process of drafting the Convention, the delegations of the countries which are considered labour exporting countries have maintained that since paragraph (1) of Article 44 establishes the right to family protection by the States, this right includes the preserving of family unity and consequently the right to family reunification.[32]

The recipient countries, on their part, have stressed two points:

- First, this Article is a general statement and does not oblige the State of employment to admit members of migrant workers' families.

- The second point is that those States have interpreted the term reunification in a very broad way to include the admission of migrant workers' families, the terms and duration of their residence, and the terms of housing and resources.

The USA delegate is reported to having stated that the Article is:

> ...a statement of general principle regarding family reunification was a useful contribution to the text, but the sovereign right of States to establish their own immigration policies had to be protected. He stressed his

> delegations' understanding that the provision in no way prejudiced that sovereign right.

Norway has expressed the view that:

> ...it understood the text as a statement of guidance only, and not imposing any obligations on the States of employment, leaving the family reunification subject to the legislation of the State of employment.

France has stated that:

> ...the provision means that the State of employment might, according to its legislation, set conditions to family reunification.[33]

The effect of these statements is to reduce this provision to a mere recommendation. It is within the discretion of each State to recognize persons who are members of a migrant worker's family and to take measures to facilitate their reunification with migrant workers.

The provision of the UN Convention regarding family reunification does not establish a right to family reunification nor does it depart from the ILO Conventions Nos. 97 and 143 regarding migrant workers. Both Conventions do not place obligations on the Contracting States to admit members of migrant workers families. Article 8 of the ILO Convention No. 97 speaks about persons who are authorised to join migrant workers who have been admitted to a State of employment on a permanent basis. The purpose of this Article is not to deal with family reunification, but to limit the power of the concerned State of employment to send back migrant workers and members of their families who have been admitted permanently:

> A migrant for employment who has been admitted on a permanent basis and the members of his family who have been authorised to accompany or join

him shall not returned to their territory from which they emigrated because the migrant is unable to follow his occupation by reasons of illness contracted or injury sustained subsequent to entry, unless the person concerned so desires or an international agreement to which the member is a party so provides.[34]

Article 13 of the ILO Convention No. 143 mentions that the competent bodies of the States members to this convention "may" take "measures" to "facilitate" the reunification of the families of migrant workers who are legally residing in its territory.[35]

The Committee of Experts affirms that "...neither of the two Conventions imposes any obligation on ratifying States to permit the families of migrant workers to join them." and the Committee recognizes the fact that "only a limited number of measures designed to facilitate family reunification have been mentioned in governments' reports."[36]

Article 50 of the UN Convention in addresses an actual issue which is not covered by the two ILO Conventions regarding migrant workers. This issue deals with the effects of death or dissolution of a marriage on the legal status of migrant workers' families who are admitted on the ground of family reunification.

The purpose of this Article is to protect these families from being considered in an irregular situation in case of a migrant worker's death or dissolution of his marriage. Clearly, this Article establishes a link between the status of migrant workers and their families. These families are not entitled to continue their residence or employment in the country of employment since the ground for their admission into the State of employment -family reunification- has been forfeited by death or marriage dissolution. This Article imposes serious difficulties for migrant workers' families in counties where the national immigration laws do not entitle these families to independent work or residence permits. Consequently, these families are considered in an irregular situation as the case is in the law of USA whereby families

of migrant workers are considered in such a situation and are granted 30 days to leave the country.[37]

This Article has raised conflicting views between the countries with emigrant population and the employment States. The latter have sought to limit the number of foreign nationals in their territories to reduce the social costs which are associated with the existence of migrant workers' families. The recipient countries have stipulated that this Article does not give these families an absolute right to stay but only obliges the States of employment to grant them a reasonable period of time during which they can legally remain in the State of employment.[38] The German delegation has represented a very restrictive view. Germany has stipulated that it shall grant such families a permission to stay if they meet the following conditions that:

- A migrant worker has been granted a permanent permission to reside in Germany.

- Members of migrant workers' families have legally resided in Germany for a specified period of time, or they have been born in Germany.

- Members of migrant workers' families should have at their disposal enough resources to support themselves without depending on social assistance.[39]

The labour exporting countries have opposed the link between the permits of dependents and migrant workers. They have argued for a differential treatment between the cases of the families of migrant workers who have resided in the territories of employment States for a considerable time, and families who have resided in the States of employment for a short period of time; stressing the need for a favourable treatment to the children of migrant workers who are born in the States of employment:

> No parallel could be drawn between the cases of migrant workers who had recently settled in the employment State and those who had been there for several years, especially children of migrant workers who are born in the State of employment.[40]

Article 50 reflects a compromise between the two conflicting views. It provides that families of migrant workers will not be regarded in an irregular situation if a migrant worker dies or his marriage is dissolved. The obligation which this Article places on the States of employment is to allow members of migrant workers' families to stay for a reasonable period in order to settle their affairs. However, the Article recommends that the States of employment may grant these families an authorization to stay in the country of employment if they fulfil the following conditions that:

- They have been legally residing with the migrant workers in the State of employment.

- They have been admitted into the State of employment for the purpose of family reunification.

The Article does not entitle families who have not been in the State of employment at the time of the death of a migrant worker or the dissolution of his marriage to enter the State of employment afterwards. It must be noted that the Article does not adversely affect any right granted to the members of migrant workers' families by the legislation of the State of employment or by a multilateral or bilateral treaty.

**The Rights of the Families of Migrant Workers**

This section focuses on the rights which are accorded by the Convention to persons

who are recognized as members of migrant workers' families. Article 36 provides that families of migrant workers shall enjoy the rights which are enumerated in the Convention. This section will be confined to analyzing the provisions which specifically deal with their access to employment and to educational and social services.

It must be emphasized that only members of migrant workers' families who are legally residing in the territory of a State of employment benefit from the rights which are provided in Articles 12, 31, 45 and 53 of the Convention. One exception to this general rule is to be found in Article 30 which stipulates that the children of all migrant workers shall enjoy the basic right of access to education on the same basis of with the nationals. This right shall not be "limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child's stay in the State of employment. Thus the Article extends the right to education to the irregular migrant workers' children.[41]

Article 45 (1) guarantees that families of migrant workers shall enjoy equality of treatment with nationals regarding access to educational institutions and services, vocational guidance and training institutions, social and health services. Their children will also have access to the local schools in which teaching is in their native language. However, this principle of the equality of treatment is subject to various conditions which undermine its practical and legal value. And the exercise of these rights is subject to fulfilment of the conditions and the requirements laid down by the respective institutions. The families of migrant workers have access to social and health services provided that the requirements for participation in the respective schemes are met.

As it has been explained in Chapter Three of this work that the laws of the

receiving countries stipulate various conditions regarding access to the above services. The period of residence is an established precondition for the entitlement of social, health and educational services. Families of migrant workers who do not accumulate the stipulated period of residence cannot benefit from these services. For this reason, several delegations have objected to any reference to national legislation.[42]

The other reason which hinders the effective implementation of equality of treatment is the obligations of the States of employment. The wording of Article 45 does not oblige the States of employment to take specific measures in favour of migrant workers' families and their children, regarding the preservation of their cultural identity.[43]

Article 31 of the U N Convention provides:

> 1. States Parties shall ensure respect for the cultural identity of migrant workers and members of their families and shall not prevent them from maintaining their cultural links with their State of origin.
> 2. States Parties may take appropriate measures to assist and encourage efforts in this respect.[44]

According to this Article, the States of employment "may take appropriate measures to assist and encourage efforts in this respect." It is stated by the Chairman of the Working Group that:

> ...to "ensure" is understood to mean that the States concerned did not bear the responsibility for ensuring the religious and moral education of the children of migrant workers, but rather undertook to respect the liberty of migrant workers to ensure the religious and moral education of their children.[45]

Another example which can be cited regarding the cultural rights is the

provision of Article 45 (2). The Article reads:

> States of employment shall pursue a policy, where appropriate in collaboration with the States of origin, aimed at facilitating the integration of children of migrant workers in the local school system, particularly in respect of teaching them the local language.[46]

The USA has stated that its understanding of the provision of this Article imposes only a non-interference obligation.[47]

Similar views have been expressed regarding paragraph (3) of Article 45 of the U N Convention. The paragraph provides that:

> States of employment shall endeavour to facilitate for the children of migrant workers the teaching of their mother tongue and culture and, in this regard, States of origin shall collaborate whenever appropriate.[48]

The French and German delegations have explained that this paragraph does not require the States of employment to provide the children teaching courses in their mother tongue; it is a matter, exclusively, for the countries of origin.[49]

In this aspect, the provision of the UN Convention does not depart from the ILO Conventions regarding migrant workers. Article 10 of the Convention No. 143, provides for equal treatment of migrant workers regarding cultural rights.[50] Article 12 (f) of the same Convention states that States Parties to the Convention shall, by methods appropriate to national conditions and practice:

> Take all steps to assist and encourage the efforts of migrant workers and their families to preserve their national and ethnic identity and their cultural ties with their country of origin, including the possibility for children to be given some knowledge of their mother tongue.[51]

Article 10 of the ILO Convention No. 143, as we have just mentioned,

provides for equal treatment in respect of cultural rights. The Article also states that migrant workers should have the right to participate in the cultural life in the State of employment and to maintain and develop their cultural heritage in the same ways as the nationals. Both Articles, Article 10 and 12 of the ILO Convention, represent statements of general principles which do not regulate specific questions of educational assistance nor do they place an obligation on the employment States to interfere positively in this field.

**Access to Employment by Members of Migrant Workers' Families**

The final issue in this section is access to employment by members of migrant workers' families. Article 53 of the UN Convention reads as follows:

> 1. Members of a migrant worker's family who have themselves an authorization of residence or admission that is without limit of time or is automatically renewable shall be permitted freely to choose their remunerated activity under the same conditions as are applicable to the said migrant worker in accordance with article 52 of the present Convention.
> 2. With respect to members of a migrant worker's family who are not permitted freely to choose their remunerated activity, States Parties shall consider favorably granting them priority in obtaining permission to engage in a remunerated activity over other workers who seek admission to the State of employment, subject to applicable bilateral and multilateral agreements.[52]

The UN Convention distinguishes between two cases. The first case concerns members of migrant workers' families who have a residence permission of unlimited period of time. In this case these families enjoy the right to choose freely their employment provided they comply with the conditions and restrictions of Article

52. The second case is when members of migrant workers' families do not possess, on their own, a residence permit of unlimited period of time. Article 53 (2) recommendes that States of employment may consider favorably their applications for work permits.

Another point which is to be mentioned in this regard is that some States object to the idea that families of migrant workers who have been admitted on humanitarian grounds should be entitled to the right to employment.[53]

While the UN Convention makes an explicit reference to access to employment by members of migrant workers' families, the ILO Conventions deal with it implicitly. Access to employment by members of migrant workers' families is dependent on the work permit issued to the migrant workers. Article 10 of the ILO Convention No. 143 provides for equality of opportunity and treatment for migrant workers and their families in respect of employment and occupation thus covering access to employment by members of migrant workers families:

> ...ILO Con. No. 143 Article 10 provides for equality of opportunity and treatment for migrant workers and their families in relation to employment and occupation and thus covers the free choice of employment. But the right to free choice of employment is restricted implicitly. It has to be recalled that neither the right of a State to admit a foreigner to its territory nor the issue and renewal of residence or work permit is affected. Thus a family member may only derive rights from Con. No. 143 Article 10 referring to the access to employment if he himself possesses a work permit. The provision does not extend the rights of family members under this aspect.[54]

**The Non-Discrimination Principle**

The elimination of discrimination is a major objective of human rights instruments. Chapter Four has brought into focus the main obstacles which hinder the effective realization of equality. Four important reasons have been identified as fundamental obstacles towards achieving equality:

- The absence of an agreed definition as to what constitutes discrimination.
- The diversity of the prohibited grounds of discrimination.
- The rights which the principle of non-discrimination protects.
- The States' obligations in respect of the non-discrimination principle.

Articles 1 and 7 of the UN Convention provide for a general rule of non-discrimination. Further Articles of the UN Convention deal with the equality of treatment in respect of employment, working and living conditions and social security. The implications of non-discrimination in respect of employment, social security and other rights as enumerated in the Convention will be examined later.

Article 1 of the UN Convention provides that:

> The present Convention is applicable, except as otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind such as sex, race colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, material status, birth or other status.[55]

The above Article provides for a general rule of non-discrimination without limiting it to the rights which are enumerated in the Convention irrespective of the legal status of migrant workers and members of their families. The Article authorizes the States of employment to "distinguish" between different categories of migrant

workers as it is provided in the Convention. This affirms the fact that the UN Convention confers or limits certain rights to different groups of migrant workers such as seafarers.

Article 7 of the Convention provides for non-discrimination only in respect to the rights enunciated in the Convention, and refers to the non-discrimination principle in the human rights instruments:

> States Parties undertake, in accordance with international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without any distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.[56]

The wording of the two Articles is formulated along the same lines as the international human rights conventions which prohibit discrimination, *i.e.* Article 2 of the I.C.C.P.R.[57], Article 2 of the I.C.E.S.C.R.[58], Article 2 of the U.D.H.R.[59], and the E.C.H.R.[60] Yet, the UN Convention extends the prohibited grounds of discrimination to include nationality, age, ethnic and economic position. It must be recalled that Article 1 of the I.C.E.R.D. enlists ethnic origin as a prohibited ground of racial discrimination.[61]

The inclusion of nationality as a prohibited ground of discrimination aims to remedy the defects of the former human rights instruments which do not include nationality among the prohibited grounds of discrimination. However, this addition cannot be considered as a novelty in international law since other instruments enlist nationality as a prohibitive ground of discrimination such as the ILO Convention No.

103 on Maternity Protection[62], and Article 6 (1) of the ILO Convention No. 97.[63]

The interesting point in the wording of Articles 1 and 7 of the UN Convention is that both Articles prohibit any kind of "distinction" which is based on one or more of the grounds enumerated in these two Articles, but without specifying the exact meaning of "distinction". The question is does the term "distinction" include exclusion, restriction, or preference? And does any "distinction" which is based on one or more of the grounds enumerated in these two Articles constitute "discrimination" for the purpose of the Convention?

A perusal of the preparatory work of the Convention discloses the lack of criteria to identify discriminatory acts. It can be adduced that the constant reference to human rights instruments during the process of drafting these two Articles, implies that the drafters of the UN Convention do not adopt a different meaning for discrimination. Therefore, it can be stated that the term "distinction" means exclusion, restriction, or preference.

However, the views which have been expressed during the elaboration on the non-discrimination principle establish that:

- Equality of treatment must be understood as a general treatment enjoyed by nationals in contrast to any special treatment or any special rights that a State of employment may accord to certain nationals in special situations.[64]

- The States do not breach equality of treatment if they impose necessary restrictions which aim at meeting manpower requirements of their own nationals.[65]

- Equality of treatment means that the national legislation of the States of employment are applicable to both national and migrant workers. Several delegations have stated that they cannot accept any reference to national legislation because "it would open door for the State of employment of not allowing migrant workers to enjoy equality of treatment with nationals".[66]

In comparison with the ILO Conventions Nos. 97 and 143, the non-discrimination provision in the UN Convention is wider in its scope. Article 6 of the ILO Convention No. 97 prohibits discrimination on the grounds of race, nationality, religion and sex and only in respect of certain matters which are exclusively enumerated in paragraph (a) of Article 6 provided that such matters are subject to law or regulations, or to the control of the administrative authorities.[67] The ILO Convention No. 143 does not provide for a general principle of non-discrimination. Article 10 of the ILO Convention No. 143 requires States Parties to the Convention to promote and guarantee equality of treatment regarding employment, social security, trade unions and cultural rights, and individual and collective freedoms:

> Each Member for which the Convention in force undertakes to declare and pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individuals and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory.[68]

According to both ILO Conventions Nos. 143 and 97, only migrant workers and members of their families who are lawfully residing and working in a State of employment, benefit from the non-discrimination principle. However, Article 9 of the ILO Convention No. 143 provides that equality of treatment is extended to migrant workers who are in an irregular situation only in respect of "rights arising out of past employment as regards remuneration, social security and other benefits."[69]

One of the major advantages of the non-discrimination clause of the UN Convention is the extension of the scope of its application to protect migrant workers in an irregular situation. This can be compared with the ILO Conventions No. 97

Article 6 (1)[70] and Article 10 of Convention No. 143[71], both of which limit the scope of protection to migrant workers who are lawfully residing within the territories of the States of employment.

**States' Obligation in respect of the Non-Discrimination Principle**

This section examines the States' obligations in respect of enforcing the non-discrimination principle. Article 43 (2) of the UN Convention provides that:

> States Parties shall promote conditions to ensure effective equality of treatment to enable migrant workers to enjoy the rights mentioned in paragraph 1 of this article whenever the terms of their stay, as authorized by the State of employment, meet the appropriate requirements.[72]

This Article requires States to abolish the discriminatory legislative or administrative measures. In this respect the UN Convention differs from the ILO Conventions Nos. 97 and 143. The ILO Convention No. 97 limits the scope of the equality of treatment to the matters which are regulated by law or regulations or, are subject to the control of the administrative authorities.[73] States are not obliged to take legislative or other measures to achieve equality:

> This provision prohibits inequalities of treatment, which may result from legislation or practices of the administrative authorities in certain areas. It does not however oblige States to take legislative or other measures to redress inequalities in practice.[74]

Contrary to this narrow obligation, is the obligation contained in the ILO Convention No. 143 in Articles 10 and 12. Article 10 provides that:

> Each Member for which the Convention is in force undertakes to declare and

pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individuals and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory.[75]

States Parties to the ILO Convention are required to repeal and modify the legislative and administrative measures which are discriminatory, and public authorities are also required to promote equality in practice. The Article leaves to the States the discretion to choose methods which are appropriate to national conditions and practice in order to achieve equality.

Article 43 (2) of the UN Convention provides that States Parties to the Convention should seek"...to ensure effective equality of treatment to enable migrant workers to enjoy the rights mentioned in paragraph 1..."

Does the term "effective equality" imply that States of employment are under obligations to adopt special measures in favour of migrant workers to enable them to enjoy equality of treatment in respect of the rights enumerated in paragraph (1) of Article 43? It can be deduced from the preparatory works and from the statements of the delegations -which have already been discussed- that the term "effective equality" does not denote or imply that there is an obligation on the States Parties to the UN Convention, to adopt special measures. In the absence of an express provision which stipulates that States must adopt special measures to achieve equality, an obligation on the States cannot be assumed. Equality of treatment, according to the UN Convention, simply means that migrant workers are subject to the same conditions of work and to the same legislation as national workers. For example paragraphs (c) and (e) of Article 12 of the ILO Convention No. 143 recognize the special needs of

migrant workers and their families and require States Parties to the Convention to adopt special measures in order to enable migrant workers to effectively enjoy the rights enlisted in this Article. These measures should not infringe the principle of the equality of treatment. Article 12 paragraph (e) of the ILO Convention No. 143 reads:

> In consultation with representative organisations of employers and workers, formulate and apply a social policy appropriate to national conditions and practice which enables migrant workers and their families to share in advantages enjoyed by its nationals while taking account, without adversely affecting the principle of equality of opportunity and treatment, of such special needs as they may have until they are adapted to the society of the country of employment.[76]

States Parties to the ILO Conventions Nos. 143 and 97 are required to promote equality of treatment between migrant and national workers, however, the Conventions leave the matter to the discretion of States to select the methods which are appropriate to national conditions and practice to achieve equality.[77]

The Committee of Experts points out that the obligations contained in Articles 10 and 12 of the ILO Convention cannot be interpreted as imposing an obligation on the States to interfere in matters which are left to negotiations between management and labour. The term "methods appropriate to national conditions and practice" does result in bringing about an obligation of interference or a general obligation to enact such legislation to achieve equality in matters which are left by "law or tradition to negotiations":

> As the Committee remarked in its general survey of 1971 on Convention No. 111, which imposes an obligation stated in similar terms, this provision does not oblige States "to intervene in certain areas in any manner not appropriate to such conditions and practice. In matters which by law

> and by tradition are left to be negotiated between the parties, the State may endeavour to obtain the desired results, where necessary, by exhortation, by attempts at persuasion or by negotiation, rather than by having resources to executive measures or legislation."[78]

Such a formulation does not appear in the UN Convention. This issue is raised by the USA delegation who has remarked that certain professions are self-regulating and the government in this case is unable to interfere for the purpose of achieving equality of treatment.

The preparatory works do not assist in concluding that the UN Convention departs from the ILO Convention No. 143, as it has just been explained in the former paragraph. Although the UN Convention asserts that the States Parties are responsible for the proper implementation of the equality of treatment principle, it does not specify that States are under an obligation to interfere in such cases.[79]

The effectiveness of the non-discrimination principle depends on the capacity of migrant workers to enforce it against their employers. The rules of international law provide that private individuals cannot invoke the provision of international treaties against other private individuals, since international treaties regulate relations between States. In the absence of a provision to the contrary, private persons cannot rely on international treaties against private persons whether these persons are legal persons or private individuals. Neither the ILO Conventions nor the UN Convention establishes a capacity for migrant workers to enforce non-discrimination measures in their contractual relations with private employers. The Committee of Experts affirms that:

> Since these provisions regulate only relations between the State and private individuals..., and not relations between private persons (particularly between employers and workers), further measures to supplement them would appear necessary.[80]

The draft of the UN Convention discloses legal confusion regarding the capacity of migrant workers to invoke its provisions against private employers. Article 82 of the UN Convention provides that "the rights provided for in the present Convention may not be renounced and it shall not be permissible to exert any form of pressure upon migrant workers and members of their families with a view possible to derogate by contract from rights recognized in the present Convention."[81] The wording of this Article might suggest that the rights enumerated in the Convention are individual rights:

> A ban on relinquishing any of the rights accorded under the Convention could be interpreted as conferring on those rights the status of individual rights. In his delegation's view the Convention contained only obligation on States.[82]

Similarly, it is explained in the preparatory works of the UN Convention that Article 7 refers to the obligations of States to apply the Convention without discrimination. Article 1 may also refer to companies and other private employers.[83] It is stated by the Chairman of the Working Group that:

> Apart from any participation by private sectors or professional associations in the implementation of the future Convention, it was obvious that the States Parties to the Convention would be responsible for ensuring its proper implementation.[84]

Having compared the ILO Convention Nos. 143 and 97 with the UN Convention regarding the principle of equality of treatment, we can draw these conclusions:

- The concept of the non-discrimination principle in the UN Convention must be understood in the light of the studied human rights instruments. This means that a

distinction, exclusion or preference is considered discriminatory if it does not pursue a legitimate aim, or if there is a lack of proportionality between a legitimate aim and the methods employed to attain it.

- In comparison with the ILO Conventions Nos. 143 and 97, the UN Convention expands more on the prohibited grounds of discrimination.

- The UN Convention provides in Article 1 for a general principle of non-discrimination, and in Article 7 provides for non-discrimination principle in respect of the rights enumerated in the Convention. Both the ILO Conventions Nos. 97, Article 6 and Convention 143 Article 10 provide for non-discrimination with respect to the rights enumerated in these two Conventions. It must be recalled that further Articles of the UN Convention deal with the equality of treatment regarding specific issues such as employment and occupation, social security, trade unions and cultural rights.

- While the ILO Convention No. 143 provides in Article 12 for specific measures to pursue and achieve the policy of equality of treatment including legislative and administrative measures, the measures required by Article 43 (2) of the UN Convention are of a very general nature.

**Residence and Expulsion of Migrant Workers and Their Families**

The preceding chapters of this work have constantly emphasized the crucial issue of the security of the residence of migrant workers and their families. It has been underlined that the residence of non-nationals in States other than their own is still a privilege granted by the host States according to their national criteria. The problem of the security of residence is further aggravated by the fact that the national immigration laws of the recipient States are characterized by the wide discretionary

power enjoyed by the immigration authorities and by the vagueness and multiplicity of legal texts governing the residence of aliens.

International law and human rights conventions recognize that the admission of aliens and their residence is a fundamental component of sovereignty. However, the sovereign power in this regard is not perceived in absolute terms. The constraints which are placed on the power of the sovereign can be characterized as minimal. The residence of an alien is neither a right that can be claim nor is protected by the concept of acquired rights. The guarantees in the case of an expulsion are confined to procedural guarantees.

This section enquires into the provisions of the UN Convention regarding the residence and expulsion of migrant workers.

Article 79 of the UN Convention is a principal Article regarding the residence and expulsion of migrant workers. All other Articles of the Convention which deal with the residence and expulsion of migrant workers must be understood in connection with this Article. The Article states:

> Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families. Concerning other matters related to their legal situation and treatment as migrant workers and members of their families, States Parties shall be subject to the limitations set forth in the present Convention.[85]

The UN Convention restates two principles. First, the admission and residence of migrant workers falls within the sovereign discretion. Second, the discretion is subject to the limitations which are provided in the Convention. This implies that the immigration law of a State Party to the UN Convention is considered

contrary to the UN Convention if it infringes or diminishes the rights and the guarantees provided for in the Convention.

The UN Convention regarding the admission and residence of migrant workers does not diverge from Article 10 of the ILO Convention No. 143. The Committee of Experts categorically state that:

> Article 10 does not therefore affect the right of a State to admit or refuse to admit a foreigner to its territory: nor is its purpose to regulate the issue or renewal of residence or work permits. It is only when such documents contain restrictions or conditions contrary to the principle of equality of opportunity and treatment laid down in Article 10 of Convention No. 143 that States may have to amend their law or practice in accordance with Article 12.[86]

Further Articles of the UN Convention provide for the right to liberty and security of person[87], and prohibit unlawful interference with private life.[88] However, Article 16 which provides for the right to liberty and security of person cannot be related to the issue of security of residence for the following reasons:

-The preparatory works of the UN Convention do not provide that security of residence is included within the term of security of persons.

- This Article is drawn from other human rights instruments which interpret security of persons as protection against physical injury and violence. This meaning is confirmed by paragraph (2) of Article 16 which states:

> Migrant workers and member of their families shall be entitled to effective protection by the State against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions.[89]

The refusal by the States of employment to issue or renew residence permits

does not constitute unlawful interference with private life even if this refusal produces adverse consequences on a migrant worker's contractual obligations or on other rights acquired under private law.

The UN Convention approach to the States' powers regarding the residence of migrant workers and their families corresponds with the jurisprudence of the European Court on Human Rights. States, in principle, are free to formulate their immigration policies. However, this power is subject to the limitations provided for in the Convention.

**The Effect of the Loss or Termination of Employment on Residence and Work Permits**

An important issue which faces migrant workers is the effect of the loss or termination of their employment on their residence and work permits. The UN Convention envisages three cases:

- The case of migrant workers who have been admitted into the States of employment according by employment contracts to perform specific jobs.

- The second case is concerned with the effect of the loss of employment on their residence permits.

- The third situation is the effect of the loss of employment on the residence permits of migrant workers who are not freely allowed to choose their employment.

Article 20 of the UN Convention deals with the case of migrant workers who have been admitted into the States of employment by employment contracts to perform specific jobs. Paragraph (2) of the Article provides that:

> No migrant worker or member of his or her family shall be deprived of his or her authorization of residence or work permit or be expelled merely on the

> ground of failure to fulfil an obligation arising out of a work contract unless fulfilment of that obligation constitutes a condition for such authorization or permit.[90]

In this case the failure of migrant workers to meet their contractual obligation will result in the withdrawal of their residence permits. Article 20 of the UN Convention, as it has originally been suggested in the draft of the Convention, provides that migrant workers who fail or are unable to meet their contractual obligations shall not be deprived from their residence or work permits or be expelled merely on these grounds.

The Article is amended to accommodate the USA objection that some migrant workers are issued with work and residence permits only to perform certain jobs, and if they fail to do so, they will have to leave the country.[91] Paragraph (1) of Article 20 is based on Article 11 of the I.C.C.P.R., but the second paragraph which deals with the effect of the failure to fulfil contractual obligations contains a new element.[92]

The second case is concerned with the effect of the loss of employment on a residence permit. Article 49 of the UN Convention provides that the States of employment shall issue residence permits for at least the same period as their permission to engage in remunerated activity. Migrant workers shall not lose their residence permits because of the termination of their employment provided that they are not subject to restrictions regarding their employment.[93]

Article 51 of the UN Convention deals with the effect of the loss of employment on the residence permits in the case where migrant workers are not freely allowed to choose their employment. The Article states that:

> Migrant workers who in the State of employment are not permitted freely to choose their remunerated activity shall neither be regarded as in an irregular situation nor shall they lose their authorization of residence by the mere fact

> of termination of their remunerated activity prior to the expiration of their work permit, except where the authorization of residence is expressly dependent upon the specific remunerated activity for which they were admitted. Such migrant workers shall have the right to seek alternative employment, participation in public work schemes and retraining during the remaining period of their authorization to work, subject to such conditions and limitations as are specified in the authorization to work.[94]

According to Article 51, the work permits of migrant workers, who are subject to restrictions regarding their employment, shall remain valid for the remaining period of their work permits, except for those whose residence permits are expressly dependent upon the specific employment for which the migrant workers have been admitted. This Article restates the provision of Article 20 of the the UN Convention.

The two Articles, 49 and 50, reflect conflicting views between the labour sending countries and labour receiving countries. Morocco and Algeria have argued that the two Articles fall short of offering adequate protection to migrant workers in the event of the loss of employment.[95] Germany has placed reservations on both Articles explaining that according to German law, the first work permits of migrant workers are linked to specific jobs. If migrant workers lose their jobs, their residence permits are withdrawn.[96] The German delegation has pointed out that his country opposes paragraph (2) of Article 49 which limits the repercussions of the termination of a remunerated activity on the validity of the authorization of residence in the case of migrant workers who are allowed freely to choose their remunerated activities. It cannot accept the provision of Article 51 which refers to the consequence of termination of a remunerated activity on the validity of the authorization of residence in the case of migrant workers who are not freely allowed to choose their remunerated

activities.[97]

The main points regarding the effects of the loss of employment on work or residence permits as provided for in the UN Convention can be summed up as follows:

- Both Articles are applicable to migrant workers in regular situations.

- Both Articles deal with involuntary loss of employment as opposed to resignation.

- Migrant workers are not considered in an irregular situation as a result of terminating of their remunerated activities.

- While Article 49 primarily refers to the retention by migrant workers of residence permits in the case of loss of employment, Article 51 deals with the retention by migrant workers of the authorization to work in the event of loss of employment.[98]

- Migrant workers who are freely allowed to choose their employment are allowed sufficient time to find alternative employment. Their authorization of residence shall not be withdrawn for at least a while during which time they are entitled to unemployment benefits.[99]

Article 51 does not provide for a period of time for migrant workers whose employment is subject to restrictions in order to maintain their residence permits when they lose their employment. However, migrant workers should be allowed a period within the duration of their work permit to use the rights granted to them according to Article 51.[100]

It is safe to state that the provisions of the UN Convention regarding the effect of the loss of employment are essentially similar to those in Article 8 of the ILO Convention No. 143. According to Article 8 migrant workers shall not be considered in an irregular situation as a result of losing of their employment. The loss of

employment does not imply the withdrawal of work or residence permits provided that the work permit is not issued for specific employment. In this case a migrant worker has to leave the country when his work permit expires.[101]

It is obvious from what has been discussed that the provisions of the UN Convention and the ILO Convention No. 143, regarding the effects of the loss of employment on the work and residence permits, do not purport to regulate or set conditions for renewing or withdrawing work or residence permits of migrant workers. The objective of these instruments is to ensure that migrant workers who are lawfully residing within the territory of the employment States shall not be regarded in irregular situations because of the loss of their employment.

**The Migrant Workers' Right to Geographical Mobility within the Territory of an Employment State**

Another issue which is closely connected with the question of residence is the freedom of migrant workers to choose their residence within the territory of an employment State. Article 39 of the UN Convention states:

> 1. Migrant workers and members of their families shall have the right to liberty of movement in the territory of the State of employment and freedom to choose their residence there.
> 2. The rights mentioned in paragraph 1 of this article shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (ordre public), public health or morals, or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.[102]

This Article must be understood in the light of other Articles of the

Convention regarding the residence of migrant workers and their right to a free choice of employment. Article 39 subjects the right of liberty of movement and the freedom to choose a place of residence to very ambiguous conditions which include "any restrictions which are provided by law and which are necessary to protect national security, public order, public health or morals, or the rights and freedoms of others and are consistent with other rights recognized in the present Convention."

The statements which have been made during the elaboration on the free choice of employment confirm the States of employment have the right to restrict the liberty of movement at least during the period when migrant workers are subject to employment restrictions.[103] Norway has stated that the free choice of employment does not affect the State of employment's right to restrict migrant workers' access to certain geographical regions.[104]

The UN Convention represents in this respect a setback from the ILO Convention No. 143. The only condition that Article 14 (a) of the ILO Convention stipulates as to the geographical mobility is that migrant workers should be lawfully present in the States of employment.[105] No link exists between the right to geographical mobility and the duration of residence or employment. The Committee of Experts states that: "The right to geographical mobility, must be assured whatever the duration of residence or employment":

> Article 14 (a) of Convention No. 143 expressly stipulates that national legislation may not restrict the right to geographical mobility of migrant workers lawfully within the territory, which they must enjoy from the beginning of their stay in the same conditions as national workers.[106]

**Expulsion of Migrant Workers and Members of Their Families**

The focus in this final section turns on the expulsion power of the States of employment and the guarantees that the UN Convention provides for migrant workers.

The preparatory works of the Convention manifest a disagreement between the labour sending countries and the recipient States regarding the grounds for expulsion and the guarantees available to migrant workers who are under an expulsion order. The labour sending countries have endeavoured to restrict the expulsion power of the sovereign by enumerating specific grounds for expulsion and enlarging the procedural guarantees in the cases of expulsion. While the recipient States on their part, have invoked the sovereignty doctrine to retain the power for the national legislators to determine the grounds and the procedure for expulsion.

The procedural guarantees which are available to migrant workers in case of an expulsion vary according to the legal status of migrant workers: those who are in a regular situation and those who are in an irregular situation. While Article 22 sets out the procedural guarantees which are to be enjoyed by all migrant workers *i.e.* regardless of their legal status, Article 56 provides for additional guarantees for migrant workers in a regular situation.

**Expulsion of Migrant workers**

The provisions of Article 22 of the Convention include new clauses regarding the expulsion of migrant workers particularly paragraphs (1) and (5):

> 1. Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined

and decided individually.

5. If a decision of expulsion that has already been executed is subsequently annulled, the person concerned shall have the right to seek compensation according to law and the earlier decision shall not be used to prevent him or her from re-entering the State concerned.[107]

Paragraph (1) prohibits the collective expulsion of migrant workers and their families and provides that each case of expulsion has to be examined on an individual basis. As it has been pointed out in the course of this study that only a few human rights instruments explicitly prohibit the collective expulsion of aliens such as the African Charter on Human Rights, the American Convention on Human rights and the Fourth Protocol (the European Convention on Human Rights).

The procedural guarantees contained in this Article are applicable to migrant workers in an irregular situation. By including migrant workers in an irregular situation within the scope of this Article, the UN Convention goes beyond the requirements of other human rights instruments which limit the procedural safeguards to aliens who are lawfully present in a State like Article 13 of the I C.C.P.R.[108]

It is not surprising that these two provisions are met with reservations from the labour recipient States. Germany has stated that it will not accept any text which protects aliens who are unlawfully present in a State.[109] It has suggested the deletion of the sentence on collective expulsion since it will not accept the "blanket prohibition of measures of collective expulsion":

> This could be interpreted in such a way as to prohibit the authorities of the States of employment from simultaneously expelling a group of migrant workers who are nationals of a single State.[110]

Paragraph (5) of Article 22 of the UN Convention establishes two rights for

an expelled migrant worker: the right to compensation if the decision to expel a migrant worker is subsequently abrogated; and the right that the annulled expulsion decision cannot be invoked against a migrant worker to prevent him or her from re-entering the concerned State.

Paragraph (5) of Article 22 corresponds with Article 9 (5) of the I.C.C.P.R. The differences between the two Articles relate to their wording. While Article 9 (5) of the I.C.C.P.R. provides for the right to compensation in absolute terms: "...shall have an enforceable right to compensation", paragraph (5) of Article 22 of the UN Convention refers to the right to compensation according to law. This has prompted some delegations to prefer the formulation of paragraph (5) of Article 9 of the I.C.C.P.R. The reference "to law" indicates the national law of a State; accordingly, the right to compensation exists only if national law recognizes such a right.[112]

The controversy regarding the reference to national legislation is settled by the understanding that the expression "according to domestic legislation" refers only to the procedure to be followed without putting into question the right to compensation itself, and by the Chairman of the Working Group's statement that the Working Group is agreed on an absolute right to compensation.[113] Other procedural safeguards of Article 22 provide that an expulsion decision should be made by the competent authorities of the expelling State in accordance with law, and a migrant worker's rights regarding his employment must not be affected by the expulsion decision. A major defect of this Article is that it does not provide for judicial review of an expulsion decision. Paragraph (2) of Article 22 stipulates that migrant workers and members of their families may be expelled from a State only in pursuance of a decision taken by a competent "authority" and in accordance with law. This implies that an expulsion decision might by reviewed by a competent authority which does not have to be a judicial body.

**Expulsion of Migrant Workers in a Regular Situation**

The procedural guarantees of the UN Convention differ according to the legal status of migrant workers: those who are considered to be in a regular situation and those who are in an irregular situation. Article 22 of the Convention establishes basic procedural guarantees which are applicable to both groups of migrant workers. However, Article 56 of the UN Convention provides for additional guarantees for migrant workers who are in regular situations and regulates substantive grounds for expulsion. The Article states:

> 2. Expulsion shall not be resorted to for the purpose of depriving a migrant worker or a member of his or her family of the rights arising out of the authorization of residence and the work permit.
>
> 3. In considering whether to expel a migrant worker or a member of his or her family, account should be taken of humanitarian considerations and of the length of time that the person concerned has already resided in the State of employment.[114]

The legislative history of Article 56 of the UN Convention shows the profound differences between the labour sending countries and labour receiving countries in respect of expulsion. It has been suggested by the recipient States that Article 56 should be made similar to Article 22 (2) of the I.C.C.P.R. This involves enlisting national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others[115], as grounds for expulsion. the recipient States have also argued that the grounds for expulsion should be expanded.[116] The USA representative has gone further to suggest:

> ...that Article 56 should be deleted altogether since the Convention should in no way restrict the sovereign right of each State to determine its own

immigration policy including grounds of entry and stay in its territory.[117]

The labour sending countries have argued that the purpose of the Article in question is to limit the cases of expulsion to precise situations which should be specifically defined and that the drafters of the UN Convention cannot reproduce the text of the I.C.C.P.R. in this regard. The vague formulation of Article 22 (2) of the I.C.C.P.R. justifies that the UN Convention must go beyond the I.C.C.P.R.as regards expulsion of migrant workers.[118] The final formulation of Article 56 (1) does not enumerate the grounds for expulsion; it only entitles each State to determine the grounds of expulsion according to its national legislation. Hasenau remarks that this Article reaffirms that the "power of expulsion remains a State's prerogative":

> As regards Art. 56, the Working Group discussed in the course of its deliberations a far-reaching proposal to enumerate more or less exhaustively the grounds for expulsion of regular migrant workers. The version adopted finally in the second reading does not maintain this enumeration, but it restricts the reasons of expulsion to those defined in national legislation. Thus, the power of expulsion remains a State's prerogative which is essentially discretionary, but the manner of its exercise is prescribed.[119]

Paragraphs (2) and (3) of Article 56 provide further protection for migrant workers in a regular situation. Paragraph (2) provides that migrant workers cannot be expelled only as the result of the economic situation.

Paragraph (2) represents an important safeguard against expulsion resulting from an economic recession. The application of paragraph (2) might cause legal difficulties for two main reasons. First, the ambiguous wording of this Article is liable to abuse by States which can evade the prohibition contained in this provision by establishing more than one reason for expulsion. Second, it is difficult to establish that the motive for expulsion is to deprive a migrant worker or members of

his or her family from their rights. The Algerian delegation has rightly pointed out that:

> If the aim is to give effective protection to migrant workers threatened with arbitrary expulsion for economic reasons, then the provision should be worded more clearly as to avoid any ambiguity.[120]

Other delegations have stressed that their understanding of this paragraph is that economic reasons cannot be invoked as reasons for expulsion.[121]

The UN Convention bridges the gap of the ILO Conventions Nos. 143 and 97 regarding expulsion of migrant workers. Both Conventions do not deal with the expulsion of migrant workers. The ILO adopts the view that matters related to immigration control fall outside the competence of the organization. However, Article 8 of the ILO Convention No. 97 reads:

> 1. A migrant for employment who has been admitted on a permanent basis and the members of his family who have been authorised to join him shall not be returned to their territory of origin or to the territory from which they emigrated because the migrant is unable to follow his occupation by reason of illness contracted or injury sustained subsequent to entry, unless the person concerned so desires or an international agreement to which the Member is a party so provides.
> 2. When migrants for employment are admitted on a permanent basis upon arrival in the country of immigration the competent authority of that country may determine that the provisions of paragraph 1 of this Article shall take effect only after a reasonable period which shall in no cases exceed five years from the date of admission of such migrants.[122]

This Article has a limited scope of applicability for the following reasons:

- It limits the prohibition of expulsion to migrant workers and members of their families who have been admitted into the States of employment on a permanent

basis. This is hardly applicable to migrant workers whose admission into the States of employment is for a definite period.

- The purpose of this Article is not to deal with expulsion in general, but, rather to protect migrant workers and members of their families from expulsion as resulting from of their inability to pursue their employment for health reasons.

- It authorizes expulsion during the first five years.

- This Article is based on the assumption that an employment State grants the status of permanent residence after five years of admission. In States which do not accord the status of permanent residence until after a longer period of residence, Article 8 does not become applicable until the qualifying period for permanent residence has elapsed.[123]

The States' power regarding the residence and expulsion of migrant workers is circumscribed by the provisions of the UN Convention such as the non-discrimination provision, the obligation not to act arbitrarily and not to infringe the rights enumerated in the Convention. The UN Convention provides for new provisions in relation to the issue of expulsion. These provisions are more advanced and elaborated than the studied human rights instruments:

- The UN Convention does not only regulate the procedure of expulsion but also the substantive grounds for expulsion.

- The UN Convention extends the procedural guarantees to migrant workers who are in an irregular situation. Other human rights instruments limit the procedural guarantees to aliens who are lawfully residing within a State.

- The UN Convention explicitly prohibits collective expulsion of migrant workers.

- It establishes a right to compensation if an expulsion decision is

subsequently annulled.

- It protects migrant workers from expulsion on economic grounds.

But the major defect of the UN Convention is that it neither provides for a judicial review, in case of an expulsion, nor it introduces a concept of security of residence for migrant workers and their families. Article 22 (4) of the UN Convention which deals with expulsion provides that migrant workers or members of their families shall have the right to submit reasons against their expulsion. The Article states:

> Except where a final decision is pronounced by a judicial authority, the person concerned shall have the right to submit the reason against his or her expulsion and to have his or her case reviewed by the competent authority, unless compelling reasons of national security require otherwise. Pending such review, the person concerned shall have the right to seek a stay of the decision of expulsion.[124]

The wording of this paragraph suggests that migrant workers are entitled to have an expulsion decision reviewed by a competent authority. The right to review an expulsion decision is qualified by two conditions. First, the decision of expulsion is final. Secondly, it is decided by a judicial body. The right to review an expulsion decision does not necessarily imply the right to appeal to a higher judicial body.

The UN Convention could have established criteria to identify unlawful interferences in private and, expanded on the concept of liberty and security of persons in Article 16 to include security of residence.

**The Employment of Migrant Workers**

It has been explained before that Articles 1 and 7 of the UN Convention provide for a

general principle of non-discrimination regarding to the rights enumerated in the Convention.

It has been underlined in a previous section of this chapter that equality of treatment points to the national treatment standard. Migrant workers shall enjoy equality of treatment with national workers of States Parties to the UN Convention subject to national legislation.

States Parties to the UN Convention do not infringe the principle of equality of treatment if they impose restrictions on the employment of migrant workers provided that these restrictions are aimed at meeting manpower requirements of their own nationals, and that they give special treatment to certain nationals in a special situation.

Articles 25[125], 43[126] and 55[127] of the UN Convention specifically address the equality of treatment in the employment of migrant workers. These Articles lay down a general principle of equality of treatment between nationals and migrant workers covering all aspects of employment relationships: remuneration, hours of work, holidays, safety, health, minimum age of employment and home work, and access to vocational guidance and training.

Paragraphs (2) and (3) of Article 25 of the UN Convention include two interesting provisions which state:

> 2. It shall not be lawful to derogate in private contracts of employment from the principle of equality of treatment referred to in paragraph 1 of this article.
> 3. States Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle by reason of any irregularity in their stay or employment. In particular, employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of any such irregularity.

Paragraph (2) prohibits deviation from the equality of treatment principle in private employment contracts. However, Article 66 of the UN Convention, which authorizes recruitment of workers by private agencies, does not specifically refer to the provision of this paragraph or to any other safeguards as required by the ILO Convention No. 97.[128]

The UN Convention clearly safeguards the rights which stem from employment contracts entered into by migrant workers in an irregular situation. The validity and the binding force of an employment contract between a migrant worker in an irregular status, whether the contract is oral or written, is not affected by the irregular status of the concerned migrant worker. Paragraph (2) goes further to forbid any derogation from the equality principle in any employment contract entered into by a migrant worker in an irregular situation. According to Article 25, an irregular migrant worker will be entitled to the same period of notice given to nationals in their contractual conditions of work or guaranteed under the minimum standards of national labour law regulations. Irregular migrant workers are put on a par with those of nationals.[129]

In comparison with the ILO Conventions regarding migrant workers, the UN Convention is broader and more specific than the ILO Conventions Nos. 97 and 143.

Under the ILO Convention No. 97, the equality of treatment is qualified by three conditions. First, it is limited to regularly admitted migrant workers. Secondly, it applies to employment matters only if such matters are regulated by law or subject to the control of the administrative authorities. Thirdly, the equality of treatment is confined to the rights enlisted in this Article.[130]

Similarly, paragraph (2) of Article 8 of the ILO Convention No. 143 stipulates that migrant workers shall enjoy equality of treatment with nationals if they are legally residing in the territory of a State for the purpose of employment. The

same paragraph limits the equality of treatment to alternative employment, relief work, re-training, and security of employment.[131]

Article 9 of the ILO Convention No. 143 deals with the effects of the irregular status of migrant workers on the equality of treatment. It states that:

> Without prejudice to measures designed to control movements of migrants for employment by ensuring that migrant workers enter national territory and are admitted to employment in conformity with the relevant laws and regulations, have not been respected and in which his position cannot be regularised, enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits.[132]

According to this Article, migrant workers who are in breach of residence or employment laws, and whose positions cannot be regularised, shall be entitled to equality of treatment regarding rights arising of past employment only. While paragraph (1) of Article 9 provides that irregular migrant workers shall enjoy equality of treatment in respect of rights arising of past employment, it does not make a reference to the equality of treatment with nationals. This interpretation is confirmed by the Committee of Experts:

> It would seem from the context that Article 9, paragraph 1, should be understood as requiring that the irregularly employed migrant workers enjoy equality of treatment with regularly admitted and lawfully employed migrants not with nationals of the country of immigration.[133]

The ILO Convention No. 143 confines the claims of irregular migrant workers to the actual employment, because their contracts are considered invalid. As a result, they have no contractual stand to claim for the unpaid remuneration.[134]

Both the ILO Conventions and the UN Convention do not address the case where the irregularity of migrant workers status is attributed to the failure of employers to comply with national laws such as placing an application to renew a migrant workers' employment authorization.

Article 55 of the UN Convention regarding equality of treatment has raised controversial views during the process of drafting the UN Convention. The Article states:

> Migrant workers who have been granted permission to engage in a remunerated activity, subject to the conditions attached to such permission, shall be entitled to equality of treatment with nationals of the State of employment in the exercise of that remunerated activity.[135]

The wording of this Article suggests that only migrant workers who have been admitted to specific employment, would enjoy equality of treatment with nationals. Morocco has considered this Article discriminatory stating that the wording of this Article contradicts Article 25 of the UN Convention which provides for equality of treatment regardless of the type of employment. This is understood in the context of according a preferential status to highly qualified migrant workers:

> ...article 55 is discriminatory in comparison with article 25. According to article 55 if a migrant worker is not recruited for a specific job, he would not be entitled to equality of treatment. This would give a specific status to qualified skilled workers and it would not be fair to provide for equality of treatment for this category of workers and not for the labourers.[136]

It cannot be deduced from the preparatory works of the UN Convention that the purpose of Article 55 is to grant a preferential or special status to qualified migrant workers. It can be said that the Article purports to define the States' obligation in

respect of the non-discrimination principle. According to Article 55, States are not required to interfere in self-regulating remunerated activities in order to guarantee equality of treatment for migrant workers.

**Free Choice of Employment and Access to Alternative Employment**

The equality of treatment poses an important question which relates to the capacity of migrant workers to freely choose their remunerated activities. The provisions of the UN Convention vary according to the type of work permit:

Migrant workers who are legally residing in a State of employment and possessing work permits unlimited in time.

Migrant workers whose work permits are limited in time.

In the case of migrant workers who are legally residing in a State of employment and possess work permits unlimited in time, they have the right to a free choice of employment. This right is not provided for in absolute terms. Article 52 (2) permits States of employment to subject the right to free choice of employment to necessary restrictions in the interests of the employment States. The Article also conditions this right on the recognition of occupational qualifications acquired outside their territories, and limits the access of migrant workers to certain categories of employment.[137]

Migrant workers may obtain a right to free access to employment if they legally reside in the territory of an employment country for five years for the purpose of remunerated activities.[138]

Paragraph (3) of Article 52 deals with the free choice of employment regarding migrant workers whose work permits are limited in time. It differentiates between two cases. The first case deals with migrant workers who have been admitted into the country of employment by recruitment treaties, and "assimilated

workers". The second case concerns migrant workers who have been admitted into a State for the purpose of employment on their own accord.

Paragraph (3) (b) authorizes a State of employment to grant migrant workers, who have been admitted into its territory by international agreements, and assimilated migrant workers a priority to choose their employment. Paragraph (3) (b) of Article 52 provides that States may:

> Limit access by migrant workers to remunerated activities in pursuance of a policy of granting priority to its nationals or to persons who are assimilated to them for these purposes by virtue of legislation or bilateral or multilateral agreements. Any such limitation shall cease to apply to a migrant worker who has resided lawfully in its territory for the purpose of remunerated activity for a period of time prescribed in its national legislation that should not exceed five years.[139]

Paragraph (3) (b) of Article 52 raises conflicting views regarding the term "assimilated workers" and the period of residence that enables a migrant worker to freely choose his employment.

Some delegations have objected to the preference granted to assimilated migrant workers on the ground that the term "assimilated workers conveyed the idea of political and economic regionalism."[140] The term "persons who are assimilated" reflects the fact that national immigration laws grant different status to permanent resident migrant workers in contrast to those who have been admitted for a definite period of time.[141]

Other countries have stated that the five years residence requirements is considered as a setback because their laws stipulate only three years of lawful and working residence before a migrant worker becomes entitled to the free choice of employment.[142]

Other delegations have argued for a complete deletion of the time limit.[143] The term "should not exceed" has been agreed upon in order to accommodate these conflicting views. Consequently, the provision on a time-limit has become a mere recommendation.[144]

The provisions of the UN Convention regarding the free choice of employment provide for lesser rights to migrant workers than the ILO standard. Article 14 of ILO Convention No. 143 provides that a member State may:

> Make the free choice of employment, while assuring migrant workers the right to geographical mobility, subject to the conditions that the migrant worker has resided lawfully in its territory for the purpose of employment for a prescribed period not exceeding two years or, if its laws or regulations provide for contracts for a fixed term of less than two years, that the worker has completed his first work contract.[145]

The above Article authorizes the States of employment to condition the free choice of employment on a prescribed period of legal residence. Yet, Article 14 (a) limits this period for two years, and obliges the States of employment to lift these restrictions if the national laws provide for contracts of fixed terms of less than two years and the worker has completed the first work contract.

Paragraph (b) of Article 14 provides for lifting the restrictions on the free choice of employment after consultation with employers and the workers' representative.

Paragraph (c) of the same Article includes an equivalent provision to that of Article 52 (2) (a) of the UN Convention which authorizes States of employment to limit access to certain categories of employment in the interest of State.

**Social Security**

It has been underlined in this study that the protection of migrant workers and their families' entitlement to social security benefits requires the observation of the following principles:

-The position of migrant workers calls for the adoption of special legislative measures which go beyond the principle of the equality of treatment between nationals and non-nationals.

- The maintenance of acquired rights and rights in the course of acquisition.

- The inclusion of special provisions for the transfer of social security benefits abroad.

The UN Convention provides in Article 27 a generally worded provision regarding migrant workers and members of their families' entitlement to social security. In Article 62 there is a special provision which enables a certain category of migrant workers (project-tide workers) to benefit from social security in their countries of origin.[147]

Article 27 of the UN Convention provides that:

> 1. With respect to social security, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. The competent authorities of the State of origin and the State of employment can at any time establish the necessary arrangements to determine the modalities of application of this norm.
> 2. Where the applicable legislation does not allow migrant workers and members of their families a benefit, the States concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment

granted to nationals in similar circumstances.[148]

The Article is placed in Part III of the Convention. Consequently it is applicable to all migrant workers and members of their families whether they are in a regular or in an irregular situation. Although the Article is placed in Part III of the Convention, it leaves to the States' legislative bodies discretion to determine the requirements of social security benefits. This implies that States' legislation can vary according to the legal status of the concerned migrant workers. The only limitation on States' discretion is the prohibition of discrimination on the ground of nationality.

However, the equality of treatment as provided in the Article does not require reciprocity in order to receive social security benefits.

The drafters of the UN Convention have agreed that only a general provision regarding social security should be included in the Convention in order to reconcile different national views regarding the term social security and the rights included in this term.

Delegations have pointed out the "near impossibility of defining the term social security."[149] In some States, such as Austria, the welfare and social assistance are not covered by the provision of this Article and the Austrian law requires the acquisition of citizenship in order to obtain benefits from the social assistance law.[150] In Germany the term social security includes social and unemployment insurance, family benefits and welfare services.[151]

The UN Convention leaves to the national laws of each State to determine the exact meaning of the term "social security" and the rights it includes.

The equality of treatment with nationals in matters related to social security is bound to place migrant workers in a disadvantageous position. It has been explained in Chapter Three that the national legal systems condition the enjoyment of social

security benefits on the fulfilment of a prescribed period of residence, and simultaneously subject the receiving of benefits on the continuous residence of migrant workers in the employment States particularly regarding non-contributory benefits.

The problem is more acute in the case of migrant workers who work in different States because the aggregation of periods of employment abroad is preserved for foreign nationals from countries with which reciprocity agreements have been concluded.

According to Article 27 of the UN Convention, migrant workers and their families are entitled to equality of treatment if they fulfil the requirements provided for in the applicable legislation of that State or by bilateral and multilateral treaties. Paragraph (1) of Article 27 includes a minimum standard only for migrant workers and their families.[152]

The drafters of the UN Convention have failed to reach consensus in respect of these important issues:

First, the right of migrant workers to receive social security benefits when they leave the employment States.

Secondly, the provision of Article 27 does not provide for the maintenance of acquired rights and rights in the course of acquisition.

Paragraph (2) of Article 27 provides that the concerned States shall "examine the possibility of reimbursing interested persons the amount of contributions made by them on the basis of the treatment to nationals in similar circumstances." Several countries have clarified that their national laws do not provide for the reimbursement of social security contributions even for their own citizens.[153]

The reference to bilateral or multilateral treaties is not helpful since some

national laws do not accept entering into any treaty regarding the reimbursement of paid contributions.[154]

In contrast to the limited provision of the UN Convention regarding social security for migrant workers is the elaborated and detailed provisions of the ILO Conventions.

Paragraph (1) (b) of Article 6 of the ILO Convention No. 97 provides a definition of social security. The rights to be included by the term social security covers legal provisions in respect of unemployment injury, maternity, invalidity, old age, death, unemployment family responsibility and any other contingency which, according to national laws or regulations, is covered by social security.[155]

The same Article addresses the problem of preserving the acquired rights and rights in the course of acquisition.[156] The failure of the UN Convention to recommend the preservation of acquired rights or rights in the course of acquisition is regarded as a setback from the ILO general policy. This is stipulated in the ILO Conventions Nos. 118, Equality of Treatment Convention (Social Security)[157]; the Maintenance of Social Security Rights Convention No. 157, 1982.[158] The latter provides for the maintenance of social security rights for migrant workers and members of their families regardless of their status and their residence condition.

It must be noted that both ILO Conventions Nos. 143 and 97 are not based on the principle of reciprocity. Migrant workers benefit from the equality of treatment whether their countries have ratified the Conventions or not. Both Conventions are applicable to migrant workers and their families who are legally residing within the territory of an employment country, and, consequently, the Conventions do not provide for benefits to be transferred abroad when migrant workers who leave the concerned State. The ILO Convention No. 118, 1962, and the Convention No. 157 are based on the principle of reciprocity. The ILO points out that:

> Most of the Articles on which a consensus was reached in 1987 concern matters already dealt with by international labour standards. This overlap is self-evident in the case of social security, where the future UN Convention will lay down general principles in one Article (27), whereas detailed provisions can be found in several ILO instruments (in particular the Equality of Treatment (Social Security) Convention, 1962 (No. 118) and the Maintenance of Social Security Rights Convention, 1982 (No. 157). Unfortunately, even the broad principles in the UN text represent in some respects a step backwards compared with the principles enshrined in ILO standards.[159]

It is evident that the provisions of the UN Convention regarding social security for migrant workers represent a backward step if compared with the ILO Conventions. The UN Convention should have recognized the need for particular legislative measures to enable migrant workers to enjoy the benefits of national security systems and should have also placed an obligation on the States Parties to the Convention to adopt such measures.

**Concluding Remarks**

An assumption can be made that the rational for adopting any new instruments in the field of human rights is to bridge the gaps in the already existing human rights instruments, and that a special status of certain categories of individuals justifies special provisions.

The argumentation for adopting a new international instrument regarding migrant workers has been justified by three major reasons:

Firstly, the need to make an explicit reference to human rights of migrant workers and members of their families.

Secondly, the existing human rights instruments do not adequately protect migrant workers and member of their families.

Thirdly, there is the need to protect migrant workers in an irregular situation.

The concluding section examines and evaluates the extent to which the UN Convention fulfils the above mentioned considerations.

The UN Convention can best be described as a list of rights which is characterized by vagueness and the repetition of the texts and the wording of the human rights instruments particularly the I.C.C.P.R. The drafters of the Convention have endeavoured to enlist as many rights as possible in a single document and simultaneously empowered the States Parties to the Convention with a sweeping power to exclude particular categories of migrant workers from all or part of the Convention as provided in the reservation clause in Article 88.

This power -when combined with the generality of scope of the rights, and the guarantees provided by the Convention- may well justify the comment of one writer that the Convention is a "laundry list."[160]

The legislative technique of the UN Convention of listing very detailed rights in one instrument dealing with various issues runs certain risks. The result of this approach is that some rights are not included in the Convention despite their importance to migrant workers:

> Despite the detailed provisions, some significant rights are not regulated in the Convention. In fact, the Convention does not go as far as what has been already accomplished on the international scene nor the level reached in the Federal Republic of Germany. It ignores the vital importance for the migrant worker of the right to plan a secure life in the receiving state. This includes, as the German case shows, permanent residence and work permits, safeguards against withdrawal of such permits and against expulsion, as well as the same rights to the spouse and children independent of the rights of

migrant workers.[161]

This technique of listing too many detailed rights contradicts the purpose of the consensus procedure which is adopted during the drafting of the Convention. The aim of the consensus procedure is to encourage as many States as possible to ratify the Convention. However, the views which are expressed during the drafting of the Convention establish that many States might refrain from ratifying the Convention because of this detailed listing of rights. The German delegation has clearly expressed doubts about the possibility of his country ratifying the Convention:

> ...the draft Convention went into many details and if his Government was considering whether to ratify the Convention, it would not wish to be bound to recognize all of the extensive rights covered therein in respect of many categories of migrant workers it sought to cover.[162]

It is unlikely that the UN Convention will attract a large number of ratifications. The statements which are made during the elaboration of the Convention and upon its adoption by the General Assembly, manifest that some major employment States -Australia, United States, Japan and Oman- will not accept the obligations of the Convention.[163]

Part III of the Convention is entitled "Human Rights of All Migrant Workers and Members of Their Families". Whether the new Convention advances new concepts or new provisions regarding human rights is very doubtful.

In the final analysis it can be claimed that the UN Convention is not only fragmenting the already existing human rights, but also raising the possibility of different and perhaps conflicting interpretations of the same legal texts or provisions. This negative effect can be explained by the fact that the topics of the Convention have already been dealt with by other human rights instruments, and that the

provisions of the UN Convention textually repeat the provisions of the human rights conventions "substituting the term migrant workers for more inclusive persons in other instruments."[164]

Bohning observes that:

> Of the 27 substantive Articles in Part III of the new Convention, ten are covered, at least partly, by the ILO Conventions and a further five by ILO Recommendations. Of the twenty substantive Articles in Part IV, fourteen are covered by ILO Conventions and other three by Recommendations. Double coverage occurs also with respect to the substantive provisions of Part VI, where six of the eight Articles deal with matters also dealt with by ILO standards. Double coverage occurs also with respect to the substantive provisions of Part VI, where six of the eight Articles deal with matters also dealt with by ILO standards.[165]

The human rights provisions of the UN Convention, in comparison with the human rights conventions, can be classified under the following categories:

- The Articles are completely formulated in accordance with the I.C.C.P.R. such as the right to life (Article 9), the right not to be subjected to cruel, inhuman or degrading treatment or punishment (Article 10), freedom from slavery, servitude and forced labour (Article 11), freedom of thought, conscience and expression (Article 12), the right to equality before law (Article 18), the protection against retroactive penal law (Article 19).

- The Articles of the UN Convention are based on the provisions of other human rights agreements, but they are more detailed. For example, Article 14 prohibits arbitrary or unlawful interference with migrant workers' privacy, family, home, correspondence or other communications, or to unlawful attacks on a migrant worker's honour and reputation; Article 16 expands the right to liberty and security of

persons.

- The Articles of the Convention go beyond the texts of the I.C.C.P.R.: Article 22 prohibits collective expulsion of migrant workers, Article 56 prohibits expulsion of migrant workers on economic grounds, Article 21 makes it unlawful for an unauthorized person to destroy migrant workers' documents.

- Some Articles of the UN Convention limit some other rights which are available to migrant workers under the human rights conventions such as the right to an adequate standard of living.[166]

It must be recalled that the reference to human rights conventions is already established in the ILO Convention No. 143, Article 1, which provides that each member for whom this Convention is in force undertakes to respect the basic rights of all migrant workers. Despite the fact that the reference to human rights is to "basic human rights", its placing in part I of the Convention is intended to cover basic human rights of all migrant workers regardless of their legal status in the country of employment.[167]

The reference to human rights conventions in the field of migration is included in the final communiqué of the conference of ministers on the movement of persons from Central and Eastern European countries.[168]

The UN Convention creates only a few new rights for migrant workers. These new rights can hardly justify the need for a new convention. It would have been a more effective technique to revise the ILO Conventions regarding migrant workers, rather than adopting a new instrument the provisions of which are bound to raise differences and there may be conflicting legal interpretations in respect of the legal texts which have been duplicated in the new Convention. One of the major criticisms of international human rights is the vagueness of their provisions and the

absence of authoritative interpretations of some of these provisions. The Convention aggravates this problem and indirectly undermines the normative rules of human rights:

> A single comprehensive instrument to protect migrant workers, however, poses serious complications. First, new language for both new *and* existing rights may obfuscate or obscure the enforcement of both the Convention and corresponding human rights instruments that are designed to protect everyone, including migrant workers, at least in certain prescribed circumstances.[169]

The evaluation of the UN Convention as an amorphous legal instrument which does not provide for a coherent legal framework is not shared by all writers on the Convention. Lonnroth who has participated during the various stages of drafting of the UN Convention, argues that the new Convention has some significant features which make it different from other human rights conventions:

- It provides for a universally accepted definition of migrant workers and their different categories.

- The repetition of some provisions of human rights conventions will enhance the rights provided in the Convention.

- The equality of treatment principle in the Convention applies to migrant workers in an irregular situation. He states:

> 1. The Convention is the first universal codification of the rights of the migrant workers and their families members in a single instrument. This will make it possible to give the rights applicability as international standards beyond national provisions and definitions.
> 2. While some of the provisions can be found in other international instruments, the fact that they are brought together in one Convention, gives them validity and consequently promotes an effective enjoyment by

the individuals of the rights provided for in the Convention.

3. The Convention breaks new ground by including a universally accepted (hitherto nonexistent) definition of the term "migrant workers" and of most special subcategories of migrant workers. A few of them, such as "project-tied," "self-employed" and "special employment" workers, are not previously covered by existing international instruments. The Convention thereby reflects the changing nature of the migratory phenomenon.

4. The Convention differs from many other instruments in its field by applying an equal treatment of the migrant with the nationals of the state of employment, rather than a mere "minimum standard" approach. This principle is of special relevance for migrant workers in an undocumented or irregular situation. By establishing an appropriate balance between a set of fundamental rights applicable to every one, irrespective of the person's legal status, and a set of sanctions against the exploitation of undocumented workers, the Convention is believed to create prerequisites for combating illicit trafficking of clandestine migrant workers.[170]

Lonnroth's argument carries some weight. Yet it can be argued that the features of the UN Convention, which according to Lonnroth's statement represent important aspects of the UN Convention, should not be overvalued.

First, the definition of the term "migrant worker" as provided in the Convention is far from being a well-defined one. The definition of migrant workers can raise interpretive issues. It is explained by Nafziger that the Convention defines migrant worker as a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national. This "leaves open what degree of a remunerated activity is necessary in order to be "engaged" therein. It also suggests by the disjunctive reference to past status ("or has been engaged") that once a person has been engaged in a remunerated activity at some point, he or she is *always* a migrant worker."[171]

It cannot be denied that the expansion of the categories of migrant workers corresponds with the change in the composition of the migratory flow, like self-employed persons. However, the UN Convention authorizes States to exclude categories of migrant workers from the scope of its application.[172]

It is very doubtful whether the provisions of the UN Convention which repeat other texts of the human rights conventions will enhance these rights. The statements which have been made during the drafting of the UN Convention stress that the provisions of the UN Convention are binding only on the States which ratify the Convention and they are not codification of international customary law.[173]

Regarding the issue of equality of treatment with nationals, it has been pointed out that the ILO Conventions adopt the principle of equality of treatment of migrant workers with nationals specifying the measures and obligations in this regard.

It has been stressed during this study that the equality of treatment with nationals can place migrant workers in a disadvantageous position. This explains the objection which have been raised by some delegations to the reference to the national laws of the employment States.

One of the major reasons for justifying the adoption of the UN Convention is that migrant workers need additional protection beyond those enjoyed by nationals in order to fully enjoy equality of treatment with nationals. The UN Convention fails to introduce the concept of reverse discrimination that States of employment have to adopt special measures in favour of migrant workers.

The provisions of the UN Convention which deal with migrant workers in an irregular situation, have given rise to conflicting views. An extreme view is presented by Nafziger who argues that the inclusion of the provisions that address the problems of irregular migrant workers in a universal human rights instrument, will result in stigmatizing of this vulnerable group of migrant workers:

> Finally, a separate instrument to address the problem of trafficking in undocumented aliens, that is workers in an irregular situation, is preferable to the incorporation of anti-trafficking provisions in a more general human rights instrument, so as to stigmatize those aliens. The lot of undocumented workers is bad enough without enlisting a new corpus of human rights law, in effect, against them.[174]

This view can be justified on a number of grounds:

- The term migrant workers in an irregular situation refers to migrant workers who are in breach of immigration laws. The criterion to decide whether a migrant worker is in a regular or irregular situation is determined by national legislation. It has already been pointed out that immigration laws are liable to abuse by the officials of the immigration authorities of the employment States. A migrant worker who is in a regular situation and enjoys the rights and the protection of the Convention is liable to lose this protection just for not being in compliance with national laws.

- By establishing two sets of rights -the first which is applicable to all migrant workers and the second granted only to migrant workers who are in an irregular situation-, the UN Convention does not only contradict the core concept of human rights as rights attached to every individual, but also its purpose for establishing uniform norms of international human rights for all migrant workers and their families:

> ...providing one set of rights for *all* migrant workers and another for *documented* workers alone poses enormous problems of interpretation and implementation. The distinction may also threaten principles of humanity and justice.[175]

- The provisions of the UN Convention do not provide for legalizing the status of migrant workers in an irregular situation. Article 35 of the UN Convention

clearly provides that:

> Nothing in this Part of the present Convention shall be interpreted as implying the regularization of the situation of migrant workers or members of their families who are non-documented or in an irregular situation or any right to such regularization of their situation, nor shall it prejudice the measures intended to ensure sound and equitable conditions for international migration as provided in Part VI.[176]

This Article maintains the power of the sovereign to adopt immigration policies according to its own criteria, and is considered a real failure on the part of the drafters of the UN Convention regarding migrant workers in an irregular situation:

> The Convention's failure to require any regularization of, or amnesty for, irregular migrant workers or members of their families simply underlines this dilemma. Of course, inclusion of their of provisions on amnesty would have constituted interference with states' decisions regarding the composition of their own national membership-decisions which, as we have seen, are considered part of the states' domain of territorial sovereignty. Moreover, mandating extensive legalization might arguably have served to engender further irregular migration by providing migrants with the hope that they would be included the next time, thereby undercutting one of the central objectives of the Convention.[177]

The provisions of the UN Convention in respect of migrant workers and members of their families in an irregular situation, represent a compromise between two conflicting views. The first is the desire of some countries with large illegal migrant workers abroad to improve the situation of their citizens in the employment States and to ensure the continuous flow of their hard earned currency. And the second view is that the labour receiving States have felt that granting irregular migrant workers the same rights as regular migrant workers might encourage further illegal

migration. The outcome of these views is to grant migrant workers in an irregular situation limited rights. Despite the fact that UN Convention provides limited rights for migrant workers in an irregular situation these provisions should not be undermined. The UN Convention is the first universal human rights instrument which deals with illegal migration. The only reference to irregular immigrants in other UN human rights instruments is indirectly mentioned in Articles 12 (1) and 13 of the I.C.C.P.R. By providing that equality of treatment regarding employment related rights, the UN Convention narrows the scope of discrimination against illegal immigrants. The inclusion of migrant workers in an irregular situation in a universal human rights instruments stresses the importance and the need to deal, at an international level, with the ever growing problem of illegal migration. It is estimated that in the next two decades there will be 25 million migrants in irregular situations.[178]

The process of drafting the UN Convention reflects the conflicting national interests of the different States and the mix between human rights considerations and national economic interests. The exclusion and the inclusion of particular categories of migrant workers is an obvious example. Self-employed workers are included in the Convention in order to satisfy the demands of the developing countries, while the exclusion of the non-resident and non-national seafarers is to accommodate the interests of the employment countries with a considerable shipping fleet.

Reading through the provisions of the Articles of the first draft of the UN Convention and the Articles as they are finalized proves that there is a shift from individual human rights to preservation of the sovereignty principle. For example, the language of Article 44 of the UN Convention regarding family unity, in the first draft, places an obligation on the employment States to admit them:

> Spouse and minor dependent unmarried sons and daughters [of migrant workers] shall be authorised to accompany or join migrant workers and to stay in the State of Employment for a duration not less than that of migrant worker, subject to [procedures prescribed by] the [national] legislation of the State of Employment of [applicable] international agreements. States of employment may make this authorization subject to the conditions that the migrant worker has available appropriate accommodation and resources to meet the needs of the persons concerned. The process of verifying that such conditions are met shall be completed within a reasonable period.[179]

The draft of this Article differs sharply from Article 42: "States Parties shall take measures that they deem appropriate...to facilitate..."

Another example is the right of a migrant worker's family to stay in an employment State after the marriage dissolution. Lonnroth observes that

> The first reading was, to a greater extent, enlightened by the wish of the "founding fathers" to regard the exercise from the point of view of the individual, whereas the interests of the states became more apparent in the second reading...Many provisions phrased in terms of absolute rights for individuals or absolute obligations by states gradually evolved into provisions containing recommendations or escape clauses, thus qualifying the provision or merely highlighting an issue.[180]

The UN Convention is geared towards an absolute preservation of the States' power regarding migration. The protection of migrant workers and members of their families necessitates, from the international human rights perspective, redefining the concept of sovereignty.

The drafting and the adoption of the UN Convention have taken place at a time of fundamental changes on the national and international scene. Among these changes are: the widening gap between the North and South, the collapse of the

former Eastern block setting thousands of migrants moving into Western Europe, the surge in illegal migration, the increasingly restrictive immigration laws, and the growth of nationalism and anti-migrant movements. The impact of the UN Convention on these developments is yet to be seen.

## Notes

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26. UN Doc. A./C.3/41/3, p. 9.

27. *Ibid.*, p. 9.

28. *Ibid.*, p. 32.

29. Hasenau, *op.cit.*, p. 149.

30. Article 8, ILO Convention No. 97; Article 13 (2), ILO Convention No. 143.

31. Article 44 (2) and (3).

32. UN Doc. A/C.3/41/3, p. 39.

33. *Ibid.*, pp. 39-40.

34. Article 8, ILO Convention No. 97.

35. Article 13, ILO Convention No. 143.

36. General Survey, *op.cit.*, p. 20.

37. UN Doc. A/C.3/43/1, p. 7.

38. *Ibid.*, p. 7.

39. UN Doc. A/C.3/44/4, p. 18.

40. UN Doc. A/C.3/43/1, p. 7.

41. Hasenau, *op.cit.*, p. 147.

42. UN Doc. A/C.3/42/6, p. 27.

43. Article 45, GB., *op.cit.*, p. 25.

44. *Ibid.*, Article 31, p. 21.

45. UN Doc. A/C.3/41/3, p. 24.

46. Article 45 (2), GB., *op.cit.*, p. 25.

47. UN Doc. A/C.3/41/3, p. 25.

48. Article 45 (3), GB., *op.cit.*, p. 25.

49. UN Doc. A/C.3/42/6, p. 48.

50. Article 10, ILO Convention No. 143.

51. Article 12 (f), ILO Convention No. 143.

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63. Article 6 (1), ILO Convention No. 97.

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66. *Ibid.*, p. 27.

67. Article 6, ILO Convention No. 97.

68. Article 10, ILO Convention No. 143.

69. Article 9, ILO Convention No. 143.

70. Article 6 (1), ILO Convention No. 97.

71. Article 10, ILO Convention No. 143.

72. Article 43, GB., *op.cit.*, p. 24.

73. Article 6 (1), ILO Convention No. 97.

74. General Survey, *op.cit.*, p. 81.

75. Article 10, ILO Convention No. 143.

76. Article 12, ILO Convention No. 143.

77. Articles 10 and 12 of ILO Convention No. 143.

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89. *Ibid.*, Article 16 (2).

90. *Ibid.*, Article 20 (2), p. 18

91. UN Doc. A/C.3/42/1, p. 24.

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94. *Ibid.*, Article 51, p. 27

95. UN Doc. A/C.3/42/6, p. 13.

96. *Ibid.*, p. 14.

97. *Ibid.*, p. 14.

98. *Ibid.*, p. 12.

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100. Hasenau, *op.cit.*, pp. 141-142.

101. General Survey, *op.cit.*, p. 132.

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104. *Ibid.*, p. 19.

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121. *Ibid.*, p. 6.

122. Article 8, ILO Convention No. 97.

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124. Article 22 (4), GB., *op.cit.*, p. 18.

125. *Ibid.*, Article 25, p. 1.

126. *Ibid.*, Article 43, p. 24.

127. *Ibid.*, Article 55, p. 29.

128. *Ibid.*, Article 66, p. 32.

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130. Article 6, ILO Convention No. 97.

131. Article 8 (1), ILO Convention No. 97.

132. Article 9, ILO Convention No. 143.

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138. *Ibid.*, Article 52 (3).

139. *Ibid.*, Article 52 (3) b, pp. 27-28.

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142. *Ibid.*, p. 21.

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