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THE PROTECTION OF MIGRANT WORKERS AND THEIR FAMILIES IN INTERNATIONAL HUMAN RIGHTS LAW

A Thesis submitted to the School of Graduate Studies and Research in Fulfilment of the Requirement of the Doctorate of Laws (LL.D.) Degree in the Faculty of Law, University of Ottawa

by

Ryszard I. Cholewinski

Ottawa, Ontario
August 1992

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To Aleksander

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ABSTRACT

Migration is an irrepressible human urge and remains a timeless concern. People have always migrated across frontiers, whether unwillingly or willingly. They have been forced to migrate because of war, famine, environmental and man-made disasters, political and religious persecution and expulsion. An appalling example of forced migration in colonial times was slavery. People have also always migrated voluntarily seeking a better life. International migration for employment is one type of voluntary migration and takes place in every region of the world. Its principal cause is the demand for labour in developed countries in need of workers willing to do work that nationals refuse or at a wage level unacceptable to nationals and the corresponding high level of poverty and unemployment in other countries.

This thesis focuses on the protection in international human rights law of the economic, social, cultural, political and residence rights of migrant workers and their families, broadly defined as long- or short-term immigrants who are or have been employed in countries other than their own, including those who entered illegally. These are the rights of most concern to migrants in the country of employment. Economic and social rights comprise employment rights, trade union rights and rights to social security, health, housing, family reunification and education. Cultural rights of migrants embrace their right to retain and develop cultural identity, including the teaching to their children of the culture and language of the country of origin, and political rights encompass their right to political activity and to participate in the decision-making process concerning their interests, including the right to vote. Residence rights comprise their right to remain in the host country, while in work and immediately after the termination of employment, and their rights to permanent residence and naturalization and to protection against unfair expulsion.

Migrant workers and their families are also aliens. This status creates significant obstacles to the realization of their rights. The international protection of aliens has evolved from the concept of the "minimum standard" in the international law of state responsibility to the development of universal and regional human rights norms protecting *all* persons. Despite the application of these instruments to both citizens and aliens, they contain a number of common exceptions which limit the rights of the latter. A recent United Nations (UN) General Assembly Declaration on the human rights of non-nationals has done little to remedy this situation.

The thesis develops a theoretical framework that is justified in terms of both individualist and communitarian liberal principles. These principles provide for conceptions of citizenship which go beyond mere form and which justify the extension of membership of the

state to alien migrant workers and their families. These normative models also support the provision of more extensive rights to both legal and illegal migrants. Limiting the rights of migrants already in the territory and controlling the entry of new immigrants is justified by the principle of sovereignty on the basis of socio-economic, cultural and physical state security. This principle, however, is being eroded by the development of international standards for the protection of vulnerable groups. A redefined conception of the liberal-democratic community, which recognizes the participation and contribution of migrant workers and their families, is more responsive to the interdependence of the international community of states and more closely conforms to its own individualist and communitarian precepts.

Since 1919, the ILO has been concerned with the protection of the human rights of all people in their working environment and contains a number of unique mechanisms for the supervision and enforcement of these rights. The ILO has also adopted several Conventions and Recommendations expressly for the protection of migrant workers and their families. An analysis of these instruments indicates that they protect not only the labour rights of both legal and illegal migrants, but also some of the other important rights, such as the right to education and to maintain and develop cultural identity and rights of residence. Although the protection of these rights does not, strictly-speaking, fall within its competence, the ILO recognizes that labour rights cannot be considered in isolation from the broader social, cultural and political context in which migrants find themselves.

The new UN *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, adopted in December 1990 after ten years of negotiation, is a comprehensive and complex instrument which aims to protect all the rights of all migrant workers and their families, including the rights of those in an irregular situation. An examination of the Convention's provisions, with extensive reference to the *travaux préparatoires*, reveals that the scope of the Convention is indeed broad, but that some of the rights of importance to migrants, such as access to employment and family reunification, are qualified considerably. The impact of the Convention remains to be determined. As of January 1, 1992, it is still awaiting its first ratification.

A case study concerning international migration for employment in Europe reveals that labour migration to Western Europe is primarily a post-war phenomenon which reached its height in the early 1970s before the energy crisis of 1973-74. Rather than diminishing, however, the foreign populations in countries of employment have grown as a result of continuing family reunification. In response, European migration policy has evolved from one of exclusion to the integration of migrants into host societies. Recent developments, such as the political and economic changes in Eastern and Central Europe, the growing prosperity of the countries of Southern Europe and the expected demand for labour as a result of the

forthcoming creation of the single internal market within the European Community (EC), are factors likely to increase once again migration for employment on the continent.

The rights of migrant workers and their families in Europe are protected by Council of Europe human rights conventions and by EC provisions on the free movement of workers. An examination of these standards, however, reveals a hierarchy of protection. Council of Europe instruments, with the exception of the *European Convention on Human Rights*, apply only on the basis of reciprocity to those migrants resident and employed in a state party who are nationals of another state party. Similarly, the protection of EC law is confined to nationals of member states residing and working in other member states. Council of Europe instruments defer considerably to state sovereignty. For example, the rights of migrant workers to access to employment and family reunification are seriously circumscribed. The principle of state sovereignty, however, is less significant under the EC system, the very *raison d'être* of which demands free choice of employment for EC workers, more comprehensive social security coverage and greater family reunification rights. Cultural rights, however, are poorly protected under both Council of Europe instruments and EC provisions. There is no protection of the political rights of migrants under the former, although the EC is set to embrace, in the near future, the right of EC nationals residing in other member states to full political participation in local elections. With regard to residence rights, EC law provides a right to remain in a member country of employment for EC workers who have lived and worked there.

Migrants who come from non-EC countries, which have not signed any of the Council of Europe instruments, or from developing countries outside of Europe, may only claim protection under the *European Convention on Human Rights* or under the ILO Conventions, which so far have been ratified by few countries of employment in Europe and elsewhere. The tendency to exclude on a regional level is a manifestation of exclusion at the level of the nation-state and must be counteracted, especially since the EC model is being adopted by regional free trade systems in other parts of the world, which might also consider the progressive implementation of free movement of labour.

This thesis concludes with the conviction that the adequate realization of the rights of alien migrant workers and their families can only serve to advance the rights of *all* human beings, including citizen-members of states.

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The Human Rights Research and Education Centre has been the nucleus of my studies at the University of Ottawa. I would like to thank Magda Seydegart, the Executive Director of the Centre, and the former Acting Director, Bill Pentney who made the necessary financial and administrative arrangements which enabled me to come and study at the University of Ottawa. In this regard, I would also like to thank Dr. Eugene Meehan, the former Head of Graduate Studies in Law, who assisted greatly in this task and whose encouragement and enthusiasm on my arrival in Canada were an inspiration to me. The Human Rights Centre provided me with space and an independent environment in which to work and also to participate in its activities, which considerably broadened my human rights education beyond the confines of the subject of this thesis. I would also like to express my thanks to Iva Caccia, the Head Documentalist, for her invaluable assistance in helping me locate essential research sources in the Centre's outstanding human rights collection.

My gratitude goes out to my thesis supervisor Bill Black, the Director of the Human Rights Centre, who read and commented on many drafts of my work, and to those who read certain chapters of my thesis, namely Laurie Wiseberg, Kalmen Kaplansky and Salam Hawa, as well as to all those associated with the Centre with whom I have discussed my work and who are simply too numerous to mention here.

Finally, I would like to thank my family back in England for the moral and spiritual support which they have given me during the writing of this thesis. At the beginning of my studies in Ottawa, my nephew was born in England. As his uncle and Godfather, I have only been able to see him on rare occasions. It is to him, therefore, that I dedicate this work.

Ryszard Cholewinski

Ottawa, August 1992

ABBREVIATIONS

JOURNALS AND OTHER PUBLICATIONS

AEHRYB	All-European Human Rights Yearbook
A.J.I.L.	American Journal of International Law
Am. Pol. Sci. Rev.	American Political Science Review
Am. Soc. Int'l L. Prcdgs	American Society of International Law Proceedings
Am. U. J. Int'l L. & Pol.	American University Journal of International Law and Policy
Arizona L. Rev.	Arizona Law Review
Boston College Int'l & Comp. L. Rev.	Boston College International and Comparative Law Review
Can. J. L. & Juris.	Canadian Journal of Law and Jurisprudence
C.M.L.R.	Common Market Law Reports
Common Market L. Rev.	Common Market Law Review
Eur. Comm. H.R. D.R.	Decisions and Reports (of the European Commission of Human Rights)
Eur. Court H.R. Ser. A	Publications of the European Court of Human Rights, Series A: Judgments and Decisions
E.C.R.	European Court (of Justice) Reports
E.H.R.R.	European Human Rights Reports
Eur. Industr. Rel. Rev.	European Industrial Relations Review
Harv. L. Rev.	Harvard Law Review
HRLJ	Human Rights Law Journal
Georgetown Immigration L.J.	Georgetown Immigration Law Journal
ILO SLB	Social and Labour Bulletin (International Labour Organization)
ILR	International Labour Review
IM	International Migration

IMR	International Migration Review
Industr. & Lab. Rel. Rev.	Industrial and Labor Relations Review
Mich. L. Rev.	Michigan Law Review
Modern L. Rev.	Modern Law Review
NQHR	Netherlands Quarterly of Human Rights
Netherlands Y.B. Int'l L.	Netherlands Yearbook of International Law
Nordic J. of Int'l L.	Nordic Journal of International Law
Queen's L.J.	Queen's Law Journal
Stan. J. Int'l L.	Stanford Journal of International Law
Texas Int'l L.J.	Texas International Law Journal
U. Pitt. L. Rev.	University of Pittsburgh Law Review
U.N.T.S.	United Nations Treaty Series
U.T.L.J.	University of Toronto Law Journal
Wisconsin L. Rev.	Wisconsin Law Review
Yale J. Int'l Law	Yale Journal of International Law
Yale L. & Policy Rev.	Yale Law and Policy Review
Y.B. Eur. Conv. H.R.	Yearbook of the European Convention on Human Rights
Y.B. of Eur. L.	Yearbook of European Law

TREATIES AND ORGANIZATIONS[1]

ACHR	*American Convention on Human Rights*
ACHPR	*African Charter of Human and Peoples' Rights*
C97	*ILO Convention No. 97 of 1949 concerning Migration for Employment (Revised)*
C143	*ILO Convention No. 143 of 1975 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers*
CoE	Council of Europe
EC	European Community
ECHR	*European Convention for the Protection of Human Rights and Fundamental Freedoms*
EMW	*European Convention on the Legal Status of Migrant Workers*
ESC	*European Social Charter*
ICCPR	*International Covenant on Civil and Political Rights*
ICERD	*International Convention on the Elimination of All Forms of Racial Discrimination*
ICESCR	*International Covenant on Economic, Social and Cultural Rights*
NGO	Non-governmental Organization
OECD	Organization for Economic Co-operation and Development
R86	ILO Recommendation No. 86 of 1949 concerning Migration for Employment (Revised)
R100	ILO Recommendation No. 100 of 1955 concerning the Protection of Migrant Workers in Underdeveloped Countries and Territories
R151	ILO Recommendation No. 151 of 1975 concerning Migrant Workers

1 These abbreviations are only used when repeated references are made in certain parts of the text to the treaties and organizations enumerated. Otherwise, the full title is given or a derivative of this title. For example, the United Nations *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* is referred to as UNCMW in chapter four of the thesis, but elsewhere it is referred to simply as the UN Convention.

UDHR	*Universal Declaration of Human Rights*
UN	United Nations
UNCMW	*United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*
UNESCO	United Nations Educational, Scientific, and Cultural Organization

INTRODUCTION

INTERNATIONAL MIGRATION FOR EMPLOYMENT: AN OVERVIEW

> [A]nthropologically-speaking, migration is an irrepressible human urge. People have always wanted to move to places with more spiritual freedom, greater political liberty or higher standards of living (and the satisfaction of basic needs in their country of origin does not constitute a threshold at which the urge to migrate suddenly vanishes or loses legitimacy). The more tolerant the receiving state, the more attractive its spiritual freedom and political liberty; the richer it is, the stronger its economic pull. When tolerance and wealth go hand in hand, man-made laws can attempt to regulate migration but they cannot suppress it.
>
> Economically-speaking, migration represents for the individual an escape from poverty (relative or absolute) and it relieves his home country of mouths to feed and bodies to clothe and shelter -- even if it does not necessarily boost its productive capacity or afford it other gains as it does the individual and the country of employment.[1]

1. Historical Background

These are fascinating and extraordinary times. The last three years have brought about many changes. With the collapse of the Berlin Wall, the great ideological barrier between East and West has been swept aside. In its place, uncertainty reigns. Many states have regained their political freedom after a long period of oppression. Many more have entered the modern arena of international affairs for the very first time. A short but ferocious war has been fought in the Gulf. War rages in the heart of Europe - in the newly independent states of the former Yugoslavia. Conflict and unrest have spread to all corners of what was once the Soviet Union, where nations and peoples seek to assert themselves after a long dark period of totalitarian rule.

In this newly emerging world order, the situation of migrants remains a familiar and perennial concern. From the earliest times, people have migrated across frontiers. They have done so for numerous and various reasons. War, famine, environmental and man-made disasters, political and religious persecution and forced expulsion have caused and continue to

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1 W.R. Böhning, *Studies in International Labour Migration* (London: ILO (published by Macmillan Press), 1984) c. 1, "International Migration and the International Economic Order" 3 at 13.

cause the involuntary migration of individuals and groups all over the globe.[2] One appalling example of forced migration was slavery. Colonial conquests led to the deportation of whole peoples constituting a profound affront to human dignity. This practice depopulated Africa and, together with colonialism itself, contributed greatly to the present economic gulf between developed and developing countries by restraining the economic development of the latter.[3] The institution of slavery and the inequitable economic disparity between the developed and developing worlds, which is the principal cause of international migration today, are therefore inextricably connected.

More often, international migration is voluntary and simply constitutes the manifestation of a quest for a better life. Hence the term "economic refugees". Migration for employment is merely one of the facets of the broader phenomenon of voluntary international migration. Its viability depends to a great extent on the sovereign policy of the receiving nation-state and whether the entry of alien migrant workers is perceived to be in the national economic interest.[4]

Improvements in ocean travel during the latter half of this millennium resulted in mass migrations overseas, primarily from Western Europe to North, South and Central America and the Caribbean. Voluntary migrants were usually colonial settlers. For example, it is estimated that between 1506 and 1650 just under half a million persons migrated from Spain to the Caribbean and to Central and South America, and that by 1815, one million migrants had settled in North America from the United Kingdom and Ireland. Their numbers, however,

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2 Aaron Segal and Linda Marston observe that the distinction between voluntary and involuntary international migration is not hard and fast given the multiple factors involved in migration decisions. The emphasis in voluntary migration is on the absence of "physical coercion", although it is recognized that many other forms of "coercion" exist. A. Segal & L. Marston, "Maps and Keys - World Voluntary Migration 1500-1980" (1989) 27:1 Migration World Magazine 36 at 36.

3 *Exploitation of Labour Through Illicit And Clandestine Trafficking* (Preliminary Study prepared by Halima E. Warzazi, Special Rapporteur), UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 27th Session, at 8, para. 17., UN Doc. E/CN.4/Sub.2/351 (17/6/74) [hereinafter *Warzazi Preliminary Report*]. This report has been consolidated in *Exploitation of Labour Through Illicit And Clandestine Trafficking*, UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1986/6 (1986).

4 Cf. Böhning, *supra*, note 1 at 3.

were considerably less than those forced to migrate, such as slaves, indentured labourers, convicts and refugees.[5]

The nineteenth century witnessed the expansion and acceleration of migratory movements. The industrial revolution, the demographic and economic situation of Europe, the attraction of spaces to be settled and developed in the New World, technical advances in transportation and the relaxation of government controls on movements of peoples all contributed to this process.[6] It is estimated that about 60 million people migrated to the Americas, Oceania, and South and East Africa from Europe between 1814 and 1915. In Asia, approximately 12 million Chinese and 6 million Japanese moved to Eastern and Southern Asia, whereas about 1.5 million persons emigrated from India to Southeastern Asia and South and East Africa during the same period.[7]

The nineteenth century also saw the development of migration for paid employment, which initially consisted of the large-scale importation of agricultural workers to sustain the plantation economies of European colonial empires.[8] The importation of Indian Tamils by the British to work in the coffee and tea plantations in Ceylon (Sri Lanka) is just one example. The consequences of this migration, like the effects of slavery in the United States, have proven to be the source of human rights problems and international tensions today.[9] In Europe, industrialization created a demand for labour which was initially met by internal resettlement from rural to urban areas within countries and then by intra-European migration.[10] Until the beginning of the twentieth century, one characteristic of labour migration was its permanency. The temporary nature of migration is essentially a recent phenomenon.[11]

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5 Segal & Marston, *supra*, note 2 at 36.

6 *Warzazi Preliminary Report*, *supra*, note 3 at 8-9, para. 18.

7 Segal & Marston, *supra*, note 2 at 37.

8 *Warzazi Preliminary Report*, *supra*, note 3 at 9, para. 18.

9 V. Leary, "Migrant Workers and Human Rights" in *Materials for the 18th Study Session of the International Institute of Human Rights*, Strasbourg, France, July 1987 (Strasbourg: International Institute of Human Rights, 1987) at 1-2. The problems of adjustment of modern-day migrant workers and their families to their new milieu are also acute and have international repercussions. *Ibid.*

10 *Warzazi Preliminary Report*, *supra*, *note 3* at 9, para. 18.

11 T. Ansay, "Legal Problems of Migrant Workers" (1977) Recueil des Cours (Académie de Droit

International voluntary migration continued as before during the inter-war period, but at a slower rate due to the introduction of restrictive immigration policies and the Great Depression of the 1930s. This period also witnessed the phenomenon of large-scale forced and voluntary repatriation as the United States and Argentina, for example, sent home many Mexican and Italian migrants.[12]

The end of the Second World War brought about a significant increase in migration generally. In addition to the forced migration of refugees, many foreign workers flocked to Western Europe, mainly from Southern Europe and the Mahgreb (Algeria, Morocco and Tunisia) region of North Africa. These "guestworkers" contributed significantly to the reconstruction of Western Europe after the devastation of the war and to the creation of economic prosperity shortly afterwards. Indeed, the influx of foreign labour in many Western European countries appeared to spiral uncontrollably until the beginning of the 1970s. In the former Federal Republic of Germany, for example, there were 165,000 foreign workers in 1959. In 1960, this figure reached 280,000 and by 1971 it had climbed to a staggering 2.2 million.[13] Foreign labourers also migrated in significant numbers after 1945 to the United States from Mexico, Latin America and the Caribbean, to Argentina and Venezuela from Uruguay and Colombia, to the Gulf States from Egypt and Asia, to the Ivory Coast and Nigeria from other parts of Western Africa and to South Africa from neighbouring countries.[14] Many of these were illegal migrant workers who immigrated without the necessary documents permitting them to take up paid employment.

Labour migration to Europe declined significantly after the 1973 oil crisis, which brought on an economic recession. Nonetheless, many migrant workers remained in their

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International, The Hague) 1 at 7.

12 Segal & Marston, *supra*, note 2 at 39.

13 *Warzazi Preliminary Report*, *supra*, note 3 at 9, para. 19, citing from International Labour Office Doc. G.B. 188/5/9 (188th Session of the Governing Body, Nov. 1972), para. 106. In Western Europe, in 1972, there were eleven million migrant workers and their families. Of these, seven million were to be found in seven countries, namely the Federal Republic of Germany, Belgium, France, the Netherlands, United Kingdom, Sweden and Switzerland. *Ibid.*

14 *Ibid.* at 9-10, para. 20; Segal & Marston, *supra*, note 2 at 40-41.

countries of employment, and the total number of migrants actually increased as the families of migrant workers came to join them. Migration for employment to Europe, however, is predicted to increase again in the very near future, particularly in view of the recent "opening of borders" in Eastern and Central Europe, the dismantling of the Soviet empire, the continuing economic disparity between North and South, and the advent of the single European Community (EC) market at the end of 1992.

2. Current Global Migration Movements

Labour migration is truly a global phenomenon and takes place in every region of the world. Estimates from the ILO's International Migration for Employment Branch place the number of economically active migrant workers in the world at approximately 25 million, with 18 million migrant workers in Europe, the Gulf Region, United States and Canada, three million in Central and South America, and one million in Asia and Oceania. In addition, there are 11 million refugees living and working outside of their countries of origin. With an average of three dependents for every migrant worker, the ILO estimates that the current migrant population worldwide is well over 100 million. This number is expected to increase as a result of entry pressures created by population growth in developing countries.[15]

In addition to its global scope, international migration for employment also takes place within different economic, social and cultural settings, which is of utmost importance when proposing universal solutions to the human rights problems of migrant workers and their families. At the recent UN Seminar on *Cultural Dialogue Between the Countries of Origin and the Host Countries of Migrant Workers*, held in Athens in September 1989, the participant from the Philippines, Mr. Tomas Achacoso, noted that migration within Asia differs vastly from the European experience. Although discussions at the Seminar indicating an advanced

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15 Note, International, "Increase in Emigration Pressures" (1991) ILO SLB 100 at 100. For example, the populations of Algeria, Egypt, Nigeria, Mexico, Haiti, India and Indonesia are forecast to rise over the next 20 years by 50 per cent to 1,805 million. *Ibid.*

state of development in Europe were admirable, they seemed "irrelevant and hollow" when considered in the Asian context.[16]

2.1 Europe

Migrant workers and their families in Western Europe mainly come from the economically less developed and underdeveloped regions of the world. Originally, workers came from former colonial territories to settle permanently in the United Kingdom, France and the Netherlands. They were followed by "temporary" migrant workers from certain parts of southern Europe, the Mahgreb region of North Africa, other parts of Africa and from Asia. The migratory movement from North Africa is substantial. In the early 1970s, at the height of labour migration to Western Europe, it was estimated that the average annual flow of migrants from this region was between 600,000 to one million.[17] In 1988, there were still over 1.8 million nationals from the Mahgreb resident in the EC, with over 1.4 million resident in France.[18]

Estimates for the years 1988-1990 reveal that there are approximately 6.4 million legal migrant workers in nine Western European countries belonging to the Organization for Economic Co-operation and Development (OECD). Germany, France, Switzerland and the United Kingdom possess the most immigrant workers at approximately two million, 1.5 million, one million and 900,000 respectively.[19] Luxembourg and Switzerland have the

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16 UN Commission on Human Rights, 46th Session, *Report of the International Seminar on Cultural Dialogue Between the Countries of Origin and the Host Countries of Migrant Workers*, Athens, Greece, September 18-26, 1989 (Implementation of the Programme of Action for the Second Decade to Combat Racism and Racial Discrimination), at 14, para. 79, UN Doc. E/CN.4/1990/50 (10-11-89).

17 *Warzazi Preliminary Report, supra*, note 3 at 9, para. 19, citing from ILO Report VII (1) at 6.

18 International Confederation of Free Trade Unions (ICFTU), European Trade Union Confederation (ETUC), Union of Arab Mahgreb Workers - Union Syndicale des Travailleurs du Mahgreb Arabe (USTMA), *Report to the Conference on Migrant Workers from the Mahgreb in the European Community* (Tunis, April, 18-20, 1991), Table 1 [hereinafter *Report to the Conference on Migrant Workers from the Mahgreb in the EC*]. Out of the 1,805,486 migrants from the Mahgreb resident in the EC, 813,546 came from Algeria, 770,431 from Morocco, and 221,509 from Tunisia. *Ibid.*

19 OECD, *Trends in International Migration - Continuous Reporting System on Migration - SOPEMI 1992* (Paris: OECD, 1992) at 133 (Table 5) [hereinafter *SOPEMI 1992*]. See also OECD, *Continuous*

highest number of migrant workers in proportion to the total working population, at 41.9 per cent (1990) and 17 per cent (1982) respectively.[20] If the dependents of migrant workers are included in these calculations, 1989-1990 figures reveal that the total migrant population in thirteen Western European OECD countries stands at 15.5 million. In Switzerland, resident foreigners constitute 16.3 per cent of the total population.[21] A striking feature in Western Europe is the growth of the younger generation of migrants, as evidenced by the rising proportion of foreign children to nationals enroled in primary school education, which, in recent years, has ranged from 36.2 per cent in Luxembourg (1986), 17.8 per cent in Switzerland (1990), 14.1 per cent in Germany (1989), 11.3 per cent in Belgium (1988), to 10.3 per cent in France (1989).[22]

Migration for employment in Western Europe is also characterized to a lesser extent by movements of highly-skilled individuals, particularly within the context of the EC, who are able to take advantage of the favourable freedom of movement provisions of that regime. EC nationals in other EC member countries, however, are outnumbered by more than one-third by non-EC migrants.[23]

Reporting System on Migration - SOPEMI 1990 (Paris: OECD, 1991) at 118 (Table A.1) [hereinafter *SOPEMI 1990*]. The nine OECD countries included in these figures are Austria, Belgium, France, Germany, Luxembourg, Netherlands, Sweden, Switzerland and the United Kingdom. The other European member states of the OECD are Denmark, Greece, Iceland, Ireland, Italy, Norway, Portugal, Spain and Turkey. The figure for Switzerland includes the 300,000 or so seasonal and frontier workers resident there as of August 1990 and the figure for the United Kingdom includes over 600,000 Irish nationals employed in the country. *SOPEMI 1992*, *ibid.* at 157 (Table 6) and at 83. ILO estimates are lower. Figures for 1991 point to there being 5.6 million migrant workers in Western Europe, including the EC. W.R. Böhning, "Integration and Immigration Pressures in Western Europe" (1991) 130 ILR 445 at 449.

20 See respectively *SOPEMI 1992*, *ibid.* at 69 and *Migrant Workers No. 2. The Social Situation of Migrant Workers and Their Families*, UN Department of International Economic and Social Affairs, Centre for Social Development and Humanitarian Affairs, at 6, UN Doc. ST/ESA/189 (1986), citing from Council of Europe, Second Conference of European Ministers Responsible for Migration Affairs, *Report on the Situation of Migrant Workers and Members of Their Families: Achievements, Problems and Possible Solutions* (Strasbourg: Council of Europe 1983) at 3. The percentage of foreign workers in the total Swiss labour force is probably now much higher than 17 percent because the foreign population in Switzerland has been increasing steadily since 1982. *SOPEMI 1992*, *ibid.* at 81.

21 *SOPEMI 1992*, *ibid.* at 131 (Table 1). These countries comprise the same nine OECD countries as *supra*, note 19, and Denmark, Finland, Italy and Norway. ILO figures are comparable and estimate that there were 15.4 million legally resident foreigners in Western Europe in 1991. Böhning, *supra*, note 19 at 449.

22 *SOPEMI 1992*, *ibid.* at 31 (Table I.6); *SOPEMI 1990*, *supra*, note 19 at 127 (Table A.9).

23 Figures for 1988 indicated that there were almost five million EC residents in other EC member states, but nearly eight million non-EC residents. This is from a total population of the EC of over 324 million as of January 1, 1988. *SOPEMI 1990*, *ibid.* at 26 (Table 10). It was estimated that there were four million

As far as Eastern Europe is concerned, small-scale migration amongst the former socialist countries had existed for some time.[24] In recent years, there was an influx of guestworkers from the socialist countries of Asia and Africa. Figures for 1990 put the number of migrant workers in Eastern Europe at 300,000. These came mainly from Vietnam, but also from Mozambique, Cuba, Angola, Ethiopia and Nicaragua.[25] The plight of migrant workers in Eastern Europe is becoming critical as radical political and economic changes sweep the countries in the region. The sudden unemployment of nationals means that migrants are no longer welcome and are being sent home.[26] If the economic situation of the former socialist Eastern European countries improves significantly in the near future, which appears for the moment highly unlikely, these countries will become more attractive for migrants from Third World countries.

A significant feature in Europe in the last decade or so is that former migrant-sending Mediterranean countries, such as Italy, Greece, Spain and Portugal, have increasingly become attractive receiving countries. Most of the migrants to these countries come from Africa (especially North Africa) and Asia, and are usually to be found in an irregular situation without the necessary employment and residence papers. In Italy, unofficial estimates placed the number of illegal immigrants at between 800,000 and one million.[27] Over 300,000 were regularized in accordance with amnesty legislation adopted in 1986 and 1990.[28]

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economically active migrants in the EC in 1991. Böhning, *supra*, note 19 at 449.

24 See J. Claydon, "International Protection of the Welfare of Migrant Workers" in R.S.J. Macdonald, D.M. Johnston & G.L. Morris, eds, *The International Law and Policy of Human Welfare* (Alphen aan den Rijn, The Netherlands: Sijthoff & Noordhoff, 1978) 347 at 350.

25 V. Grecic, "East-West Migration and its Possible Influence on South-North Migration" (1991) 29 IM 241 at 244, citing from Radio Free Europe, *Foreign Workers in Eastern Europe and the USSR* (Munich: Documentation, June 13, 1990).

26 For example, see E. Greenspon, "What can Happen when Guests Overstay their Welcome" *The [Toronto] Globe and Mail* (22 October 1990) A12 (concerning the situation of Vietnamese migrant workers in the former East Germany). The numbers of these migrant workers are decreasingly rapidly. For example, in 1990, there were 33,970 Vietnamese workers in the Czech and Slovak Federal Republic. In 1991, only 9,808 Vietnamese workers remained in the country. *SOPEMI 1992*, *supra*, note 19 at 118 (Table III.19).

27 See respectively Note, Italy "Act Guarantees Equal Rights for Migrant Workers and Legalizes Clandestine Workers" (1987) ILO SLB 358 at 359 and Note, Italy, "New Amnesty for Illegal Migrants" (1990) ILO SLB 217 at 217.

28 *SOPEMI 1990*, *supra*, note 19 at 22 (Table 8). Of those illegal immigrants regularized, about 125,000 came from North Africa. *Ibid.* In 1991, Spain also instituted a regularization programme. Out of 133,000

Many non-EC migrants are illegal or in an irregular situation. It is very difficult to provide precise figures because of their undocumented status and reluctance to make themselves known for fear of expulsion. The ILO estimated that there were approximately 2.6 million non-nationals in an irregular or undocumented situation residing in Western Europe in 1991. This figure comprises migrant workers and their families, including seasonal workers, and asylum-seekers who have not achieved refugee status and whose presence is not tolerated officially.[29]

International migration for employment and its historical context in Europe is analyzed in more detail in chapter five of the thesis, which serves as the first of a series of chapters constituting a case study of the condition of migrant workers and their families in Europe and of the existing regional standards concerned with the protection of their economic, social, cultural, political and residence rights.

2.2 North America

The other materially developed region of the world in which many migrants reside and work is North America, particularly the United States and to a lesser extent Canada. In comparison to the countries of Western Europe, both the United States and Canada are countries of permanent immigration.

(a) United States

The United States has always been a country of immigration. Between 1820 and 1989,

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requests, over 100,000 were granted. *SOPEMI 1992*, *supra*, note 19 at 33 and at 76-77.

29 Böhning, *supra*, note 19 at 449. In 1974, it was estimated that there were 600,000 illegal migrant workers (excluding members of their families) residing in the EC. This figure is likely to be similar today, since migrant workers in an irregular situation constitute approximately one-tenth of the legal foreign working population. European Communities, Commission, *Action Programme in Favour of Migrant Workers and Their Families*, Bulletin of the European Communities, Supplement 3/76 at 21 [hereinafter *EC Action Programme*]. See also *supra*, note 23.

approximately 56 million immigrants entered the United States. More than half came from Europe.[30] Between 1945 and 1980, there was an inflow of over ten million immigrants from Mexico, Central America and the Caribbean.[31] This number includes both legal and illegal migrant workers, who come to the United States mostly from these regions.

Legal temporary migrant workers in the United States are divided into three categories: H2 workers - agricultural labourers and others as well as middle-level professionals; H1 workers - workers of "distinguished merit and ability"; and exchange visitors - foreign professionals admitted for two to three years in exchange for similar professionals going abroad from the United States, and students sponsored by their own governments. In 1989, 141,000 H workers and 178,000 exchange visitors were admitted to the United States.[32]

The difficulties in measuring the number of illegal immigrants in the United States are well-known. Official and independent estimates fluctuate enormously, ranging from one to 10 or 12 million.[33] If one of the higher figures is chosen, it would not be an exaggeration to suggest that, in the late 1970s, there were between 3 to 5 million illegal migrant workers in the

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30 *SOPEMI 1990*, *supra*, note 19 at 14. It has been estimated that between 1801 and 1935, 34 out of 38 million immigrants to the United States were Europeans. D.G. Papademetriou, "International Migration in North America and Western Europe: Trends and Consequences" in R.T. Appleyard, ed., *International Migration Today - Vol. 1: Trends and Prospects* (Paris; Nedlands, Western Australia, The Centre for Migration and Development Studies: UNESCO, 1988) 311 at 313. See also Segal & Marston, *supra*, note 2 at 39-40.

31 Segal & Marston, *ibid.* at 40. The principle countries of emigration to the United States in Central America and the Caribbean are Puerto Rico (one million persons, who are U.S. citizens), Dominican Republic (800,000), Haiti (600,000) and the West Indies (600,000). *Ibid.*

32 For the recent figures see *SOPEMI 1992*, *supra*, note 19 at 86 and for the explanation regarding the categories of legal temporary foreign workers in the United States see generally E.P. Reubens, "Temporary Foreign Workers in the U.S.: Myths, Facts and Policies" (1986) 20 IMR 1037 at 1041-1044. Between 1942 and 1964, the Bracero programme, intended to cope with the labour problems of the post-Second World War era, legally imported temporary Mexican workers, contracted to individual U.S. employers, to work in agriculture and in the railroad industry. *Ibid.* at 1038.

33 V. Briggs, "Methods of Analysis of Illegal Immigration into the United States" (1984) 18 IMR 623 at 628-630. It is possible also to arrive at an approximation from the number of apprehensions of illegal immigrants by the U.S. Immigration and Naturalization Service (INS). Between 1977 and 1980, an average of one million illegal immigrants were apprehended by the INS. These figures are unreliable as an indicator of the magnitude of illegal immigration for three principal reasons. First, and most obviously, they only count those who are caught. Second, they do not take into account multiple counting, i.e., some persons are caught more than once in a given year. Third, the figures (90 per cent) largely reflect INS activities on the Southwest frontier with Mexico where most of its border patrol is concentrated. There is, therefore, a bias towards reflecting the number of Mexican illegal immigrants apprehended, which contributes to the false public impression that illegal immigration is chiefly a Mexican problem. *Ibid.* at 626-627.

United States.[34] Recent figures are more conservative. Estimates of the size of the undocumented alien population resident in the United States, as of January 1, 1982, ranged from 2.5 to 4 million persons and present government estimates range from 2 to 3.5 million persons.[35] The former figures were obtained in response to a policy of regularization, which was eventually introduced by the United States government in 1986 in the *Immigration Reform and Control Act*, and which encompassed, *inter alia*, illegal aliens who had lived in the country continuously since January 1, 1982.[36] Official figures for 1989 indicated that 480,000 immigrants had been registered since the regularization procedure took effect. These figures also suggest that Mexicans are likely to comprise between two-thirds and three-quarters of the illegal residents in the United States.[37] Although the United States has a very high number of migrant workers in absolute terms, it is noteworthy, however, that the size of this population to the total working population is proportionately not as great as in other countries.[38]

(b) Canada

Although Canada is a country of permanent settlement, like the United States it issues temporary work permits to migrant workers and is also home to illegal migrants. In 1989, almost 280,000 temporary work permits were issued, an increase of 31.4 per cent over 1988. Most of the increase, however, could be attributed to work permits issued to refugee claimants, who were waiting in a backlog in order for their claims to be heard. In 1990, just over

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34 Cf. Leary, *supra*, note 9 at 2. The ILO estimated that there were between 2.5 and 4 million economically active immigrants in an irregular situation living in the United States in 1980. About half of these came from Mexico. Legal migrant workers amounted to 2.5 million persons. *The Social Situation of Migrant Workers and Their Families*, *supra*, note 20 at 12, citing from ILO, *World Labour Report* (Geneva: International Labour Office, 1984) at 101.

35 See respectively J.S. Passel & K.A. Woodrow, "Change in the Undocumented Alien Population in the United States, 1979-1983" (1987) 21 IMR 1304 at 1321 and *SOPEMI 1992*, *supra*, note 19 at 86.

36 D.G. Papademetriou, (Current Trends and Developments), "The Immigration Reform and Control Act of 1986: America Amends Its Immigration Law" (1987) 25 IM 325 at 326; Note, United States, "Immigration Act Combines Amnesty and Penalties" (1987) ILO SLB 359 at 360.

37 See respectively *SOPEMI 1990*, *supra*, note 19 at 18 and *SOPEMI 1992*, *supra*, note 19 at 86.

38 Leary, *supra*, note 9 at 3.

200,000 workers were permitted to enter the country to take up temporary employment.[39] The number of illegal migrants in Canada is by no means as great as in the United States. In December 1982, the Canada Employment and Immigration Advisory Council estimated that there were 200,000 illegal immigrants in Canada.[40] This estimate, however, was recognized as too high and it was suggested, in 1983, that 50,000 was a more acceptable "working" figure.[41]

2.3 Latin America

(a) South America

Migration for employment on the continent of South America is characterized by flows of migrant workers from border regions of countries to neighbouring states. Estimates of the number of migrant workers in the region in 1974 were put at three million, with 1.5 million family members.[42] Most of the migrants were in an irregular situation, illiterate and unskilled.[43]

The principal receiving countries in South America are Argentina and Venezuela. There is also limited migration for employment to Brazil, Chile, Colombia and Peru.[44] Both

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39 *SOPEMI 1990*, *supra*, note 19 at 45 and *SOPEMI 1992*, *supra*, note 19 at 57. Most of the temporary work permits issued in 1989 were to U.S. citizens and, to a lesser extent, to nationals of Asian and other Third World countries. *SOPEMI 1990*, *ibid.* In 1990, Canada also admitted 11,000 foreign domestic workers and 12,598 seasonal agricultural workers from the Caribbean and Mexico under two special temporary employment programmes. *SOPEMI 1992*, *ibid.*

40 Canada Employment and Immigration Advisory Council, *Illegal Immigrants* (Ottawa: Canada Employment and Immigration Advisory Council, 1982) cited by W.G. Robinson, *Illegal Migrants in Canada: A Report to The Honourable Lloyd Axworthy, Minister of Employment and Immigration* (Ottawa: Supply and Services Canada, 1983) at 23 [hereinafter *Illegal Migrants in Canada*]. See also W.G. Robinson, "Illegal Immigrants in Canada: Recent Developments" (1984) 18 IMR 474 at 475.

41 *Illegal Migrants in Canada*, *ibid.* at 24.

42 *The Social Situation of Migrant Workers and Their Families*, *supra*, note 20 at 12.

43 *The Welfare of Migrant Workers and Their Families*, UN Commission for Social Development, 24th Session, January 6-24, 1975, Report of the Secretary-General, at 5, para. 15, UN Doc. E/CN.5/515 (14/10/74).

44 In 1974, there were over 100,000 migrants in each of these countries. *The Social Situation of Migrant Workers and Their Families*, *supra*, note 20 at 12.

Argentina and Venezuela were countries of destination for European migration to South America. Immigrants came from Southern Europe to Venezuela in the 1940s and 1950s.[45] In Argentina, approximately 3.5 million European immigrants settled before the world depression of 1929. There was also some post-war immigration.[46] Migration for employment, however, to these countries commenced later. In 1974, about 1.3 million migrants resided in Argentina, with most coming from Bolivia, Paraguay and Chile and, to a lesser extent, Uruguay.[47] Venezuela became a destination for migrant workers in the 1960s, especially illegal Colombian workers, whose numbers escalated during the oil-boom of the 1970s.[48]

As mentioned above, many migrants to Argentina and Venezuela are in an irregular situation. As in the case of Europe and the United States, reliable estimates of the number of illegal migrants in these countries are difficult to find. Both Argentina and Venezuela have undertaken amnesty programmes to regularize the situation of these workers.[49] In Argentina, over 360,000 illegal migrants were regularized by amnesty decrees of 1964, 1965 and 1974.[50] In Venezuela, estimates of the number of illegal migrants in the country in 1980 ranged from 1.2 million to four million persons.[51] A subsequent amnesty programme (December 1980 -

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45 R. Torrealba, "International Migration Data: Their Problems and Usefulness in Venezuela" (1987) 21 IMR 1270 at 1270; A. Pellegrino, (Current Trends and Developments), "The Recent Evolution of Immigration in Venezuela" (1985) IM 397 at 397.

46 J.M. Villar, "Argentine Experience in the Field of Illegal Immigration" (1984) 18 IMR 453 at 453.

47 *The Social Situation of Migrant Workers and Their Families*, *supra*, note 20 at 13 (Table 3), citing from ILO, "La condition des travailleurs migrants en Amérique du sud" (General Conditions of Work Series, No. 31) (ILO: Geneva, 1974). For Uruguayan migration to Argentina see generally C. Sapelli & G.J. Labadie, "Causes of Uruguayan Migration to Argentina" (1989) 27 IM 427. The authors estimate that the Uruguayan migrant population in Argentina is about 125,000. *Ibid.* at 427.

48 Torrealba, *supra*, note 45 at 397. The number of Colombian migrants in Venezuela is difficult to ascertain. In 1961, it was estimated that most of the 755,000 migrant workers in Venezuela were from Colombia. *The Social Situation of Migrant Workers and Their Families*, *ibid.* In the late 1970s, at least 2 million Colombians were living abroad, mainly in the United States and Venezuela. J.N.C. Martinez, "Social Effects of Labour Migration: The Colombia Experience" (1989) 27 IM 203 at 203.

49 In Venezuela, the regularization programme was unique because it took place within the context of an international convention. It was developed in conjunction with the Andean Labour Migration instrument which mandated the legalization of all Andean Pact member state nationals who resided illegally in another member state. D. Meissner, D. North & D.G. Papademetriou, "Legalization of Undocumented Aliens: Lessons from Other Countries" (1987) IMR 424 at 427.

50 Villar, *supra*, note 46 at 460, 463.

51 R. Van Roy, "Undocumented Migration to Venezuela" (1984) 18 IMR 541 at 545; Meissner, North & Papademetriou, *supra*, note 49 at 428.

April 1981) resulted in the regularization of over 250,000 illegal migrants. Colombians constituted 92.3 per cent of this figure.[52] The figures also revealed that 17.1 per cent of illegal immigrants were illiterate, 66.2 per cent had primary education and only 0.2 per cent possessed higher education.[53] In both countries, the problem of illegal migration has lessened somewhat as a result of economic downturns in the 1980s. Many of these illegal immigrants have probably now returned voluntarily to their countries of origin.[54]

(b) Central America

Migration for employment in Central America is difficult to isolate from the substantial refugee movements in the region. For example, between 1980 and 1984, there were 350,000 refugees and one million displaced persons in the region, the great majority coming from El Salvador. As far as movements of migrant workers are concerned, irregular migration is widespread among the islands of the Caribbean as is evidenced by the expulsion of 25,000 illegal Haitians from the Bahamas in 1981. There is also seasonal labour migration, ranging from 20,000 to 60,000 annually, of irregular Haitian migrant workers to the sugar plantations in the Dominican Republic.[55] The plight of these workers formed the subject of an ILO investigation in response to a complaint filed with the ILO in 1981.[56]

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52 Pellegrino, *supra*, note 45 at 398; Torrealba, *supra*, note 45 at 1273; Van Roy, *ibid.* at 542. Van Roy, *ibid.* at 555, observes that the number of illegal migrants actually regularized fell far short of the estimations of illegal migrants in the country. These figures indicated, therefore, that it was not necessarily true that undocumented migrants lay behind Venezuela's most critical internal problems.

53 Pellegrino, *ibid.* at 402. Illegal migrant workers were mostly to be found in agriculture, manufacturing, construction and services. *Ibid.* at 412 (Table 7).

54 R. Lohrmann, "Irregular Migration: A Rising Issue in Developing Countries" (1987) 25 IM 253 at 258, 259. See also Villar, *supra*, note 46 at 467 and Meissner, North & Papademetriou, *supra*, note 49 at 429.

55 Lohrmann, *ibid.* at 258-259.

56 International Labour Office, *Report of the Commission of Inquiry appointed under Article 26 of the Constitution of the International Labour Organization to Examine the Observance of certain International Labour Conventions by the Dominican Republic and Haiti with respect to the Employment of Haitian Workers on the Sugar Plantations of the Dominican Republic* (1983) 66 Official Bulletin, Series B. See chapter three, *infra*, for more information with regard to this complaint.

2.4 Gulf States and the Middle East

After Europe, the oil-rich Gulf region contains the most migrant workers. Estimates for 1989 and 1985 placed their number in the six Gulf Cooperation Council (GCC) states (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, United Arab Emirates (UAE)) at approximately five million, equivalent to about one half of the region's total population.[57] Two-thirds of these workers were employed in Saudi Arabia.[58] The presence of family members and children of migrant workers probably increases the foreign population in the GCC states by a further two to three million.[59] Not all migrant workers, however, gravitate to GCC states. Before the Gulf War, Iraq too was a major labour-importing country, with an estimated one million Egyptian workers, who were recruited to fill positions vacated by Iraqis drafted for the war with Iran.[60]

The rise in oil-prices in the mid-1970s resulted in an increase in international labour migration to the Gulf region. Initially, the majority of foreign workers came from other Arab countries. In 1975, 65 per cent of migrant workers in the GCC states (and Libya) originated from other Arab countries in the region, particularly from Egypt, Yemen and Jordan.[61] Since

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57 See respectively Note, Gulf Cooperation Council, "Strengthening the National Labour Force" (1989) ILO SLB 302 at 302 and J.S. Birks, I.J. Seccombe & C.A. Sinclair, "Labour Migration in the Arab Gulf States: Patterns: Trends and Prospects" (1988) 26 IM 267 at 267. See also J.N. Sarmiento, "The Asian Experience in International Migration" (1991) 29 IM 195 at 197-198.

58 3.52 million or 68 per cent of all migrant workers in the GCC work in Saudi Arabia. Birks, Seccombe & Sinclair, *ibid.*

59 J. Addleton, "The Impact of the Gulf War on Migration and Remittances in Asia and the Middle East" (1991) 29 IM 509 at 509.

60 Addleton, *ibid.* at 513, 512.

61 I. Serageldin *et al.*, *Manpower and International Labour Migration in the Middle East and North Africa* (Oxford: Published for the World Bank by Oxford University Press, 1983) at 5. Egypt is by far the principal migrant-supplying country in the Arab region. In the early 1980s, there were 1.15 million Egyptian migrant workers employed in GCC states. Other significant Arab labour-exporting countries to the GCC are Yemen, Syria, Sudan, Lebanon, Iraq, Oman, Somalia and Jordan. R. Owen, *Migrant Workers in the Gulf*, Minority Rights Group Report No. 68 (London: Minority Rights Group, 1985) at 18, Appendix (Table 1). Recently, Jordan has also become a migrant-receiving country. In 1985, there were 143,000 foreign workers in Jordan (about 25 per cent of the domestic labour force). Most migrant workers come from Egypt and Pakistan and are employed in agriculture. M. Samha, "The Impact of Migratory Flows on Population Changes in Jordan: A Middle Eastern Case Study" (1990) 28 IM 215 at 216, 220. The number of foreign workers in Jordan is probably much higher today. In 1989, it was estimated that there were 160,000 Egyptians alone working in Jordan. Note, Egypt, "Population Growth and Jobs" (1989) ILO SLB 3-4, 292 at 293.

1975, however, the principal labour-supplying countries to the Gulf have been those from South and South-East Asia. It was estimated that between 1976 and 1981 *annual* labour migrant flows from the eight major sending countries in Asia increased sevenfold, from 146,000 to over one million.[62] In 1985, 63 per cent of foreign workers came from this region in contrast to only 30 per cent from non-GCC Arab countries. One-third of these migrant workers come from India and Pakistan, although, most recently, South-East Asia has played a more important role as labour supplier, with many migrant workers from the Philippines, South Korea and Thailand now working in the Gulf.[63] There are also significant numbers of migrant workers from Bangladesh and Sri Lanka and a smaller number from Indonesia.[64] Most of the Arab migrant workers in the GCC states are to be found in Kuwait and Saudi Arabia. Prior to the Iraqi invasion in August 1990, Kuwait possessed the largest Arab workforce of any GCC country (approximately 50 per cent), with most of these workers coming from Jordan, the West Bank and Egypt.[65]

Statistics for 1985 revealed that most migrant workers in the Arab Gulf States are employed in services (30 per cent) followed by construction (29 per cent), the wholesale and retail trade (14 per cent), manufacturing (9.4 per cent) and agriculture (8.9 per cent).[66] Remittances constitute an especially important source of revenue for the migrant-sending countries. For example, both Yemen and Pakistan relied heavily on the remittances of their

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62 M.I. Abella, (ILO Asian and Pacific Project for Labour Administration - ARPLA), "Labour Migration from South and South-East Asia: Some Policy Issues" (1984) 123 ILR 491 at 491.

63 Birks, Seccombe & Sinclair, *supra*, note 57 at 268. In 1985 there were approximately 325,000 and 268,000 migrant workers from South Korea and Thailand employed in GCC member states. *Ibid.* Estimates of the number of Filipino migrant workers range from 350,000 (Gulf region only) in 1975 to 530,000 (Middle East as a whole) in 1990. See respectively, Birks, Seccombe & Sinclair, *ibid.* and A. Bandiola & A. Divino, "Migrant Workers: How They Fared in the Gulf War" (January 15 - February 14, 1991) 6:5 Philippine Human Rights Update (International Edition) 11 at 14. The number of South Korean migrant workers has declined significantly in accordance with the decrease in work in the construction sector, in which most South Koreans are employed. Birks, Seccombe and Sinclair, *ibid.* at 272; Note, Saudi Arabia, "Economic Changes Foster New Requirements in Pattern of Demand for Migrant Labour" (1988) ILO SLB 511 at 511.

64 Over 170,000 migrant workers from Bangladesh and 200,000 from Sri Lanka were employed in the Gulf and Middle East in the early 1980s. See respectively, The *Social Situation of Migrant Workers and Their Families*, *supra*, note 20 at 10 and F. Felens, "Early Return of Sri Lankan Migrants in the Middle East" (1988) 26 IM 401 at 402.

65 Addleton, *supra*, note 59 at 512-513.

66 Birks, Seccombe & Sinclair, *supra*, note 57 at 268.

expatriate workers in the early 1980s. Remittances to Yemen effectively paid for that country's annual imports, whereas remittances to Pakistan were greater than earnings from all of the country's exports.[67] It is estimated that the remittances of migrant workers from Arab and Asian labour-exporting countries amount to US$6-8 billion annually.[68]

Migration for employment to the Gulf has two principal characteristics. First, Gulf states are heavily dependent on foreign labour to the extent that migrant workers outnumber the national populations. For example, 71 per cent of the total labour force of Saudi Arabia, the chief employer of migrant workers in the Gulf region, was composed of foreign workers in 1985. This dependence, however, is even greater in other GCC member states. Over 80 per cent of the workforce in Kuwait and Qatar consisted of foreign workers in 1985. In the United Arab Emirates, this figure stood at a staggering 91 per cent.[69] These statistics also partly explain the precarious legal status and the difficult working and living conditions experienced by many migrant workers in the region, particularly those from Asia. Not surprisingly, settlement or the acquisition of citizenship in the host country is extremely difficult to obtain. In practice, only Arab nationals from non-GCC states may obtain naturalization, and, in order to qualify for it, they must first live in the country in question for a period ranging from ten to thirty years.[70] The great majority of migrant workers are also employed on short-term contracts, with residence being tied directly to the work permit (project-tied labour migration). Any rights to residence lapse upon loss of employment. Trade union rights are only recognized in Kuwait. Moreover, family reunion is only open to family members of workers employed in certain professions or who receive a salary above a certain amount. Accommodation is expensive and hard to find and access to education and health care, although in theory

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67 Addleton, *supra*, note 59 at 511.

68 "Strengthening the National Labour Force", *supra*, note 57 at 303.

69 Birks, Seccombe and Sinclair, *supra*, note 57 at 267. Moreover, only 20 per cent of *government* posts in the United Arab Emirates are occupied by native workers. "Strengthening the National Labour Force", *ibid.* at 302.

70 Immigration and Refugee Board Documentation Centre, Question and Answer Series, "The Persian Gulf: The Situation of Foreign Workers" (Ottawa: Immigration and Refugee Board Documentation Centre, May 1991) at 4.

available, is restricted in practice.[71] Female migrant workers are especially vulnerable, in particular those employed in domestic service.[72] The greatest hazard, however, facing foreign workers in the Gulf region, is the extent of control that employers exercise over their fate: employers are responsible for reporting any breach of contract by workers to the authorities; migrant workers must request their employers for permission to change their jobs; and many are required to leave their passports with their employers for the duration of their stay.[73] Hence the right of migrant workers to leave the country is severely constrained.

In 1986, the sharp drop in world oil prices resulted in an outflow of migrant workers from the region. Between 1985 and 1987, some 615,000 foreign workers, or 12 per cent of the foreign labour force, returned home.[74] Another trend has involved efforts by GCC member states to reduce their reliance on foreign labour. Before the Gulf War, both Saudi Arabia and Kuwait had planned to drastically cut their migrant labour force.[75]

2.4.1 The Impact of the Gulf War on Labour Migration in the Region

The immediate impact of the Iraqi invasion of Kuwait in August 1991 was the flight of over 1.5 million migrant workers from Kuwait and Iraq. This figure included about 860,000 Asian migrants. Migrant workers leaving Kuwait suffered immeasurable losses, including anticipated future wages, material possessions and life savings in Kuwaiti dinar bank accounts

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71 Owen, *supra*, note 61 at 11-12. See also *The Social Situation of Migrant Workers and Their Families*, *supra*, note 20 at 12.

72 Owen, *ibid.* at 13 and *"The Persian Gulf: The Situation of Foreign Workers"*, *supra*, note 70 at 3. These women are subjected to 14-16 hour working days and receive no protection from local labour laws, which specifically exclude domestic service. Owen, *ibid.*

73 "The Persian Gulf: The Situation of Foreign Workers", *ibid.* See also Owen, *ibid.* The latter practice has been justified on the basis that the migrant worker is a significant investment for the employer which might be lost if he or she is free to leave the country at will. This practice, however, does not apply to professional workers. Note, International, "The Hidden Costs of War" (1991) ILO SLB 99 at 100.

74 Birks, Seccombe and Sinclair, *supra*, note 57 at 272.

75 Saudi Arabia had planned to slim down its foreign labour force by 600,000 by 1990. The intentions of Kuwait to reduce its foreign workforce by one half within 25 years were unveiled before the decimation of the Gulf War (see below). See respectively "Economic Changes Foster New Requirements in Pattern of Demand for Migrant Labour", *supra*, note 63 at 511 and Note, Kuwait, "Balance Needed" (1990) ILO SLB 218 at 218.

which, when linked to the Iraqi monetary system, became virtually useless.[76] Most of those fleeing the war reached Jordan where they were housed in makeshift refugee-like camps. Many had difficulties in returning to their home countries, while many others were reluctant to return to their countries of origin because of war or famine.[77] Furthermore, the extra burden that returning migrants imposed upon the economies of countries such as Bangladesh, Pakistan, India and the Philippines, which are already experiencing severe economic and financial difficulties, is only too apparent.[78] In addition to these "voluntary" departures, approximately one million Yemenese migrants were expelled from Gulf states (including 800,000 from Saudi Arabia) and returned to the newly reunited Yemen, regarded as Iraq's ally during the war.[79]

Many migrant workers, however, were not permitted to leave the war-torn Gulf, largely as a result of the constraints on their right to leave. Those who had handed in their passports to their employers were trapped in the country of employment.[80] Moreover, in Iraq, Egyptian and Sudanese migrant workers were forcibly drafted into the Iraqi armed forces and some of them were executed for resisting the draft.[81]

The long-term impact of the Gulf War on international migration for employment in the region appears to be more detrimental to the Arab than to the Asian migrant population. The large numbers of Egyptians in Iraq, Jordanians and Palestinians in Kuwait, and Yemenese in Saudi Arabia were all severely affected by the crisis. On the other hand, only Asian migrant workers in Kuwait were forced to leave, with the largest concentrations of Asian migrants, in Saudi Arabia and the United Arab Emirates, remaining. The increased political polarity in the

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76 Addleton, *supra*, note 59 at 513.

77 "The Persian Gulf: The Situation of Foreign Workers", *supra*, note 70 at 6, 8. The latter group included Somalis, Liberians, Afghans, Sudanese and Sri Lankans. *Ibid.* at 8.

78 *Ibid.* at 9.

79 Note, Yemen, "Repatriating One Million People" (1991) ILO SLB 207 at 207.

80 "The Hidden Costs of War", *supra*, note 73 at 100.

81 ICFTU, Feature Service, "Migrant Workers in the Gulf, the Hidden Casualties" (February 1991). Bangladeshi migrant workers were reportedly also recruited to dig trenches for the Iraqi army. *Ibid.*

Arab world points to a greater Asian composition of the Gulf foreign workforce in the future.[82] The Gulf War is probably the best, as well the most recent example, of the perilous situation that awaits a large migrant labour population in times of crisis in a particular region.

2.5 Asia

As indicated in the previous section, the countries of South and South-East Asia are the main providers of foreign labour to the Gulf states. But workers from these countries also migrate for employment within Asia itself. Three types of labour migration in the Asian region are discernible: regulated contract labour immigration, clandestine flows and high-level manpower with direct foreign investment by Japan, Hong Kong, Singapore and Australia, which has been labelled as "transient professional migration".[83] The principal labour-receiving countries in the region are Singapore, Malaysia and Japan and these are examined below. Foreign labour inflows, however, have also been experienced in India, Brunei, Hong Kong, South Korea, Taiwan and Pakistan.[84] The last two countries merit particular attention, because of the substantial increase in irregular migrant labour within their territories. The continued economic growth of Taiwan has created a labour shortfall in certain industries, which is being filled with illegal immigrant workers, principally from the Philippines, Malaysia, Thailand and China, and estimated in 1989 to number between 200,000 and 300,000. Finally, there has been a substantial influx, in recent years, of Bangladeshi nationals and Burmese Muslims to Pakistan in search of employment. These have been estimated to number from 1 to 1.5 million and 200,000 respectively.[85]

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82 Addleton, *supra*, note 59 at 518.

83 C.W. Stahl, "South-North Migration in the Asia-Pacific Region" (1991) 29 IM 163 at 168.

84 In India, a large contingent of Nepalese migrants appears to be employed on both a permanent and temporary basis. In Brunei, approximately 40 per cent of the workforce of 87,000 are foreign nationals and are mostly employed in the private sector. In Hong Kong, recent labour shortages have resulted in the limited temporary legal migration of semi-skilled workers as well as an influx of a substantial number of illegal immigrants. South Korea, so long a country of labour emigration, is beginning also to experience an inflow of illegal migrant workers, mainly from the Philippines. *Ibid.* at 165-166, 168-169, 173.

85 *Ibid.* at 171, 173.

(a) Singapore

Singapore has received migrant workers on a regular basis since 1968 (with the exception of the 1974-75 recession) when controls on immigration were relaxed as a result of increasing labour shortages.[86] Estimates of the number of foreign workers in Singapore range from 120,000 to 175,000 or about one-eighth of the total labour force. Originally, most of these workers came from neighbouring Malaysia, but more recently many of them have been replaced by other migrants from the Philippines, Indonesia and Thailand.[87] Many of the non-resident migrant workers in Singapore are concentrated in the low productivity sectors of manufacturing and construction.[88] This is because the government has only permitted employers to recruit foreign labour in these sectors and in the hotel trade. From March 1990, however, industries in the service sector were allowed to fill ten per cent of their labour needs with Malaysian workers, whereas firms in the construction and ship-building sectors were able to draw up to 50 per cent of their labour from foreign sources. Given that the continuing strength of the Singapore economy and the slow growth of its own labour force points to an increasing need for and reliance on foreign labour, it is not surprising that this government policy is contrary to earlier intentions to repatriate all migrant workers. The present policy does, however, harbour an objective to change the composition of the foreign labour force in order to reflect more skilled personnel.[89]

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86 *Ibid.* at 171.

87 *Ibid.* at 171-172; C.W. Stahl, *International Labour Migration: A Study of the ASEAN Countries* (New York: Center for Migration Studies, 1986) at 38; *The Social Situation of Migrant Workers and Their Families*, *supra*, note 20 at 15.

88 *International Labour Migration: A Study of the ASEAN Countries*, *ibid.* at 38-40.

89 "South-North Migration in the Asia-Pacific Region", *supra*, note 83 at 171-173. In order to reduce its reliance on cheap and unskilled labour, the Singapore government introduced a monthly levy on firms hiring foreign workers. From August 1, 1990 this levy was $300 per month for all foreign workers with the exception of domestic maids ($230). *Ibid.* at 172.

(b) Malaysia

Malaysia is both a labour exporter and importer. It exports mostly skilled and professional personnel to Singapore, but imports a greater number of unskilled and semi-skilled labourers from the Philippines, Indonesia and Thailand.[90] The vast majority of these workers are in an irregular situation. Official estimates for the end of 1988 place the number of illegal migrant workers from the Philippines and Indonesia in the east Malaysian State of Sabah at 335,000 and 145,000 respectively.[91] These migrant workers are employed mainly in the agriculture and construction sectors. In 1988, the government of the State of Sabah introduced an amnesty for illegal immigrant workers, which enabled them to obtain work permits if they chose to return after leaving Malaysia. Many Indonesian illegal immigrants, but few Filipinos, took advantage of this opportunity to regularize their situation.[92] Another region of the country where migrant workers abound is the Malaysian Peninsular. The government estimated in 1989 that there were approximately 350,000 illegal Indonesian workers in this region. More ambitious estimates from the Malaysian Trade Union Congress reveal that the number may even be greater than one million. In addition, between 10,000 and 30,000 Thais from southern Thailand are engaged there in the planting and harvesting of paddy rice. These figures far exceed the official number of legal temporary labour migrants to this region, which stood at a mere 18,000 in 1987.[93] Given the current rate of economic growth in Malaysia as a whole, it is likely that the country will continue to rely heavily on foreign labour.[94]

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90 *Ibid.* at 170.

91 *Ibid.* The figures are sketchy. Manolo Abella claims that there are only 120,000 to 140,000 illegal migrant workers in the region. M.I. Abella, "Migration in the ASEAN Region: Trends and Dimension" (Paper presented at the ILO Technical Workshop for ASEAN Countries on Social Security Protection of Migrant Workers, 13-16 March, 1990, Kuala Lumpur, Malaysia), cited by Stahl, *ibid.*

92 *Ibid.*

93 *Ibid.* at 170-171. A large number of Indonesian migrants (over 100,000) are also to be found in the South Malaysian State of Johore and a smaller number in the State of Sarawak. *International Labour Migration: A Study of the ASEAN Countries, supra*, note 87 at 30; "South-North Migration in the Asia-Pacific Region", *ibid.* at 170.

94 "South-North Migration in the Asia-Pacific Region", *ibid.* at 170, 171. See also C. Donville, "Malaysia is Losing its Wage Advantage. The Country has a Shortage of Workers, Making it Difficult to Operate at Full Tilt" *The [Toronto] Globe and Mail* (Report on Malaysia) (7 July 1992) C2. This article

(c) Japan

Illegal migration for employment to Japan is a recent phenomenon. Japan's sustained economic growth combined with a slowly growing national workforce has resulted in a widespread labour shortage at the skilled, semi-skilled and unskilled levels.[95] Because recruitment of non-Japanese workers without any formal qualifications is not permitted,[96] the shortage of this kind of labour has resulted in illegal immigration, chiefly from South-East Asia. The strength of the Japanese economy, the decline in economic opportunities in the Middle East and the enormous income gap between Japan and other Asian nations are the principal factors attracting the illegal immigration of workers from this region.[97] Estimates of illegal migrant workers in Japan range from 70,000 to 150,000.[98] From the lists of persons deported each year for performing undocumented work or for attempting to enter the country illegally, it may be gauged that the main suppliers of this kind of labour to Japan are South Korea, the Philippines, Malaysia, Thailand, Pakistan, Bangladesh, Taiwan and Iran.[99] In 1990, an all-time high of nearly 14,000 foreigners were deported for seeking illegal entry into Japan and approximately 30,000 were indicted for unauthorized work and forced to leave the country.[100]

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estimates that there are about 400,000 migrant workers in Malaysia as a whole, a far more conservative figure compared with those provided above.

95 "South-North Migration in the Asia-Pacific Region", *ibid.* at 169.

96 Note, Japan, "New Trainee Scheme Proposed for Migrant Workers" (1992) ILO SLB 94 at 95. On the other hand, recruitment of technical and professional labour is permitted. In 1987, 70,000 foreign workers entered Japan legally. Note, Japan, "Migrant Workers Become Pressing Issue for Japan" (1988) ILO SLB 509 at 510. It was estimated recently that the legal foreign resident population of Japan stood at 940,000. "South-North Migration in the Asia-Pacific Region", *ibid.* at 168.

97 M. Selby, "Human Rights and Undocumented Immigrant Workers in Japan" (1989) 26 Stan. J. Int'l L. 325 at 329-330. Marilyn Selby, *ibid.*, observes that some of these illegal immigrant workers can earn in Japan up to 77 times the monthly wage in their country of origin.

98 Selby, *ibid.* at 328; "South-North Migration in the Asia-Pacific Region", *supra*, note 83 at 168. Stahl, *ibid.*, notes that unofficial estimates place the number of undocumented migrant workers as high as 300,000.

99 "New Trainee Scheme Proposed for Migrant Workers", *supra*, note 96 at 94; Selby, *ibid.* at 329.

100 "New Trainee Scheme Proposed for Migrant Workers", *ibid.*

The working and living conditions of undocumented immigrant workers in Japan are poor, but nonetheless similar to those experienced by illegal migrants in other countries. Because of the shortage of living space, *all* foreigners in Japan have difficulties in renting apartments. Illegal migrants usually find themselves in extremely crowded accommodation without bathing or cooking facilities. Moreover, they possess no health or accident insurance and lack employment stability. Employers pay them one-half or two-thirds the salary of a Japanese employee in a similar position and often withhold their wages after the work is performed. Illegal migrants are also subject to the added threat of extortion and violence by organized crime. The majority of female workers come from Thailand, Taiwan and the Philippines and most are employed in the so-called "water trade" (*mizu shobai*), as hostesses, strippers and prostitutes. Japan's strong cultural support of the sex industry does little to improve their exploitative situation. The majority of male illegal migrant workers are employed in the construction sector or in small or rural factories.[101]

Recently, the pressure of public opinion in Japan led the government to impose strict regulations aimed at preventing clandestine immigration. The amended *Immigration Control and Refugee Recognition Act (Law No. 79)*, which came into force in June 1990, penalizes foreigners who work in violation of the terms of their residence permit. Undocumented migrant workers face a heavy fine or between one to three years imprisonment. Employers who hire illegal workers also face sanctions of fines up to two million yen or a maximum prison sentence of three years (article 73(2)).[102] Despite these strict regulations, the government is also considering a "training scheme", which will enable Japanese businesses, especially small firms, to legally hire low-skilled foreign workers.[103] This proposed scheme is in line with the recognition that Japan will have to increasingly rely on foreign labour. Given the aging population and the reluctance of young Japanese workers to perform menial jobs,

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101 Selby, *supra*, note 97 at 330-334.

102 Note, Japan, "Immigration Act Amended" (1990) ILO SLB 99 at 99.

103 "New Trainee Scheme Proposed for Migrant Workers", *supra*, note 96 at 94-95.

economists have predicted that there will be 2.7 million more jobs than workers in Japan by the turn of the century. Most of these shortages will be in the construction, services and retail sectors, positions most likely to be filled by immigrant workers.[104]

2.6 Africa

Africa has been described as a continent where people are constantly on the move.[105] Its history is hardly a placid one. The scars of the inhumanity of slavery during the colonial era are still visible today in the disparity between the state of development of African countries and former colonial powers.[106] Political turmoil and ecological disasters have led to vast numbers of refugees and displaced persons.[107] It was estimated that there were as many as five million refugees in Africa in 1984, more than on any other continent.[108] It is the refugees and those starving from hunger that have attracted most attention from the international community, which has striven to provide sufficient material assistance for their survival.[109] In such a context, therefore, international migration for employment in Africa is not the most pressing concern and yet it involves, as in other regions, movements of a substantial number of both unskilled and skilled workers.

Most migration for employment in Africa is of the irregular kind. The division of Africa by colonial powers resulted in the creation of many artificial boundaries which cut across ethnic and cultural ties. These borders are disregarded by members of those ethnic groups and by nomads, such as those from Somalia and from the Sahel countries of West

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104 Cf. "South-North Migration in the Asia-Pacific Region", *supra*, note 83 at 168-169.

105 S. Ricca, *International Migration in Africa: Legal and Administrative Aspects* (Geneva: International Labour Office, 1989), cited by A. Adepoju, "South-North Migration: The African Experience" (1991) 29 IM 205 at 205.

106 See also *supra*, note 3 and accompanying text.

107 "South-North Migration: The African Experience", *supra*, note 105 at 205.

108 W.T.S. Gould, "International Migration of Skilled Labour within Africa: A Bibliographical Review" (1985) 23 IM 5 at 6. This figure suggests that one person out of every one hundred Africans is a refugee. *Ibid.*

109 Cf. Lohrmann, *supra*, note 54 at 256.

Africa, who continue to move about within their traditional "homelands". Individuals who live in border regions and who have extended families in neighbouring states regularly cross frontiers illegally to work there. This practice, for example, occurs regularly between such countries as Kenya and Uganda, Uganda and Rwanda, and Nigeria and Cameroon. Moreover, the sheer size of some of the countries in Africa and the fact that they have borders with several states make undocumented migration inevitable.[110] These factors distinguish the phenomenon of irregular migration in Africa from undocumented movements elsewhere in the world to the extent that this form of migration in Africa is frequently regarded as merely an extension of internal migration.[111]

International migration for employment in Africa is a continent-wide phenomenon, although it manifests itself mainly in two regions: West Africa and Southern Africa. Less extensive labour migration takes place in Central and Eastern Africa and North Africa.

(a) West Africa

The principal migrant-receiving countries in West Africa today are the Ivory Coast, Gabon and Nigeria. Recent figures are hard to find. Workers migrate to the Ivory Coast from the countries situated within the southern limits of the Sahara, particularly from Mali, Niger and Burkina Faso.[112] In 1975, 1.4 million foreign nationals were resident in the Ivory Coast and 700,000 were economically active, or 26 per cent of the total workforce.[113] In mineral-rich Gabon, there are migrant workers from a number of countries, but especially from

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110 A. Adepoju, "Illegals and Expulsion in Africa: The Nigerian Experience" (1984) 18 IMR 426 at 427. See also Lohrmann, *ibid.*

111 Lohrmann, *ibid.* at 256-257; A. Adepoju, "Links between Internal and International Migration: the African Situation" in C. Stahl, ed., *International Migration Today - Vol. 2: Emerging Issues* (Paris; Nedlands, Western Australia, The Centre for Migration and Development Studies: UNESCO, 1988) 34 at 41. See also E.M. Brennan, "Irregular Migration: Policy Responses in Africa and Asia" (1984) 18 IMR 409 at 416.

112 *The Welfare of Migrant Workers and Their Families, supra*, note 43 at 4, para. 9.

113 *The Social Situation of Migrant Workers and Their Families, supra*, note 20 at 15.

neighbouring Cameroon and Congo.[114] As a result of an expanding economy linked to its oil revenue, Nigeria became a major importer of labour between 1975 and 1982, when it was estimated that between one and three million workers migrated there. Most came from Benin, Niger, Cameroon and Ghana.[115] Many of these migrants came under the terms of a protocol of the Economic Community of West African States (ECOWAS), which permitted them to enter another member state to work on a 90-day visa, and then remained for a longer period to work illegally. A decline in the oil revenue in the early 1980s due to a collapse in oil prices and the subsequent deterioration of living and working conditions produced a backlash against foreigners in Nigeria. On January 18, 1983, all illegal aliens were given two weeks to leave the country. Estimates of the number expelled ranged from 1.2 to 1.5 million.[116] The mass expulsion of these migrant workers, the largest in Africa's recent history, is a poignant reminder of the need for human rights protections for this vulnerable group.

(b) Southern Africa

The protection of the rights of migrant workers is the principal focus of concern in Southern Africa, particularly for those states neighbouring the Republic of South Africa that supply migrant labourers to work primarily in the mining and quarrying sectors of the former

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114 Gould, *supra*, note 108 at 12.

115 "Illegals and Expulsion in Africa: The Nigerian Experience", *supra*, note 110 at 432. Before 1969, Ghana itself was a significant labour-importer attracting immigrant workers from Nigeria, Niger and Burkina Faso. Lohrmann, *supra*, note 54 at 257. In December 1969, however, Ghana expelled about 500,000 of these persons. Lohrmann, *ibid.*; "Illegals and Expulsion in Africa: The Nigerian Experience", *ibid.* at 420. In 1980, there were still 562,000 foreign nationals in Ghana, over half of whom came from Togo. The remainder were from Burkina Faso and Nigeria. *The Social Situation of Migrant Workers and Their Families*, *supra*, note 20 at 15.

116 "Illegals and Expulsion in Africa: The Nigerian Experience", *ibid.* at 432; "South-North Migration: The African Experience", *supra*, note 105 at 212; Brennan, *supra*, note 111 at 417 (footnote 8) 418, 419 (footnote 10). The ECOWAS protocol stipulates that where ECOWAS citizens are to be expelled or deported, such a decision is to be communicated to the citizens concerned, their governments and the Executive Secretary of the organization. Nigeria claimed that it had duly informed other ECOWAS governments of its decision to expel their citizens. "Illegals and Expulsion in Africa: The Nigerian Experience", *ibid.* Adepoju also maintained in 1984 that a large majority of the expellees, especially those from Ghana, returned to Nigeria. *Ibid.*

apartheid economy. The principal labour-exporting states are Lesotho, Mozambique, Malawi, Botswana, Namibia and Swaziland.[117] In 1980, the Republic of South Africa registered 287,000 black foreign workers, with 220,000 working in mining and quarrying. Lesotho is by far the largest labour-sending country. In 1980, 151,000 workers were recruited from Lesotho to work in South Africa.[118]

The living and employment conditions of these workers paints a dismal picture. They are also denied the right to family reunification and to form and join trade unions. An ILO-initiated survey in 1976 found that Black African migrant labourers in the South African gold mines were forced to work in very dangerous conditions by their White team leaders and that they were more likely to be killed, injured or to suffer from occupational disease than Whites or Coloured persons.[119] Attempts have been made to reduce the economic dependency of these countries on South Africa and their export of migratory labour. Both Malawi and Mozambique reduced their supply of migrant workers, from nearly 650,000 in 1975 to approximately 300,000 in 1981.[120] A multilateral approach to the problem has also been undertaken. The UN General Assembly Resolution 33/162 of December 20, 1978 endorsed the Charter of Rights for Migrant Workers, as adopted by the Lusaka Conference on Migratory Labour in Southern Africa on April 7, 1978,[121] and annexed it to the resolution. Moreover, the resolution also urged UN member states, UN organizations and all other international organizations to extend material, financial, technical and political support to African states affected by migratory labour to the Republic of South Africa so that they may fully utilize their

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117 M. Cissé, "The "Right to Live" and the Protection of Migrant Workers at the International Level" in D. Prémont, ed., *Essays on the Concept of A "Right to Live" in Memory of Yougindra Khushalani* (Bruylant: Brussels, 1988) 133 at 139.

118 *The Social Situation of Migrant Workers and Their Families*, *supra*, note 20 at 12, 14.

119 F. de Vletter, "Conditions Affecting Black Migrant Workers in South Africa: A Case Study of the Gold-mines" in W.R. Böhning, ed., *Black Migration to South Africa: A Selection of Policy-Oriented Research* (Geneva: International Labour Office, 1981) 91-112, cited by Cissé, *supra*, note 117 at 139.

120 *The Social Situation of Migrant Workers and Their Families*, *supra*, note 20 at 14.

121 *Report of the Conference on Migratory Labour in Southern Africa*, Lusaka, April 4-8, 1978, UN Docs. E/CN.14/ECO 142, ECA/MULPOC/LUSAKA/109 (19/4/78), cited by Cissé, *supra*, note 117 at 139 (footnote 6).

own workforce and obviate the need to export labour to that country.[122]

It is difficult to ascertain whether the South African government's recent dismantling of *apartheid* will have a positive effect on the situation of Black migrant workers in that country. It must be assumed for the moment, however, that the improvement in the working and living conditions of these workers will only come about with an improvement of the general human rights situation of the Black population of South Africa.

(c) Central and Eastern Africa

Information on transnational migration for employment in Central and Eastern Africa is sparse. As referred to earlier, frontier migration occurs between Kenya and Uganda, and Rwanda and Uganda.[123] A 1974 UN Report also recorded a sizeable migrant worker flow from East Africa to Zaire to work in the copper mines and in agriculture. Free flows of labour between Kenya, Uganda and Tanzania effectively ended on the collapse of the East African Economic Community in the early 1970s,[124] and expulsions of former Community workers from Kenya were recorded between 1979 and 1981.[125] In Central Africa, Zaire, Rwanda and Burundi have created the Economic Community of the Great Lakes Region with the objective of creating a free movement of labour zone in the near future.[126]

(d) North Africa

The region of North Africa is chiefly a labour exporter. As noted earlier, migrants from

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122 Cissé, *ibid.* at 141.

123 *Supra*, note 110 and accompanying text.

124 Gould, *supra*, note 108 at 11.

125 "Illegals and Expulsion in Africa: The Nigerian Experience", *supra*, note 110 at 430. In 1972, 50,000 Asians were also expelled from Uganda. *Ibid.*

126 Note, Africa, "Immigration Policies: Economic Community of the Countries of the Great Lakes" (1986) ILO SLB 356 at 356-357.

the three countries of the Mahgreb work in France and other Western European countries. Egypt is an even greater labour supplier, especially to other Arab states. In 1989, it was estimated that more than half of the Egyptians in Arab states worked in Iraq (one million), Jordan (160,000) and Yemen (50,000).[127] Libya, on the other hand, due to its oil resources, is a significant importer of labour. In 1975, there were 280,400 foreign workers in Libya, or 38.2 per cent of the total labour force. This figure was projected to rise to 719,300 by 1985, or approximately half of the Libyan workforce.[128]

(c) Recent Trends

A number of trends are discernible with respect to the phenomenon of international labour migration on the African continent. First, since the 1970s, there has been an increase in intra-African migration of skilled labour. The tightening of immigration regulations in developed countries has forced skilled African nationals to seek employment elsewhere in Africa. This employment mobility has been aided by increased opportunities within the region, the formation of co-operative unions, sub-regional protocols on free movement of labour and the oil-led growth of some African economies.[129]

Another trend has been the measures taken to control and prevent irregular migration. Some countries have stepped up their border controls, others require that all workers obtain a permit before they enter or that employers check on the status of immigrants before they offer them employment, while labour inspection services have been established in a number of states to ensure that no illegal migrant workers are employed. Some countries have also introduced

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127 "Population Growth and Jobs", *supra*, note 61 at 293. The plight of Egyptian migrant workers in Iraq during the Gulf crisis of 1990-1991 has already been documented. *Supra*, note 81 and accompanying text.

128 Serageldin, *supra*, note 61 at 4 (Table 1-1) and 26 (Table 4-1).

129 "South-North Migration: The African Experience", *supra*, note 105 at 214. Gould, *supra*, note 108 at 7, observes that skilled migrant workers from Black Africa, unlike those from Arab countries and Asia, do not seem to have been attracted to the oil-rich Gulf states.

sanctions against employers for hiring undocumented workers.[130] A drastic measure taken against irregular migration has been forced mass expulsion, which has been utilized in Africa on several occasions. The mass expulsions of illegal migrant workers from Ghana and Nigeria as well as other smaller expulsions in East Africa have already been noted.[131] As the thesis indicates later, many international human rights instruments expressly forbid the collective expulsion of aliens.

Africanization in the labour market is also on the increase. Many countries are implementing policies that considerably reduce, first the employment of non-Africans, and then non-national Africans. These policies are aimed at skilled cadre and include the following measures: restorative measures such as incentives encouraging skilled nationals to return home or the promotion of remittances; restrictive measures to reduce out-migration such as the requirement that workers in certain professions are employed for a number of years at home before leaving; and preventive measures such as financial and social incentives to make the home country more attractive to live in.[132] Moreover, an increasing number of expatriates are being replaced in employment by African workers in many countries. The dismissal of such workers by employers on the grounds of Africanization because of pressure from public authorities as part of their employment policy have, in many cases, been upheld by national courts.[133]

A final trend has been the gradual development of sub-regional economic regimes, referred to above, which have propagated, *inter alia*, the free movement of labour among the countries concerned. Although one such community, the East African Economic Community is now defunct, ECOWAS in West Africa and the Economic Community of the Countries of the Great Lakes in Central Africa are still in operation. Both are attempting to implement multilateral instruments with the objective of eventually establishing virtually unrestricted free

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130 Brennan, *supra*, note 116 at 417-418.

131 See respectively *supra*, notes 116 and 125 and accompanying text.

132 Gould, *supra*, note 108 at 15-16.

133 Note, Africa, "Are Dismissals on Grounds of "Africanization" Justified?" (1985) ILO SLB 321 at 322.

movement of labour in the sub-regions in question.[134]

3. The Condition and Plight of Migrant Workers and Their Families

Given the varied types of migration referred to above, to summarize the condition and plight of migrant workers and their families worldwide can only be a crude sketch. Nonetheless, this sketch is a useful indicator of the situation in which migrants usually find themselves and the human rights infringements that ensue.

The legal status of alien migrant workers and their families in the state of employment, as this thesis indicates, is inferior to that of citizens. In particular, the obsession of host countries with sovereignty limits the access of migrants to certain crucial entitlements. For example, their rights to free choice of employment, family reunification, residence and political benefits are severely circumscribed. Moreover, depending on their country of employment, the protection of economic and social rights, such as rights to satisfactory employment and working conditions, participation in trade unions, housing, health, social security, and education may also be inadequately protected.

The participants at the 1975 UN Seminar on the *Human Rights of Migrant Workers* asserted that it was necessary to steer away from a legalistic perception of migrant workers and to move towards a more social-psychological understanding. There was a tendency to think of migrant workers in stereotypical fashion, as persons who leave a rural setting in their home country in order to work abroad for a few years and then return. This picture was rightly rejected as too narrow and simplistic. For example, the return of migrant workers to their countries of origin is not as straightforward and problem-free as it may appear. After a few months in the state of employment, these workers become attached to the more materialistically developed society; they pass through a process of adaptation, ranging from non-acceptance and

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134 See respectively Note, Economic Community of West African States (ECOWAS), "Boosting Intra-regional Migration" (1990) ILO SLB 315 and "Immigration Policies: Economic Community of the Countries of the Great Lakes", *supra*, note 126.

discrimination to full social integration. The pressures to integrate become stronger if their spouses and, particularly, their children are with them. The latter, in time, are more likely to become estranged from their homeland and even from their own families.[135] Trapped between two cultural worlds, these second- or third-generation migrants constitute a difficult social problem for states of employment.

Similarly, when migrant workers do go back home, their return is fraught with difficulties. They are by no means guaranteed employment on their arrival. Those who have acquired skills abroad are usually in the minority. Indeed, the latter are more likely to remain in the host country. Most, however, have laboured in low-skilled and menial jobs. Furthermore, the restless spirit and high expectations of migrant workers, factors contributing to their emigration in the first place, may have social and political ramifications in the country of origin, especially in the event of mass repatriation.[136] Reintegration of families may be even more difficult, especially if the children of migrant workers have become accustomed to the lifestyle and culture abroad and if they have little or no knowledge of the culture and language of their parents.

Illegal immigrant workers, because of their irregular status, are particularly subject to exploitation:

> [E]ven more than the lawful migrant, the unlawful migrant faced serious problems of disrespect for his human rights. He was a natural target of exploitation because of his lack of status. He was at the mercy of his employers and was forced to accept any kind of employment, working and living conditions. He could not seek recourse for fear of exposing his illegal status. His plight was an urgent one.[137]

In addition to being either legal or illegal immigrants, the level of education and the number of qualifications and skills migrant workers possess are without doubt relevant to the

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135 UN Division of Human Rights, *Report of the Seminar on the Human Rights of Migrant Workers* (Tunis, Tunisia, November 12-24, 1975) at 31, para. 117, UN Doc. ST/TAO/HR/50 (1976).

136 *Ibid.* at 31, para. 118.

137 *Ibid.* at 11, para. 34.

treatment they may receive. Most immigrant workers, men and women, are unskilled. Workers in unskilled or menial jobs receive least pay, have less access to employment security (protection against dismissal) and benefits, and are more liable to be subject to exploitation by unscrupulous employers. It is these jobs too that tend not to be unionized. Although some workers may be skilled and highly trained in their countries of origin, their qualifications or experience may count for little in their new states of employment because of restrictions on their access to certain kinds of jobs in those countries.

Women migrant workers, especially, are to be found in unskilled employment, for example, as domestic servants.[138] Most domestic female workers originate from developing countries and constitute the great majority of female migrant workers from those countries.[139] In general, they are often employed in an irregular situation and suffer from deplorable working and living conditions which are characterized by extremely low wages, long hours and little rest, absence of written contracts, minimal protection against dismissal, no social security coverage and verbal and physical abuse, including sexual harassment.[140]

4. Causes of Migration for Employment: Benefits and Disadvantages

The causes of international migration for employment are numerous. Some of these causes, which are common to many of the migratory movements outlined above and clearly

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138 Leary, *supra*, note 9 at 5. Other low-level jobs in which women migrant workers are to be found include farm workers and sewing machine operators. S. Hune, "Migrant Women in the Context of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families" (1991) 25 IMR 800 at 805. Hune observes that: "Women migrant workers as unique from men endure "triple oppression" or are "doubly disadvantaged". They experience discrimination and are more susceptible to exploitation, including sexual abuses, as foreigners, workers and females in the intersection of nationality/race/ethnicity, class and gender". *Ibid.* at 807, citing from C.B. Brettell & R.J. Simon, "Immigrant Women: An Introduction" in R.J. Simon & C.B. Brettell, eds, *International Migration: The Female Experience* (Totowa, N.J.: Rowman & Allanheld, 1986) 3.

139 For example, in Italy and Spain respectively, 90 and 95 per cent of migrant Filipino women are employed as domestic servants. Note, International, "Foreign Women in Domestic Service" (1991) ILO SLB 361 at 361. Most foreign female domestic workers are drawn from developing countries such as the Philippines, Thailand, Sri Lanka, Indonesia, Cap-Verde, as well as from African and, to a lesser extent, Latin American countries. *Ibid.*

140 *Ibid.* at 361-362.

discernible, are considered in the following section. Although international labour migration is of mutual benefit to both receiving and sending countries, it also results in a number of disadvantages. The majority of these are experienced by developing countries of origin, hence widening the economic gap between developed and developing nations.

4.1 Causes

Most labour migrations are predominantly the result of economic under-development in the Third World and of the considerable discrepancies in standards of living between different countries. Linked to this cause is the significant population growth in the countries of labour emigration in contrast to the demographic stability in Western Europe and North America.[141] It has been suggested that emigration may reduce the pressure on developing countries to take action in order to stem the growth of their populations.[142] Therefore, the combined factors of poverty and unemployment in developing countries linked to population growth compel persons to leave their homeland, in many instances unwillingly and without their families, to seek a better life and a more dignified existence. In some instances, international migration for employment constitutes, more fundamentally, survival itself.

The demand for labour is another cause of migration to the developed industrialized world, particularly to Western Europe and North America:

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141 Warzazi Preliminary Report, *supra*, note 3 at 9, para. 21; Claydon, *supra*, note 24 at 134. See also *supra*, note 15 and accompanying text. A good exemplar of such population growth is Egypt. Egypt's population rose from 9.7 million in 1897, to 19 million in 1947, and to 48.2 million in 1986. In 1989, it stood at 54 million. These figures represent an annual population growth of 2.7 per cent. "Population Growth and Jobs", *supra*, note 61 at 292. Warzazi, *ibid.*, maintains that the economic disparities between developed and developing countries are due to the effects of colonialism, which did much to create and perpetuate a state of under-development in former colonized countries by an unfavourable economic policy and by a deficiency in education and vocational training.

142 T. King, "Immigration from Developing Countries: Some Philosophical Issues" (1983) 93 Ethics 525 at 529. King also notes, however, that there is evidence to show that the level of development along with government population policy are significant determinants of population growth rates. If migration were to result in the more rapid development of sending countries, it is arguable that this would have a favourable effect on reducing population growth in those states. King, *ibid.* at 531, citing from R.G. Ridker, ed., *Population and Development: The Search for Selective Interventions* (Baltimore: John Hopkins University, 1976).

> The juxtaposition of rich, developed countries in need of workers willing to do work that nationals refuse or at a wage level unacceptable to nationals and the corresponding high level of poverty and unemployment in other countries creates the demand for labour.[143]

Unfortunately, this demand for labour coupled with the fear migrant workers have of returning to unemployment and poverty in their own countries creates a situation "conducive... to all kinds of abusive practices which constitute a violation of human rights".[144]

Finally, although not a cause *per se*, readily available transportation and scientific and technical improvements in communication systems have undoubtedly facilitated and contributed to the growth of international labour migration.[145]

This section would be incomplete without a consideration of the causes of irregular migration. The principal causes of migration generally are equally powerful incentives for potential migrant workers to enter a country through clandestine means in order to find employment.[146] This desperation is accentuated by the hurdles migrant workers face in order to enter a country legally. Indeed, studies suggest that there is a correlation between stringent and restrictive immigration regulations and an increase in the illicit traffic of migrant workers where appropriate preventive measures have not yet been taken.[147] Restrictive immigration policies apart, migrant workers come up against a number of specific obstacles which may tempt them to migrate illegally. The length and complexity of immigration and recruitment procedures common to many public administrations have a discouraging effect. Would-be immigrants are also likely to have a general mistrust of these bodies, a reaction possibly

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143 Leary, *supra*, note 9 at 4.

144 *Warzazi Preliminary Report*, *supra*, note 3 at 10, para. 22.

145 Cf. *International Provisions Protecting the Human Rights of Non-Citizens*, Study prepared by Baroness Elles, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (New York: UN, 1980), at 1, para. 4, UN Doc. E/CN.4/Sub.2/392/Rev.1 (1980).

146 *Warzazi Preliminary Report*, *supra*, note 3 at 16, para. 38.

147 *Exploitation of Labour Through Illicit And Clandestine Trafficking* (Study prepared by Halima E. Warzazi, Special Rapporteur) UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 28th Session, at 10, para. 24, UN Doc. E/CN.4/Sub.2/L.629 (4/7/75) [hereinafter *Warzazi Final Report*], citing ILO Report No. VII (1), *Migrant Workers* at 8 and UN Doc E/CN.5/515, paras. 18-19. The above Warzazi report can also be found in the consolidated report, *supra*, note 3.

attributable to past colonialism,[148] or to a fear of repressive governments and corrupt public officials in their home countries. Furthermore, most receiving states require newly-arrived migrant workers to fulfil certain residence and housing conditions before their families are permitted to join them. Often, migrant workers consider these conditions too harsh or impossible to meet and are willing to arrange for the entry of their families without adhering to the proper regulations.[149] Migrant workers may also acquire irregular status, having entered the country legally, if their contracts of employment expire and they elect to prolong their stay.[150] Two other factors may be added to the list of causes of illegal migration. Misleading publicity by traffickers in clandestine labour contributes to the promotion of illicit migration[151] and the willingness of employers, desperate for easily available and cheap labour, to recruit workers without regard to their nationality or status.[152]

4.2 Benefits and Disadvantages

(a) Receiving Countries

Receiving countries, especially affluent countries, "benefit" from foreign migrant labour in a number of ways. Immigrant workers constitute a source of cheap, easily available, effective and youthful labour willing to perform the most unpleasant and arduous of tasks which nationals seldom are prepared to take on. Employers find this labour to have two advantages. First, it reduces the strain on labour relations. So long as migrant workers are in the worst jobs, there is less cause for national workers to complain about employment

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148 *Warzazi Preliminary Report*, *supra*, note 3 at 16, paras. 39-40.

149 *Ibid.* at 17, para. 43.

150 *Warzazi Final Report*, *supra*, note 147 at 9, para. 21. Warzazi also notes, *ibid.*, that the prolongation of the stay of migrant workers increases their desire to have their families join them in the receiving country, if need be by illegal means.

151 *Ibid.* at 9, para. 20.

152 *Warzazi Preliminary Report*, *supra*, note 3 at 16, para. 41.

conditions. Moreover, few migrant workers belong to labour unions. Second, resort to foreign labour initially halts the upward wage spiral, facilitating later salary increases to national workers and the acceleration of mechanization in industrial structures.[153] This combination of convenience and economics is eloquently illustrated by Michael Walzer:

> The managers of the economy [of a capitalist democracy and welfare state, with strong trade unions and a fairly affluent population] find it increasingly difficult to attract workers to a set of jobs that have come to be regarded as exhausting, dangerous and degrading. But these jobs are also socially necessary; someone must be found to do them. Domestically, there are only two alternatives, neither of them palatable. The constraints imposed on the labour market by the unions and the welfare state might be broken, and then the most vulnerable segment of the local working class driven to accept jobs hitherto thought undesirable. But this would require a difficult and dangerous political campaign. Or, the wages and working conditions of the undesirable jobs might be dramatically improved so as to attract workers even within the constraints of the local market. But this would raise costs throughout the economy and, what is probably more important, challenge the existing social hierarchy. Rather than adopt either of these drastic measures, the economic managers, with the help of their government, shift the jobs from the domestic to the international labour market, making them available to workers in poorer countries who find them less undesirable.[154]

Furthermore, migrant workers cost nothing to receiving countries in social terms, nor in terms of education and training, prior to their employment.[155] These "benefits" to the host country are effectively forms of "exploitation" not only of the immigrant workers themselves, but also of their countries of origin. This exploitative situation is exacerbated when the

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153 *Exploitation of Labour Through Illicit and Clandestine Trafficking: Introductory Statement Concerning the Study on Illicit Trafficking in Labour and on the Present Problem of Migrant Workers* (made by Mrs. Halima Warzazi in introducing her preliminary report on the same topic, *supra*, note 3), at 5, UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 27th Session, UN Doc. E/CN.4/Sub.2/352 (14/8/74) [hereinafter *Warzazi Introductory Statement to Preliminary Report*]. This statement is also to be found in the Consolidated Report, *supra*, note 3. It is not altogether clear whether the employment of migrant workers will result in eventual salary increases for national workers. Labour groups might argue that such workers facilitate the ability of employers to keep wages low for everyone. I am indebted to Professor Bill Black for this observation.

154 M. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983) at 56. Warzazi notes also, *ibid.*, at 10, that the employment of immigrant labour contributes to "technical conservatism" with the result that certain sectors of the economy, usually those comprised of old-fashioned, small and mid-size businesses, are kept in a state of under-development without any effects being felt in the economy as a whole.

155 *Warzazi Introductory Statement to Preliminary Report*, *supra*, note 153 at 11.

negative effects of labour migration on sending countries are considered.

One of the principal disadvantages labour migration poses for receiving countries concerns the social malaise created by the existence of a second-class, vulnerable and culturally distinct population in the midst of the host community, especially in times of economic recession when immigrants are wrongly perceived as taking away jobs from nationals.[156] This malaise manifests itself in the form of intolerance, xenophobia and racism directed towards migrants. However, an uncontrolled influx of migrant workers and their families, together with illegal migration, also threaten to stretch the economic and social entitlements available to the members of the national community.[157]

(b) Sending Countries

For poor countries, international labour migration supposedly alleviates unemployment and the resulting social turmoil created by poverty.[158] It is unlikely, however, that there are any positive long-term effects.[159] Migration for employment also ensures the influx of much-needed hard currency. The importance of migrant workers' remittances cannot be underestimated. For example, remittances from Turkish migrant workers to their country of origin amounted to $3.1 billion in 1989.[160] Not all of the migrants' hard-earned money, however, finds its way into these economies. Much of it is irrationally invested or remains in

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156 Immigrant workers, particularly illegal migrant workers, in general end up performing work which domestic workers refuse to do. See also Walzer, *supra*, note 154 and accompanying text.

157 P.H. Schuck, "Immigration Law and the Problem of Community" in N. Glazer, ed., *Clamour at the Gates: The New American Immigration* (San Francisco: Institute for Contemporary Studies (ICS) Press, 1985) 285 at 289 and 304.

158 Cf. Leary, *supra*, note 9 at 4.

159 In reviewing the literature on this subject, Mark Miller observes that labour migration has probably only a short-term stabilizing effect on sending societies and that, in the long-term, it represents a threat to the political stability of those states. Economic downturns may result in massive return migration to the countries of origin at times when they can least afford to re-integrate returning nationals. M.J. Miller, "Introduction" in *"Temporary Worker Programs: Mechanisms, Conditions, Consequences"* (1986) 20 IMR 740 at 749. Massive return migration may also occur as a result of war and social turmoil in the state of employment. An exemplar of such a situation are the recent events in the Gulf, and particularly in Kuwait.

160 *SOPEMI 1990*, *supra*, note 19 at 126 (Table A.8).

the host country for the purchase of luxury goods. In actual fact, only a small portion is transferred to sending countries.[161]

The expectation that returning migrants will transfer their industrial experience to their countries of origin is seldom realized. Whilst in host countries, most immigrant workers are not interested in perfecting a foreign language nor in vocational training. In addition, as noted earlier, the return of migrants may also entail negative social effects. During their stay in host countries, migrant workers acquire new lifestyles, social habits and forms of behaviour, which, when introduced into the countries of origin, may threaten and disturb social harmony.[162]

Given that migration not only involves unskilled workers but also highly skilled cadre, the effects of the "brain drain" on developing countries must not be overlooked. The training of such personnel constitutes a great expense to these countries, and yet the only real beneficiaries are receiving countries. According to a UN Conference on Trade and Development (UNCTAD) study, the contribution of foreign skilled workers to the economy of the United States in 1970 amounted to $3.7 billion. In contrast, the total assistance that year provided by the United States to developing countries totalled $3.1 billion.[163] These admittedly aged but nonetheless staggering figures place the provision of foreign aid by developed countries to developing countries into its true perspective.

There is another irony to this situation, however. Sending countries need to resort to foreign technical assistance at a cost twice or three times to that of nationals. In the meantime, the skilled cadre of those countries are working abroad, usually in positions which, in many cases, fall short of their aspirations.[164] Although sending countries must take some blame in

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161 *Exploitation of Labour Through Illicit and Clandestine Trafficking: Statement Concerning the Study on Illicit Trafficking in Labour and on the Present Problem of Migrant Workers* (made by Mrs. Halima Warzazi in introducing her final report on the same topic, *supra*, note 3), UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 28th Session, at 26, UN Doc. E/CN.4/Sub.2/L.640 (20/11/75) [hereinafter *Warzazi Introductory Statement to Final Report*]. This document is also part of the Consolidated Report, *supra*, note 3.

162 *Ibid.*

163 *Ibid.* at 27.

164 *Ibid.*

failing to appreciate the true value of their trained personnel and by not ensuring them sufficiently promising futures, the profound problem lies in "the lack of means which prevents countries from equipping themselves with the institutes, professors and technology needed in order to train and re-adapt their own technicians locally".[165] It is this lack of means, therefore, whether embodied in a shortage of adequate facilities, poverty or unemployment, which causes all workers, be they highly skilled or unskilled and illiterate, to migrate from developing countries. The only feasible solution to arresting the "brain drain", and, indeed, to preventing most labour migration from developing to developed countries is relatively straightforward. It lies in the creation of employment, with international assistance and redistribution and the specific help of developed countries, which will keep potential migrant workers at home.[166]

This solution to the "brain drain" constitutes part of an overall solution to alleviating the greater inequities suffered by developing sending countries as a result of international migration for employment. Assuming that the prevention of migration altogether is, strictly-speaking, an impossible task, this inequality may be tempered somewhat by international redistribution or compensation to sending countries for their outflows of labour.[167]

5. Definition and Terminology

5.1 Definition

References are made throughout this thesis to international definitions of migrant workers and their families. The concept of "migrant worker" is defined explicitly in article 11 of both ILO Conventions No. 97 (1949) and 143 (1975), article 1 of the Council of Europe's

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165 *Ibid.* at 27-28. If the only way to keep trained personnel at home in developing countries, however, is to compete with the remuneration of industrialized countries, such an approach might require very steep social stratification and a very large disparity in income. I am grateful to Professor Bill Black for this observation.

166 *Ibid.* at 27.

167 Böhning, *supra*, note 1 at 13-14.

Convention on the Legal Status of Migrant Workers (EMW) and articles 2 and 3 of the recent UN *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, which contains the most comprehensive definition of "migrant worker" to date.[168] A definition may also be implied from article 19 of the *European Social Charter* (ESC). Although no textual definition of an EC worker exists, a broad interpretation of this concept has been fashioned by the European Court of Justice. The definition of "migrant worker" as found in the treaties of the Council of Europe and in EC law, however, is confined to migrant workers from other states parties and EC member states. On the other hand, both ILO Conventions and the UN Convention apply to all migrant workers residing in a country of employment that has ratified the instrument in question regardless of whether it has been ratified by the country of origin.

Foreign workers may either be long- or short-term immigrants.[169] The first category includes workers and their families who migrate with a view to settling permanently in the receiving country. Examples of such persons are immigrants to Australia, Canada and the United States, who are usually admitted as permanent residents. The second category comprises workers admitted on temporary work permits for specific employment (bearing in mind, of course, that work permits may be extended or renewed while workers are in the country of employment). This describes the approach that has been taken and still is being taken in Western European states of employment which do not consider themselves to be "countries of immigration". The category of short-term migrants also includes frontier and seasonal workers[170] and those studying and pursuing their careers abroad. Self-employed workers may fall into both categories. Not all of these groups are covered by each definition of "migrant worker" in the international instruments referred to above. For example, artists,

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168 The UN Convention also includes an explicit definition of members of the migrant worker's family (article 4), whereas the applicability of the other instruments to migrant workers' families may only be implied.

169 *Report of the Seminar on the Human Rights of Migrant Workers*, *supra*, note 135 at 30, para. 115.

170 Seasonal workers are usually nationals of countries bordering receiving states, who are employed in the construction or hotel and catering industry, for example, Mexican workers in the United States and workers in Switzerland. Ansay, *supra*, note 11 at 8.

frontier workers, self-employed migrant workers and seafarers are expressly excluded from this definition in the ILO Conventions and the EMW, but included in the UN Convention.[171] Seasonal workers are also expressly omitted from the EMW definition. Students, trainees and those sent by their employers to another country to perform a specific job are explicitly excluded from all the definitions.

The two categories of long- and short-term immigrants are by no means distinct from one another. For example, migrant workers who initially intended to work abroad for a limited period of time and then to return home may settle on a permanent basis. Indeed, this has occurred to many of the migrant workers in Western Europe, who are effectively settled in the country of employment. They have obtained unlimited residence status and have been joined by their families. On the other hand, migrant workers may intend staying longer in a country or be admitted for permanent residence there without intending to make that country their home. At all times, they may consider their place of origin to be their permanent home.[172]

Migrant workers may also be residing and working in a country illegally. Illegal migrants are expressly excluded from the definition of "migrant worker" in the two ILO Conventions (although they are afforded some protection under Part I of Convention No. 143 of 1975), the EMW and the ESC, but covered by the UN Convention.

The following types of illegal migrants are discernible. Migrants may attempt to cross a frontier wholly concealed from the authorities or may enter a country by means of false documentation or other kinds of misrepresentation. The first form of clandestine migration frequently takes place into countries with particularly long borders, for example, the 3,000 kilometre border between the United States and Mexico.[173] Although the former method is achievable with the assistance of relatives or on the migrant's own initiative, both methods, and especially the latter, increasingly involve the participation of criminal organizations with

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171 The application of the definition of "migrant worker" in the UN Convention to self-employed migrant workers and seafarers is limited however. See *infra*, chapter four.

172 I am grateful to Professor Bill Black for bringing this latter point to my attention.

173 *Warzazi Preliminary Report*, *supra*, note 3 at 17, para. 46.

substantial resources.[174] Clandestine crossings arranged by traffickers often expose immigrants to many forms of exploitation. Immigrants pay not only a large sum of money for these services, but also face blackmail by traffickers for long periods after entry together with confiscation of their travel documents. Moreover, illegal migrants are particularly vulnerable to dangerous, unhygienic and very uncomfortable conditions of transport to their destination.[175]

In most cases, however, illegal migrant workers enter a country legally. They may enter as "tourists" without the necessary papers for employment and then find themselves in an "irregular situation" when they start working.[176] Illegal labour migration more frequently encompasses those migrants who are entitled to residence and not to work and yet work as well as those who have both residence and work permits, but nevertheless work illegally in "informal" jobs. In this instance, illegal migration for employment is inextricably bound up with legal labour migration.[177] The numbers of illegal migrants may be inflated substantially by the family members of migrant workers. These may accompany a clandestine entrant, join a legally residing migrant worker in contravention of family reunification requirements, or become themselves workers in an irregular situation by finding employment without permission, even though their entry into the country was sanctioned by law.

Because of the diverse definitions of the term "migrant worker" in the various international instruments, it is necessary to embrace a broad understanding of the term for the purpose of this thesis. The adopted definition applies to both long- and short-term immigrants. So long as these persons have not acquired the citizenship of the state of employment and are working or have worked in that country, they are included.[178] Self-employed, frontier and

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174 *Ibid.* at 17-18, paras. 45-50.

175 *Ibid.* at 19, paras. 51-53. The hardship that such irregular crossings may cause was publicized in 1973 when a truck carrying 59 Africans from Mali, packed into it like sardines with little food, water or air, broke down after having passed into France from Italy through the Mount Blanc tunnel. These people had paid a great deal of money to be smuggled into France. Leary, *supra*, note 9 at 6.

176 J. Power, *Western Europe's Migrant Workers*, Minority Rights Group Report No. 28, rev'd ed. (London: Minority Rights Group, 1978) at 24.

177 R. Rogers, "Western Europe in the 1980s: The End of Immigration?" in R. Rogers, ed., *Guests Come to Stay: The Effects of European Labour Migration on Sending and Receiving Countries* (Boulder, Colorado: Westview Press, 1985) 285 at 294-295 [hereinafter *Guests Come to Stay*].

178 Therefore, persons *seeking* employment for the first time in a country other than their own are not

seasonal migrant workers, seafarers, and those studying and training abroad but also working, are therefore covered. This thesis has a special interest in illegal migrants, who, as mentioned earlier, constitute the most vulnerable class of migrants and are most likely to be subject to exploitation and suffer abuses of their human rights. The persons excluded under this broad definition are tourists and those migrating to a country for the purpose of retirement, unless their intention is to remain in a country to retire there after completing their work life in that country.

5.2 Terminology

Throughout the thesis, the terms "migrant worker", "immigrant worker" and "guestworker" are used interchangeably. The expression "migrants" is used in two senses depending on the context: to refer globally to all immigrants regardless of whether they migrate to take up employment and to refer to migrant workers and their families taken together. Likewise, the terms "illegal migrant worker", "non-documented" or "undocumented migrant worker" and a "migrant worker in an irregular situation" or an "irregular migrant worker" are equivalent. States of employment are also referred to as "receiving" or "host countries", whereas migrants' states of origin are also called "sending countries". Although many sending countries are developing states and most receiving countries are developed and highly industrialized states, these terms are not synonymous. Indeed, migration for employment outside of Europe and North America does not necessarily conform to this rubric. Finally, it is important to note that a number of countries both export and import labour. Examples of such countries are Portugal and Malaysia.

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included, although EC law on the free movement of workers does cover those seeking employment, at least for a period of up to six months. See the *Antonissen* case, *infra*, chapter six, note 114.

6. International Standards Relating to the Protection of the Economic, Social, Cultural, Political and Residence Rights of Migrant Workers and Their Families

The focus of this thesis is the protection of the economic, social, cultural, political and residence rights of migrant workers and their families in states of employment. These rights are arguably of most concern to migrants once they are present in the host country. Consequently, the protection of the rights of migrants before they leave their country of origin, whilst in transit, and during their reception in the state of employment is not the object of this thesis. Rights pertaining mainly to this process are also excluded, for example the right to information.[179] Nor is the thesis concerned with the so-called basic or fundamental rights and freedoms, such as the right to life, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, and the right to freedom of thought, conscience or religion. Because of the interdependence of all rights, however, these fundamental rights and freedoms interact with the rights under consideration and references are made to them where appropriate. For example, an argument may be advanced that the denial of family reunion may, in certain circumstances, constitute a form of inhuman or degrading treatment.

Economic and social rights are defined as follows: employment rights which incorporate the right to equal treatment with nationals in respect of work and employment conditions and the right of access to employment; trade union rights; social security rights; the right to health which includes rights to health care and occupational health and safety; the right to housing which may extend to ownership of property; the right to family reunification; and the right to education which comprises both the education of migrant children and workers' education, such as vocational training and language instruction. The cultural rights of migrant workers and their families embrace the right to retain and develop culture and language as well as the right of the children of migrants to be taught their culture and language or to be partly

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179 For a synopsis of what is understood by the right of migrant workers to information, see generally T. Hujanen, "The Role of Information in the Realization of the Human Rights of Migrant Workers" (Conference Report of the Final Conference of the Joint Study held at Crêt-Bérard, Lausanne, Switzerland, October 23-27, 1988) (1989) 23 IMR 105.

educated in their language. The political rights of migrants encompass the right to political activity and the right to participate in the decision-making process concerning their interests, including the right to vote. The thesis also considers migrants' residence rights, broadly defined as the right to remain in the host country while in work and immediately after the termination of employment, rights to permanent residence and naturalization and protection against arbitrary or unfair expulsion. Residence rights are clearly integral to the enjoyment of the other enumerated rights.

Part I of the thesis is entitled "Citizens and Aliens". In addition to the problems faced by all workers and associated with labour everywhere, migrant workers and their families are further burdened by their status as aliens and by the particularly difficult consequences which accompany this status. The obstacles alienage poses to the realization of their rights are substantial.

Chapter one of the thesis focuses on migrant workers *as aliens*. It traces the evolution of the international protection of aliens from the concept of the "minimum standard" in the international law of state responsibility to the development of international human rights norms protecting *all* persons. Chapter one surveys the universal and regional human rights instruments of general application in order to evaluate how well they protect aliens and the exceptions which they contain with regard to this protection. It concludes with an appraisal of the recent UN General Assembly Declaration on the human rights of individuals who are not nationals of the country in which they live.

Chapter two contains a jurisprudential analysis of the protection of the rights of migrant workers and their families in Western liberal democracies. It evaluates the distinction these countries make between members and non-members and contends that both liberal individualist and communitarian precepts provide for conceptions of citizenship, which go beyond mere form and which justify an extension of membership of the state to alien migrant workers and their families. On the same basis, these normative models support the granting of more extensive rights to migrants, including a right to stay in the country of employment. Chapter

two also examines, in the light of the individualist and communitarian approaches, arguments concerned with open migration and whether rights should be accorded to illegal migrants. It evaluates the principle of state sovereignty as it pertains to the limitation of certain rights and to control over entry into the territory on the basis of socio-economic, cultural and physical security. The chapter concludes by offering a redefined conception of the national community which is more consistent with the interdependence of the international community of states.

Part II of the thesis examines the universal standards within the ILO and the UN specifically relating to the protection of migrant workers and their families.

The oldest multilateral body concerned with the protection of migrant workers is the International Labour Organization (ILO). Chapter three contains a general appraisal of the protection of human rights by the ILO and the unique mechanisms in force for their supervision and enforcement. Within this context, it evaluates ILO standards found in Conventions and Recommendations expressly concerned with the protection of migrant workers and their families. This analysis is not limited, however, to rights concerned with labour alone and includes an examination of the protection of other rights, such as rights to education and to maintain cultural identity, and political rights. Strictly-speaking, the protection of these rights does not fall within the competence of the ILO. Nonetheless, this chapter shows that the ILO *is* concerned with these rights, largely because the question of labour cannot be considered in isolation from the broader social, cultural and political context in which migrants find themselves.

The new UN *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, adopted in December 1990 after ten years of negotiation, is the focus of chapter four of the thesis. This chapter evaluates the Convention's provisions on the rights of migrant workers and their families. In doing so, it refers extensively to the *travaux préparatoires* in order to assess the potential extent of this protection, the position of some key countries of employment towards the Convention and the prospects for its ratification.

Part III of the thesis is a detailed case study of the regional protection of the rights of migrant workers and their families in Europe.

Chapter five traces the history of this migration from the late nineteenth century to the present day and the evolution of European migration policy from one of exclusion to the integration of migrants into host societies. It also examines the specific concerns of particular groups of migrants in Europe, such as seasonal and frontier migrant workers, illegal migrants, migrant women and youth. The chapter concludes by reflecting upon the recent political and economic changes in Eastern and Central Europe and by speculating upon how these may affect international migration for employment on the continent.

Chapters six, seven and eight constitute a comprehensive and detailed evaluation of the regional human rights standards found in Council of Europe conventions and in EC law on the free movement of workers, which are relevant to the protection of the economic, social, cultural, political and residence rights of migrant workers and their families. Numerous references are made throughout to interpretations of these standards by the relevant supervisory and enforcement bodies and to the legal situation in certain individual countries of employment.

The thesis concludes with a hypothetical appraisal of the position in international human rights law of a vulnerable group of migrant workers and their families residing in Western Europe. These migrants come from countries which are not members of the EC or which have not signed any of the Council of Europe instruments, or from developing countries outside of Europe, such as from the Mahgreb region of North Africa. The tendency to exclude these migrant workers and their families from national life must not be translated into similar moves to exclude them from the protection of regional economic regimes, such as the EC, nor from other regional trading blocks or systems, established or in the process of being established elsewhere, which plan to implement free movement of labour on a similar basis to that within the EC. The concluding chapter argues that the realization of the rights of alien migrant workers and their families is a test of our humanity and can only serve to advance the rights of *all* human beings.

PART I

CITIZENS AND ALIENS

CHAPTER ONE

MIGRANT WORKERS AS ALIENS: DEVELOPMENT OF INTERNATIONAL LAW AND APPLICABILITY OF UNIVERSAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS

> The situation of aliens or foreigners seems... to be one of the most serious, and at the same time most widespread, departures from the principle of the universality of human rights and one of the most manifest signs of intolerance and discrimination in our age.[1]

1. Introduction

The situation of migrants working worldwide is inextricably connected to their status as aliens. Any established international legal rules in this area are, therefore, relevant when endeavouring to gauge the treatment migrant workers may expect to receive. Rudimentary standards regarding the treatment of aliens have developed over time and have become part of the international law of state responsibility. More recently, these standards have been reinforced by the international community's recognition of rights pertaining to all human beings.

This chapter traces the history of the treatment of aliens and the basic international legal rules which evolved. It then examines the applicability of general international and regional human rights norms to aliens, in particular as they pertain to the protection of their economic, social, cultural, political and residence rights. Although the universal thrust of these norms holds out much promise for safeguarding the rights of aliens, a closer examination reveals that this protection is not so comprehensive. The chapter concludes with an appraisal of the recent

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1 P. Leuprecht, "Reflections on Human Rights" (Lecture given at the University of Gdansk, Poland on April 25, 1988) (1988) 9 HRLJ 163 at 166.

Declaration on the Human Rights of Individuals who are not Nationals of the Country in Which They Live, adopted by the UN General Assembly on December 13, 1985.

2. The Treatment of Aliens - A Brief History

Throughout history aliens have always been treated differently from citizens. There is little doubt that traditional deprivations upon aliens have their roots "deep in primitive suspicions and fears of the outsider".[2] Indeed, strangers and enemies were once labelled by the same word in a number of ancient languages, including Latin.[3] The first historical records concerning differences in treatment between aliens and citizens may be traced to Ancient Greece and Rome.

2.1 Roots of Alienage

The Greek city-states made a very rigid distinction between citizens and aliens, much to the detriment of the latter. The city-states were not political entities like the nation-states of today, but more akin to religious and tribal associations. They excluded aliens, or *metics*[4] as they were known, almost completely from their affairs.[5] Michael Walzer, writing on the Athenian polis, asserts that the only justification for this position

> lies in the concept of citizenship as something that the Athenians literally could not distribute given what they thought it was. All they could offer to aliens was fair treatment, and that was all the aliens could think to ask of them.[6]

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2 M.S. McDougal, H.D. Lasswell & L. Chen, "Protection of Aliens from Discrimination and World Public Order: Responsibility of States conjoined with Human Rights" (1976) 70 A.J.I.L. 432 at 433. See also R.B. Lillich, *The Human Rights of Aliens in Contemporary International Law* (Manchester: Manchester University Press, 1984) at 5.

3 Walzer, *supra*, Introduction, note 154 at 32.

4 *Ibid.* at 53.

5 Lillich, *supra*, note 2 at 5-6, citing generally from C. Phillipson, *The International Law and Custom of Ancient Greece and Rome* (1911) at 122-209.

6 Walzer, *supra*, note 3 at 55. Lillich, *ibid.* at 5, maintains that this position was not so much a result

Indeed, "fair treatment" by today's standard did not amount to much. Aliens were denied basic civil and political rights. They were not permitted to marry citizens or to own property, nor could they participate in the political affairs of the state. Since they were unable to swear oaths in the name of the host state's gods, access to legal machinery was also barred.[7] In addition, *metics* were unable to share in the most basic of welfare rights; for instance, the distribution of corn.[8]

Gradually, these harsh restrictions were lifted. In order to encourage craftsmen to settle in the city, aliens were granted more rights,[9] including even grants of citizenship.[10] Further, treaties known as "isopolites" evolved between various city-states providing for the mutual granting of privileges to each others' citizens.[11]

In Roman law the *jus civile* applied only to citizens. Foreigners were considered to be outlaws and in a position of legal inferiority.[12] With the expansion of the Roman Empire, however, aliens were gradually afforded protection under *jus gentium*, a law applicable to them alone.[13]

2.2 The Middle Ages and Beyond

At the beginning of the Middle Ages, few people lived and worked outside of their home countries. Those who did had few rights and were treated, in some places, as serfs. Almost everywhere, for example, aliens were unable to transfer property by inheritance. The

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of fear or hatred of aliens, but of the inherent logic of the prevailing political and legal order.

7 Lillich, *ibid.* at 6.

8 Walzer, *supra*, note 3 at 53.

9 Lillich, *supra*, note 2 at 6.

10 *Elles Report*, *supra*, Introduction, note 145 at 1, para. 10. For example, at the time of Solon, foreign craftsmen were encouraged to settle in Attica with the promise of Athenian citizenship. *Ibid.*

11 Lillich, *supra*, note 2 at 6, citing from A. Nussbaum, *A Concise History of the Law of Nations* (1947) at 13.

12 *Elles Report*, *supra*, note 10 at 2, para. 11.

13 McDougal, Lasswell & Chen, *supra*, note 2 at 440.

position of aliens improved, however, with the expansion of trade and commerce.[14]

In the feudal era, the precarious lot of those who did not have land tenure is illustrated by the situation of travelling merchants. Most likely to carry all their wealth with them, they were a prime target for robbers. Moreover, access to the ordinary public courts was limited to those merchants holding free tenure of land and they could only resort to the local courts of the various manors.[15] As the advantages of trade became more evident, merchants were increasingly granted greater privileges. One of the most notable privileges was the right to hold a fair. The fair became a law unto itself and gave rise to a number of juridical immunities and informal legal rules, which today are enshrined in many legal systems.[16]

With time, merchants became more organized. Whole cities and mercantile communities, for example, Venetians, Genoese and Hanseatic merchants, negotiated privileges from governments. These privileges amounted to the creation in the host country of merchant community enclaves where merchants were permitted to live under their own laws administered by their own courts and according to their national customs.[17]

The granting of privileges to aliens, as described above, constituted a collective form of protection. On a more individual level, aliens who suffered injury at the hands of the host country's subjects could request a letter of reprisal from their prince or ruler, which usually authorized them to take action against any subject of the country of the alleged wrongdoer.[18] This method had significant ramifications for the development of the international law of state responsibility, crystallizing into the institution of the diplomatic protection of nationals

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14 McDougal, Lasswell & Chen, *ibid.* at 440, citing from F. Dawson & I. Head, *International Law, National Tribunals and the Rights of Aliens* (1971) at 1.

15 Lillich, *supra*, note 2 at 6 and note 6, citing generally from M. Bloch, *Feudal Society*, trans. L. Manyon (1961). The travelling merchant's legal position was exacerbated by the hopelessly under-developed state of the law of contract at this time.

16 Lillich, *ibid.* at 6-7, citing from H. Pirenne, *Economic and Social History of Medieval Europe* (1933) at 96-102 and from W. Ferguson, *Europe in Transition 1300-1520* (1973) at 153-173.

17 Lillich, *ibid.* at 7, citing from J. Mundy, *Europe in the High Middle Ages 1150-1309* (1973). See also *Elles Report*, *supra*, note 10 at 2, para. 15. These agreements developed into the capitulation treaty system.

18 Lillich, *ibid.* at 8, citing from E. Arćchaga, "International Responsibility" in M. Sorenson, ed., *Manual of Public International Law* (1968) 531 at 533.

abroad.[19]

With the development of the modern nation-state system, a more humanitarian attitude towards aliens developed. The fathers of contemporary international law, Grotius and Francisco de Vitoria, advocated fair treatment for aliens on an equal footing with nationals.[20] The doctrine expounded by Vattel, identifying the concern of aliens with the interests of the state, influenced the development in this area of international customary law rules of state responsibility. Because states generally regard people as important bases of power, Vattel's doctrine, maintain McDougal, Lasswell and Chen, remains closest to the social reality of today.[21]

3. State Responsibility Towards Aliens - Two Conflicting Approaches

The level of protection which states are obliged to afford to aliens under international law was for many years (and still remains to a limited extent) the subject of a profound debate between those who claim that states need only provide aliens with the same treatment provided to nationals and those who advocate that the treatment of aliens by states is regulated by a "higher" international "minimum standard".

3.1 Equal Treatment with Nationals

The chief proponent of this approach is the Argentine jurist Carlos Calvo. His position comprises two separate lines of thought. First, it is an aspect of state sovereignty that a state should enjoy, on the basis of equality, freedom from interference by other states and that it should not be bound by international law unless it consents to be bound. Second, and this

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19 *Ibid.*

20 McDougal, Lasswell & Chen, *supra*, note 2 at 440, citing from A. Roth, *The Minimum Standard of International Law Applied to Aliens* (1949) at 27.

21 *Ibid.* at 441-442.

pertains specifically to diplomatic protection, an alien who suffers an alleged injury may only seek redress in the local courts.[22]

The Calvo approach was adopted by the First International Conference of American States in Washington in 1899-1900 and by article 9 of the *Convention on Rights and Duties of States* in 1933 at the Seventh Conference in Montevideo.[23] This doctrine, however, has been criticized, *inter alia*, upon the following grounds. It leaves aliens to the mercy of the state in which they are residing and affords them no outside protection, since "what logically follows from this doctrine, of course, is that there can be no universal standard of treatment of aliens; there can only be individual national standards which each State sets unilaterally".[24] Moreover, aliens are also denied a political remedy on account of their status.[25] As eloquently summarized by McDougal, Lasswell and Chen: "In a world in which many states are tyrannical or totalitarian or otherwise oppressive such an outcome is not to be desired nor lightly accepted".[26]

3.2 The International Minimum Standard

The opposing approach to the national treatment doctrine contends that there are fundamental international standards of justice by which municipal law is to be measured. An

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22 Lillich, *supra*, note 2 at 16. In fact, Calvo did allow in his doctrine for resort to international means of assistance, but only if the alien was denied justice in the host country. He defined "denial of justice" very narrowly as the denial of access to the local courts. *Ibid.* and endnote 60.

23 McDougal, Lasswell & Chen, *supra*, note 2 at 445. See also *Elles Report*, *supra*, note 10 at 3, para. 22.

24 Lillich, *supra*, note 2 at 17. Borchard writes:

> The doctrine of equality has... little or no relation to the minimum, which practice has established. If it delimited the international minimum, as it does the local maximum, municipal law would replace international law as the test of international responsibility.

E. Borchard, "The "Minimum Standard" of the Treatment of Aliens" (1940) 38 Mich. L. Rev. 445 at 452.

25 Borchard, *ibid.* at 453 and note 14 (citing from John Bassett Moore's brief in the *Constanscia Sugar* case before the Spanish Treaty Claims Commission, Library of Congress, Briefs and Records, Spanish Treaty Claims Commission, JX 238), writes: "[N]ationals are presumed to have a political remedy, whereas the alien's inability to exercise political rights deprives him of the principal safeguards against oppression".

26 *Supra*, note 2 at 445.

authoritative definition of the international minimum standard was given by the United States Secretary of State, Elihu Root, in 1910:

> There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country's system of law and administration does not conform to that standard, although the people of that country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens.[27]

Numerous treaties, especially those of friendship, commerce and navigation, international arbitral decisions,[28] and national judgments have arguably given international customary law status to the minimum standard for the treatment of aliens.[29]

The international minimum standard, however, contains two weaknesses. First, it is a nebulous concept, with no defined parameters, and therefore highly vague and general.[30] In 1940, Edwin Borchard attempted to fashion a conceptual framework to the standard by outlining its substantive and procedural contents. The former encompassed "certain elementary

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27 E. Root, "The Basis of Protection to Citizens Residing Abroad" (1910) 4 A.J.I.L. 517 at 521-522, cited by Lillich, *supra*, note 2 at 17. Lillich, *ibid.*, exposes succinctly the *raison d'être* of this doctrine:

> This doctrine takes into account the possibility that the standards prevailing in a given State may be so low that, even if nationals and aliens are treated (or oppressed) alike, the norms of international law will have been violated.

28 See for example the following statement in *Roberts (U.S.)* v. *Mexico* 1 Op. Comm. 100 at 105, cited by Borchard, *supra*, note 24 at 454 and note 17:

> Roberts was accorded the same treatment as that given to all other persons... Facts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of authorities in the light of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization.

29 In accordance with the general principles of law recognized by civilized nations under article 38 of the Statute of the International Court of Justice. See *Elles Report*, *supra*, note 10 at 3, para. 23 and McDougal, Lasswell & Chen, *supra*, note 2 at 447-449.

30 Borchard, *supra*, note 24 at 448; McDougal, Lasswell & Chen, *ibid.* at 450; G.S. Goodwin-Gill, *International Law and the Movement of Persons Between States* (Oxford: Oxford University Press, 1978) at 62.

privileges of human existence... mainly rights to life and the elementary liberties connected with the earning of a living", whereas the latter was defined by "fair courts, readily open to aliens, administering justice honestly, impartially, without bias or political control".[31] Although this framework continues to suffer from ambiguity, the minimum standard, in the substantive context at least, may be associated with the provision of certain basic rights to non-citizens.

The second weakness is that, as a creature of the doctrine of state responsibility and diplomatic protection, the international minimum standard may only be "activated" by the state on behalf of its nationals residing in another country. The individual's injury is attributed to the state which alone may pursue redress for the injury in international fora.[32] Furthermore, the state is not obliged to transfer or distribute to the injured party any recoverable compensation or reparations.[33] In general, therefore, the rights which flow from the minimum standard accrue to the state and not to the individual, who in the eyes of traditional international law has no legal status whatsoever.[34]

The minimum standard for the protection of aliens, as a rule of international customary law, has faced serious challenges since the end of the Second World War. The number of new independent states, which have never been part of international custom, has grown substantially.[35] Coupled with the recent lack of international practice in this area and the tendency of the new and developing states to move towards the national treatment approach, particularly with respect to economic matters,[36] the international minimum standard is no

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31 Borchard, *ibid.* at 458 and 460 respectively.

32 Lillich, *supra*, note 2 at 11-12; *Elles Report*, *supra*, note 10 at 5, para. 31.

33 Lillich, *ibid.* at 12.

34 *Ibid.* This approach is particularly inept, if, as is frequently the case with migrant workers (especially illegal migrant workers), the group comes from sections of society that have little political influence in their country of origin. I am indebted to Professor Bill Black for bringing this point to my notice.

35 McDougal, Lasswell & Chen, *supra*, note 2 at 452.

36 R.B. Lillich, "The Current Status of the Law of State Responsibility for Injuries to Aliens" in J.F. Murphey *et al.*, "State Responsibility, Self Help and International Law" (1979) 73 Am. Soc. Int'l L. Predgs 242 at 245-246. The views of the new and developing states prevailed in article 2(2)(c) of the United Nations Charter of Economic Rights and Duties of States which adopts the national treatment standard. *Ibid.* at 246.

longer a secure institution of customary international law.

The international minimum standard offers aliens the possibility of an objective and guaranteed level of protection potentially superior to that afforded by inadequate national laws. Indeed, if these laws are woefully deficient, it may also provide aliens with greater protection than that accorded to nationals.[37] In these modern times, however, when states provide nationals with comprehensive safeguards, particularly in the fields of economic and social welfare, it is arguable that the standard of equal treatment with nationals would provide greater protection in some countries if it were rigorously applied.[38]

3.3 International Human Rights Norms - New Standards

With the advent of express international protections for the rights of all human beings, the debate between advocates of the standard of equal treatment with nationals and the international minimum standard has been rendered essentially defunct. García-Amador, the Special Rapporteur to the International Law Commission on state responsibility, asserted that

> the conflict and antagonism formerly existing between the "international standard" and the principle of equality of nationals and aliens have become obsolete in consequence of the political and juridical phenomenon in the post-war world of the recognition of fundamental human rights, and hence it would be useless to continue to hope that either the "international standard" or the principle of equality will prevail.[39]

International human rights instruments have also raised the standards of protection for aliens and nationals alike to the extent that the minimum standard is no longer relevant as a yardstick by which abuses are to be measured:

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37 Cf. W. McKean, *Equality and Discrimination under International Law* (Oxford: Clarendon Press, 1983) c.XI, "Equality in the Treatment of Aliens" 194 at 197.

38 I am grateful to Professor Bill Black for bringing this argument to my attention.

39 G. Amador, "Third Report" in (1958-II) Yearbook of the International Law Commission, at para. 8 (UN Doc. A/CN.4/111), cited by Goodwin-Gill, *supra*, note 30 at 63.

> The principal thrust of the contemporary human rights movement is to accord nationals the same protection formerly accorded only to aliens, while at the same time raising the standard of protection for all human beings, nationals as well as aliens, far beyond the minimum international standard under the earlier customary law.[40]

Although it is correct to say that individuals, including aliens, are today subjects of modern international law and receive direct protection of their rights and freedoms through legally enforced provisions,[41] to discard the traditional state responsibility doctrine for the protection of aliens would, at the present time, be imprudent. A number of states, the United States included, are not parties to important international human rights instruments.[42] Furthermore, the enforcement procedures under these instruments dealing with individual complaints are weak.[43] Given these shortcomings of the international human rights protection system, an approach synthesizing the traditional law of state responsibility with this system might be more beneficial to aliens.[44] Nonetheless, it is clear that the growing plethora of human rights prescriptions and their increasing universal and regional recognition have fundamentally altered international legal precepts in relation to the protection of aliens.

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40 McDougal, Lasswell & Chen, *supra*, note 2 at 464.

41 *Elles Report*, *supra*, note 10 at 2-3, para. 20.

42 Lillich, *supra*, note 36 at 246. It would be difficult, however, to dispute the position that many of these instruments today, especially the *Universal Declaration of Human Rights* and the two international Covenants, examined below, form part of international customary law.

43 *Ibid.*

44 Cf. McDougal, Lasswell & Chen, *supra*, note 2 at 456. Indeed, according to these authors, *ibid.* at 464-465, both old and new law can mutually contribute to the protection of individual human rights:

> [T]he traditional channels of protection through a State, together with the newly developed procedures under the contemporary human rights program of claims by individuals, would appear to achieve a cumulative beneficent impact, each reinforcing the other, in defense and fulfilment of the human rights of the individual.

4. The Applicability of Universal and Regional International Human Rights Instruments to Aliens

This section examines the principal universal and regional international human rights instruments and their applicability to non-citizens. The regional instruments examined are the three major human rights conventions in Europe, America and Africa. Generally-speaking, these instruments protect the rights and freedoms of aliens as well as nationals.[45] Wording such as "Everyone has the right to...", "All persons...", and in the negative, "No one shall be...", is indicative of this all-embracing approach. Furthermore, it is arguable that all the non-discrimination provisions, with perhaps one notable exception, apply to aliens. Although "nationality" is not included as a specific ground, the provisions are illustrative only and not exhaustive.[46] The UN Charter, "the primary source of many of the most fundamental norms of contemporary international law",[47] serves as an example. Articles 55 and 56 relate specifically to human rights. The former provision obliges the UN to promote "universal respect for, and observance of, human rights and fundamental freedoms for *all* without distinction as to race, sex, language or religion".[48]

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45 See McDougal, Lasswell & Chen, *ibid.* at 457 (footnote 100):

> It has been generally recognized that one of the major purposes of the whole panoply of human rights prescriptions has been to accord the nationals of the State the same protection previously accorded aliens and to make unnecessary, in general, any differentiation between aliens and nationals. There is nothing in the legislative history (*travaux préparatoires*) of these prescriptions to suggest any intent to exclude aliens from protection.

46 McDougal, Lasswell & Chen, *ibid.*; Lillich, *supra*, note 2 at 43 and 46.

47 Lillich, *ibid.* at 41.

48 Emphasis added. See also article 1, which includes as one of the major purposes of the UN:

> the promoting and encouraging [of] respect for human rights and for fundamental freedoms for *all* without distinction as to race, sex, language or religion (emphasis added).

Baroness Elles in her report, *supra*, note 10 at 6, para. 40, takes a more restrictive approach towards the non-discrimination clause in the UN Charter particularly with regard to the protection of economic, social and cultural rights:

> What the Charter does not say is that there should be no distinction made between aliens and nationals. The non-discrimination clause refers to race, sex, language and religion. In promoting the observance of human rights, in accordance with the provisions of the Charter, if it was to be interpreted closely, economic, social and cultural progress are concomitant with human rights and the alien, although his human rights and fundamental freedoms must be respected, may not necessarily expect equal treatment with nationals.

In spite of the universality which the principal international human rights instruments embrace, they contain provisions which refer either specifically to non-citizens or which are clearly inapplicable to them. Restrictions and limitations are most evident in the areas with which this thesis is concerned, namely economic, social, cultural and political rights and rights of residence and freedom of movement.[49]

4.1 Universal Declaration of Human Rights (UDHR)[50]

The precursor to all international human rights instruments, the UDHR, is phrased in all-embracing language.[51] It contains an open-ended non-discrimination provision, which is found in article 2:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Baroness Elles points out that although the grounds specified in article 2 are illustrative only, this does not mean that all grounds are acceptable nor that "nationality" may be a prohibited ground. Referring to the *travaux préparatoires*, Elles observes that the ground of "national origin" was used to connote national characteristics and not citizenship.[52]

Notwithstanding its universal language, the UDHR contains some provisions that have been interpreted as excluding aliens from their protection. Articles 13 and 21 warrant particular attention. Article 13 reads:

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49 See also Leuprecht, *supra*, note 1 at 165-166.

50 *Universal Declaration of Human Rights*, UN General Assembly Res. 217A (III), December 10, 1948.

51 For example, article 1 reads:

> *All* human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood (emphasis added).

52 *Supra*, note 10 at 15, para. 114.

> 1. Everyone has the right to freedom of movement and residence within the borders of each State.
>
> 2. Everyone has the right to leave any country, including his own, and to return to his country.

Paragraphs (1) and (2) of article 21 declare:

> 1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
>
> 2. Everyone has the right of equal access to public service in his country.

Article 13(2) grants non-citizens or migrant workers the right to leave the country in which they live and to return to their countries of origin.[53] It does not, however, unless interpreted very liberally, provide them with the right to enter a country, the citizenship of which they do not possess. Paragraphs (1) and (2) of article 21 appear to preclude aliens from claiming political rights in the host country.[54] Commentators on these provisions maintain that the reference to "his country" most likely means the country of origin or nationality.[55] Richard Lillich suggests a "freer interpretation" of articles 13 and 21:

> It is possible to offer a more "progressive" interpretation of Articles 13 and 21 than has been advanced above. One could contend for instance, that the expression "his country" does not refer exclusively to the State of the alien's nationality. One could argue for a more sociological, as opposed to juridical, interpretation of those words and conclude that, for any given person, "his country" refers to the one with which he has the most substantial real connections, whether through family ties, residence, *economic activity*, or whatever. Under such an interpretation, one might then read Articles 13 and 21 to grant aliens rights in host States.[56]

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53 *Warzazi Preliminary Report*, *supra*, Introduction, note 3 at 66 and 67, paras. 246 and 268 respectively.

54 Lillich, *supra*, note 2 at 43.

55 J.A.R. Nafziger & B.C. Bartel, "The Migrant Workers Convention: Its Place in Human Rights Law" (1991) 25 IMR 771 at 783 (footnote 58); McKean, *supra*, note 37 at 199.

56 *Supra*, note 2 at 43. Emphasis added.

Lillich is careful, however, not to adopt the above interpretation as his own, claiming that it would be out of place with respect to a document which, in any case, breaks new ground with its forcefulness through simplicity.[57] Nonetheless, the argument is an important one, for, as discussed below, the wording in subsequent human rights documents does not provide non-citizens with the same possibility of claiming political rights as does article 21 of the UDHR.

One of the common restrictions imposed upon aliens and migrant workers concerns the right to work and to free choice of employment. Article 23(1) of the UDHR, however, extends to everyone "the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment". The drafting history of this provision reveals that the word "everyone" in this context was understood to mean that everybody ordinarily resident in the territory of the state concerned should have free access to employment outside of the public service.[58]

Another relevant provision is article 29, which is concerned with individual duties and which also outlines the permissible limitations that may be imposed on the rights in the UDHR. Article 29(1) reads: "Everyone has duties to the community in which alone the free and full development of his personality is possible". Baroness Elles argues that the absence of the nexus of nationality does not mean that aliens owe no duties to the states in which they are residing.[59] She adds that in order to claim protection from the state an alien must conform to

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57 Lillich writes, *ibid.* at 43-44:

> [A]lthough this argument has its attractions, for reasons more of strategy than of logic it probably is best not to advance it, at least at the present stage of development of international human rights law. Such an argument requires introducing a certain artfulness into debates about the meaning of the Universal Declaration which could detract from its cardinal strength of forcefulness - through simplicity. It would probably be a mistake to open the door to casuistry in debates about the Universal Declaration, as even in its very plainest and simplest interpretation, it contains guarantees which are very far-reaching indeed. Moreover,... there are other mechanisms available for the promotion of such "progressive" ends.

58 W.R. Böhning, "Basic Rights of "Temporary" Migrant Workers: Law vs. Power" in L.F. Tomasi, ed., *In Defense of the Alien, Vol. VIII Immigration Enforcement, Employment Policy, Migrant Rights and Refugee Movements* (Proceedings of the 1985 Annual National Legal Conference on Immigration and Refugee Policy) (New York: Center for Migration Studies, 1986) 99 at 102 (footnote 7).

59 *Supra*, note 10 at 43, para. 321.

its laws, refrain from interfering in its political affairs and contribute generally to the development of the country.[60] To read into this clause, however, a prohibition on the political activity of aliens is surely incorrect, particularly when considering article 20(1), which grants to everyone "the right to freedom of peaceful assembly and association", and the possible "progressive" interpretation of article 21 discussed above.

Attention should also be drawn to the extensive limitation clause in article 29(2):

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Any restrictions upon the rights of aliens and migrants commonly imposed by states might, therefore, be justified by this provision, hence precluding a truly "free" interpretation of the UDHR enhancing these rights.

4.2 International Covenant on Civil and Political Rights (ICCPR)[61]

The ICCPR is more precise than the UDHR regarding the applicability of its provisions to non-citizens. In addition to the open-ended non-discrimination provision found in article 2(1),[62] the ICCPR also contains a substantive equality clause (article 26), which ensures to *"all*

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60 *Ibid.* at 43, para. 322.

61 *International Covenant on Civil and Political Rights*, December 16, 1966, 999 U.N.T.S. 171; entered into force March 23, 1976; ratified by 100 states as of January 1, 1992.

62 Article 2(1) reads:

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

A suggestion during drafting to replace "persons" by "nationals" or citizens" was not followed up. B.G. Ramcharan, "Equality and Nondiscrimination" in L. Henkin, ed., *The International Bill of Rights: The*

persons" equality before the law and equal protection of the law without discrimination on the same grounds as those listed in article 2(1).[63] "Nationality" is not specified as a ground of discrimination, although, as with article 2(1), article 26 is illustrative only. "National origin" is specified, but cannot be interpreted as implying the prohibition of discrimination on the grounds of nationality.[64] The general consensus which emerged from the drafting process was that states parties may discriminate against aliens so long as such distinctions are considered strictly necessary.[65] Further, the ICCPR contains a clause permitting measures derogating from certain enumerated rights in time of public emergency provided that these measures do not amount to discrimination on the grounds of "race, colour, sex, language, religion or social origin".[66] Since these grounds appear exhaustive, measures might be implemented affecting aliens in general. Provisions, however, to the detriment of a particular class of aliens on the basis of one of the above grounds would not be justified.[67]

In contrast to the UDHR, the ICCPR expressly limits the enjoyment of the right to freedom of movement in article 12(1) to those *lawfully* within the territory of the state.[68] This

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Covenant on Civil and Political Rights (New York: Columbia University Press, 1981) 246 at 263.

63 Article 26 proclaims:

> *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 (emphasis added).

64 See *supra*, note 52 and accompanying text with respect to the interpretation of "national origin" in article 2(1) of the UDHR.

65 Ramcharan, *supra*, note 62 at 263.

66 The derogation provision is found in article 4(1):

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Article 4(2) prohibits derogation from certain fundamental rights, for example the right to life (article 6) and the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (article 7).

67 Goodwin-Gill, *supra*, note 30 at 69; McKean, *supra*, note 37 at 200.

68 Article 12(1) reads: "Everyone *lawfully* within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence (emphasis added)".

provision, therefore, does not encompass illegal aliens or clandestine migrant workers. The ICCPR also explicitly excludes aliens from the enjoyment of political rights. The rights in article 25 to participate in public affairs, to vote and to be elected to political office and to have access to the public service are reserved exclusively to "citizens".[69] There is nothing in the provision, however, which prevents the state granting political rights to aliens or migrant workers. Indeed, if a state has already conferred political rights upon non-citizens, the shortcomings of the ICCPR in this regard do not mean that these rights may be taken away.[70]

Article 13 of the ICCPR is a provision which applies solely to aliens:

> An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Article 13 only applies to those aliens "lawfully" in a country, affording them procedural protection or natural justice safeguards against arbitrary expulsion.[71] The expulsion decision must be taken "in accordance with law" and aliens must be given the opportunity to challenge the decision and to have their case reviewed by a competent authority. These procedural

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69 Article 25 reads:

> Every *citizen* shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
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> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
>
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
>
> (c) To have access, on general terms of equality, to public service in his country (emphasis added).

70 Lillich, *supra*, note 2 at 46. Article 5(2) of the ICCPR asserts:

> There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

71 McDougal, Lasswell & Chen, *supra*, note 2 at 460.

safeguards, however, may be overridden for "compelling reasons of national security". The phrase "compelling reasons" is intended to emphasize the narrowness of the exception.[72] Although article 13 only regulates the expulsion procedure and does not restrict a state's sovereign right to delimit the substantive grounds of the actual expulsion decision, it does appear to be based on the premise that an alien lawfully in a country has some right to stay.[73]

Article 27 of the ICCPR is the sole provision in international human rights treaty law with the object of protecting the cultural, religious and linguistic rights of ethnic minorities:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

The applicability of article 27 to aliens is disputed.[74] The UN Special Rapporteur on Minorities, Francesco Capotorti, contends that because foreigners are able to benefit from the protection of international customary law as well as from other special rights conferred on them by treaties and various agreements, the clause should not apply to aliens.[75] The former Chief Justice of the Québec Superior Court, Jules Deschênes, in defining the term "minority", argues that in order to qualify as a minority the relevant group must be composed of citizens. According to Deschênes, groups of migrants or aliens, despite having resided in a country for an indefinite period of time, owe no allegiance to it: "the first duty of the state is towards its own citizens"; to others, the state "owes only courtesy, which does not give rise to any rights".[76]

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72 S. Jagerskiold, "Freedom of Movement" in *The International Bill of Rights: The Covenant on Civil and Political Rights*, *supra*, note 62, 166 at 184.

73 Cf. Jagerskiold, *ibid.*

74 The discussion below is taken from R. Cholewinski, The Positive Cultural and Linguistic Right of Ethnic Minorities (LL.M. Thesis, College of Law, University of Saskatchewan, Saskatoon, August 1988) [unpublished] at 40 and endnotes 20 and 21.

75 F. Capotorti, *Study of the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, at 12, para. 57, UN Doc. E/CN./Sub.2/384/Rev.1 (New York: UN, 1979).

76 *Proposal Concerning a Definition of the Term "Minority*, (by J. Deschênes), UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, at 7-8, paras.

Both of these arguments are unconvincing. First, international customary law, as discussed earlier, cannot afford the same extensive protection to aliens as may be provided by international human rights instruments. Moreover, regional or bilateral agreements aimed at protecting aliens, and particularly migrant workers, do not apply to all groups of non-citizens. Second, an interpretation of article 27 excluding aliens from its ambit may encourage states to deny nationality to certain groups residing within its borders in order to keep them under the "discipline" of aliens legislation.[77]

Certain provisions in the ICCPR allow the rights in question to be restricted for a number of specified reasons. These "limitation clauses", therefore, present states parties with the possibility of further restricting aliens' rights. For example, article 22(1) recognizes the right of everyone to "freedom of association with others, including the right to form and join trade unions". Article 22(2), however, permits restrictions on the exercise of this right

> which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.[78]

4.3 International Covenant on Economic, Social and Cultural Rights (ICESCR)[79]

The ICESCR affords less protection to aliens than the UDHR and the ICCPR. Two reasons may be advanced for this state of affairs, both stemming from the nature of the rights to be found in the ICESCR. The first is that the ICESCR expressly asserts that the standards

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39-44, UN Doc. E/CN.4/Sub.2/1985/31 (Geneva: UN, 1985).

77 C. Tomuschat, "Protection of Minorities under Article 27 of the International Covenant on Civil and Political Rights" in *Mosler Collection*, Völkerrecht als Rechtsordnung - International Gerichtsbarkeit-Menschenrechte; Festschrift für Hermann Mosler (Berlin: Springer Verlag, 1983) 949 at 960-961.

78 Similar restrictions may be imposed upon the right to freedom of movement (article 12), the right to freedom of expression (article 19), and the right of peaceful assembly (article 21).

79 *International Covenant on Economic, Social and Cultural Rights*, December 16, 1966, 993 U.N.T.S. 3; entry into force January 3, 1976; ratified by 104 states as of January 1, 1992.

therein are to be achieved progressively.[80] Consequently, neither aliens nor nationals may be able to benefit immediately from the rights set out in the document.[81] The second reason flows from the first. The rights in the ICESCR involve state affirmative measures and because resources are scarce, especially in developing countries, it is not surprising that states prefer to favour their own nationals.[82] Such an approach, however, should not detract from the conviction that the human rights protections in the ICESCR are designed for *all* human beings irrespective of nationality.[83] This conviction, however, is undermined by one particular provision in article 2 of the ICESCR.

The non-discrimination provision, article 2(2),[84] is generally recognized to be closed to the admission of any further grounds of discrimination.[85] Referring to the *travaux préparatoires*, Halima Warzazi explains that the majority of drafters believed that the word "discrimination" gave states sufficient leeway to make distinctions between aliens and nationals with respect to certain rights, in particular the right to work and social benefits which

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80 See also Böhning, *supra*, note 58 at 103. Article 2(1) of the ICESCR reads:

> 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 (emphasis added).

81 Eides writes, *supra*, note 10 at 7, para. 43:

> With the present wide disparities in economic and social development there is no reason to suppose that the progressive achievement of these standards implies equal and simultaneous progress for all individuals within the jurisdiction of the member State, including aliens.

82 Lillich, *supra*, note 2 at 47.

83 McDougal, Lasswell & Chen, *supra*, note 2 at 460.

84 Article 2(2) reads:

> The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

85 McDougal, Lasswell & Chen, *supra*, note 2 at 457-458 (footnote 100); Lillich, *supra*, note 2 at 47-48. Although Lillich adds that the list of enumerated grounds in article 2(2) is not expressly stated to be exhaustive, he concludes, on balance, that the ICESCR does not have a general norm of non-discrimination against aliens as does the ICCPR. Goodwin-Gill, *supra*, note 30 at 68, suggests that the provision is sufficiently broad to limit the circumstances in which discrimination against aliens is justified. He notes, however, that article 2(3), discussed below, may undermine this argument.

governments considered should continue to be restricted to nationals.[86]

Any lingering doubts concerning the scope of article 2(2) are immediately dispelled, however, by the very next clause:

> Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.[87]

Article 2(3) constitutes a *carte blanche* to developing countries, permitting these countries to give priority to their nationals with regard to the guarantee of economic rights.[88] The object of the clause was to enable developing countries to rectify the legacy of the post-colonial era which left non-citizens with an undue influence over their economies.[89] Article 2(3) has met with wide criticism. Indeed, at the drafting stage, many delegates viewed it as "contrary to the spirit of universality and equality underlying the draft Covenant and likely to give rise to all kinds of discrimination alien to the intention of the sponsors".[90] The provision suffers from ambiguity. Developing countries may only limit the application of "economic rights" to non-nationals. "Economic rights" refer to those economic rights enunciated in the ICESCR, but it is not clear what these rights are. The right to work in article 6 is clearly affected by this provision, but it may also be considered a "social right".[91] Article 7, which guarantees "just

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86 *Warzazi Preliminary Report*, *supra*, note 53 at 30, para. 93.

87 Goodwin-Gill, *supra*, note 30 at 68, explains that this provision is in line with a number of UN General Assembly Resolutions: for example, Resolution 1803 (XVII) of 1962 on Permanent Sovereignty over Natural Resources and Resolution 3281 (XXIX) of 1974 adopting the Charter of Economic Rights and Duties.

88 Lillich, *supra*, note 2 at 47.

89 McKean, *supra*, note 37 at 201 (footnote 37). The provision was narrowly adopted by 41 votes to 38 with 12 abstentions. *Ibid.*

90 L. Sohn, "Supplementary Paper: A Short History of United Nations Documents on Human Rights" in Commission to Study the Organization of Peace, *The United Nations and Human Rights* (1968) 38 at 116, cited by McDougal, Lasswell & Chen, *supra*, note 2 at 458 (footnote 100). Warwick McKean, *ibid.* at 201, maintains that article 2(3) must "be regarded as an unfortunate inclusion in a covenant of this nature and likely to cause invidious and unreasonable distinctions to be made against aliens on the ground of their foreign nationality".

91 E.V.O. Dankwa, "Working Paper on Article 2(3) of the International Covenant on Economic, Social and Cultural Rights" (1987) 9 Human Rights Quarterly 230 at 239-240. Article 6 reads:

> The State Parties to the present Covenant recognize the right to work, which includes the

and favourable conditions of work", would also seem to fall into the "economic rights" category.[92] It is difficult, however, to justify restrictions on the rights in article 7. Although there is no obligation upon states to permit aliens to work, once they have granted them this right, both aliens and citizens have the equal right to enjoy "just and favourable conditions of work".[93] In short, "economic rights" may be defined as "rights that enable a person to earn a living or that relate to that process".[94]

The term "developing country" in article 2(3) is far from clear. No precise definition is provided. The term is understood, however, to refer to economically weak countries, especially those which have experienced colonial rule.[95] Presumably, once a country's economy achieves a certain level of improvement, it no longer falls into the "developing" category.[96] The term "non-nationals" is also not defined. Doubts remain whether illegal immigrants may even benefit from the economic, social and cultural rights of the ICESCR.[97]

Article 2(3) does not impose *an obligation* upon developing countries to limit the economic rights of non-nationals. They retain discretion whether to do so, as conveyed by the word "may". Indeed, non-citizens may only have their economic rights restricted and not taken away altogether, since developing countries are only empowered to determine "the extent" to which they may limit these rights.[98] In exercising their power under the provision, developing countries are to give "due regard" to "human rights" and the "national economy". "Human rights" are understood to encompass all those rights other than economic rights which are enumerated in international human rights instruments. Further, the power may only be

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right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

92 Dankwa, *ibid.* at 240.

93 G.S. Goodwin-Gill, "Immigration, Nationality and the Standards of International Law" in A. Dummett, ed., *Towards a Just Immigration Policy* (London: Cobden Trust, 1986) 3 at 14; G.S. Goodwin-Gill, R.K. Jenny & R. Perruchoud, "Basic Humanitarian Principles Applicable to Non-Nationals" (1985) 10 IMR 556 at 558.

94 Dankwa, *supra*, note 91 at 240.

95 *Ibid.* at 236, 238.

96 Cf. *Elles Report*, *supra*, note 10 at 8, para. 51.

97 Dankwa, *supra*, note 91 at 242.

98 *Ibid.* at 244-245.

exercised if the condition of the national economy so warrants.[99]

Despite the criticism levelled at article 2(3), in particular that it undermines the concept of the universality of human rights, the provision arguably provides developing countries with no more than what developed countries already have. In practice, the latter have always been able to protect the economic rights of their nationals by imposing strict residence requirements upon non-citizens and, in general, by remaining in control of their economies.[100] Article 2(3) implies, however, that developed countries cannot blatantly exclude non-nationals from economic protection.

Apart from article 2(3), there are no other specific limitations on the rights of aliens in the ICESCR. As discussed above, the rights to work and to the "enjoyment of just and favourable conditions of work" are guaranteed to "everyone".[101] Another example is the right to education in article 13 of the ICESCR, which is directed to all. There are no qualifications preventing aliens from benefiting from this right. The principle that a country's education should be available to all regardless of nationality is also clearly expressed in article 3(1)(e) of the UNESCO *Convention Against Discrimination in Education*,[102] by which state parties undertake "to give foreign nationals resident within their territory the same access to education as that given to their own nationals". The ICESCR also guarantees to everyone in article 8 the right to form and join trade unions, but this right is subject to similar restrictions to those found in the corresponding provision of the ICCPR, article 22.

In addition to individual limitation provisions, and like the UDHR in article 29(2), the ICESCR also contains a general limitation clause in article 4:

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99 *Ibid.* at 238, 242.

100 *Ibid.* at 247.

101 See also Goodwin-Gill, *supra*, note 93 at 14.

102 *UNESCO Convention Against Discrimination in Education*, December 14, 1960, 429 U.N.T.S. 93; entry into force May 22, 1962; ratified by 76 states as of January 1, 1992.

> The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Once again, the temptation exists for states to justify discrimination against non-nationals or migrant workers on the basis of this clause. The provision is also broader than its predecessor in the UDHR. Guy Goodwin-Gill has remarked with reference to article 4 of the ICESCR: "Permissible grounds for derogation of this nature are so vague as to be nearly meaningless".[103]

4.4 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)[104]

The most pertinent provision in the ICERD relating to aliens is, as with article 2(3) of the ICESCR, a limitation clause. Article 1(2) of the ICERD declares:

> This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.

This prescription does not exclude aliens from the protection of the instrument altogether. Nor is it a new norm permitting general discrimination on the basis of alienage. It was introduced to encourage governments to sign the instrument, which they would otherwise have been reluctant to sign if they had been unable to withhold certain entitlements from aliens, such as political rights and the right to work.[105] According to McDougal, Lasswell and Chen, article

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103 *Supra*, note 30 at 68.

104 *International Convention on the Elimination of All Forms of Racial Discrimination*, December 21, 1965, 660 U.N.T.S. 195; entry into force January 4, 1969; ratified by 130 states as of January 1, 1992.

105 D. Mahalic & J.G. Mahalic, "The Limitation Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination" (1987) 9 Human Rights Quarterly 74 at 75. These authors maintain that article 1(2) is drafted in an unfortunate manner. The ICERD clearly operates to protect the rights of non-citizens. The *travaux préparatoires* reveal that the drafters intended that the ICERD, as one of its main

1(2) only reserves to states the competence to continue to make historic differentiations between aliens and nationals as is reasonable under international customary law.[106] For example, article 5(e) guarantees political rights to everyone without distinction as to "race, colour or national or ethnic origin". Traditionally, these rights have been withheld from non-nationals and article 1(2) would justify a similar approach.[107] It would be difficult, however, to defend, by virtue of article 1(2), differences in treatment between nationals and aliens with respect to, for example, the right to security of the person (article 5(b)) and the right to education and training (article 5(e)(v)). Moreover, under article 6 of the ICERD, states are obliged to afford to everyone within their jurisdiction effective legal protection against racial discrimination and access to adequate remedies.[108] A situation whereby a state provides such protection to its citizens and not to non-nationals, who are more likely to be subject to discrimination, is surely an infringement of article 6. Any other interpretation would be contrary to the spirit of the ICERD.[109]

Another provision in ICERD which refers specifically to nationality is article 1(3):

> Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

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objectives, protect both citizens and aliens from racial discrimination. Indeed, the practice of the Committee on the Elimination of Racial Discrimination and of states parties reporting under the ICERD indicates that distinctions between citizens and aliens are prohibited if there exists the slightest hint of racial discrimination. *Ibid.* at 76. A study of Committee and state practice has shown that the protection of the cultural rights of alien migrant workers is also a concern of the ICERD. R. Cholewinski, "The Racial Discrimination Convention and the Protection of Cultural and Linguistic Ethnic Minorities" (1991) Revue de Droit International (The International Law Review) 157 at 185-187.

106 *Supra*, note 2 at 461.

107 *Ibid.*; Goodwin-Gill, *supra*, note 30 at 67.

108 Article 6 reads in full:

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

109 See also Goodwin-Gill, *supra*, note 30 at 67.

The aim of article 1(3) is to ensure the sovereign right of states to decide who may enter and remain in their territory, provided that no element of racial discrimination is involved.[110] This provision, therefore, prohibits distinctions between aliens of different nationalities.[111]

4.5 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[112]

The ECHR of the Council of Europe, as with the other instruments examined above, is phrased in all-embracing language.[113] Furthermore, as with the UDHR and the ICCPR, the ECHR also contains an open-ended non-discrimination clause.[114]

The provisions in the ECHR specifically relating to aliens concern protection against expulsion, freedom of movement and the arrest and detention of illegal immigrants. With regard to expulsion, Article 1 of Protocol No. 7 to the ECHR[115] resembles article 13 of the

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110 Mahalic & Mahalic, *supra*, note 105 at 79.

111 *Niles Report*, *supra*, note 10 at 26, para. 182.

112 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, November 4, 1950, Council of Europe, *European Treaty Series* No. 5; entry into force September 3, 1953; ratified by 24 states as of March 18, 1992.

113 For example, article 1 proclaims: "The High Contracting Parties shall secure to *everyone* within their jurisdiction the rights and freedoms defined in Section 1 of this Convention (emphasis added)".

114 Article 14 of the ECHR reads:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

115 *Protocol No. 7 to the European Convention on Human Rights*, November 22, 1984, Council of Europe, *European Treaty Series* No. 117; entry into force: November 1, 1988; ratified by 13 states as of March 18, 1992. Article 1 reads as follows:

> 1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
>
> a. to submit reasons against his expulsion,
>
> b. to have his case reviewed, and
>
> c. to be represented for these purposes before the competent authority or a person or persons designated by that authority.
>
> 2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

ICCPR and provides procedural safeguards against the arbitrary expulsion of lawfully resident aliens. The grounds upon which these safeguards may be overridden, however, are wider under article 1, since they may be overturned not only for reasons of national security, but also in the interests of "public order", arguably a far broader term. Under article 4 of Protocol No. 4 to the ECHR, the collective expulsion of aliens is strictly prohibited.[116] In respect of freedom of movement, article 2(1) of Protocol No. 4 to the ECHR, like article 12(1) of the ICCPR, restricts the right of freedom of movement within the territory of a state party to nationals, and to aliens in a regular situation. Finally, article 5(1)(f) of the ECHR prescribes an exception to the right to liberty and security of person by permitting the arrest and detention of illegal immigrants.[117]

The most significant provision in the ECHR relating to non-nationals, however, is a limitation clause. Article 16 of the ECHR declares:

> Nothing in articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

Article 10 contains the right to freedom of expression and article 11 deals with "the right to freedom of peaceful assembly and to association with others, including the right to form and to join trade unions". Although the other instruments examined all restrict political rights to nationals, the ambit of article 16 of the ECHR is clearly broader.[118] This provision may not be

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116 *Protocol No. 4 to the European Convention on Human Rights*, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, September 16, 1963, Council of Europe, *European Treaty Series* No. 46; entry into force: May 2, 1968; ratified by 17 states as of March 18, 1992. Article 4 reads simply: "Collective expulsion of aliens is prohibited".

117 Article 5(1)(f) reads:

> 1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with procedure prescribed by law:
> .....
> f. the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

118 Baroness Elles argues, *supra*, note 10 at 38, para. 280, that these restrictions may be justified on the principle that aliens remain under the jurisdiction of their state of nationality and that interference by aliens in

used to prevent non-citizens from joining trade unions to protect their employment interests nor, for example, from forming their own cultural associations, so long as there is no implicit political activity in these actions. In addition to article 16, many of the rights in the ECHR are subject to limitations, which are separately written into the provisions in question.

In chapters six to eight of the European case study, a more thorough examination is undertaken of the applicability of the provisions of the ECHR and its Protocols to the protection of the rights of migrant workers and their families. These chapters examine other relevant Council of Europe instruments, such as the *European Social Charter* (ESC), which in article 19 devotes a lengthy provision to the protection of migrants' rights, and the *European Convention on the Legal Status of Migrant Workers* (EMW). Chapters six to eight also evaluate the freedom of movement provisions of the European Community regime and their relevance to the protection of the economic, social, cultural, political and residence rights of migrant workers and their families.

4.6 American Convention on Human Rights (ACHR)[119]

The Preamble to the ACHR contains a "unique proclamation"[120] in the second paragraph:

> Recognizing that the essential rights of man are not derived from one's being a national of a certain State but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a Convention reinforcing or complementing the protection provided by the domestic law of the American States.

This principal is also found in paragraph 2 of the Preamble to the *American Declaration of the*

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the internal affairs of a country is incompatible with the sovereignty of states.

119 *American Convention on Human Rights*, November 22, 1969, *OAS Treaty Series* No. 36; entry into force: July 18, 1978; ratified by 23 states as of January 1, 1992.

120 McDougal, Lasswell & Chen, *supra*, note 2 at 463.

Rights and Duties of Man.,[121] the forerunner of the ACHR.

The grounds of prohibited discrimination in article 1(1) of the ACHR appear to be exhaustive, thereby precluding the prescription of additional grounds based on nationality.[122] The very next clause, however, tempers this restrictive interpretation somewhat by returning to the universal spirit of the above-cited paragraph of the Preamble: "For the purposes of this Convention, "person" means *every* human being".[123] Another innovative provision is article 22(8) which effectively recognizes the right of asylum by explicitly affording aliens protection against deportation to countries where their rights to life and personal liberty are in danger of violation because of "race, nationality, religion, social status or political opinions".

Apart from these innovations, the position of aliens under the ACHR is similar to that under other international human rights instruments: freedom of movement is restricted to those persons "lawfully in the territory of a State party"; a legal alien may only be expelled "pursuant to a decision reached in accordance with law"; and "the collective expulsion of aliens is prohibited".[124] Article 23(1) of the ACHR expressly reserves political rights for citizens with the addendum in article 23(2) that these rights may be regulated by law exclusively on the basis of, *inter alia*, "nationality". Article 30 of the American Declaration accords to "every person" the right to vote and to participate in "the government of his country". It is clear, however, that in this context "person" means "citizen" because the Declaration, in its second chapter concerning duties, proclaims that:

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121 *American Declaration of the Rights and Duties of Man*, OAS Res. XXX, adopted by the 9th International Conference of American States, Bogotá, 1948.

122 Article 1(1) reads:

> The States Parties to this Convention undertake to respect the rights and freedoms recognized therein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

123 Article 1(2). Emphasis added.

124 Articles 22(1), 22(6) and 22(9) respectively.

> It is the duty of every person to refrain from taking part in political activities that, according to law, are reserved exclusively to the citizens of the state in which he is an alien.

Special note should also be taken of article 32 of the ACHR under the heading "Chapter V - Personal Responsibilities". Article 32(1) is similar to article 29(1) of the UDHR in that it recognizes that "every person has responsibilities to his family, his community and mankind". Article 32(2) contains a general limitation clause, similar in ambiguity to article 4 of the ICESCR: "The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society". This provision repeats, almost word for word, article 28 of the earlier American Declaration.

The discussion on the applicability of the ACHR to non-citizens would be incomplete without a reference to the recent Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights, which has not yet come into force.[125] The Additional Protocol reiterates in the third paragraph of its Preamble the proclamation in the Preamble to the ACHR that essential human rights are not derived from citizenship ties to a particular state, "but are based upon attributes of the human person". Although article 1 of the Additional Protocol asserts, like article 2(1) of the ICESCR, that the economic, social and cultural rights recognized therein are to be achieved progressively, these rights in the Protocol are assigned to "everyone" without any exceptions based on nationality.[126] As with article 32(2) of the ACHR, the Additional Protocol also contains a general limitations clause in article 4, which empowers states parties to restrict the rights enumerated in the Protocol "by means of laws promulgated for the purpose of preserving the general welfare in a democratic society", but

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125 *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, November 17, 1988, *OAS Treaty Series* No. 69; not in force; ratified by one state as of January 1, 1992. The Protocol requires eleven ratifications in order to come into force (article 21(3)).

126 The following economic, social and cultural rights (and groups) are protected in the Additional Protocol to the ACHR: right to work (article 6), right to just, equitable and satisfactory conditions of work (article 7), trade union rights (article 8), right to social security (article 9), right to health (article 10), right to a healthy environment (article 11), right to food (article 12), right to education (article 13), right to benefits of culture (article 14), right to formation and the protection of families (article 15), rights of children (article 16), protection of the elderly (article 17), and protection of the handicapped (article 18).

subject to the proviso that these laws "are not incompatible with the purpose and reason underlying those rights".

4.7 African Charter on Human and Peoples' Rights (ACHPR)[127]

The ACHPR is a unique document because it emphasizes the rights of peoples and individual duties in addition to the protection of individual rights. Nonetheless, the ACHPR's provisions relating to non-nationals are unexceptional and similar to many of the provisions already considered in other international human rights instruments: the general non-discrimination clause is illustrative;[128] freedom of movement is restricted to "law-abiding" individuals; a legally admitted non-national may only be expelled from a state party's territory by virtue of a decision taken in accordance with the law; and the mass expulsion of aliens, defined as that aimed at "national, racial, ethnic or religious groups", is prohibited.[129] Given however the many instances of mass expulsions of aliens in Africa's recent history, as documented in the introductory chapter, the existence of this clause is of great importance in preventing future reoccurrences.

Individual duties are extensively outlined in Chapter II of the ACHPR (articles 27 to 29) and include, *inter alia*, the duty of the individual "not to compromise the security of the State whose national or resident he is" (article 29(3)). If the term "security" is to be interpreted broadly, activities of aliens that have political connotations may be restricted or prohibited. Although no explicit general limitation clause exists, as in the ACHR, article 27(2) asserts that individual rights and freedoms are to be exercised "with due regard to the rights of others,

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127 *African Charter on Human and Peoples' Rights*, June 26, 1981, OAU Doc. CAB/LEGI/67/3/Rev. 5; entry into force October 21, 1986; ratified by 42 states as of January 1, 1992.

128 Article 2 of the ACHPR reads:

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.

129 Articles 12(1), (4) and (5) respectively.

collective security, morality and common interest".

5. The Protection of the Family

This thesis is concerned with the protection of the rights of migrant workers and *their families*. Widespread protection is given to families in the universal and regional human rights instruments examined above. Indeed, the family is sacrosanct. Article 16 of the UDHR declares: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State". This clause is repeated, word for word, in article 23 of the ICCPR and article 17 of the ACHR. The wording in the ICESCR and the Additional Protocol to the ACHR is even more forceful. Article 10(1) of the ICESCR maintains that "the *widest possible* protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children".[130] Article 15(1) of the Additional Protocol to the ACHR stipulates that "the family is the natural and fundamental element of society and ought to be protected by the State, which should see to the improvement of its spiritual and material conditions". The family also occupies a special place in African society and this is brought out in the first two paragraphs of article 18 of the ACHPR:

> (1) The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.
>
> (2) The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.

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130 Emphasis added. See also the Preamble of the UN *Convention on the Rights of the Child*:

> *Convinced* that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community...

Convention on the Rights of the Child, November 20, 1989, UN General Assembly Res. 44/25; entry into force September 2, 1990; ratified by 107 states as of January 1, 1992.

The protection of the family in European human rights instruments is more the object of the ESC, which imposes positive obligations upon states parties towards families,[131] than of the ECHR. Article 8(1) of the ECHR does, however, guarantee the right of everyone "to respect for his private and family life, his home and correspondence".

These clauses protecting the family and family life must be borne in mind when considering the problems of the families of migrant workers outlined later in the thesis. One problem, which merits particular discussion, is that of family reunification. Given the extensive protection afforded families by the aforementioned provisions, measures to facilitate the reunion of families with migrant workers would appear to be a natural attribute of this protection. This is, however, one of the areas where rights clash with the principle of state sovereignty, with the result that these noble phrases concerning the protection of families have effectively become little more than declaratory statements.

6. Supervision and Enforcement

All the universal and regional human rights instruments examined in this chapter, with the exception of the UDHR and the *American Declaration of the Rights and Duties of Man*, provide for mechanisms to implement the rights specified in them.

The ICCPR, the ICESCR and the ICERD oblige states parties to submit periodic reports to special bodies set up under each treaty on the measures which they have adopted to give effect to the provisions of the instrument in question.[132] In addition, both the ICCPR and

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131 Article 16 of the ESC, entitled "The right of the family to social, legal and economic protection", reads:

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

132 Article 40 of the ICCPR (Human Rights Committee), article 16 of the ICESCR (Committee on

the ICERD allow for the right of individual petition. A state party which has ratified the Optional Protocol to the ICCPR[133] or which has made a declaration under article 14 of the ICERD[134] recognizes the competence of the Human Rights Committee and the Committee on the Elimination of Racial Discrimination "to receive and consider communications from *individuals [or groups of individuals] subject to [within] its jurisdiction*" who claim a violation by that state party of their rights.[135] Both citizens and aliens, therefore, may lodge a complaint against that state party provided that the relevant admissibility criteria are complied with, including, in particular, the exhaustion by the petitioner of all available domestic remedies.

Individual communications are also permitted by the ECHR, the ACHR and the ACHPR. Under article 25 of the ECHR, the European Commission of Human Rights may receive petitions "from any person, non-governmental organization or group of individuals" claiming a violation of their rights by a state party. As with the right of individual complaint under the ICCPR and the ICERD, only complaints against states parties which have made declarations under article 25 of the ECHR are valid.[136] Article 44 of the ACHR provides that petitions may be lodged with the Inter-American Commission on Human Rights by "any person or group of persons, or any non-governmental entity legally recognized in one or more member States of the Organization [of American States]". The right of individual petition

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Economic, Social and Cultural Rights) and article 9 of the ICERD (Committee on the Elimination of Racial Discrimination) Although article 16 of the ICESCR stipulates that reports are to be submitted to the UN Secretary-General for transmission to the Economic and Social Council, there is now a Committee on Economic, Social and Cultural Rights which was set up by the Council to oversee the implementation of the ICESCR in the same way as the Human Rights Committee monitors the implementation of the ICCPR. The Committee on Economic, Social and Cultural Rights began its work only recently. See also Note (Recent Meetings), "Committee on Economic, Social and Cultural Rights - 3rd Session" (May 1989) Human Rights Monitor 27.

133 *Optional Protocol to the International Covenant on Civil and Political Rights*, December 16, 1976, 999 U.N.T.S. 171; entry into force March 23, 1976; ratified by 60 States as of January 1, 1992.

134 Declaration regarding article 14 of the *International Convention on the Elimination of All Forms of Racial Discrimination* (competence of the Committee on the Elimination of Racial Discrimination to receive communications from individuals); entry into force December 3, 1982; 15 declarations as of January 1, 1992.

135 See article 1 of the Optional Protocol to the ICCPR and article 14 of the ICERD respectively. Emphasis added. The wording in parenthesis refers to the additional and slightly different terminology found in article 14 of the ICERD.

136 Declaration regarding article 25 of the *European Convention on Human Rights* (right of individual petition); entry into force July 5, 1955; 24 declarations as of March 18, 1992. All the states parties to the ECHR have therefore recognized the right of individual petition.

under the ACHR is automatic and does not depend on any separate state declarations. The implementation of the ECHR and its applicability to aliens and migrant workers is considered in more detail in chapters six to eight.

The ACHPR makes provision under article 55 for communications "other than those of States parties to the present Charter" to be considered by the African Commission on Human and Peoples' Rights. This procedure, however, is more limited than those described above, since the Commission is only obliged to take the matter further if one or more communications "apparently relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights" (article 58(1)).[137]

7. The UN Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live

7.1 Background - UN Action

Moves in the UN to establish international principles for the protection of aliens began earnestly in 1972 after the mass expulsion of Asian nationals from Uganda.[138] Although the UN Commission for Human Rights acknowledged that legal doctrine and judicial practice accorded to states the right to expel aliens, this right was not discretionary and contained defined limits.[139]

In 1973, acting on a draft resolution of the UN Commission for Human Rights, the UN Economic and Social Council, in Resolution 1790 (LIX), requested the Sub-Commission on the Prevention of Discrimination and Protection of Minorities to consider, as a matter of

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137 In the event of such violations, the Commission is obliged to draw the attention of the Assembly of Heads of State and Government of the Organization of African Unity (OAU). This Assembly may then instruct the Commission to undertake an in-depth study of these cases and to prepare a factual report, accompanied by its finding and recommendations (article 58(2)).

138 Lillich, *supra*, note 2 at 51.

139 UN Centre for Human Rights, *United Nations Action in the Field of Human Rights* (New York: UN, 1988) at 249 [hereinafter *UN Action in the Field of Human Rights*].

priority, the application of international human rights provisions for the protection of non-citizens. In 1974, by Resolution 10 (XXVII), the Sub-Commission appointed one of its members, Baroness Elles, as special rapporteur, to prepare a report to supplement the survey on the subject by the UN Secretary-General. Baroness Elles submitted her report in 1976 together with a draft declaration (E/CN.4/Sub.2/392 and Corr.1). This report was considered the following year by the Sub-Commission at its 30th Session. The Sub-Commission requested the Secretary-General, in Resolution 4 (XXX), to submit the draft declaration to governments for their comments and invited the special rapporteur to take into account their replies so that she could present a new draft declaration to the Sub-Commission at its next session. At its 31st Session in 1978, the Sub-Commission, in Resolution 9 (XXXI), sent Baroness Elles's revised study and declaration (E/CN.4/1336) to the Commission for Human Rights.[140] In 1980, the Economic and Social Council, acting on a resolution of the Commission for Human Rights, recommended to the General Assembly that it consider the adoption of a draft declaration on the rights of non-citizens.[141] At its 30th Session, the General Assembly set up an open working group entrusted with the elaboration of a final version of the draft declaration. The Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live was adopted and proclaimed by UN General Assembly Resolution 40/144 on December 13, 1985.[142]

7.2 The Contents of the UN Declaration[143]

The UN Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live commences by reiterating in the Preamble the non-discrimination provisions of the UN Charter, the UDHR, the ICCPR and the ICESCR, and by recognizing,

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140 *Ibid.*

141 Lillich, *supra*, note 2 at 56.

142 *UN Action in the Field of Human Rights*, *supra*, note 139 at 249-250.

143 See Appendix A for the full text of the Declaration.

in paragraph 7 of the Preamble, that "the protection of human rights and fundamental freedoms provided for in international instruments should also be ensured for individuals who are not nationals of the country in which they live".

By and large, the Declaration applies to both legal and illegal aliens, which was not the original intention of the draft declaration submitted by Baroness Elles.[144] Indeed, the application of the Declaration to undocumented aliens was only agreed upon after a number of years of divisive debate.[145] Extensive qualifications upon its application to illegal immigrants, however, were placed in the text. Article 2(1) emphasizes that the Declaration does not condone illegal immigration nor that it operates to restrict the right of states to regulate the entry and stay of aliens unless these laws are contrary to their international legal obligations.[146] Moreover, although many essential civil and political rights[147] are guaranteed in the Declaration to *all* aliens (article 5(1)), the enjoyment of economic and social rights is restricted to aliens "lawfully residing in the territory of a State" (article 8(1)).

In many respects, the Declaration's provisions are similar in content to those in other

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144 Article 1 of the Declaration reads:

> For the purposes of this Declaration, the term "alien" shall apply, with due regard to qualifications made in subsequent articles, to any individual who is not a national of the State in which he or she is present.

Article 1 of the draft Declaration, *Elles Report*, *supra*, note 9 at 53, read:

> For the purposes of this Declaration, the term "non-citizen" shall apply to any individual who *lawfully* resides in a State of which he is not a national (emphasis added).

145 L.S. Bosniak, "Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention" (1991) 25 IMR 737; G.S. Goodwin-Gill, "International Law and Human Rights: Trends Concerning International Migrants and Refugees" (1989) 23 IMR 536 at 539. For example, Mexico supported the "simple presence" of aliens as a sufficient criterion for the application of the Declaration, whereas Canada and the United States wanted to retain the lawful residence requirement. Goodwin-Gill, *ibid.* at 540.

146 Article 2 reads:

> Nothing in this Declaration shall be interpreted as legitimizing the illegal entry into and presence in a State of any alien, nor shall any provision be interpreted as restricting the right of any State to promulgate laws and regulations concerning the entry of aliens and the terms and conditions of their stay or to establish differences between nationals and aliens. However, such laws and regulations shall not be incompatible with the international legal obligations of that State, including those in the field of human rights.

147 There is no mention in the Declaration of "political rights" in the strict sense, namely the right to participate in public affairs, including the right to vote, and the right to employment in the public service.

international human rights instruments. For example, article 5(3) grants legal aliens "the right to liberty of movement and freedom to choose their residence within the borders of the State", and article 7 of the Declaration affords them procedural safeguards against expulsion. The individual or collective expulsion of legal aliens on grounds of "race, colour, religion, culture, descent or national or ethnic origin" is also prohibited under article 7.

With regard to the protection of the economic and social rights of legal aliens, article 8(1)(a) guarantees to them just and favourable conditions of work, but *not* the right to work.[148] Under article 8(1)(b), aliens in a regular situation are also entitled to join trade unions and other organizations and associations and to participate in their activities,[149] but there is no right to form trade unions.[150] Finally, under article 8(1)(c), lawful aliens are granted the right to health protection, medical care, social security, social services, education, and rest and leisure. In order to benefit from this right, however, aliens must "fulfil the requirements under the relevant regulations for participation". Consequently, any state may limit the enjoyment of these rights by setting stringent qualifying conditions. In the case of social security, for example, many countries require a certain duration of residence and participation in public funds before social security legislation becomes applicable to non-nationals. Alien migrant workers find it hard to meet these conditions and, therefore, are at a disadvantage as compared with national workers.[151] A further restriction on the right in article 8(1)(c) is that "undue strain is not placed on the resources of the State". A state may, therefore, plead poverty in order to avoid its obligations under article 8(1)(c) towards aliens. Although this qualification rings similar to article 2(3) of the ICESCR, its scope is potentially broader, because it covers not only economic rights, but also certain social rights.

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148 See also Lillich, *supra*, note 2 at 53, writing on a similar provision in the Elles draft declaration.

149 This right, however, is subject to legal limitations necessary in a democratic society "in the interests of national security or public order or for the protection of the rights and freedoms of others".

150 Nor may such a right be inferred from any other provision in the Declaration. Notably, there is no clause guaranteeing the right to freedom of association, but only the right to peaceful assembly (article 5(2)(c)).

151 *Warzazi Final Report, supra*, Introduction, note 147, citing from the *Report of the ILO Symposium on Equality of Opportunity and Treatment in Employment in the European Region*, at para. 32, ILO Doc. CECTE 1975/R (Geneva, April 19-21, 1975). Qualifying conditions based on participation, if too stringent however, risk infringing the norm of non-discrimination with regard to aliens.

Furthermore, it is applicable to all states and not merely to developing countries.

With regard to cultural rights, article 5(1)(f) confers upon aliens the right "to retain their own language, culture and tradition". Lillich suggests that this clause may grant aliens "the legal right to resist integration into the life of the host country".[152] A more positive justification for this provision, however, is that the right of aliens to retain their own language, culture and tradition is an essential element of integration itself. Forced assimilation, incompatible with genuine integration, is an affront to human dignity and a negation of cultural diversity.[153]

The right to family reunification is recognized in article 5(4) of the Declaration, which imposes the duty upon the state to admit the spouse and minor or dependent children in order to accompany, join and stay with the alien residing lawfully in its territory. The state, however, retains considerable discretion, if not complete discretion, as to whom to admit and under what conditions, because the obligation is subject to "national legislation and due authorization".[154]

The Declaration is not a legally binding document in contrast to the universal and regional human rights treaties and arguably the UDHR, which, although a declaration itself, is widely considered as part of international customary law. Although it contains a number of novel provisions,[155] there is nothing to suggest that the Declaration will revolutionize the

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152 Lillich, *supra*, note 2 at 55. Lillich observes in this regard, however, that the Declaration, in article 4, also imposes the duty upon aliens to "respect the customs and traditions" of the people of the state in which they reside. *Ibid.*

153 The participants at the 1975 UN Seminar on the *Human Rights of Migrant Workers* stressed that the fundamental aims of policy in the area of cultural rights should be "to preserve at all costs the migrant worker's own cultural identity" and that "assimilation should never be attempted". *Report of the Seminar on the Human Rights of Migrant Workers*, *supra*, Introduction, note 135 at 16, para. 58.

154 The need to defer to state sovereignty was underlined during the drafting of the declaration by the U.S. representative, who noted that the textual references to domestic law did not necessarily impose an obligation to legislate and that the right of family reunion existed, but was subject to the right of sovereign states to enact laws on entry and immigration. Goodwin-Gill, *supra*, note 145 at 541.

155 Two novel provisions include the right of *any* alien to communicate with the consulate or diplomatic mission of his or her home state (article 10) and a clause particularly applicable to migrant workers, namely article 5(1)(g), which accords to all aliens "the right to transfer abroad earnings, savings or other personal monetary assets, subject to domestic currency regulations". The end phrase of this latter provision, maintains Lillich, commenting on similar wording in the draft Declaration, "has a ring of tautology about it... [and] is tantamount to saying that States must allow the repatriation of earnings provided that their laws allow it". *Supra*, note 2 at 54.

treatment of aliens in many parts of the world. On the contrary, it constitutes a step backwards in respect of the protection of a number of rights accorded to *all* human beings by previous instruments, in particular economic and social rights.

8. Conclusion

Migrant workers as aliens may be considered to be in a vulnerable position as far as the international protection of their economic, social, cultural, political and residence rights is concerned. Universal and regional human rights instruments are full of promise in terms of the protection of these rights, but on closer examination, deliver substantially less.

Although international human rights norms possess an "all-embracing" approach with the objective of protecting *all* human beings, expectations that they would greatly raise the protection of aliens above that afforded by the vague and rudimentary minimum standard of traditional international law have not been fulfilled. Nowhere is "nationality" an expressly prohibited ground of discrimination, even though many of the human rights instruments analyzed contain open-ended non-discrimination clauses. Considerable discretion is provided to states to impose restrictions on the economic and social rights of non-citizens. Their rights to freedom of assembly and association, including the right to form and join trade unions, may also be limited on a number of grounds, especially in the European context if these activities are perceived as "political" by host countries. Aliens are denied political rights regardless of their length of residence in a country. Finally, safeguards against their expulsion are procedural only and may be overridden, even if aliens are lawfully present in a country. For undocumented aliens, there is no protection against expulsion.

Although the UN Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live introduces new concepts with respect to the protection of the human rights of aliens, it is a non-binding document and hardly comprehensive in its coverage. Indeed, it even retrogresses from some of the human rights

protections in the universal and regional instruments. The examination of these instruments has revealed that new conventions tailored to the needs of aliens and migrant workers were clearly required. Such specific conventions have been adopted under the auspices of the ILO, the UN and the Council of Europe, and are examined in the thesis. Nonetheless, the universal and regional international human rights instruments, despite their shortcomings, remain a valuable tool for the protection of the rights of aliens and especially migrant workers, largely because of the familiarity that they exude and their wide ratification by states from all the regions of the globe.

CHAPTER TWO

CITIZENSHIP AND RIGHTS: THE PROTECTION OF MIGRANT WORKERS AND THEIR FAMILIES IN LIBERAL DEMOCRATIC SOCIETIES: INDIVIDUALIST AND COMMUNITARIAN PERSPECTIVES

1. Introduction

It is crucial that the workers who are admitted should be "guests", not immigrants seeking a new home and a new citizenship. For if the workers came as future citizens, they would join the domestic labour force, temporarily occupying its lower ranks, but benefiting from its unions and welfare programs and in time reproducing the original dilemma. Moreover, as they advanced, they would come into direct competition with local workers, some of whom they would outdo. Hence the regulations that govern their admission are designed to bar them from the protection of citizenship. They are bought in for a fixed time period, on contract to a particular employer; if they lose their jobs, they have to leave; they have to leave in any case when their visas expire. They are prevented or discouraged from bringing dependents along with them, and they are housed in barracks, segregated by sex, on the outskirts of the cities where they work. Mostly they are young men or women in their twenties or thirties; finished with education, not yet infirm, they are a minor drain on local welfare services (unemployment insurance is not available to them since they are not permitted to be unemployed in the countries to which they have come). Neither citizens nor potential citizens, they have no political rights. The civil liberties of speech, assembly, association -- otherwise strongly defended -- are commonly denied to them, sometimes explicitly by state officials, sometimes implicitly by the threat of dismissal and deportation.

Gradually, as it becomes clear that foreign workers are a long-term requirement of the local economy, these conditions are somewhat mitigated. For certain jobs, workers are given longer visas, allowed to bring in their families, and admitted to many of the benefits of the welfare state. But their position remains precarious. Residence is tied to employment, and the authorities make it a rule that any guest worker who cannot support himself and his family without repeated recourse to state welfare programs can be deported....

Their existence is harsh and their wages low by European standards, less so by their own standards. What is most difficult is their homelessness: they work long and hard in a foreign country where they are not encouraged to settle down, where they are always strangers. For those workers who come alone, life in the great European cities is like a self-imposed prison term. They are deprived of normal, social, sexual and cultural activities (of political activity, too, if that is possible in their home country). During that time they live narrowly, saving money and sending it home. Money is the only return that the host countries make to their guests; and though much of it is exported rather than spent locally, the workers are still very cheaply had. The costs of raising and educating them where they work, and of paying them what the domestic market requires, would be much higher than the amounts remitted to their own countries. So the relation of guests and hosts seems to be a bargain all around:

> for the harshness of the working days and years is temporary, and the money send home counts there in a way it could never count in a European city.[1]

This eloquent account of the predicament of migrant workers and their families working and residing in a Western European liberal democratic society is drawn by Michael Walzer. It reflects mainly the legal situation existing in Western Europe in the early 1970s, although it is by no means a comprehensive sketch. Other relevant concerns are the education of the children of migrants, including instruction in their mother tongue and culture, and the situation of migrant women, who require special provision to cover their needs, regardless of whether they come as workers or in the company of their spouses.[2]

The objective of this chapter is to construct a theoretical framework to justify according more extensive economic, social, cultural, political and residence rights to migrant workers and their families living and working in countries of employment, to the extent of affording them the right to stay in certain circumstances. Countries of employment for the purposes of this chapter are liberal democracies, defined by Walzer as those countries which possesses a "capitalist democracy and welfare state, with strong trade unions and a fairly affluent population".[3] So-called liberal democracies comprise most of the developed world and are the destination for most migrant workers from the developing world. The countries of focus in this chapter, therefore, are found in the Northern hemisphere and particularly in Western Europe and North America.[4]

The principal and most frequent distinction made between the states of North America and Western Europe with respect to immigration is that the former are countries of permanent

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1 Walzer, *supra*, Introduction, note 154 at 56-58.

2 For example, the provision of daycare, job and language training, vocational guidance and orientation programs. Cf. E.M. Chaney, "Migrant Workers and National Boundaries: The Basis for Rights and Protections" in P. Brown & H. Shue, eds, *Boundaries: National Autonomy and its Limits* (Totwa, N.J.: Rowan & Littlefield, 1983) 37 at 66.

3 Walzer, *supra*, note 1 at 56. The countries which Walzer is thinking of specifically are Switzerland, Sweden and Germany. *Ibid.*

4 It is fair to say, however, that although the United States may also be categorized as a "liberal democracy", as a welfare state" it is far from maturity. B.S. Heisler & M.O. Heisler, "Transnational Migration and the Modern Democratic State: Familiar Problems in New Form or a New Problem? (1986) 485 The Annals of the American Academy of Political Science and Social Sciences 12 at 19 (footnote 8).

settlement, whereas the latter do not perceive themselves as "countries of immigration". Indeed, the "guestworker" phenomenon in Western Europe, as portrayed by Walzer above, was based on the assumption that these workers would eventually return home. Although it is necessary to keep this distinction in mind throughout the chapter, two similarities between these regions must also be emphasized. First, the problem of diverse immigration into liberal democratic states, whether permanent or temporary raises similar theoretical arguments. As outlined in the introductory chapter, this thesis is concerned with all migrant workers and their families who have not acquired the citizenship of the host country. It is true that immigrants accepted for permanent settlement in North America find it easier to acquire citizenship and therefore formal membership of the polity than permanent residents of some European countries, where citizenship status, as indicated in Part III of this thesis, is exceedingly difficult to obtain. Second, illegal migration for employment, as portrayed in the introductory chapter, is a widespread phenomenon in both North America and Western Europe. Indeed, most of the American literature examined in this chapter wrestles with the difficult issue of undocumented migration from a theoretical standpoint and therefore is also relevant to the European context.

The normative human rights approach in this chapter focuses on two broad prevailing schools of thought within liberal ideology, both ultimately aimed at the protection of the individual. One school emphasizes that freedom belongs to the individual *per se*, whereas the other sees freedom as belonging to the community, society, or the nation-state through which the individual is enhanced. The chapter also examines the problems posed for this theoretical human rights framework by the existence of illegal migrants. Familiar explanations by governments from the position of state sovereignty for limiting the rights of migrants residing and working legally in the country and for restricting immigration, including the prevention of irregular migration, are also analyzed. Finally, the chapter proposes a definition of the national community, based on the fact of increasing interdependence among states, which justifies according more extensive rights to migrant workers and their families.

2. Liberalism

Liberalism essentially comprises two conflicting schools of thought. Both are concerned with individual freedom. The first school emphasizes freedom of individuals from the constraints of the state, which is only to be given minimal powers to protect their most basic civil and political rights. The second school embraces a broader concept of freedom, with the aim of conferring upon the state sufficient authority and control to "liberate" individuals from economic and social disadvantage.[5] This division within liberalism is recognizable in England, France and Germany, although the foundations for these opposing schools of thought in the above countries are not necessarily the same. Generally-speaking, the notion of liberalism in the United States is today associated with the second school of thought.[6] Historically, the United States, as evidenced by its Constitution based on Lockean principles (see below), has much closer ties with the first school of thought, which is not necessarily identified with "liberalism" as it is in Europe. For the purpose of this chapter, the first stream of thought is labelled "the individualist model" and the second is understood as "the communitarian model".

2.1 The Individualist Model

The individualist model is derived from classical liberal thought as espoused by Thomas Hobbes and John Locke. Both theorists emphasize that, in a state of nature, persons are "free, equal and independent" and only create governments by social compacts for their own mutual protection.[7] According to Locke, the aim of this social contract is to preserve the

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5 Cf. *The Encyclopedia of Philosophy*, vol. 6, ed. by P. Edwards (New York: Macmillan and the Free Press, 1967) at 458-460.

6 *Ibid.* at 459-460.

7 J. Locke, *Second Treatise of Government*, ed. by C.B. Macpherson (Indianapolis: Hackett, 1980) at para. 95. See also R.M. Smith, "The "American Creed" and American Identity: The Limits of Citizenship in the United States" (1988) 41 Western Political Quarterly 225 at 229.

lives, freedom and property of all.[8] The only limit on the enjoyment of the rights of individuals is that there should be no interference with the enjoyment of these rights by others. Individual pursuits of the good life or happiness must be given priority over state or public pursuits.

The individualist model, therefore, only provides a minimal role for the state. Its contemporary version is libertarianism, which has an extremely narrow conception of individual rights. According to one libertarian model of individual rights, individuals have inherent worth because of their distinctness which is defined in terms of natural talents and abilities. Any inequalities arising out of the natural assets of "distinct" individuals are therefore in order and market redistribution to compensate for this unequal state of affairs is considered unjust.[9]

The harshness of classical liberal thought has been tempered somewhat by egalitarian liberals, who support, *inter alia*, state redistribution to alleviate the situation of disadvantaged individuals in society. Recent advocates of this approach have been John Rawls and Ronald Dworkin. The equality of the moral worth of *each* individual is at the heart of their discourse. Rawls constructs a hypothetical framework in which "equal" individuals deliberate to reach two principles of justice (the original position). These principles advance the maximization of equal liberties for all with the aim of creating the best conditions for each individual to pursue his or her conception of the good life, but also take care to ensure that the quest for the good life does not worsen the situation of the disadvantaged in society (the difference principle). Creation of inequalities is only permitted to the extent that benefits accrue to those at the bottom of the social ladder.[10] Rawls concedes that these principles of justice may be reached intuitively,

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8 Locke, *ibid.*; *The Encyclopedia of Philosophy*, vol. 4, ed. by P. Edwards (New York: Macmillan and the Free Press, 1967) at 499.

9 The arguments of Robert Nozick as interpreted by N. Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights* (Manchester: Manchester University Press, 1986) at 56-58. For a full account of Nozick's libertarian theory see R. Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974).

10 J. Rawls, *A Theory of Justice* (Cambridge, Massachussets: Harvard University Press, 1971) at 302.

without the hypothetical framework.[11] Dworkin translates this intuition into the abstract right of all individuals to equal concern and respect, or the right of all persons to treatment as equals.[12] The liberal must adapt the institutions of the market economy and representative democracy in order to accommodate this basic right. A scheme of redistribution is necessary to counter the inegalitarian distribution of talents, original wealth, opportunities and disabilities and the effects of past discrimination. The adoption of a scheme of civil rights, such as a Charter or Bill of Rights, enables individuals and minorities to "trump" majority decisions which are based on *external* preferences, defined as preferences directed at what others should do or have as opposed to *personal* preferences which are directed at what persons want to do or have themselves and which threaten to violate individual and group dignity.[13]

The notion of the equal moral worth of each individual might be considered as too abstract to confer specific rights on aliens or migrant workers and their families.[14] Abstract or not, this notion is very powerful indeed and offers a very strong thesis for migrants' rights. As indicated by the arguments of communitarian thinkers considered in the next section, the individualist model, however, tempered or otherwise, reflects an impoverished understanding of the individual and what his or her social, psychological and political nature requires.[15] Its preoccupation with individualistic ideals is threatening to a sense of community to the extent of diluting the social glue that keeps communities intact.[16] The model fails to meet the needs for a strong, realistic, and satisfying sense of political community and common identity.[17]

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11 *Ibid.* at 21-22.

12 R. Dworkin, *Taking Rights Seriously* (Cambridge, Massachussets: Harvard University Press, 1977) at 181 and R. Dworkin, *A Matter of Principle* (Cambridge, Massachussets: Harvard University Press, 1985) at 190.

13 *A Matter of Principle, ibid.* at 196-198.

14 Cf. Note, "Immigration Policy and the Rights of Aliens" (1983) 96 Harv. L. Rev. 1286 at 1290.

15 Schuck, *supra*, Introduction, note 157 at 290. See *infra*, notes 20-23 and accompanying text.

16 F. Schauer, "Community, Citizenship and the Search for National Identity" (1986) 84 Mich. L. Rev. 1504 at 1506.

17 Smith, *supra*, note 7 at 225-226.

2.2 The Communitarian Model

The allocation of greater power and authority to the state to facilitate the economic and social "liberation" of the individual constitutes, as mentioned earlier, a school of thought found within English, French and German liberalism, which has been labelled as the "communitarian model" for the purposes of this chapter. The origins of this school are different, however, in each country. In England, this broader concept of individual freedom was advanced by late nineteenth century liberal thinkers, such as T.H. Green and Matthew Arnold, with the aim of enlarging the state's power and control in order "to liberate the poor from the oppressive burdens of poverty". In France, it has its roots in Rousseau's concept of liberty, which argues that "as long as the state belongs to the people, the enlargement of the power of the state is equally an enlargement of the power, and therefore the freedom, of its citizens". In Germany, this stream of liberal thought originated in the nineteenth century in the context of the creation of the modern German nation-state.[18]

The communitarian model urges social redistribution within the state in order to enhance individual welfare, and therefore freedom.[19] Although it does not appear to diverge significantly from the refined individualist position as interpreted by Rawls and Dworkin, the communitarian model offers a radically different conception of the individual. According to modern communitarian thinkers, an understanding that "our sense of individual personality and identity is derivative from a social context"[20] is more relevant to "the reality of human

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18 *The Encyclopedia of Philosophy*, vol. 4, *supra*, note 8 at 458-460.

19 A more radical model of social redistribution may be derived from utilitarian thought. Although founded on respect for individuals, the aim of basic utilitarianism is to maximize happiness, which, when translated into the modern language of nation-states, means the maximization of state welfare. This process counts all individual interests at full value, but the end result of this process, if it enhances the welfare of the whole, may be incompatible with those interests to the extent of violating the equal moral worth of individuals. Simmonds, *supra*, note 9 at 26-30 and at 39. A refined version of utilitarian thought, preference utilitarianism, adopts a neutral approach to the good life, in line with the Rawlsian/Dworkinian model outlined earlier. However, this version fails to distinguish between personal and external preferences. Consequently, argues Dworkin, the legislation of certain objectionable preferences might result in the violation of rights. Cf. *A Matter of Principle*, *supra*, note 12 at 66-68.

20 N. MacCormick, "Nations and Nationalism" in C. MacClean, ed., *The Crown and Thistle: The Nature of Nationhood* (Edinburgh: Scottish Academic Press, 1979) 99 at 102.

experience"[21] than an abstract liberal notion of self. Michael Sandel argues that the individual, detached from family, friends and community, is "a person wholly without character, without moral depth".[22] Instead, he offers a constitutive conception of the individual whose bounds are not fixed in advance, but are defined by the individual's affiliations, attachments and commitments.[23]

In addition to undermining the individualist notion of self, the communitarian critique upsets the very tenets of the Rawlsian and Dworkinian thesis. The Rawlsian model prioritizes "justice" or the "right" before the "good" (assuming that the "good" includes communitarian aims). This order is necessary to ensure a neutral framework within which each individual pursues his or her own conception of the good life or happiness. According to communitarians, however, such a division is impossible because of the inextricable connection between individual identity and community as defined by family, friends or other individual attachments. Consequently, the "good" must, to some extent at least, come before the "right".[24] The communitarian model, therefore, foresees a *collective* expression of the good beneficial to both community and individual.[25]

On the other hand, the right of each individual to equal moral worth is a principle intermeshed into the very understanding of community in liberal democratic societies. Joseph Carens argues that to take the community as a starting-point is to take a community that expresses its moral values in terms of *universal* principles.[26] In other words, just as the

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21 D. Johnston, "Native Rights as Collective Rights: A Question of Group Self-Preservation" (1989) 2 Can. J. L. & Juris. 19 at 20. In this article, Darlene Johnston provides a useful overview of the communitarian critique of the liberal individualist model. *Ibid.* at 19-22.

22 M. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982) at 179. Such a person is labelled by Sandel as the liberal "unencumbered self". M. Sandel, "The Procedural Republic and the Unencumbered Self" (1984) 12 Political Theory 81 at 85-87.

23 *Liberalism and the Limits of Justice*, *ibid.* at 63.

24 *Ibid.* at 173.

25 Johnston, *supra*, note 21 at 21, writes: "The constitutive community holds out the promise that the well-being of the individual and the group may be harmonized. If community is seen as a constituent of individual identity, then enhancing the former need not diminish the latter".

26 J. Carens, "Aliens and Citizens: The Case for Open Borders" (1987) 49 The Review of Politics 251 at 269. In other words, argues Carens, *ibid.* at 268-269, the communitarian approach "that seeks its ground in the tradition and culture of *our* community must confront, as a methodological paradox, the fact that liberalism is a central part of our culture".

individual is inseparable from the community of which he or she forms a part, the community cannot be seen outside of a framework which respects the equal moral worth of persons. No moral argument, writes Carens, will seem acceptable if it directly challenges the assumption of the equal moral worth of all individuals.[27] The potentially *universal* application of individualist liberal ideals means that they may be used to claim basic rights for all human beings, including both citizens and aliens.[28]

Although the communitarian approach offers a strong sense of community, which supports, as argued below, according rights to migrants on the basis of their economic and social participation in the polity, it has been criticized, *inter alia*, for supporting the illiberal concepts of moral education and homogeneity.[29] This criticism envisions a community with propensities towards closure and exclusion, which is unlikely to be responsive to increased pressures of immigration nor to according rights to migrant workers and their families already in the country, especially to those in an irregular situation.

The tension within liberal democracies between the willingness of the individualist model to accept and to grant rights to those ready to embrace basic individualist values and the tendency to exclude inherent in the communitarian position is elaborated towards the end of the chapter in the section on state sovereignty.

3. Citizenship

Chapter one illustrated the extent to which universal and regional international human rights instruments allow for distinctions between citizens and non-citizens. Of particular concern is the considerable discretion allotted to states to restrict the economic and social rights

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27 *Ibid.* at 269-271.

28 Smith, *supra*, note 7 at 229-230. Although under the banner of liberal ideals equal treatment was denied to certain disadvantaged groups in the past, for example, to minorities and women, (and, arguably, this is still the case), liberalism has demonstrated a certain fundamental *inner logic*, which has enabled it to expand both the definition of the public sphere and the requirements of equal treatment. Carens, *ibid.* at 268.

29 H.N. Hirsch, "The Threnody of Liberalism: Constitutional Liberty and the Renewal of Community" (1986) 14 Political Theory 423 at 424.

of aliens and to deny them political rights. These instruments indicate that possession of citizenship status is a requirement for the full enjoyment of many of these rights. The two liberal schools of thought, outlined above, consider the question of individual liberty in the context of the individual's relationship with his or her national community, but most liberal philosophers have ignored the distinctions made by states between citizens and foreigners and the concept of membership in the state.[30] Because of their potential universal application, liberal principles are, for the purpose of this chapter, applied more broadly to all persons generally, regardless of whether they are members of the polity.

Citizenship, in the formal sense, is understood as membership of a state.[31] Membership of the national community, however, must be distinguished from membership of a voluntary association:

> [B]ecause men do not usually become or remain members of a state by choice, and because a state exercises exclusive authority over everyone in a given territory, the concept of membership is hazier than in the case of voluntary associations. The state insists that not only its citizens but also everyone else in its territorial jurisdiction shall conform to its rules. Indeed, the notion of a citizen suggests a certain minimum degree of active participation. This may be restricted, as it was in Athens, to a relatively small number of the resident native population. In that case, would the association include only the citizens? Are the rest outsiders on whom the state imposes its will, much as a trade union might insist that nonunionists shall not work for lower wages than its members? Or are citizens and non-citizens merely two classes of members, one with rights of participation, such as the right to vote, the others with private rights only?[32]

The concept of citizenship, therefore, is difficult to define. Its acquisition by individuals depends less on their actions and more on the role of the state, which considers itself as the

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30 F.G. Whelan, "Principles of U.S. Immigration Policy" (1983) 44 U. Pitt. L. Rev. 447 at 448; D.A. Martin, "Membership and Consent: Abstract or Organic" (1985) 11 Yale J. Int'l L. 278 at 278, citing from R. Dahl, *After the Revolution? Authority in a Good Society* (1970) at 60; P.G. Brown, "Introduction" in Brown & Shue, *supra*, note 2, ix at ix. A contemporary political theorist associated with this omission is John Rawls. Whelan, *ibid.*

31 T. Hammar, *Democracy and the Nation State: Aliens, Denizens and Citizens in a World of International Migration* (Aldershot, England: Avebury, 1990) at 3.

32 *The Encyclopedia of Philosophy*, vol. 8, ed. by P. Edwards (New York: Macmillan and the Free Press, 1967) at 8.

sole entity capable of deciding whether to grant membership, if at all.

Such a formal concept of citizenship has been described as a "bleak and lifeless idea" and as "a matter of fact, something that is self-evidently taken for granted" by members of the state[33] and as "an abstraction, a theory. No matter what safeguards it may be equipped with, it is at best something that was given to some and not to others, and it can be taken away".[34] This hollow and formal understanding of citizenship must be rejected. A number of conceptions of citizenship exist within the individualist and communitarian schools of liberal thought, which discuss the nature of membership in the state and how it might meaningfully be conferred or acquired on the basis of individual action rather than state decree. It is argued below that some of these conceptions are broad enough to encompass aliens as members of the polity.

3.1 Individualist Conceptions

Membership in the minimalist liberal state is based on individual consent. An example of individual consent theory is derived from the approach taken by Locke. In the Lockean state, each individual must personally consent to become a member. This consent might only be refused by the state if there is evidence that the interested party does not respect the rights of others. Therefore, so long as individuals agree to the basic tenets of the minimalist liberal state, there are no grounds for refusing them entry. In the context of international migration for employment, this approach would clearly support a right to immigrate and open borders.[35] A modern version of this approach is the libertarian theory espoused by Robert Nozick, discussed earlier.[36] Nozick's minimalist state would not be able to interfere with individual

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33 H.R. van Gunsteren, "Admission to Citizenship" (1988) 98 Ethics 731 at 733.

34 A.M. Bickel, "Citizenship in the American Constitution" (1973) Arizona L. Rev. 369 at 387. See also A.M. Bickel, *The Morality of Consent* (New Haven: Yale University Press, 1975) c. 2.

35 Carens, *supra*, note 26 at 417.

36 See *supra*, note 9 and accompanying text.

transactions so long as they do not violate the rights of others. In the labour market context, this would mean that employers would be completely free from state restrictions to hire aliens.[37] As mentioned earlier, however, the Nozickean state has a very limited conception of rights and can do little to afford migrant workers protection against economic and social exploitation.

A more restrictive reading of Lockean consent theory asserts that the individual must not only freely choose to join the polity, but also that the polity must concur in this choice.[38] This interpretation has been labelled "mutual consent theory". In addition to encouraging individual personal commitment, development and the affirmation of values through association with others, the mutual consent principle also permits the community to shape its own destiny by refusing new members.[39] In this way, it resembles the republican tradition, considered below.[40] The principle of mutual consent, however, is open to a number of profound criticisms: the consent given may not be entirely free; the principle may lead to unjust exclusion; in a radical form, it may justify unlimited expatriation; it may lead to a "narrow desiccated rationalism" ignoring other sources of obligation such as family and community ties; and there is difficulty in determining who has or has not consented.[41] Since the definition of the community is also left in doubt, mutual consent theory risks identifying the community with those who hold political power, which might, for example, sanction the rule of a minority over a majority, such as the rule of Whites over Blacks in South Africa.[42]

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37 Carens, *supra*, note 26 at 253. It may, however, be argued that for Nozick, citizenship does not mean consent but merely a material exchange.

38 P.H. Schuck & R.M. Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity* (New Haven: Yale University Press, 1985) at 28-31. See also P.H. Schuck, "Membership in the Liberal Polity: The Devaluation of American Citizenship" (1989) 3 Georgetown Immigration L.J. 1 at 9.

39 Schuck & Smith, *ibid.* at 36.

40 Schuck and Smith, *ibid.* at 28, recognize that mutual consent theory is consistent with republican thought, but they prefer to locate it within Lockean discourse. Although Locke omitted to discuss this issue, Schuck and Smith, *ibid.* at 30-31, argue that the logic of Locke's formulation of social contract doctrine leads to the conclusion that consent to membership must be mutual. Joseph Carens disputes this view and maintains that Locke's notion of consent is strictly limited to the individual consent principle outlined above. J.H. Carens, "Who Belongs: Theoretical and Legal Questions About Birthright Citizenship in the United States" (1987) 37 U.T.L.J. 413 at 416-417.

41 Schuck & Smith, *ibid.* at 37-38.

42 Carens, *supra*, note 40 at 424-425. Schuck and Smith, *ibid.* at 37, 44 and 46, qualify their mutual

3.2 Communitarian Conceptions

Whereas individualist conceptions of citizenship focus on consent, which may be exercised by the individual alone or, more restrictively, by the individual with the approval of the polity, communitarian conceptions of citizenship are more diverse and emphasize the attachment of the individual to the community or state, whether passively by ascription, or actively through participation.

(a) Ascription

A simple idea of citizenship is that membership in a political community is determined solely by objective circumstances. A clear application of this idea is granting citizenship to those who were born within the boundaries of a particular sovereign state.[43] This ascriptive conception of citizenship has been criticized as equating the political community with a natural order where citizenship is an inherited status,[44] because birth and parentage are purely arbitrary events and should have no influence over the distribution of a valuable resource such as membership in a political community.[45] In spite of the seemingly blatant injustice of the ascriptive principle, it is how most people obtain citizenship. Birth to citizen parents, the existence of citizen relatives or even birth *per se* in the territory of a particular country, termed "birthright citizenship",[46] is in most cases sufficient to confer citizenship on the individual.

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consent theory by asserting that the community must admit the children of all new and existing members and that it should not be permitted to denationalize citizens against their will in order to avoid the violation of basic human rights. Carens, *ibid.* at 421, contends that these qualifications greatly depreciate Schuck and Smith's mutual consent approach.

43 Schuck & Smith, *ibid.* at 4.

44 Carens, *supra*, note 40 at 415.

45 Carens, *supra*, note 26 at 261. Schuck, *supra*, note 38 at 2, also takes note of this argument.

46 In the United States, the Fourteenth Amendment has been interpreted to grant birthright citizenship to anyone born in the territory of the United States: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside". It is this rule and instances of its abuse that prompted the writing of the book by Schuck and Smith, *supra*, note 38.

There is another version of ascriptive citizenship, which is a "fuller" and more balanced account of the basic ascriptive principle and which is more consistent with communitarian conceptions of the individual. David Martin describes a constitutive conception of citizenship:

> Time and familiarity weave their way into the complex relationship we call citizenship. Their significance sits comfortably with ascriptive citizenship rules, at least as long as ascription is not irrevocable. Most of us were simply born into our most basic affiliations - family, religion, nation. Those ties are not only objects of choice; to a significant extent they are constitutive of one's basic identity, anterior to choice. They help shape the characteristics of mind, preference, and perception that one brings to any particular consensual decision. Later we may exercise a "consensual" power to change some of those affiliations and preferences, but such choices reflect an organic process, not the radical act of a sovereign individual able to sweep away all such prior attachments by one magisterial act of consent or non-consent.[47]

This approach acknowledges that individuals are shaped to a certain extent by the society into which they were born and in which they were raised.[48] Therefore, to confer citizenship on individuals born in a particular country is morally defensible on the basis that they are, simply by their birth, part of a greater whole or context which might lose much significance without their inclusion.

The act of conferring citizenship on account of mere birth in a territory excludes migrant workers and their families as members of the host community. The "fuller" ascriptive approach, however, is more sympathetic to the situation of migrants, because the *raison d'être*

Pregnant Mexican mothers regularly come to the United States to give birth so that their children obtain entitlement to the advantages and privileges of U.S. citizenship. In their book, Schuck and Smith argue against this rule from the principle of mutual consent and suggest a different constitutional interpretation of the Fourteenth Amendment. Another country which adheres to the principle of universal birthright citizenship is Canada. Carens, *supra*, note 40 at 414.

47 D.A. Martin, "Membership and Consent: Abstract or Organic?" (1985) Yale J. Int'l L. 278 at 292. This constitutive description of the relationship of the individual with the state is also advanced by Aleinikoff: "[The individual's] relationship with the state is based on... identification with and immersion in the society's history, traditions and core assumptions and purposes". T.A. Aleinikoff, "Theories of Loss of Citizenship" (1986) 84 Mich. L. Rev. 1471 at 1495.

48 "The Procedural Republic and the Unencumbered Self", *supra*, note 22 at 90. A similar argument might also be fashioned for a constitutive attachment of individuals to territory. This argument, however, is more forceful when considered in terms of a collectivity. Few would deny, as Walzer points out, *supra*, note 1 at 44, that "the link between people and land is a crucial feature of national identity."

for conferring citizenship extends to attachments which ensue *after* birth. At the very least, both models offer a justification for granting citizenship to the children of migrants, born and raised in the country of employment of their parents. The argument for granting citizenship to the children of migrants born in the host country is uncontroversial in North America where the principle of birthright citizenship (*jus soli*) applies. In many Western European states, however, a child's citizenship depends mainly on the nationality of his or her parents (*jus sanguinis*). This argument is, therefore, more relevant to the situation in Europe, where, as described in Part III of the thesis, it is difficult for second-generation, or even third-generation, migrants to obtain naturalization in some countries.

(b) Participation and Inclusion

The tradition of "Atlantic Republicanism", which originates with the thought of Aristotle and embraces more recent philosophers such as Montesquieu and Rousseau,[49] reflects a conception of citizenship which, although exclusionary in principle, is also rooted in the idea of the participation of individuals in the running of their societies.

Aristotle's conception of citizenship is essentially based upon participation. A citizen is distinguished from all others by "*participation* in giving judgment and in holding office".[50] Aristotle's citizens not only rule but are also capable of being ruled (the notion of self-rule).[51] This basic definition lends itself to exclusionary impulses in that not all those resident in a state are entitled to citizenship. Indeed, Aristotle specifically excluded slaves, women and trades persons (mechanics) from citizenship, maintaining that only male individuals of certain linear descent and with the time to exercise the faculties of reason were able to fulfil the function of

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49 Schuck & Smith, *supra*, note 38 at 27.

50 Aristotle, *The Politics*, rev'd ed. (Harmondsworth, England: Penguin Books, 1985) at 168. Emphasis added.

51 *Ibid.* at 183.

citizenship.[52] On this basis, *metics* or resident foreigners from other city-states were never able to aspire to citizenship in Ancient Greece.[53]

The common thread running through Atlantic Republican thought is the need to achieve institutions and practices that make possible collective self-governance in pursuit of a common good for the community as a whole. To support such institutions and practices requires a degree of social homogeneity which may only be sustained in a small republic. Homogeneity on all levels, namely the social, cultural, religious, ethnic, economic and political levels, is necessary if citizens are to have the strong sense of fraternity essential to engender a civic virtue among them.[54] Although this latter conception of citizenship retains the virtues of participation and solidarity extolled by Aristotle, it clearly lends itself to ethnocentrism.[55] Hence, restraints on the addition of aliens to the citizenry are sanctioned.[56] These restraints not only apply to those wishing to enter the territory, but may also extend to foreigners already working and residing in the republican state. The republican state, therefore, would have no difficulty in justifying the rule of citizens over a class of disenfranchised aliens.[57]

The communitarian conception of republican citizenship is hardly conducive to affording migrant workers and their families membership in a given state. Nevertheless, this classical discourse still holds considerable force for a contemporary evaluation of modern citizenship.[58] This tradition asserts a citizenship based on *participation* by *all* citizens in the building of the country in which they live. It is an ideal which many still find attractive, even

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52 *Ibid.* at 168-184.

53 Walzer, *supra*, note 1 at 56. See also *supra*, chapter one, notes 4-6 and accompanying text.

54 Smith, *supra*, note 7 at 231-232. The requirement of a small republic may also be satisfied by a large country, which comprises a loose confederation of states or which exercises imperial domination. *Ibid.*

55 *Ibid.* at 232 and 247. Moreover, the contribution of Rousseau to this tradition of political thought conjures up an oppressive image of the state as a corporate and collective body in which the individual's personality is submerged. B.S. Turner, *Citizenship and Capitalism: The Debate over Reformism* (London: Allen & Unwin, 1986) at 101, citing from J. Charvet, *The Social Problem in the Philosophy of Rousseau* (Cambridge: Cambridge University Press, 1974).

56 Smith, *ibid.* at 231.

57 Walzer, *supra*, note 1 at 62, has called the rule of citizens over non-citizens or the rule of members over strangers as the most common form of tyranny in human history.

58 M. Ignatieff, "The Myth of Citizenship" (1987) 12 Queen's L.J. 399 at 407-408.

if, for the reasons given below, it is unattainable in most western liberal democracies. Despite its origins in an exclusionary and potentially oppressive tradition, it may nonetheless form the basis of a conception of citizenship that includes aliens, particularly migrant workers, as economic and, to a lesser extent, social participants in society.

A feature of the republican conception of citizenship is that it emphasizes *political* participation. In essence, this conception comprises two modes: an active mode when citizens participate in holding political office and in elections and a passive mode when they obey laws made by other citizens.[59] It is clear, however, that the extent of political participation demanded of its citizens by the republican ideal is no longer possible in the context of today's rapidly expanding nation-state. By itself, voting is hardly sufficient. In modern society, participation in the electoral process has been described as a "vestigial duty", in the same way as going to church is for some.[60] As the population increases, the quality of participation and opportunities for participation decline. Moreover, the development of large-scale organizations restricts the number of access-points for individuals to the decision-making process and narrows and distorts their view of this process.[61] It is at this juncture that a different form of participation is to be distinguished which might save the republican ideal from obscurity -- pluralism.

As direct ties between the individual and the state are gradually severed, intermediate ties (individual to group or organization and group or organization to the state) are on the increase. Not only do these groups and organizations offer individuals protection, but they also constitute a means of dialogue with the state. Furthermore, individuals are able to govern themselves most actively within these groups.[62] The great strength of such "pluralist citizenship" is that "it not only implicates the citizens in state policy, but generates real

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59 *Ibid.* at 402.

60 *Ibid.* at 407.

61 M. Walzer, *Obligations: Essays on Disobedience, War and Citizenship* (Cambridge: Massachusetts: Harvard University Press, 1970) at 213.

62 *Ibid.* at 218-219. An example of such groups or organizations are lobby groups.

obligations and an authentic patriotism by recognizing a sphere within which they actually have scope for meaningful action".[63] Admittedly, this "meaningful action" is reserved for those who are already members of the state. If citizenship, however, may be validated by a form of pluralist participation by those who are already members of the state, there is no reason why participation might not enable migrant workers and their families to gradually attain citizenship status. Those who have forged links and ties to society, through their residence and work, should be morally entitled to become members of that society. The stronger the ties the more powerful are their claims to citizenship.[64] This is especially true of migrant workers, who participate economically in society through their labour, despite their formal alien status.[65] They may also participate in a social sense by belonging to and being actively involved in various organizations, such as trade unions. The notion of gradually attaining membership status through participation in society is being put into practice by a number of European liberal democracies which grant limited political rights to foreigners. This relatively recent development, whereby aliens are permitted to vote in local elections after a defined period of residence in a country (usually three years), is described in chapter eight.

A connection between citizenship and economic and social participation in society reflects a positive recognition of the contribution of migrant workers to the state. There are, however, two sides of the coin to this connection. The first is the objective recognition of the contribution of migrant workers to society by the political community and the second concerns a subjective willingness of migrant workers to become members of the polity, which demands a certain integration in its history and institutions and a knowledge of its culture and language.[66] The latter requirement fulfilled, there is no reason why a participatory or a pluralist model of citizenship should not include migrant workers and their families.

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63 *Ibid.* at 220. Pluralist citizenship, as mediation between the individual and the state, may only retain its political and moral value, however, if the business it conducts is serious and not trivial. *Ibid.* at 221.

64 Carens, *supra*, note 40 at 426.

65 Cf. "Immigration Policy and the Rights of Aliens", *supra*, note 14 at 1303.

66 van Gunsteren, *supra*, note 33 at 736.

Granting citizenship status to migrant workers on the basis of economic and social participation seems to be consistent with recent historical developments and hence with a modern, "progressive" or politically innovative conception of citizenship which is equated with equality rights, universal criteria and the increasing emancipation of certain groups in society.[67] This conception of citizenship has evolved over time. Originally, it involved claims to individual rights by members of the bourgeoisie against the aristocracy. Today, it involves claims by workers against employers, women against men, children's advocates against parents and migrant workers against host communities.[68] The content of rights-claims has also evolved from claims to civil and political rights to claims to rights to economic and social welfare, which are at the core of this conception of citizenship.[69]

The "progressive" model of citizenship is based on descriptive sociological data and not normative assumptions. It is a powerful historical thesis, ever expanding to grant membership to an increasing number of groups. This march towards greater emancipation and equality for these groups appears irreversible. The problem with its application to migrant workers and aliens, however, is that it does not sit comfortably alongside the concept of the nation-state. The development of this empirical conception of citizenship has also been accompanied by the development of a system of nation-states with the result that citizenship has often become "exclusionary as a system of protective rights against aliens":[70] "The growth of abstract social rights within a nation-state context may well lead to a diminution or abolition of rights for minority groups where these groups fall outside an exclusionary political definition of membership".[71]

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67 Turner, *supra*, note 55 at 22.

68 *Ibid.* at 136. To this list may be added rights-claims by disabled persons and homosexual persons. The notion of an evolving conception of citizenship with "no definition that is fixed for all time" has also been observed by Etienne Balibar in "Propositions on Citizenship" (1988) 98 Ethics 723 at 723.

69 Turner, *ibid.* at 24-25 and 108, citing from the following works of T.H. Marshall: *Class, Citizenship and Social Development* (Chicago: Chicago University Press, 1977); *Social Policy in the 20th Century* (London: Hutchinson, 1975); and *The Right to Welfare and Other Essays* (London: Heineman Educational, 1981).

70 *Ibid.* at 139.

71 *Ibid.* at 140.

Economic participation, and to a lesser extent social participation, is the conception of citizenship within the communitarian framework which holds out most promise for according membership of the polity to migrant workers and their families. Awarding membership to this particular group is also consistent with the progressive and continual emancipation and inclusion of disadvantaged groups within the state itself and with a similar movement enshrining rights for these groups at the international level.

4. Rights

Although both the individualist and communitarian models contain justifications for bestowing membership in the polity to migrant workers and their families, in practice states frequently deny membership to migrants, even if they have resided and worked there for a considerable amount of time. Both schools of liberal thought, however, espouse strong arguments in favour of affording rights to this group. Rights in this context are understood as claims based on entitlements which migrants are considered to have on account of their inherent moral worth as human beings and their participation in and contribution to the host community.

In the minimalist state, once aliens have consented to the basic rules governing that polity, they are entitled to the same fundamental rights to life, liberty and property as citizens. The liberal principle of the equal moral worth of individuals, as understood by Rawls and Dworkin in their refined version of the individualist model, is also strongly in favour of affording rights to migrant workers and their families. No liberal society based on this fundamental egalitarian value may tolerate substantial inequalities between citizens and non-citizens.

Like other liberal thinkers, both of these theorists are concerned exclusively with the principles of justice as they pertain to the present members of society and omit to specifically discuss whether these principles should apply equally to resident non-members. Nonetheless, a logical extension of their arguments would imply that this ought to be the case. For example,

this approach would mean that the equal abstract individuals behind the "veil of ignorance" in the Rawlsian original position, in addition to not having information regarding their wealth, social status and level of education, would not be able to count on possessing citizenship status either and would take this possibility into account when deciding upon the principles of justice.[72] Similarly, Dworkin's model of a bill of rights, as an institutional device for protecting the equal moral worth of individuals, would not permit the external preferences of citizens to violate the rights of non-citizens.[73]

The communitarian argument for economic and social participation as the key to membership in the polity also constitutes a justification for the acquisition of rights. This argument reflects the ideal that each person is to be treated according to his or her individual merit and not on the basis of a formal status of citizenship.[74] As the contribution of migrant workers to the economic and social life of society grows, it is arguable that they should be able to lay claims to a correspondingly increasing scale of rights.[75]

The contribution of migrants to the economy of the state of employment is taken as a given by classical and neoclassical economists who argue that free mobility of capital and labour is essential to the maximization of overall economic gains. Open borders are the natural and logical consequence of this doctrine. Although economic costs to current members (as well as aliens residing in the country at the time) are morally relevant and counted in the overall

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72 A similar argument has been advanced by Carens, *supra*, note 26 at 257, in considering the case for open immigration based on a global application of Rawls's theory. See the section on "Illegal Migrants" below.

73 For the distinction between external and personal preferences see *supra*, note 13 and accompanying text.

74 "Immigration Policy and the Rights of Aliens", *supra*, note 14 at 1463.

75 "Immigration Policy and the Rights of Aliens", *ibid.* at 1290. Related to this argument is the claim that the state obligation to accord rights to aliens is greater if the participation has continued for some time. Gerald Lopez writes with respect to the situation of illegal Mexican immigrants in the United States:

> It is not possible... to have persons live, work, and participate in a community over many years without creating in them a sense of entitlement to some benefits of community membership and a moral obligation based on their reasonable expectations. No matter how strongly our formal laws deny it, our conduct creates the obligation.

G. Lopez, "Undocumented Mexican Migration: In Search of A Just Immigration Law and Policy" (1981) 28 U.C.L.A. Rev. 615 at 696, cited by T.A. Aleinikoff, "Aliens, Due Process and "Community Ties": A Response to Martin" (1983) 44 U. Pitt. L. Rev. 237 at 243.

calculation, they are insufficient to justify restrictions if the result is economic benefit to all.[76] This utilitarian approach,[77] therefore, not only recognizes the actual contribution of migrant workers to the economy of the polity, but also encourages future migration. Although classical and neoclassical economists would recognize the contribution of migrants to the national economy, they have little to offer them in terms of their economic and social protection in the country of employment. The adherence of these economists to the value of pure market forces precludes them from endorsing any type of redistribution.

The social contribution of migrant workers and aliens to the country of employment is more problematic, for it depends largely upon whether such a contribution is welcome in the host country. The same may be said about cultural contribution. It is argued that migrant workers and aliens contribute to cultural diversity and enrichment, thus helping to create lively and distinct societies.[78] The effect on the existing citizenry is potentially positive and constructive: it works against xenophobic tendencies[79] and may foster knowledge of other cultures and increase international understanding.[80] Such an argument might be feasible in countries of immigration, such as Canada, the United States and Australia, but is likely to be inapplicable in the European context, where states do not consider themselves as countries of immigration and retain a profound interest in preserving homogeneity in their culture and tradition, despite having taken in a substantial number of immigrants in the past. The argument that migrant workers contribute to the social and cultural welfare of society is also utilitarian. It has been observed, however, that utilitarianism may have serious reservations about increasing immigration and open borders if all preferences are to be taken into account, including those of

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76 Carens, *supra*, note 26 at 263.

77 For a brief description of utilitarian thought see *supra*, note 19.

78 See respectively Whelan, *supra*, note 30 at 460, citing from U.S., Select Commission on Immigration and Refugee Policy, *U.S. Immigration Policy and the National Interest: Final Report* (1981) at 103 and T. King, *supra*, Introduction, note 142 at 535-536.

79 R. Nett, "The Civil Right We Are Not Ready For: The Right of Free Movement of People on the Face of the Earth" (1970) 81 Ethics 221 at 223.

80 King, *supra*, note 78 at 536. King himself doubts whether such positive effects may come about as a result of migration and maintains that his argument in this regard might only stand if international migration itself is limited.

racial prejudice and the desire to preserve a distinctive culture.[81]

The communitarian argument that economic, and to a lesser extent social and cultural, participation in the country of employment supports the granting of rights to migrant workers is attractive, especially if the only other justification for the extensive protection of the rights of members hangs solely on the bare thread of the formal legal status of citizenship. Participation favours expanding the rights of migrant workers and their families, in respect of whom, as the previous chapter illustrated, broad exceptions are permissible under the provisions of the major universal and regional human rights instruments. Moreover, rights based on participation offer an alternative and more meaningful conception of the community. Otherwise, the community is perceived as merely an idealized abstraction, presuming an equality and commonality of interests which exist only at the most formal level.[82]

The problem with the communitarian model for migrants' rights is the implication that rights have to be earned on the basis of some indeterminate and intangible contribution to the host society. The individualist model, based on the equal moral worth of each individual, rejects such an approach for justifying rights. Even so, the fact that a sense of entitlement exists, which is not only tied to individual equal moral worth but also to a contribution, however intangible, to society through labour or social interaction, does not weaken the value of the claim, but only strengthens it considerably.

4.1 The Rights Defined

The individualist model, grounded on the equal moral worth of individuals, and the communitarian model, based on participation, both offer justifications for the rights-claims that are arguably most important to migrants residing and working in the country of employment,

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81 Carens, *supra*, note 26 at 263-264. Utilitarians disagree as to whether such preferences ought to be "filtered out". *Ibid.*

82 L.S. Bosniak, "Exclusion and Membership: The Dual Identity of the Undocumented Worker under United States Law" (1988) Wisconsin L. Rev. 955 at 1005.

namely claims to rights of residence, economic and social rights, cultural rights, and political rights. The aim of this section is to offer a more detailed analysis of how these models may be applied to the specific rights-claims in question.

(a) Residence Rights and the Right to Stay

The introductory chapter broadly defined the residence rights of migrant workers and their families as including the right to remain in the host country while in work and immediately after the termination of employment, protection against arbitrary expulsion, and a right to naturalization. The latter right clearly offers the most security to migrants, since it enables them to escape their alienhood and to become, if they so wish, fully-fledged members of their adopted society. It must be emphasized, however, that many migrants, if given the chance to acquire the citizenship of the country of employment, would reject it. This is because many do not want to give up their own citizenship and, even though resident in the host state for a considerable period of time, still harbour hopes of returning to the country of origin.[83]

Walzer contends, from a communitarian standpoint, that migrant workers who have been admitted lawfully into a country should be "set on the road to citizenship" because second-class status for migrants is inconsistent with the workings of a liberal democracy and because they participate in society. His arguments are worth outlining below in more detail,[84] together with some of the criticisms which they have received.

Although migrant workers are invited for economic reasons to work in a country, Walzer maintains that the market is not the sole regulator of their situation because the power of the state plays a crucial role in the market's creation and in the enforcement of its rules. Hence, migrant workers are not only guests but also *subjects* and are therefore ruled. The argument

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83 Heisler & Heisler, *supra*, note 4 at 20. This is known as the "myth of return". *Ibid.* Indeed, the proportion of migrants obtaining naturalization in host countries is very small. *Ibid.* at 21.

84 Walzer, *supra*, note 1 at 58-62.

that migrant workers consent to this state of affairs is rejected by Walzer. Consent given in a single moment in time, "while it is sufficient to legitimize market transactions, is not sufficient for democratic politics"; political power may only be exercised democratically with the *ongoing* consent of its subjects.[85] The existence of migrant workers as a disenfranchised, exploited and oppressed class of workers is incompatible with a democratic polity, which to them must appear as nothing more than a tyranny. According to Walzer, political justice demands that migrant workers, as participating members of society, are "set on the road to citizenship":[86]

> No democratic state can tolerate the establishment of a fixed status between citizen and foreigner (though there can be stages in the transition from one of these political identities to the other). Men and women are either subject to the state's authority, or they are not; and if they are subject, they must be given a say, and ultimately, an equal say, in what that authority does. Democratic citizens, then, have a choice: if they want to bring in new workers, they must be prepared to enlarge their own membership; if they are unwilling to accept new members, they must find ways within the limits of the domestic labour market to get socially necessary work done. And those are their only choices.[87]

The core of Walzer's argument is communitarian because he asserts that migrant workers should be set on the road to citizenship, and consequently political involvement, because they *participate* in society:

> They do socially necessary work, and they are deeply enmeshed in the legal system of the country to which they have come. Participants in economy and law, they ought to be able to regard themselves as potential or future participants in politics as well.[88]

Without membership, opportunities for participation or the desire to participate in the polity decrease. Martin argues that one of the advantages of the birthright citizenship rule in the

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85 *Ibid.* at 58.
86 *Ibid.* at 60.
87 *Ibid.* at 61.
88 *Ibid.* at 60.

United States is that there are no second-generation aliens as there are in some European countries. Most have dual citizenship and are free to make the other allegiance their principal one.[89] However, if these persons stay in the United States:

> [A] secure citizenship status forms a basic foundation for the shaping of identity and involvement in the polity. They are thereby encouraged to embrace life here as full participants, not as half-hearted, standoffish "guests". Equally important, other citizens are induced to treat them as coequal members of the polity, not as intruders who stay too long.[90]

Imposing an obligation to accord membership to migrant workers and their families, even if this was not the intention of the polity that admitted them, is clearly an interference with the principle of state sovereignty. Walzer maintains, however, that although restrictions on immigration should be permissible,[91] naturalization should be mandatory once workers are permitted entry. While the members of a state may refuse entry to aliens, refugees or potential migrant workers, they cannot refuse them citizenship rights once these groups have been admitted.[92] Although Walzer recognizes that a transition period from alien to citizenship status is acceptable,[93] he does not seem to permit any discretion to the state to refuse unsuitable applicants:

> Walzer wants internal policy choice, or discretion, to be exercised exclusively at the moment of entry onto the territory. This is highly impractical. Entry decisions must often be made quickly and on the basis of insufficient information... Isn't it wiser to allow for a transition period during which applicant and receiving polity can learn more about each other by trial and error, and only then make decisions about citizenship?[94]

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89 *Supra*, note 47 at 282-283.

90 *Ibid.* at 283-284.

91 Restrictions on immigration, however, are limited by the principle of mutual aid, which is particularly applicable in the case of refugees. This moral principle asserts that all persons as well as collectivities are under a duty to positively assist those in urgent need, provided that the risks and costs of this assistance are relatively low for the giving party. Walzer, *supra*, note 1 at 33.

92 *Ibid.* at 62.

93 *Supra*, note 87 and accompanying text.

94 van Gunsteren, *supra*, note 33 at 737.

Walzer's argument for according citizenship to migrants has also been called "uncompromising" and an "ideal" by Elsa Chaney,[95] who questions whether a state might fulfil its obligations toward migrants by making significant concessions to migrant workers and the countries from which they come, short of offering them membership:

> To set up the problem as if it were impossible for the state to grant any rights and protections short of full citizenship is deceptive because the state, in fact, has a broad range of options. A state could devise a minimal package to remove most of the negative features of being a stranger worker: decent housing, minimum wage and regulated hours, expenses of the journey. Or a state could... enact a series of positive measures that give immigrant workers maximum rights and protections just short of citizenship.[96]

The right of permanent residence, and ultimately the right to citizenship, which Walzer maintains migrants should obtain once they have been lawfully admitted to the state of employment, can only be feasibly accorded to them if they have resided and "participated" in that country for some time. The guarantee of the enjoyment of the rights examined below is necessary from the time of entry in order to ensure that migrant workers and their families might live and work in dignity in the host state and to enable them also to participate in the more general sense. For example, to deny migrant workers the right to join, form or to take

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95 Chaney, *supra*, note 2 at 38 and 39 respectively.

96 *Ibid.* at 54. Chaney, *ibid.* at 42-43, argues that many of these obligations already constitute international norms and guidelines, as set down by treaties (or international customary law, if these have not been ratified). Moreover, countries of origin have also taken measures to protect their citizen workers abroad. By arguing solely from the perspective of admitting countries, Walzer has ignored these developments which have a significant influence on immigration countries. Indeed, Chaney believes, *ibid.* at 44, that "the most realistic and fruitful policy prescriptions may lie along the lines of reinforcing international conventions and positive national efforts". Walzer recognizes that an alternative method to citizenship rights in protecting migrant workers is by formal treaties between countries of origin and host countries, with a proviso for periodic renegotiation. In this way, the original citizenship of migrant workers would work for them and they would, in some sense, be represented in local decision-making. *Supra*, note 1 at 60. However, in reply to Chaney's criticism, Walzer expresses "considerable uneasiness" about the project of creating a permanent class of resident aliens "who would have social and economic rights, enforced by international agencies, but no political rights". In his view, such an approach would involve a "radical devaluation of citizenship", the logical conclusion of which would be the abolition of countries and the creation of the global state. M. Walzer, "Response to Chaney and Lichtenberg" in Brown & Shue, *supra*, note 2, 101 at 102.

part in trade unions greatly hinders their broader social participation in society and thus constitutes a serious obstacle on the road to citizenship. The protection of these rights is not an alternative to granting citizenship status, for their enjoyment continues beyond the acquisition of citizenship and they are equally applicable to members of the polity. Indeed, the manner in which these rights are safeguarded by the state in respect of migrants is a reflection of the treatment nationals may expect to receive in their own country.

(b) Economic and Social Rights

The economic and social rights of migrant workers and their families were defined in the introductory chapter as comprising rights to employment, trade union participation, social security, health, housing, family reunification and education.

The term "rights to employment" is rather misleading, for it conceals a string of important rights connected with the field of employment: the right to work, the right to free choice of employment, the right to just and favourable conditions of work; the right to protection against unemployment; the right to equal pay for equal work without discrimination; the right to just and favourable remuneration allowing for a dignified standard of living for worker and family; and the right to rest and leisure. Connected rights are rights to form and join trade unions (as an aspect of the right to freedom of association).[97] Most of these rights should be guaranteed to migrant workers immediately after their entry into the country of employment. As noted above, trade union rights especially are inextricably connected with participation itself which, according to the communitarian model, is necessary for the acquisition of further rights, particularly those concerned with residence and naturalization.

Neither the communitarian nor individualist approaches sanction distinctions between citizens and non-citizens in the employment field; the former maintains that migrant workers, as

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97 Articles 23 and 24 of the UDHR. See also articles 6 to 8 of the ICESCR.

economic participants in society, are entitled to the same treatment as nationals in this area, whereas the latter grounds this approach on the principle of the equal moral worth of individuals.[98] As chapter one revealed, however, international human rights instruments impose no specific obligation upon the state to employ aliens and therefore it may be argued that aliens have no right of access to employment or to free choice of employment outside of the state of which they are nationals. This position is usually justified on the basis of economic state sovereignty, a question considered in the final part of this chapter. Often, the claim is also advanced that the employment of alien migrants creates unemployment amongst citizens. It is generally accepted, however, that migrant workers accept employment that citizens refuse to do.[99]

Ensuring that migrant workers have equal work conditions with national workers should not be a complex idea. What migrant workers have in common with most of the citizenry is that they go to work. Although migrant workers are often referred to as "guests", "[they] are *not* "guests", and they are certainly not tourists. They are workers *above all*; and they come... because they need the work, not because they expect to enjoy the visit".[100] This notion of solidarity and interdependence amongst all workers, which crosses territorial boundaries, political ideologies and cultural differences and which has its roots in the dignity of human labour, might result in negative repercussions if broken. *All* workers suffer when employers are able to tap a labour force that accepts low wages and poor conditions and when one part of their class is treated without regard to standards established to protect workers as a single group.[101] This argument is especially forceful in the case of illegal migrant workers who are frequently subjected to exploitation as workers in the country of employment.

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98 The argument that distinctions are permissible between citizens and migrant workers in an irregular situation, because the latter have consented to poor employment conditions, is discussed and rejected below.

99 Walzer, *supra*, note 1 at 56. Indeed, limiting the right of migrants to free choice of employment by confining them to menial and dirty jobs which nationals do not want can be justified on utilitarian grounds. It is exactly utilitarian arguments like this one which provide support for stronger rights-based theories, such as those espoused by Rawls and Dworkin. See also *supra*, note 19. I am grateful to Professor Bill Black for this observation.

100 *Ibid.* at 59. Emphasis added.

101 Bosniak, *supra*, note 82 at 1004.

Rights to social security, health and adequate housing[102] should be accorded to migrant workers and their families on the same basis as employment rights. Martin Heisler explains why, in the long term, many liberal democracies in Europe were unable to deny economic and social benefits to migrant workers and their families:

> For many, the egalitarian ethos of the welfare state militated against the creation of an underclass of foreigners excluded from the social services and distributive mechanisms that had, over time, substantially closed the gaps between rich and poor among citizens.[103]

In addition to this egalitarian argument, migrants, through various forms of taxation, also contribute tangibly to social and medical insurance schemes.[104] Distinctions between migrants and nationals in respect of rights to social security and medical care on such grounds as scarce state resources or cost are therefore tenuous, because both contribute equally to these schemes. Where welfare benefits, such as unemployment insurance, are calculated on the basis of more precise contributions from workers, the contributory thresholds for these benefits should not be so demanding as to exclude migrant workers and their families who may not have had the same opportunity as nationals to accumulate the required amount of contributions. With regard to adequate housing, migrant workers are more likely to live in sub-standard housing than citizens.[105] Certainly, this is probably going to be the case if they are joined by their families. Migrants should, therefore, be afforded equal treatment with nationals in respect of the allocation of public accommodation.

Chapter one maintains that the right of migrant workers to be joined by their families

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102 See article 25 of the UDHR and articles 9, 11 and 12 of the ICESCR.

103 M.O. Heisler, "Transnational Migration as a Small Window on the Diminished Autonomy of the Modern Democratic State" (1986) 485 The Annals of the American Academy of Political and Social Science 153 at 158. Compare this approach to minimalist liberal notions of the state described earlier, which although supportive of more open migration, oppose any kind of economic and social redistribution. See *supra*, notes 37 and 77 and accompanying text.

104 Cf. Heisler & Heisler, *supra*, note 4 at 20.

105 Walzer, *supra*, note 1 and accompanying text.

proceeds from the extensive protection afforded the family by international human rights law, which repeatedly proclaims that the family is "the natural and fundamental group unit of society".[106] The family is fundamental to society, but it is fundamental to the individual as well, for it represents his or her most important attachment, more important that attachments to friends, tribe or nation. The right of migrant workers, therefore, not to be separated for an unreasonable length of time from their families may be justified on the basis of the communitarian constitutive conception of the individual.

International human rights instruments also proclaim the right of everyone to education, which is to be free in the elementary and fundamental stages.[107] Education is, *inter alia*, to be "directed to the full development of the human personality [and the sense of its dignity]"[108] and to "enable all persons to participate effectively in a free society".[109] None of these provisions limit education to citizens and, on the basis of previously advanced arguments, there is no reason for such distinctions to be made. Both individualist and communitarian principles are recognized in the objectives assigned to education: "the full development of human personality" is consistent with the principle of the equal moral worth of individuals and effective participation in a free society is compatible with a communitarian conception of rights.

The children of migrants should, therefore, be entitled to free education if they are residing with their parents in the country of employment, even if they are in an irregular situation. This principle was recognized, albeit somewhat tangentially, in the famous American case of *Plyler* v. *Doe*.[110] In this case, the United States Supreme Court struck down a Texas statute prohibiting the public education of undocumented alien children on the grounds that it violated the equal protection guarantee under the Fourteenth Amendment of the Constitution. The Supreme Court, however, did not recognize the right to education as a fundamental right

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106 See article 16 of the UDHR, article 23 of the ICCPR and article 10(1) of the ICESCR.

107 Article 26(1) of the UDHR.

108 Article 26(2) of the UDHR and article 13(1) of the ICESCR. The wording in parenthesis appears only in the ICESCR provision.

109 Article 13(1) of the ICESCR.

110 (1982), 102 S. Ct. 2382.

under the United States Constitution.[111] According to one interpretation of this case, both communitarian and individualist principles were emphasized by the Court in its reasoning. The Court focused on the "real social and economic participation" of undocumented aliens in the community recognizing that, although illegally present, the children of these aliens are part of society.[112] From an individualist point of view, the Court held that the denial of adequate educational opportunity is stigmatizing to the individual and prevents the child from acquiring the means to achieve his or her full potential.[113]

The right of migrant children to education should be guaranteed as quickly and as fully as possible after their parents have entered the country of employment because any delay in this regard would risk hindering the personal development of these children and their present and future potential for participating in a positive way in the host community.

(c) Cultural Rights

Connected with the right to education is the right of migrant workers and their families to maintain and develop their cultural identity, which includes the preservation and enhancement of their language. This right differs, however, from the right to education in that it is, first and foremost, a *group* right. According to the communitarian conception of the individual, persons cannot be cut adrift from their milieu, which includes their ethnic, cultural or linguistic group. If the principle of the equal moral worth of individuals is to be respected, protection must be afforded to the collectivity.[114] In addition to justifying this right on the basis of a synthesis of the constitutive communitarian conception of the individual and

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111 "Immigration Policy and the Rights of Aliens", *supra*, note 14 at 1450.

112 *Ibid.* at 1304-1305.

113 *Ibid.* at 1450, citing from the judgment, *supra*, note 110 at 2397. One commentator has argued that the Court's reasoning in the case was "essentially utilitarian". The denial of education to children of undocumented workers foreclosed any possibility that these children would contribute to the United States. Leary, *supra*, Introduction, note 9 at 7.

114 These arguments are taken from my earlier work. See Cholewinski, *supra*, chapter 1, note 74 at 48-55 and 59-63.

individualist precepts, support for the right may also be found on the basis that the group exists as a separate entity and that assistance to the group is necessary for its physical survival and the preservation of its identity and integrity.[115] The right of migrant workers and their families to maintain and foster their cultural identity may be justified, as referred to earlier, on the basis of their own unique contribution to the culture of the host country. Furthermore, the recognition of this right arguably contributes to the enrichment of contacts between the country of origin and the country of employment.

In practice, the right to the retention and development of cultural identity involves two commitments on the part of host countries, one to the children of migrants and the other to migrants themselves. By ensuring that migrant children receive some education in their own language and culture, the first commitment enhances the self-esteem of these children and provides cultural support to the group as a whole. The need for this kind of education is critical if a return to the country of origin is anticipated. Acute alienation may result if a child is unable to relate to the culture and language on return to his or her country of origin. The second commitment requires respect for, and support of, the cultural and religious practices of migrants: for example, the honouring of holy days; assistance to cultural associations; and support of media broadcasting and publishing.[116] This commitment may not be necessary if migrant workers are only in the country of employment on short-term contracts without their families.

The right to maintain and develop cultural identity, however, may conflict with the aspiration of the state to preserve a common culture and language on a national level. This conflict is considered towards the end of the chapter in the section concerned with the argument from state sovereignty that it is necessary to limit the rights of migrants while they are in the country and to generally restrict entry into the territory in order to preserve the "cultural

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115 *Ibid.* at 57, citing from M. McDonald, "The Forest in the Trees: Collective Rights as Basic Rights" (Faculty of Philosophy, University of Waterloo, 1987) [unpublished] at 6.

116 *Ibid.* at 327-329.

security" of the national community.

(d) Political Rights

Essentially, political rights comprise the following: the right to participate in public affairs, to vote and to be elected to political office, and equal access to the public service.[117] The preceding chapter illustrated that international human rights instruments reserve these rights exclusively for citizens. The denial to non-citizens of "full participation in the making of community decisions", including the right to vote and to be elected or appointed to political office, has been described as one of the most significant deprivations suffered by aliens.[118] The need to define the scope of the political community is the reason that has been given for denying aliens political participation:

> The exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political self-definition. Self-government, whether direct or through representatives, *begins by defining the scope of the community of the governed* and thus of the governors as well: aliens are by definition those outside of this community. Judicial incursions in this area may interfere with those aspects of democratic self-government that are *most essential* to it.[119]

If the scope of the political community were not defined, it is contended that the mechanics or process of democratic politics would be unable to function effectively because democratic politics requires an

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117 Article 25 of the ICCPR.

118 McDougal, Lasswell & Chen, *supra*, chapter 1, note 2 at 433. This is not to say that foreigners are completely denied a political voice in the host country. Heisler maintains, *supra*, note 103 at 164, that foreigners or "at least those with regular or legal status, have either indigenous champions or an agency of their home country--or, ultimately, the high law of intergovernmental labour agreements".

119 United States Supreme Court in *Cabell* v. *Chavez-Salido*, 454 U.S. at 429-440, cited by D.A. Martin, "Due Process and Membership in the National Community: Political Asylum and Beyond" (1983) 44 U. Pitt. L. Rev. 165 at 198-199. Author's emphasis.

> important measure of shared values and understandings, a willingness to work out policies as a community, rather than as a mere chance collection of isolated groups ready to splinter at the first sign that their desired outcomes are not being achieved.[120]

The right to vote has been labelled as the "quintessential right of citizenship".[121] But this idea is based on the assumption that political participation in the community is the *raison d'être* for citizenship. Such a view is consistent with the narrow republican version of the concept. As argued earlier, the Aristotelian or the subsequent republican models of citizenship are no longer suited to describe the internal pluralist dynamics of the modern nation-state and that a conception of citizenship which takes into account the economic and social participation of those residing in a state's territory is more meaningful.

Migrants should therefore be able to participate politically in society before they qualify for citizenship status. There seems no reason why political involvement should not be a natural outgrowth of other kinds of participation.[122] The importance of such participation is evident when considered in the light of the Dworkinian requirement of the establishment of institutions for the protection of the equal moral worth of individuals. Peter Schuck maintains that a tension exists within liberalism between majoritarianism and minority rights, namely the need to give effect to majority decisions in order to ensure the effective functioning of the political system, but without consistently subordinating minority interests to the majority's untrammelled will. This basic tension is especially noticeable in the area of aliens' rights:

> There, the citizens who control the political process are permitted to make decisions that profoundly affect the interests of non-citizens. Yet the latter not

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120 Martin, *ibid.* at 199.

121 G.M. Rosberg, "Aliens and Equal Protection: Why Not the Right to Vote" (1977) 75 Mich. L. Rev. 1092 at 1134.

122 However, the "political community doctrine" of the United States Supreme Court presumes citizenship as a precondition to the grant of full political rights and no amount of participation in the ordinary life of the community is sufficient to overcome this presumption. Considerations of national security (see below) are determinative in this approach. "Immigration Policy and the Rights of Aliens", *supra*, note 14 at 1306 and footnote 96.

> only constitute a minority and thus are politically subordinate to begin with; they are denied the vote altogether.[123]

Political participation would enable aliens and migrant workers to strengthen claims to economic, social, cultural and residence rights. Although these rights might, in any case, be included in the liberal institution of a bill of rights, it would be fanciful to suggest that this process will be effective without political input from this section of the population.

A final question to be determined is the *extent* to which migrants should be allowed to participate politically in society. As noted earlier, foreigners are permitted to vote in municipal elections in some countries in Western Europe. This question is considered by Chaney in the following manner:

> Voting in municipal elections might very well be an acceptable degree of representation for temporary workers. On the one hand, they would have an opportunity to have a say on many issues nearest their interests (and those of workers who come after them); on the other hand, why should persons temporarily in a country vote on national issues not directly pertinent to their situation?[124]

Walzer notes that "ongoing consent... is required only from long-term residents".[125] A compromise, therefore, which permits migrants to vote on a local level and which ties in political participation with increasing economic and social participation and length of residence seems sensible in practice. There is little justification, however, on the basis of the arguments outlined above, for denying migrants full political rights once their participation in economic and social terms has equalled that of citizens, even if citizenship status has not yet been attained.[126] The only possible explanation for restricting full political rights to citizens at this

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123 *Supra*, note 38 at 4.

124 *Supra*, note 2 at 55. See also *supra*, note 65 and accompanying text.

125 M. Walzer, "The Distribution of Membership" in Brown & Shue, *supra*, note 2, 1 at 29, also cited by Chaney, *ibid.* at 55. Chaney observes, *ibid.*, that migrant workers are not always disenfranchised, since they often continue to vote in national elections in their own homelands. See also *supra*, note 118.

126 The emphasis in this argument is concerned primarily with the right to vote. Arguably, migrant workers should obtain access to employment in the public service much sooner with the exception perhaps of

stage is that these rights carry "an important symbolic message about the value and significance of full membership".[127] At this stage, therefore, full membership of the polity should be offered to migrant workers and their families. Otherwise, this argument can be abused to keep them in perpetual alienage.

5. Illegal Migrants

The protection of the rights of migrant workers and their families in an irregular situation is problematic. Nevertheless, the situation of illegal migrants cannot be ignored given the extent of this phenomenon, as examined in the introductory chapter, in every region of the world. It is easier to justify according rights to those migrants who have been accepted as "temporary members" of the community by their lawful admission into the state than to those who have slipped over the border in clandestine fashion, falsified travel documents to gain entry, or overstayed their visas in order to take up illicit employment. Nevertheless, both individualist and communitarian schools of thought support granting rights to illegal migrants.

5.1 The Individualist Position

A global application of liberal individualist principles supports not only expanding the rights of migrants but also the right to enter or the right to immigration.[128]

The libertarian minimalist notion of the state, as portrayed by Nozick, does not justify restrictions on immigration. The state must protect the rights of citizens and non-citizens equally because it enjoys *de facto* monopoly over the enforcement of rights within its territory. Individuals have the right to enter into voluntary transactions with other individuals and the

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those positions which carry a significant amount of public responsibility.

127 Schuck, *supra*, note 38 at 6.

128 As noted earlier, care must be taken when applying the principles in this way, as this was not the intention of their architects who are solely concerned with the relationship between the state and its citizen-members.

state may not interfere with these exchanges so long as they do not violate the rights of others. On this basis, for example, an American farmer may freely hire a Mexican worker without any interference from the government, even if it is shown that American citizens are disadvantaged as a result. Although the Nozickean state has no grounds upon which to exclude aliens, this does not mean that individuals nor a collectivity may not exclude aliens (or for that matter other citizens) from entry to their land.[129]

More open migration is also the result of a universal application of the Rawlsian original position: "In the original position... one would insist that the right to migrate be included in the system of basic liberties for the same reasons that one would insist that the right to religious freedom be included: it might prove essential to one's plan of life".[130] This outcome is subject to the qualification that immigration may be restricted for the sake of liberty on the grounds of public order and security.[131] Furthermore, a global application of the difference principle requires wealthy states to redistribute resources to poor nations,[132] or, at least, needy people to the resources.[133] The main objection to this first solution (a similar objection may be raised on the state level) is that the international difference principle widens the gap between developed and developing countries. Economic improvements in the former countries may lead, with their assistance, to economic gains in the latter, but this does not mean that both sets of countries will prosper at the same pace. Furthermore, a slight improvement in the conditions of the "worst off" states may still constitute, according to international human rights standards, a violation of the basic economic and social rights of their nationals. The

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129 Carens, *supra*, note 26 at 252-254; King, *supra*, note 78 at 527.

130 Carens, *ibid.* at 258.

131 *Ibid.* at 259.

132 Whelan, *supra*, note 30 at 449 referring to B. Barry, *The Liberal Theory of Justice* (1973) at 129, B. Barry, "Humanity and Justice in Global Perspective" in J.R. Pencock & J. Chapman eds, *Ethnic, Economics and the Law: Nomos XXIV* 219-252 and C. Beitz, *Political Theory and International Relations* (Princeton, New Jersey: Princeton University Press, 1979) 125-176. Carens does not specifically make this argument, although he agrees, *ibid.* at 259, that there are vast economic inequalities among nations, which are larger than would exist under the difference principle.

133 Whelan, *ibid.* at 449; J. Lichtenberg, "National Boundaries and Moral Boundaries: A Cosmopolitan View" in Brown & Shue, *supra*, note 2, 79 at 93. The arguments for foreign aid to developing countries and for more open migration may also be justified on historical grounds; developed countries are under an obligation to compensate developing countries for past harm done or for benefits received. Lichtenberg, *ibid.* at 92-93.

second solution, advocating that needy people be sent to the resources, would involve more open immigration policies on the part of developed nations.[134]

In the global justice context, the principle of the equal moral worth of individuals also supports more extensive international migration between developing and developed countries. To accept the *status quo*, namely that those in affluent western societies are morally entitled to the citizenship of the country in which they were born (or where their parents held citizenship), and to argue that potential immigrants from the Third World have no claims to admission, harks back to the dark days of feudal privilege.[135] The equal moral worth of those in developing countries is further eroded by the gigantic efforts required there to merely maintain life; the opportunities, therefore, to contribute to overall human purpose are extremely limited. Open migration would at least increase these opportunities.[136] A forceful case often made against increased migration from developing countries is based on the brain drain hypothesis, which contends that those who emigrate from developing countries are usually skilled personnel who constitute a valuable resource to their countries of origin and, therefore, efforts should be undertaken to restrict emigration from those countries.[137] This approach, however, is "a dramatic departure from the liberal tradition in general and from the specific priority Rawls attaches to liberty".[138] Although well-intentioned, its thrust is utilitarian and it thus fails to accord sufficient recognition to the principle of individual equal moral worth.

The liberal individualist school of thought, therefore, supports more open migration and may justify irregular migration to some extent. This model, however, as mentioned earlier, is also subject to the sovereign right of states to prevent illegal immigration on the grounds of national socio-economic security and the maintenance of public order. These arguments are discussed below in the section on state sovereignty.

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134 See also Lichtenberg, *ibid.* at 91.

135 Carens, *supra*, note 40 at 429.

136 Nett, *supra*, note 79 at 225.

137 Carens, *supra*, note 26 at 261; F.G. Whelan, "Citizenship and the Right to Leave" (1981) 75 Am. Pol. Sci. Rev. 636 at 646. See also *supra*, Introduction, note 163 and accompanying text.

138 Carens, *ibid.*

5.2 The Communitarian Position

The liberal communitarian position in respect of irregular migration is far more restrictive than the liberal individualist model. Irregular migrants are a threat to the homogeneity, definition and stability of the community. They are also uninvited intruders who have violated immigration laws. The communitarian position, however, based on participation together with the argument that the government and members of the host state have consented by implication to their stay, may offer some protection to illegal migrants, especially if they have lived and worked in the community for some time.

Although illegal immigrant workers may be integrated into the community in much the same way as those workers possessing regular status, they have nonetheless broken laws in entering to work in the host country.[139] The maxim that no one should be permitted to profit from their own illegal acts is reinforced on considering that there are other people, often equally needy, who are waiting to immigrate legally.[140] These persons have respected immigration laws and have patiently waited their turn, often for years.[141] This argument is especially forceful in the event of an amnesty to regularize the status of those illegally working and residing in a country. Such an amnesty seems not only unfair to potential legal immigrants but also appears grossly unjust to legal migrant workers. Hence the paradox of illegal immigrant workers set on the road to citizenship on account of the amnesty and legal contract workers unable to shed their "half-way" status.[142] This situation may by itself encourage more irregular immigration.

The objection to the presence of undocumented workers on the ground that they have

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139 Schuck, *supra*, note 15 at 295-296.

140 "Immigration Policy and the Rights of Aliens", *supra*, note 14 at 1454.

141 Carens, *supra*, note 40 at 428-429. See also Schuck, *supra*, note 15 at 296 and Chaney, *supra*, note 2 at 42.

142 This paradox is noted by Chaney, *ibid.*

infringed immigration laws may be opposed by the view that the violation of these laws does not warrant the serious repercussions that usually follow, namely detention and deportation or expulsion. After all, one illegal act, namely illegal entry and residence, should not make irregular migrants outlaws for all purposes.[143] Furthermore, to treat them as outlaws and criminals is a negation of the reality and the deeper communitarian context in which these people live:

> Arguments about unfairness to legal entrants and incentives for future illegal immigrants often seem abstract and bloodless next to the concrete reality of the harm that will be done to people whom we have known as friends, neighbours, and co-workers if we expel them. These people are not usually robbers and murderers. They are ordinary, hard-working people, willing to abide by all the laws except the one that would have excluded them from the chance of a decent life.[144]

A communitarian argument for according rights to illegal migrant workers and their families is that society, through its actions (or non-actions), *de facto* consents to the presence of illegal migrants. In the American context, the claim that the community may have tacitly encouraged the long-term presence of some aliens that it has never openly accepted is considered by Schuck and Smith.[145] They concede that illegal migrants may have moral or humanitarian claims upon American society based on the following grounds: they have been encouraged to migrate to the United States; their labour has enriched American citizens; they have been absorbed into communities in that country; and they have been provided with

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143 "Immigration Policy and the Rights of Aliens", *supra*, note 14 at 1454. Indeed, this position has been recognized by the courts in the United States. *Ibid.*

144 Carens, *supra*, note 40 at 429. Elsewhere, Carens writes. *supra*, note 26 at 251, that the use of force is justified against criminals, subversives and armed invaders, but not against "ordinary, peaceful people, seeking only the opportunity to build decent, secure lives for themselves and their families".

145 *Supra*, note 38 at 40. Frederick Whelan, *supra*, note 30 at 455, ties this claim in with the present realities in United States immigration policy, a characteristic of which is lax enforcement. He considers the argument that the expectations of illegal migrants encouraged by lax enforcement acquire legitimacy over time (i.e., rights by prescription). But he does not find this viewpoint wholly convincing -- there are many crimes which are *de facto* tolerated, for example automobile theft and burglary, unless the perpetrator is actually caught in the act. This does not mean, however, that these activities are legitimate. *Ibid.* at 456. In line with the argument above, this reasoning must still be rejected on the basis that it equates illegal migrants with criminals.

legitimate expectations of fair treatment.[146] The argument that illegal migrants have been provided with legitimate expectations of fair treatment should be juxtaposed against the rather cynical statement that illegal migrant workers "consent" to unfavourable working conditions and hence their own exploitation which they experience because of their undocumented status. This argument must be rejected. These workers should not only *expect* to receive better treatment, they also have a *right* to better treatment on the basis of their equal moral worth as individuals and their economic participation in the host society.[147]

To persist in the claim that a state has consented to the presence of illegal migrants is misleading. This claim is based on the assumption that states are in full control of migration and the forces that propel the transnational flow of persons seeking work. In addition to possessing lax immigration enforcement mechanisms, some countries are also so large that their borders are effectively uncontrollable, for example the United States and its border with Mexico. Moreover, economic forces, influenced largely by employer needs and demands, and not always subject to state control, play a crucial role in the market for migrant workers.[148] It may be argued, therefore, that a liberal democracy cannot justifiably impose restrictions on immigration because, in practice, it is not in a position to adequately control those entering or leaving its territory, short of being a tyranny and expending huge resources on such control.

The principal communitarian claim that migrant workers should be accorded greater rights on the basis of genuine participation in society applies equally to undocumented workers. In spite of their status, illegal migrant workers are "for better or worse,... members of society; they participate in and contribute to its economic growth".[149] Participation accrues

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146 Shuck & Smith, *ibid.* at 98. Schuck and Smith, *ibid.*, insist, however, that even if compelling obligations towards illegal aliens exist, they do not imply a moral claim.

147 See also *supra*, notes 98 and 101 and accompanying text.

148 Chaney, *supra*, note 2 at 41. These arguments constitute Chaney's response to Walzer's claims that frontiers can be controlled and the migration process regulated, and that states are, therefore, free to take in strangers if they wish. See also Bosniak, *supra*, note 82 at 965.

149 "Immigration Policy and the Rights of Aliens", *supra*, note 14 at 1462. Chaney, *supra*, note 2 at 64, notes the contribution of illegal migrant workers to the United States economy: "Many are responding to and filling genuine needs, doing work that otherwise would remain undone and contributing to the growth of the U.S. economy. They are therefore entitled to all their rights as workers and to live without the constant fear of deportation".

to these workers a second "legal" identity in addition to the clandestine identity that is normally attributed to them; the undocumented worker inhabits a sphere of circumscribed but real, civil and social membership.[150] Consequently, undocumented workers suffer from a kind of split legal personality; they are *de facto* members of the community but excluded *de jure* and classified as non-members. Linda Bosniak concludes that this situation must restrict the sovereign right of the state to exclude illegal migrants at will:

> [The undocumented worker's] *de jure* membership circumscribes the reach of the exclusionary powers of the state and makes possible much of her existence as worker, while her experience as worker is significantly informed and limited by her subjection to both exclusionary theory and practice.[151]

The notion that undocumented workers possess a form of *de jure* membership in society is also recognized by Carens. Although these workers may have broken immigration laws, host countries still find it difficult to expel them, especially those workers who have long-established ties to the community in which they reside.[152] Communitarian liberal thought is therefore faced with a dilemma. To retain a consistent definition of the community requires that illegal migrants are kept out or removed once they enter the territory. To expel these workers, however, without regard to the levels of their *de facto* or *de jure* membership in the community, may well undermine the very boundaries of the community that the exclusionary policy seeks to maintain.[153] The only acceptable compromise, therefore, is to exclude illegal migrant workers on their arrival or as soon as possible thereafter, but to make rights' concessions to those who have lived and worked in the host community for a considerable length of time.

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150 Bosniak, *supra*, note 82 at 977-978.
151 *Ibid.* at 999.
152 *Supra*, note 40 at 429.
153 Cf. Bosniak, *supra*, note 82 at 1003.

6. Arguments from State Sovereignty: Limiting Rights and Immigration

A number of arguments have been posited in support of the sovereign "right" of states to exclude migrant workers and their families from the life of the national community. These arguments are largely based upon individualist and communitarian conceptions of national security, namely socio-economic, cultural and physical security, and flow from an inclination of liberal democratic states towards closure and exclusion. In state practice, exclusion is understood in two ways: limitations on the rights of migrants who have been permitted to enter the territory of the state and the imposition of controls over entry to that territory. As noted in the introductory chapter, the focus of this thesis is on the rights of migrant workers and their families once they have entered the country of employment. Nonetheless, the sovereign "right" of states to control entry is particularly relevant to the case of family members who wish to join migrant workers in the country of employment and to the phenomenon of illegal migration. Arguments in support of the state sovereign "right" to exclude, in the two ways defined above, are especially forceful with respect to the "right" to control immigration, but they must be interpreted restrictively in the light of an interdependent world order in which the actions of nation-states are subject to limitation by universal and regional human rights norms.

6.1 State Sovereignty and Closure

Government controls over immigration and limitations on the rights of migrants once they have entered the territory are consistent with a traditional conception of the nation-state, the primary purpose of which is to preserve its socio-economic, cultural and physical security. In the twentieth century, the nation-state has acquired "enhanced importance".[154] The image today of nation-states with complete control over entry to their territory has become a familiar

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154 M.S. Teitelbaum, "Right Versus Right: Immigration and Refugee Policy in the United States" (1980) 59 Foreign Affairs 21 at 22. Teitelbaum notes, *ibid.*, that "throughout most of human history, national boundaries (where they existed) were far more permeable to the temporary ebb and flow or permanent movement of peoples than they are today".

one and is rarely challenged.[155] Indeed, it is argued that "control over entry of non-citizens is universally accepted to be a sovereign national right";[156] a basic right identifiable with the very essence and meaning of the national community:

> The right to choose an admissions policy is more basic [than any other decisions states make]..., for it is not merely a matter of acting in the world, exercising sovereignty, and pursuing national interests. At stake here is the shape of the community that acts in the world, exercises sovereignty and so on. Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination. Without them, there could not be *communities of character*, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life.[157]

The existence of the liberal nation-state is a reality but the very concept of this entity is a theoretical paradox. It is at the level of the nation-state that the liberal individualist and communitarian schools of thought come into deepest conflict. Schuck maintains that exclusion is unavoidable:

> [E]ven a liberal nation has powerful propensities to exclude. The very idea of nationhood implies a coherence of shared tradition, experiences and values -- a national community. This community defines itself in ways that are often parochial, exclusionary and inward-turning; by affirming a core of common commitments, it sets the nation apart from, if not above, the rest of humanity... this tendency toward closure and boundary-setting is inevitable.[158]

On the other hand, the logic of the liberal individualist approach envisages a polity, which all

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155 Except for the principle of mutual aid, which is applicable in the case of refugees. See *supra*, note 91 and accompanying text. From a perspective of developing countries, it has also been argued that restrictions by developed countries on entry were only imposed after "Europeans in the colonial period had gone and taken over by force, fraud and other means large parts of the richest lands in the world". M. Kishwar, "Captive People but Free Trade? Human Rights and National Boundaries" (November-December 1991) Manushi (New Delhi, India) 2 at 3.

156 King, *supra*, note 78 at 533.

157 Walzer, *supra*, note 1 at 61-62. Author's emphasis. Martin, observes *supra*, note 119 at 205, that there is "a core reality, strength, and even, in a carefully restricted sense, a moral force to the notion of the national community".

158 *Supra*, note 15 at 289.

may join provided that they do not threaten its foundations of liberty and rights. It is contended, in the American context, that "policy-making on the apprehension that the influx of a new group of aliens will dilute the nation's cultural characteristics coexists uneasily with national ideals of openness, equality and pluralism".[159]

The deeper paradox, however, is rooted in the conviction that the tendency to closure is actually desirable.[160] Schuck concedes that national closure may occasionally lead to "aggressive, destructive jingoism" but, on the other hand, the national community "makes the triumph of social justice and individual freedom more likely".[161] Such an outcome is not necessarily disadvantageous to migrant workers and their families already resident in the country of employment. It may prevent or considerably restrict future migration, but to those migrants already in the country, it promises to meet their claims to the rights described. Consequently, the domestic protection of the rights of migrant workers and their families may well go beyond the international norms outlined in chapter one and in the remainder of the thesis.

International law also upholds the central component of the traditional concept of state sovereignty, pre-supposing a world order of independent and (at least potentially) exclusive states. Under international law, states have an unrestricted or discretionary authority over immigration. Independent states in the modern world universally claim and exercise this power, ceding it only rarely and to a limited degree, by treaty.[162] Moreover, the right of national communities to self-determination is recognized by international human rights instruments.[163]

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159 "Immigration Policy and the Rights of Aliens", *supra*, note 14 at 1444.

160 Frederick Schauer, *supra*, note 16 at 1517, observes that it is sad and paradoxical that we hold ourselves together by fencing others out. Nonetheless, he argues, this does not make the phenomenon less real. Bosniak, *supra*, note 82 at 1001, calls this phenomenon the "paradox of modern liberal democracy", since its existence depends upon the illiberal principles of boundedness and exclusivity required by the nation.

161 *Supra*, note 15 at 289.

162 Whelan, *supra*, note 30 at 447-448.

163 The principle of self-determination is enshrined in the first provision of both the ICCPR and the ICESCR. See also Martin, *supra*, note 119 at 206, who maintains that secessionist movements, which are the greatest threat to the national community, are paradoxically evidence of the reality and strength of community sentiment at a highly abstract level.

International law, however, is changing, as described in chapter one, with the advent of universal human rights standards aimed at the protection of *all* individuals. The development of these standards represents a movement within the international community to delimit state sovereignty. In this context, the image of a sovereign nation-state with unfettered discretion over its own actions and decisions no longer holds true:

> The positive view of human rights tends to be associated with a belief in moderate degrees of global reform beyond the confines of statism. We are not stuck with the state system in its pure form as the best of possible worlds. We can modify it through enlightened behaviour. Part of that enlightening process consists of near universal acceptance of a growing list of human rights standards. This public acknowledgement, no matter by whom or for what motive, builds expectations and moves in the direction of a more peaceful and just world.[164]

A traditional conception of the nation-state is outdated and needs to be revised in order to be consistent with a changing and increasingly interdependent modern world. Only a more flexible notion of the nation-state, in which limitations on the rights of migrants and controls over immigration are justified on the basis of more restrictive criteria, may accommodate this interdependence among nations and truly protect the rights of migrant workers and their families in its midst.

6.2 Socio-economic Security

Limiting immigration is justified by the members of the polity on the basis that migrants may become a burden on the resources of the sovereign state, thereby reducing the benefits which accrue to members. This argument is often advanced in connection with restrictions on the right of migrant workers to reunion with their families in the country of employment because families are more likely to resort to state support than single workers. Often

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164 R. Falk, *Human Rights and State Sovereignty* (New York: Holmes & Meier, 1981) at 3.

governments require migrant workers to show that they possess suitable accommodation and sufficient resources to maintain the family before family members are permitted to join them. Schuck argues, in the American context, that limitations on immigration are necessary to protect the economic and social rights of members:

> Having ordained an activist welfare state that increasingly defines liberty in terms of positive government created legal entitlements to at least minimal levels of individual security and well-being, the nation cannot possibly extend these ever-expanding claims against itself to mankind in general. Instead, it must restrict its primary concerns to those for whom it has undertaken a special political responsibility of protection and nourishment, most particularly those who reside within its territorial limits.[165]

According to Schuck, this project is further jeopardized by the existence of illegal migrants within the territory of the polity: "Even this more limited task becomes impossible if masses of destitute people, many ill-equipped to live and work in a postindustrial society, may acquire legally enforceable claims against it merely by reaching its borders".[166]

On the other hand, to limit the economic and social rights of lawfully resident migrant workers and their families, and to some extent of illegal migrants who are long-term residents, on the grounds that they threaten the enjoyment of the welfare rights of members conflicts with the approach that has already been outlined earlier in the section concerned with these rights. The equal moral worth of migrants and the fact of their economic and social participation in society demand that welfare state benefits be equitably distributed between citizens and migrants. Some of these benefits, for example unemployment insurance, may be limited to those who have satisfied reasonable qualifying criteria, but they cannot be denied *in toto* on the basis that claimants have not acquired formal citizenship status.

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165 *Supra*, note 15 at 289. See also Bosniak, *supra*, note 82 at 1001, who refers to a similar argument; van Gunsteren, *supra*, note 33 at 740; and Nett, *supra*, note 79 at 226.

166 Schuck, *ibid.* The observation that illegal immigration dilutes society's resources even further is made in "Immigration Policy and the Rights of Aliens", *supra*, note 14 at 1453. See also Schuck and Smith, who maintain, *ibid.* at 104-113, that the universal birthright citizenship rule and the growing welfare state in the United States creates an incentive for more illegal immigration. Martin, however, *supra*, note 47 at 281, is sceptical that an expanding welfare state accounts significantly for the growth of illegal migration.

6.3 Cultural Security

An argument often posited for limiting the rights of aliens or migrant workers in a country or for restricting their entry is that their actual or anticipated presence threatens the cultural and historical make-up of the polity, with the result that a functioning political community may not be possible.[167] This position is similar to the republican conception of citizenship, described at the beginning of the chapter, which requires that states, in order to thrive as political entities, should not only be small but also homogeneous.

The source of this view is consistent with the communitarian quest for a collective expression of the good, which may insist upon the need for a culturally homogeneous nation. On the other hand, the thrust of liberal individualist thought is to move away from this position. Schuck and Smith argue that citizenship should accrue to individuals on the basis of mutual consent because they are dissatisfied with Locke's individualist consensual position, which may lead to a diversity of languages, ethnic origins, social customs, economic statuses and religious beliefs within one political society, with the result that a genuine sense of common civic identity is not sustained.[168] As noted earlier in the chapter, fear of such an outcome may also result in reluctance on behalf of the state to fulfil its commitment towards migrants in assisting them with the maintenance and development of their cultural identity.

This communitarian reasoning is bound up with a conception of the sovereign state and national cultural self-determination. Walzer argues that closure in general, including closure on the level of the nation-state, is necessary if the distinctiveness of cultures and groups is to thrive; "the restraint of entry serves to defend the liberty and welfare, the politics and *culture* of

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167 This argument has been noted by a number of scholars, for example: Walzer, *supra*, note 1 at 37-39; P.H. Schuck, "Introduction: Immigration Law and Policy in the 1990s" in "Overview: Domestic Implications of Immigration Policy" (1989) 7 Yale L. & Policy Rev. 1 at 19; Nett, *supra*, note 79 at 222 and 226; van Gunsteren, *supra*, note 33 at 740; and King, *supra*, note 78 at 535.

168 *Supra*, note 38 at 26.

a group of people committed to one another and to their common life".[169]

The fear of cultural fragmentation is tempered if immigrants are required to integrate to some extent into the new society:

> An effective society... requires that newcomers achieve at least a modest degree of assimilation into its culture. At a minimum, this must involve attaining competence in the common language in which that culture expresses and changes itself, but it also demands some comprehension of the nation's institutions and traditions. If newcomers do not value citizenship, if they fail to acquire the mastery of language and social knowledge that citizenship requires, they jeopardise their own well-being and (if they are sufficiently numerous) that of their adopted society.[170]

This fear may also be reduced if entry controls are put in place in order to avoid a "swamping" of the social and cultural system,[171] which is more likely to occur as a result of "unchecked increases" in illegal migration.[172]

The argument from sovereignty that limitations on the rights of migrants residing in a country and that restrictions on entry are necessary in order to preserve the "cultural security" of the state should be contrasted with arguments earlier in the chapter claiming that migrant workers and their families actually make a positive contribution to the culture of the country of employment. Their diverse cultures are of an educational value to the host citizenry and may assist in the creation of vibrant and lively societies and enrich contacts between receiving and sending countries. Moreover, nation-states that are culturally homogeneous are today in the minority. Traditional immigration countries, such as the United States and Canada, with their diverse populations, are being joined by some European countries of employment, such as France and Germany, which can no longer consider themselves entirely homogeneous on account of their growing foreign populations.

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169 *Supra*, note 1 at 39. Emphasis added.

170 Schuck, *supra*, note 38 at 14. See also *supra*, note 66 and accompanying text.

171 The expression "swamping" is taken from Nett, *supra*, note 79 at 66.

172 Cf. "Immigration Policy and the Rights of Aliens", *supra*, note 14 at 1443.

6.4 Physical Security and Public Order

The need to maintain public order and to preserve the physical security of the state is principally associated with restrictions on immigration rather than with limitations on the rights of those already in the country. This argument is often used to justify restrictions on the immigration of the families of migrant workers and the prevention of illegal migration.

Within the liberal individualist school of thought, the social contract is based on two fears: the primary fear reflects "the need for security in order to enjoy liberty, a need that arises from the fear of others" and the secondary fear reflects "the drive to restrain government, a drive that arises from the fear of tyranny".[173] The primary fear is the reason why individuals create the polity in the first place. If aliens are perceived to be a threat to individual members of the community and to the community as a whole, to exclude them is justified, especially in an unstable political and economic international climate. This argument is based on the view that the sheer numbers of those seeking to emigrate to liberal democracies might be so overwhelming as to threaten the very nature and existence of these democracies.[174]

The view that unlimited immigration may threaten democracy in a liberal polity is a legitimate one. Should members of the state, however, have complete discretion to impose restrictions on aliens at will or whenever they perceive them to be a threat or should qualifications be attached to any restrictions? Democracy is endangered not because of the potentially massive influx of immigrants *per se*, but because of discontent (racially motivated or otherwise) within the polity itself, a situation conducive to the emergence of a tyrannical

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173 "Immigration Policy and the Rights of Aliens", *supra*, note 14 at 1301. The secondary fear is less powerful than the first, because it is only a corollary of the existence of the government or commonwealth. *Ibid.*

174 Carens, *supra*, note 26 at 260, labels this argument a "realistic concern". The concern about "overwhelming" immigration is heightened by the fact that it would naturally increase family ties across boundaries. Hence the potential for even more migration. Cf., King, *supra*, note 78 at 529. On the other hand, forcibly confining potential immigrants "in areas of great poverty is no less important in causing great turbulence and misery the world over". Kishwar, *supra*, note 155 at 7.

regime. Bruce Ackerman argues that such a turn of events would destroy the entire liberal conversation that guarantees the rights of all existing citizens and, therefore, restrictions on immigration are justified. But these restrictions are *only* justified if the security of democracy is *actually* endangered. Ackerman questions whether present immigration practices are justified on this ground.[175] In his global application of the Rawlsian principles of justice, Carens concedes that freedom of movement may be limited to avoid chaos and a breakdown of public order on the basis that such a scenario would reduce everyone's basic liberties. These limitations, however, must be used sparingly; they must only be activated if there is a "reasonable expectation" that unlimited immigration would damage public order and they must only be justified to the extent necessary to preserve this order.[176]

Limiting immigration on the grounds of public order and physical security is also relevant to the liberal communitarian position. This position, however, is less concerned with the attempt to keep down the numbers of those entering in order for the state to function effectively, but more with the need to retain a measure of control so that the national community may develop and flourish.

As noted above, the need to maintain public order and to preserve the physical security of the state is more applicable to the question of illegal migrants, who have violated immigration law, than to those who are residing and working in a country legally. The latter have been openly accepted by the community; the former, largely through their economic and social participation, only by implication. The communitarian model of participation, however, may play a significant role in transforming the primary liberal individualist fear:

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175 B. Ackerman, *Social Justice in the Liberal State* (New Haven: Yale University Press, 1980) c. 3 "Citizenship", 69 at 94-95. In accordance with the need to set stringent qualifications on immigration restrictions, Ackerman maintains that immigrants should have a *prima facie* right to demand entry into a liberal state.

176 Carens, *supra*, note 26 at 259. Another qualification upon the use of restrictions is that the threat to public order posed by unlimited migration should not be the product of antagonistic reactions, for example riots, etc. *Ibid.*

> [This model is] characterized by a certain trust, albeit hesitant, of others and of government that arises as each gradually proves deserving of that trust. The desired liberal focus upon private life may finally be within reach but only by virtue of this metamorphosis of the idea of liberty itself. For although the model's goal remains a liberal one -- the maximization of individual freedom -- its understanding of freedom is less the negative one premised on fear and more a positive one founded on trust and community.[177]

The claim, therefore, that resident illegal immigrant workers are a threat to the security of a liberal democracy becomes unacceptable after a certain period of time during which these persons have established organic ties to and relationships with the community and its members founded on trust. Arguments from "national security" and "public order" only hold against those who have not yet entered the country or those who have resided there for a very short time.[178]

7. Conclusion: The Community Reconsidered

Just as no individual exists fully outside of a social context, an alternative conception of the community must take into consideration the fact that no state operates in the world today as an isolated island. Nation-states are increasingly interdependent, especially in the economic sphere.[179] A consciousness of the growth of this interdependence should lead to an increase in sharing and a decrease in nationalism.[180] In a global context, interdependence leads to obligations between nation-states.[181] This notion has the potential to break down the barriers

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177 "Immigration Policy and the Rights of Aliens", *supra*, note 14 at 1308.

178 The state may, therefore, expel those illegal migrants who have not had the time to establish ties with the community. This policy, however, would need to be tied in with effective immigration enforcement so that it is not enforced on an arbitrary and haphazard basis. See also *supra*, note 153 and accompanying text.

179 Bosniak argues, *supra*, note 82 at 1002-1003, that the liberal exclusionist approach mistakenly views the nation as "insular and insulatable". This is certainly not true of the United States, which is inextricably embedded in an interdependent world economy and whose own economy is increasingly internationalized (this is even more the case with the countries belonging to the European Community). This approach also fails to recognize the historical facts, namely that exclusionary immigration policy may regulate the velocity of the labour flow, but will never threaten the flow itself. *Ibid.*

180 McDougal, Lasswell & Chen, *supra*, note 118 at 439, write: "A clear consciousness of interdependence offers more hope even for shared exclusive interests than the amnesia of parochialism".

181 Lichtenberg criticizes Walzer's thesis arguing that he denies or neglects the requisite empirical assumptions and treats nations as essentially closed systems. Walzer does not consider the obligations that

of national self-interest or at least broaden the scope of that self-interest to include the interests of others.[182]

The facts of global interdependence should form the basis of national and international laws.[183] In the human rights context, this process has already begun and is moving ahead. The principle that human rights are no longer the sole concern of nation-states but also the concern of the international community as a whole is clearly recognized. With respect to the protection of the rights of migrant workers and their families, international norms and guidelines have been established.[184] These standards are the object of the remainder of the thesis, together with the argument that they should be developed further on the basis of the principles elaborated in this chapter and on account of the fact that international human rights law is moving in the direction of expanding protection for disadvantaged groups.

The reality of interdependent relations among countries dilutes the sovereign nation-state. Nation-states may resist the dynamics of interdependence, but they cannot deny its existence. The fact that alien migrant workers reside and work in nation-states is a phenomenon intricately connected with the fact of global interdependence. Interdependence, as the communitarian model of participation has shown, is also evident on the local level in the dealings and relationships between citizens and non-citizens.

To deny the existence of interdependence and to stubbornly insist upon a conception of

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might arise because one nation has harmed or benefited from another. *Supra*, note 133 at 95. Walzer, *supra*, note 96 at 104, is not convinced by Lichtenberg's approach. Using the example of a people demanding political independence, Walzer claims that such a group does not shape its demand for independence to Lichtenberg's conception of interdependence. It seeks self-government and may only have self-government among its members.

182 Lichtenberg, *ibid.* at 97-98. Lichtenberg notes that "interdependence means that our wrongs come back to haunt us, and not just others". Today, it appears that the need of the nation-state to look "beyond its own interests may in the long run be the only way of serving them". *Ibid.*

183 What is needed now-a-days is that as against an abstract and unreal theory of State omnipotence on the one hand, and an atomistic and artificial view of individual independence on the other, the facts of the world with its innumerable bonds of association and the naturalness of social authority should be generally recognized and become the basis of our laws, as it is of our life.

J. Figgis, *From Gerson to Grotius* (1907) at 206, cited in "Immigration Policy and the Rights of Aliens", *supra*, note 14 at 1286.

184 See also Chaney, *supra*, note 2 at 42.

community which presumes an equality and commonality of interests existing only at the most formal level is to think of community in terms of an "idealized abstraction".[185] This sense of national community may also be a "dangerous abstraction", which rejects the significance of face-to-face relationships and other intimate bonds, such as those of family.[186] It is also dangerous because it may lead to exclusionary racist or nativist policies, xenophobia and intolerance.[187] To think in terms of a national and largely homogeneous community is also to ignore the existence of pluralist and multicultural nations, such as Australia, Canada and the United States,[188] and those European countries, which can no longer regard themselves as homogeneous entities as a result of the considerable influx of foreigners in the last three decades. It is to ignore the fact that some citizens may feel a greater sense of community with certain groups of resident aliens than with other citizens,[189] and that the attachments between citizens and aliens are anything but insubstantial. An abstract conception of the community is blind to the reality that migrant workers and their families form a relevant part of this community. It is an impoverished conception of the community indeed.

A national community which acknowledges, accepts and accommodates all the parts that form its very being, including alien migrant workers and their families, and which affords recognition to external global forces manifested at the domestic level, is more vibrant and meaningful than a community which pretends to retain full sovereignty and independence and yet, in doing so, denies basic human rights. If migrant workers and their families are recognized and accepted as part of the national community, the chances that their rights will

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185 Bosniak, *supra*, note 82 at 1005 and accompanying text.

186 Cf. Martin, *supra*, note 119 at 205.

187 This argument has been referred to by a number of scholars: Martin, *ibid.* at 204 and *supra*, note 47 at 287; Carens, *supra*, note 26 at 260; King, *supra*, note 78 at 531; and Smith, *supra*, note 7 at 228.

188 Alexander Aleinikoff writes, *supra*, note 75 at 240, that the idea of a political community sharing similar ideas of the meaning of membership and the scope of the common enterprise does not aptly describe a nation as diverse and pluralistic as the United States.

189 *Ibid.* at 242. For example, Mexican-Americans may identify more closely with Mexican citizens who are resident aliens in the United States than with other American citizens. Similarly, Black Americans are a powerful lobby for Haitians seeking entry. The point to be made here is that citizenship does not necessarily mean commitment to the community. Indeed, aliens, who overcome substantial burdens to join the community, may possess a greater sense of commitment to it than those who were born there. *Ibid.* at 241-242.

also be recognized and protected are all the greater. Moreover, only by equally respecting those who live and work within its boundaries may the national community morally justify its own existence.

Such a conception of community would not have appealed to those early republican thinkers who held out the idealistic vision of a united homogeneous group of persons pursuing collective goals in the quest for betterment and enlightenment. But this image is behind us. The alternative conception of community is certainly closer to modern-day reality. It is the *only* community we may claim to possess.

PART TWO

UNIVERSAL STANDARDS SPECIFICALLY RELATING TO THE PROTECTION OF MIGRANT WORKERS AND THEIR FAMILIES

CHAPTER THREE

THE PROTECTION OF THE RIGHTS OF MIGRANT WORKERS AND THEIR FAMILIES BY THE ILO WITH PARTICULAR REFERENCE TO THE MIGRANT WORKERS INSTRUMENTS OF 1949 AND 1975

1. Introduction

This chapter examines the International Labour Organization's contribution to the protection of the economic, social, cultural, political and residence rights of migrant workers and their families. It is the first of a series of chapters dealing with international approaches to this question. Chapter four examines the recent UN Convention on the protection of the rights of migrant workers and their families and chapters six to eight consider European standards relevant to the protection of migrants, namely Council of Europe instruments and European Community provisions concerned with the free movement of workers.

It is fitting to begin with the International Labour Organization (ILO), which has a long-standing tradition of the protection of people in their working environment. Moreover, ILO Conventions relating to the protection of migrant workers and their families are the only universal set of standards concerned with this group currently *in force* at the international level.[1]

The discussion in this chapter centres mainly on four ILO instruments concerned

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1 See also A. Trebilcock, "Migrant Workers: An Overview of International Labour Standards" in Max Planck Institute for Comparative Public Law and International Law, ed., *The Legal Position of Aliens in National and International Law* (Berlin: Springer-Verlag, 1987) 1827 at 1829. The UN *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* is not yet in force. See *infra*, chapter four.

specifically with the protection of migrant workers and their families. In order to best comprehend the context in which these texts arose as well as the justifications for the provisions found in them, particular attention is given to their drafting history, especially in the case of the most recent standards. References are also made, where appropriate, to other ILO instruments and activities in this area. A separate section considers the applicability of ILO standards to the particularly vulnerable situation of illegal migrants.

The objective of this chapter is to show, as the previous chapter indicated, that traditional unbridled state sovereignty over alien migrant workers is being rightly circumscribed by the setting of international standards concerned with the protection of their economic, social, cultural, political and residence rights.

In the first place, however, it is proposed to set the discussion within the framework of ILO standard-setting activities in the field of human rights and the unique supervisory procedures and mechanisms which the ILO possesses with respect to their protection and promotion.

2. The ILO and Human Rights

2.1 Origins and the Constitution

The ILO was founded in 1919 in order to regulate international labour concerns. International regulation was seen as essential to respond to demands for better working conditions prevalent in many countries since the end of the nineteenth century, and to offset any economic and competitive disadvantages which might accrue to those states that sought to combat these problems alone.[2]

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2 V.A. Leary, *International Labour Conventions and National Law: The Effectiveness of the Automatic Incorporation of Treaties in National Legal Systems* (The Hague: Martinus Nijhoff, 1982) at 6.

Human rights have been described as being at the very heart of the ILO's mission.[3] The constitutional documents of the ILO reveal a clear commitment to the protection and promotion of human rights. The fundamental principles and objectives of the Organization are located in Part XIII of the *Treaty of Versailles*, the original ILO Constitution of 1919 and in the *Declaration of Philadelphia*, adopted by the International Labour Conference in 1944 and incorporated into the Constitution in 1946.[4] For example, Part II of the Declaration contains the following principle:

> [A]ll human beings, irrespective of race, creed or sex, have the *right* to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.[5]

If human rights are an integral aspect of the ILO program, then the protection and advancement of economic and social rights or social justice, by virtue of the Organization's primary concern with labour, constitute its thrust.[6] Indeed, the emphasis of the ILO on general areas of economic and social policy has become more prominent with time.[7]

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3 F. Wolf, "Human Rights and the International Labour Organisation" in T. Meron, ed., *Human Rights in International Law: Legal and Policy Issues* (Clarendon Press: Oxford, 1984) 273 at 273.

4 N. Valticos, "The International Labour Organisation" in K. Vasak, ed., *The International Dimensions of Human Rights*, vol. 1, revised and edited for the English edition by P. Alston (Wesport, Connecticut: Greenwood Press, 1982) 363 at 363-364. See also M. Hasenau, "ILO Standards on Migrant Workers: The Fundamentals of the UN Convention and Their Genesis" (1991) 25 IMR 687 at 688. The full title of the *Declaration of Philadelphia* is the *Declaration concerning the Aims and Purposes of the ILO*. The Constitution of the ILO has been hailed as "a genuine declaration of the worker's rights". Valticos, *ibid.* at 363, citing from R. Cassin, "L'homme, sujet de droit international, et la protection des droits de l'homme dans la société universelle" in *La technique et les principes de droit public, mélanges en l'honneur de Georges Scelle*, vol. 1 (Paris, 1959) at 68.

5 Cited by Valticos, *ibid.* at 364 and by Wolf, *supra*, note 3 at 273. Emphasis added. The non-discrimination element in this principle should be underlined. C. Wilfred Jenks observes astutely that the principle that human rights transcend differences of race, creed and sex, which has now become the keynote of the UDHR and the two UN human rights covenants, was first formulated in the *Declaration of Philadelphia*. C.W. Jenks, "Human Rights, Social Justice and Peace - The Broader Significance of the ILO Experience" in A. Eide & A. Schou, eds, *International Protection of Human Rights*, Proceedings of the 7th Nobel Symposium, Oslo, September 25-27, 1967 (Stockholm: Almquist & Wiksell, 1968) 227 at 244.

6 K. Kaplansky, "The International Labour Organization" in R. Matthews & C. Pratt, eds, *Human Rights in Canadian Foreign Policy* (McGill-Queen's University Press: Kingston and Montreal, 1988) 115 at 115; Jenks, *ibid.* at 228-229.

7 Leary, *supra*, note 2 at 7.

2.2 Human Rights Standards

It is widely recognized that *all* ILO standards deal with the protection and promotion of human rights in a broad sense. Even the most technical ILO instruments can be contemplated as measures for the implementation of the right to "just and favourable conditions of work" proclaimed by the UDHR and recognized by the ICESCR.[8] Some ILO standards, however, are more specifically human-rights oriented; for example, those concerned with fundamental freedoms and rights, such as freedom of association, freedom from forced labour and equality of opportunity and treatment in employment,[9] and those which direct their attention to the protection of social groups, such as women, children and certain categories of workers, including foreign and migrant workers.[10]

Although ILO instruments have in-built flexibility, permitting states to accede to them in accordance with their level of economic and social development,[11] the standards themselves are strictly of universal application. A former Assistant Director-General of the ILO has stressed the importance of universality in this regard:

> One of the main effects of the standards adopted by the ILO has been to underline the universal validity of human rights. There has sometimes been a tendency to voice doubts as to the possibility of having universal standards in view of the diversity which exists between countries in the economic, social and political fields. Nothing could be more dangerous for the protection of human rights than this sceptical relativism.[12]

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8 Jenks, *supra*, note 5 at 235-236. See also Wolf, *supra*, note 3 at 274 and Valticos, *supra*, note 4 at 365.

9 Jenks, *ibid.* at 236; Wolf. *ibid.*

10 Cf. Valticos, *supra*, note 4 at 365.

11 Leary, *supra*, note 2 at 23.

12 N. Valticos, "The Role of the ILO: Present Action and Future Perspectives" in B.G. Ramcharan, ed., *Human Rights: Thirty Years after the Universal Declaration*, Commemorative Volume on the Occasion of the Thirtieth Anniversary of the Universal Declaration of Human Rights (The Hague: Martinus Nijhoff, 1979) 211 at 213. Indeed, the universality of international labour standards has been stressed by the ILO Committee of Experts on the Application of Conventions and Recommendations and by the International Labour Conference Committee, which have stated that their function is to determine whether standards are being met regardless of the economic and social situation in a given country. Cf. Valticos, *ibid.* at 226; Wolf, *supra*, note 3 at 283.

There is a significant functional distinction, however, with respect to ILO standards in that some are binding while others are merely promotional or explanatory. The international labour code consists of Conventions or Recommendations. The former are formal, binding standards that, once ratified, impose obligations upon states in international law. The latter are informal, non-binding principles, which deal with questions that do not lend themselves easily to precise obligations, often because diverse national conditions prevent the establishment of universal rules, but where it is nonetheless helpful to have a set of guidelines.[13] Recommendations frequently accompany Conventions. In such cases, they either provide further detailed definition of the standards in the corresponding Convention or set higher or more advanced standards.[14] This arrangement means that ILO Conventions are more likely to operate as recommendations with regard to those states which have not ratified them.[15] The significance of the distinction between these two kinds of ILO instrument becomes apparent on consideration of the standards relating to the protection of migrant workers.

ILO standards have unquestionably influenced, directly or indirectly, provisions in other international human rights instruments. For example, the ESC was drawn up on the basis of ILO standards and with the participation of the ILO.[16] Moreover, the ILO also contributed to the drafting, implementation and revision of a number of European Community Regulations governing the social security of migrant workers.[17]

See below for additional information on these two ILO bodies.

13 Wolf, *ibid.* at 273-274.

14 Wolf, *ibid.* at 274; Leary, *supra*, note 2 at 12; Valticos, *supra*, note 4 at 364; H. Kellerson, "International Labour Conventions and Recommendations on Migrant Workers" in A. Dummett, ed., *Towards a Just Immigration Policy* (London: Cobden Trust, 1986) 33 at 34.

15 Cf. Jenks, *supra*, note 5 at 234.

16 Valticos, *supra*, note 4 at 377; Jenks, *ibid.* at 254; *The ILO and Human Rights*, Report of the Director General (Part I) to the International Labour Conference, 52nd Session, 1968 (Geneva: International Labour Office, 1968) c. IV, "Equality" 51 at 55.

17 *ILO Action on Behalf of Foreign and Migrant Workers and their Families*, Note by the Secretary-General to the UN Commission for Social Development, 24th Session (January 6-24, 1975), at 2-3, para. 7, UN Doc. E/CN.5/523 [hereinafter *ILO Action on Behalf of Migrants*]. This document is an ILO report to the UN. The ILO also played a role in the preparation of the *European Convention on Social Security* of 1972. *Ibid.* at 2, para. 7 and at 16, para. 47.

National laws, regulations and practice, however, are the primary target of ILO standard-setting efforts. International labour standards lose significance and vitality if they are not effectively implemented and incorporated into law at the state level.[18] Conventions impose binding obligations upon ratifying States, but unratified Conventions and Recommendations, as shown above, may also substantially influence State legislation and practice. The latter non-binding standards "spell out the targets to which countries should aspire in law and practice";[19] the mere existence of these principles may establish in time "a kind of common law".[20] ILO supervision procedures are an important catalyst in this regard. Under article 19 of the ILO Constitution, member states are under an obligation to bring any Convention or Recommendation adopted by the International Labour Conference within one year of adoption (and no later than 18 months) before the competent authority (usually the national parliament) for enactment of legislation or other action. Any measures taken by member states to bring Conventions or Recommendations before the competent authorities are to be communicated to the Director-General of the International Labour Office.[21] Member states must also report to the Director-General on the position of their national law and practice with respect to unratified conventions (article 19(5)(e)) and recommendations (article 19(6)(d)) and the effect which has been given or is proposed to be given to the instruments. Every year the Governing Body of the ILO chooses the instruments for which such reports are to be requested. Instruments with a particular human rights content are often the subject of scrutiny. The receipt of the reports allows the Committee of Experts on the Application of Conventions and Recommendations to make a general survey of the situation in a particular field.[22] The effect of these general

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18 Wolf, *supra*, note 3 at 294; Leary, *supra*, note 2 at 1.

19 W.R. Böhning, *Studies in International Labour Migration* (London: ILO (published by Macmillan Press), 1984) c. 10, "International Contract Migration in the Light of ILO Instruments" 233 at 235.

20 Wolf, *supra*, note 3 at 294, citing from *In-Depth Review of International Labour Standards*, ILO Governing Body, 194th Session, at 41, ILO Doc. GB.194/PFA/12/5 (November 1974).

21 See also Wolf, *ibid.* at 246. The purpose of this provision is to stimulate ratification and the adoption of legislation applying ILO Conventions. Leary, *supra*, note 2 at 12. Valticos, *supra*, note 12 at 217, maintains that the ILO achievement in obtaining a large number of ratifications of Conventions is largely the result of this rule.

22 Wolf, *ibid.* at 278-279. The object of such a survey is to describe the situation existing in various states with regard to the area covered by the instruments, to evaluate the difficulties which stand in the way of

surveys is difficult to measure, but they have undoubtedly provided an opportunity for reporting a great deal of positive action in the field covered by the instruments under examination, which in the absence of such a stimulus might not have taken place.[23] In 1980, the four ILO instruments relating to the protection of migrant workers were the subject of such a survey, which was a source of valuable information on the measures being taken in member states to protect the rights of migrant workers and their families.

2.3 Supervisory Procedures and Mechanisms

ILO procedures and bodies established for the purpose of ensuring the protection of human rights set forth in the Constitution and in the Conventions and Recommendations have a twofold objective: to ensure compliance with state obligations under ratified Conventions and to promote the application of ILO standards irrespective of any formal obligation.[24] This second objective has already been illustrated in the discussion of ILO attempts to monitor state action with respect to unratified Conventions and Recommendations.

The aim of this section is to provide a general description of the ILO supervisory system and some of its essential and unique features relevant to the protection and promotion of human rights.

(a) Tripartism

The ILO is unique among intergovernmental organizations concerned with human rights in that its policy-making organs are composed not only of government representatives, but also of workers' and employers' representatives who participate on an equal basis.

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the application of the texts and to suggest means of surmounting these difficulties. Valticos, *supra*, note 4 at 370.

23 Jenks, *supra*, note 5 at 239.

24 Valticos, *supra*, note 4 at 367-368 and at 391.

International labour standards come to fruition as a result of discussions and negotiations at the annual International Labour Conference and in the Committee established by the Conference at the beginning of each Session. Both of these forums are composed on a tripartite basis, as is the ILO Governing Body (the executive organ of the ILO). The Governing Body and the Conference Committee are also involved in the supervisory process and discuss the conclusions reached by the Committee of Experts.[25] According to the late C. Wilfred Jenks, a former Director-General of the ILO, the unique composition of the ILO Governing Body and the Conference Committee has

> profoundly influenced their methods of work and approach to problems; it has dethroned the arrogance of sovereignty and made possible imaginative initiatives which could not have been taken in purely governmental bodies which take their tone from current official thought.[26]

As a result, groups with a genuine interest in the subject-matter covered by the ILO may effectively participate in, and substantially contribute to, the formulation of international labour standards and the mechanisms established for their protection and implementation.[27]

(b) Reporting

States which have ratified ILO Conventions are required to submit annual reports under article 22 of the ILO Constitution. More detailed reports may be requested by the Governing Body at regular intervals and, presently, more frequent reporting is sought for certain

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25 Kaplansky, *supra*, note 6 at 115; Valticos, *ibid.* at 392; Leary, *supra*, note 2 at 6; Kellerson, *supra*, note 14 at 34; *ILO Action on Behalf of Migrants*, *supra*, note 17 at 4, para. 11. An ILO Convention is adopted after two readings. On the first reading the instrument is usually adopted by a voice vote. On the second reading the Convention requires a two-thirds majority of the *whole* International Labour Conference in order to gain adoption. In effect, this means a three-quarters majority, since those who abstained or were not present at the vote count against adoption. By way of contrast, simple majorities suffice in the UN system. I am indebted to Kalmen Kaplansky, former Canadian Labour Congress delegate to the ILO, for bringing this distinction to my attention.

26 Jenks, *supra*, note 5 at 231.

27 Cf. Jenks, *ibid.* at 251.

conventions, particularly those concerning basic human rights.[28] The reports are examined by the Committee of Experts on the Application of Conventions and Recommendations. As mentioned earlier, reports on selected unratified Conventions and Recommendations may also be requested by the Governing Body. These reports constitute the data for general surveys carried out by the Committee of Experts on the instruments in question.

(c) The Committee of Experts on the Application of Conventions and Recommendations

The Committee of Experts on the Application of Conventions and Recommendations is the ILO equivalent to the various independent supervisory bodies established under international and regional human rights instruments. The Committee is composed of nineteen experts, appointed for a renewable period of three years in their personal capacities, who examine reports submitted by states on their application of ratified Conventions. The Committee may comment on these reports in two ways depending on the extent of the discrepancy between the Convention requirements and state law and practice; for serious discrepancies, observations are published in a report (submitted each year to the International Labour Conference) and for minor discrepancies, the Committee issues unpublished "direct requests" to governments. As described earlier, the Committee also undertakes general surveys, based on state reports, on unratified Conventions and Recommendations.[29]

(d) Sanctions

The ILO reporting system contains only two forms of "sanctions" to which states might be subjected. The first has already been referred to and involves the publication in the

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28 Wolf, *supra*, note 3 at 278; Valticos, *supra*, note 4 at 368.

29 Wolf, *ibid.* at 281-283; Valticos, *ibid.* 369-370; Leary, *supra*, note 2 at 19. See also *supra*, notes 22 and 23 and accompanying text with respect to general surveys.

Committee of Experts' annual report of significant irregularities between state obligations under ratified conventions and national law and practice. The second "sanction" is imposed by the tripartite Conference Committee on consideration of the Committee of Experts' report. The Conference Committee selects approximately one quarter of the latter Committee's observations for public discussion. These constitute the most serious cases. Representatives of censured governments have the opportunity to respond during these discussions. The Conference Committee then submits a report to the Conference Plenary which includes "a special list" referring to states that have either failed to comply with reporting requirements or whose law or practice does not conform with Conventions that they have ratified.[30] This "special list" has been described as "the most serious moral censure available within the ILO regular supervisory system".[31]

(e) Contentious Procedures

In addition to reporting requirements, the ILO has distinct contentious procedures in place allowing representations or complaints to be made alleging that a state has not fulfilled its obligations under a Convention or Conventions that it has ratified.

(i) Representations

Representations may be made by employers' or workers' organizations to the ILO Governing Body. The representation is communicated to the government in question for reply and if no reply is received or the response is unsatisfactory, the Governing Body may decide to publish the representation and the government statement (in the case of an unsatisfactory

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30 Valticos, *ibid.* at 371; Leary, *ibid.* at 19-20. The nature and composition of the Conference Committee give it a more political and less technical tone than the Committee of Experts. Leary, *ibid.* at 20.

31 Leary, *ibid.*

response).[32]

(ii) Complaints

The complaint procedure is the most formal and far-reaching procedure in the ILO supervisory armoury.[33] A complaint may be lodged by a state against another state for breach of its obligations under a Convention which both have ratified or the procedure may be initiated by the Governing Body on its own motion or on receipt of a complaint from a delegate to the International Labour Conference. In the latter case, therefore, the procedure may be set in motion by employers or workers who are represented at the Conference. The Governing Body may communicate the complaint to the state concerned and invite the government to make a statement. If the response received is insufficient or if the Governing Body considers that communication of the complaint is unnecessary, it may appoint a Commission of Inquiry, composed of three experts, to consider the complaint. The inquiry is conducted in a judicial fashion and includes the assembly of relevant documents, the hearing of parties and witnesses and on-the-spot visits. On completion of the inquiry, the Director-General communicates the Commission of Inquiry's report to the Governing Body and to the governments concerned and arranges for its publication.[34]

The representation and complaint procedures have been used sparingly, although the tendency in past years has been to resort to them more often, especially when the implementation of basic human rights is at issue.[35] Two complaints in the last decade alleging

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32 Articles 24 and 25 of the ILO Constitution. See also Wolf, *supra*, note 3 at 286. If an organization withdraws a representation, the Governing Body can continue with the procedure on the understanding that the representation may have been withdrawn as a result of fear or pressure and that the proceedings are recognized to be of public interest. Valticos, *supra* note 4 at 381.

33 Valticos, *ibid.* at 377; Wolf, *ibid.* at 288.

34 Articles 26 and 29(1) of the ILO Constitution. See also Wolf, *ibid.* at 288-289. If a state does not accept the recommendation in the Commission of Inquiry's report it may refer the complaint to the International Court of Justice (article 29(2)). The decision of the Court is final (article 31).

35 Wolf, *ibid.* at 286 and 289.

violations of ILO labour standards and pertaining to migrant workers are worth noting. The first was set in motion by another state and was eventually settled. The second was initiated by workers' delegates to the International Labour Conference and led to the appointment of a Commission of Inquiry.

In 1985, the Government of Tunisia brought a complaint before the ILO against the Libyan Government following the expulsion of tens of thousands of Tunisian migrant workers from Libya. The complaint alleged a number of violations of ILO Conventions which both states had ratified. Matters of concern included the non-payment of wages, compensation due to premature termination of employment and reimbursement of social security contributions. Representatives of both governments agreed to meet under the auspices of the ILO to find a solution to the dispute in the light of ILO labour standards. The matter was settled when the Libyan Government transferred a large sum of money to the Tunisian Government. Earlier, in 1981, during the 67th Session of the International Labour Conference, complaints concerning the mistreatment of Haitian migrant workers employed on sugar plantations in the Dominican Republic were filed against both Haiti and the Dominican Republic by the workers' delegates of Suriname, Burkina Faso, Rwanda and the Central African Republic. The Commission of Inquiry, established to investigate the case, found that the Dominican Republic and Haiti were violating a number of ILO Conventions relevant to the protection of migrant workers, which they had both ratified.[36]

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36 See respectively W.R. Böhning, "The Protection of Migrant Workers and International Labour Standards" (1988) IM 133 at 142 and *Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance of certain international labour Conventions by the Dominican Republic and Haiti with respect to the employment of Haitian workers on the sugar plantations of the Dominican Republic*, *supra*, Introduction, note 56. The ILO Conventions under the consideration of the Commission of Inquiry were, in the case of both countries, *Convention No. 29 of 1930 concerning Forced Labour*, *Convention No. 105 of 1957 concerning Abolition of Forced Labour*, *Convention No. 87 of 1948 concerning Freedom of Association and Protection of Right to Organize* and *Convention No. 98 of 1949 concerning Right to Organize and Collective Bargaining*, and, in the case of the Dominican Republic, *Convention No. 95 of 1949 concerning Protection of Wages*. The 1949 and 1975 Conventions relating specifically to migrant workers (considered below) were not at issue, since neither country has ratified these instruments. See also Leary, *supra*, Introduction, note 9 at 12 with respect to the latter complaints.

(f) Special Freedom of Association Procedures

The principle of freedom of association is enshrined in the Constitution of the ILO. In 1950, the ILO set up a special procedure, following an agreement with the UN Economic and Social Council, to supervise the implementation of this principle and to supplement the aforementioned procedures of general application. As a result of this agreement, matters arising within the UN concerning the right to freedom of association are now referred to the ILO Governing Body. Although specific ILO Conventions deal with the right to freedom of association,[37] complaints under this special procedure may be made to a Committee on Freedom of Association of the Governing Body against ILO member states which have not ratified these instruments on the basis that this principle is found in the ILO Constitution which applies to all member states.[38]

The existence of this special procedure and the ILO instruments relating to freedom of association must be noted when the trade union rights of migrant workers are considered later in the chapter. The Committee on Freedom of Association dealt with an untypical complaint concerning "foreign" workers in the early 1950s. The complaint concerned restrictions on trade union rights in Morocco. At the time, Morocco was still a French protectorate and Moroccans were effectively "foreigners" in their own land. The Committee found that only French workers could form their own trade unions, while Moroccan workers were unable to do so, and only those employed in certain industries could join existing organizations. New legislation abolishing this discrimination was introduced in 1955.[39]

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37 See in particular *Convention No. 87 of 1948 concerning Freedom of Association and Protection of the Right to Organize* and *Convention No. 98 of 1949 concerning Right to Organize and Collective Bargaining*.

38 Wolf, *supra*, note 3 at 290; Valticos, *supra*, note 4 at 381-382; Kaplansky, *supra*, note 6 at 118.

39 J. Hodges-Aeberhard, "The Right to Organise in Article 2 of Convention No. 87. What is meant by Workers "without distinction whatsoever"?" (1989) 128 ILR 177 at 191, citing from *Eighth Report of the International Labour Organization to the United Nations*, 12th Report of the Committee on Freedom of Association, Appendix II, Case No. 16, paras. 257-276 (Geneva: ILO, 1954).

2.4 The Pioneering and Innovative Role of the ILO with respect to the Protection and Promotion of Human Rights

As the oldest functioning organization with an interest in the protection and promotion of human rights, the ILO is widely acknowledged to have a pioneering role in this regard. Virginia Leary has observed that "international labour conventions were virtually the first multilateral treaties primarily intended to improve the lot of individuals within states".[40] Moreover, ILO standards have inspired the formulation of economic and social rights in universal and regional human rights instruments.[41] ILO procedures have also been in the forefront of attempts to supervise the implementation of human rights. Although the ILO supervisory machinery cannot readily be transposed as a whole into other human rights protection systems because of the distinct milieu in which it was created,[42] it has, in spite of its age, retained a number of unique and innovative features which remain of interest. The unique tripartite composition of the ILO policy-making organs and the state obligation under the ILO Constitution to submit adopted International Labour Conference instruments to the national competent authorities have already been noted. The ILO possesses other innovative features. The supervisory machinery applies uniformly to all member states and generally to all ILO standards.[43] Further, no reservations may be made to Conventions.[44] Finally, the ILO has developed useful informal methods which supplement formal mechanisms. For example, the system of "direct contacts" with governments is based on detailed discussions between representatives of the ILO and a government, usually initiated by the latter, with a view to obtaining technical assistance, undertaking fact-finding or resolving disputes between the

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40 *Supra*, note 2 at 6-7.

41 Valticos, *supra*, note 4 at 363; Jenks, *supra*, note 5 at 299. See also *supra*, notes 16 and 17 and accompanying text.

42 Cf. Valticos, *ibid.* at 394; Jenks, *ibid.* at 253. The ILO system may, however, still serve as a valuable model in the development of other systems of supervision. Valticos, *ibid.*

43 Kaplansky, *supra*, note 6 at 117. Moreover, most ILO Conventions only require two ratifications before they come into force. Trebilcock, *supra*, note 1 at 1828 (footnote 4); Leary, *supra*, note 2 at 9.

44 Leary, *ibid.* at 6; Jenks, *supra*, note 5 at 237. Jenks observes, *ibid.*, that most Conventions permit a considerable flexibility in their application, but the result of the prohibition on reservations means that the measure of this flexibility is determined by the terms of the instruments themselves and not by unilateral action by states parties. See also Trebilcock, *supra*, note 1 at 1828 (footnote 4).

government concerned and an ILO supervisory body.[45]

The ILO's long-standing tradition regarding the protection and promotion of the dignity of human labour and its concern with the rights of the worker set an ideal context in which to consider the human rights of migrant workers and their families. Indeed, the plight of this group has attracted the special attention of the ILO.

3. The ILO, Migrant Workers and Migration Policy

3.1 Background

One of the ILO's predominant concerns since its inception has been with the protection of foreign migrant workers.[46] Indeed, it has traditionally been the international organization with the greatest concern for this particular group.[47]

ILO constitutional documents are more explicit about the protection of the rights of migrant workers than about human rights in general. The Preamble to Part XIII (Article 427) of the *Treaty of Versailles* includes the following statement:

> [C]onditions of labour exist involving such injustice, hardship and privation to large numbers of persons as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement in these conditions is urgently required; as for example... *the protection of the interests of workers when employed in countries other than their own.*[48]

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45 Wolf, *supra*, note 3 at 285-286.

46 *ILO Action on Behalf of Migrants*, *supra*, note 17 at 1, para. 3; N. Valticos, *International Labour Law* (Deventer, The Netherlands: Kluwer, 1979) c. XIV, "Foreign and Migrant Workers" 207 at 207; Kellerson, *supra*, note 14 at 33.

47 Leary, *supra*, note 36 at 11.

48 Cited in R. Plender, *International Migration Law*, rev. 2d ed. (Dordrecht: Martinus Nijhoff, 1988) c. 9, "Migration for Employment" 295 at 295-296. Emphasis added. References to this provision also appear in the Preambles to both 1975 ILO instruments concerning migrant workers.

Paragraph 8 proclaims the following precept:

> [T]he standard set by law in each country with respect to the conditions of labour should have due regard to the equitable economic treatment of *all* workers lawfully resident therein.[49]

The *Declaration of Philadelphia* reaffirms, among the fundamental principles on which the ILO is based, that "labour is not a commodity" and that "poverty anywhere constitutes a danger to prosperity everywhere".[50]

Throughout its 72 year history, the ILO has added substance to the above principles by adopting standards relating to a number of subjects that affect migrant workers, for example: reciprocity of treatment,[51] unemployment,[52] discrimination in employment,[53] social security,[54] housing,[55] and termination of employment.[56]

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49 Cited in *General Survey of the Reports relating to Conventions Nos. 97 and 143 and Recommendations Nos. 86 and 151 concerning Migrant Workers*, Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 66th Session, 1980, at 1, para. 2 (Geneva: International Labour Office, 1980) [hereinafter *General Survey*] and by Hasenau, *supra*, note 4 at 688. This provision was also found in article 41 of the original ILO Constitution. See *Migrant Workers*, Report VII(1), International Labour Conference, 59th Session, 1974, at 17 (Geneva, International Labour Office, 1973) [hereinafter *Migrant Workers VII(1)*].

50 Cited in paragraph 3 of the Preamble to the 1975 Migrant Workers Convention, *infra*, note 61.

51 Recommendation No. 2 of 1919 concerning Reciprocity of Treatment. This instrument was adopted by the International Labour Conference at its First Session and requests each member state "on condition of reciprocity" to admit

> foreign workers (together with their families) employed within its territory to the benefit of its laws and regulations for the protection of its own workers, as well as to the right of lawful organization as enjoyed by its own workers.

Cited in *Migrant Workers VII(1)*, *supra*, note 49 at 17.

52 *Convention No. 2 of 1919 concerning Unemployment*; Recommendation No. 1 of 1919 concerning Unemployment. In paragraph 2 of the Recommendation it is specified that the recruitment of migrant workers should be promoted only by mutual agreement between the countries concerned and after consultation with workers' and employers' organizations in these countries. *ILO Action on Behalf of Migrants*, *supra*, note 17 at 3, para. 9.

53 *Convention No. 111 of 1958 concerning Discrimination (Employment and Occupation)*: entry into force June 15, 1960; ratified by 109 states as of January 1, 1992. See also Recommendation No. 111 of 1958 concerning Discrimination (Employment and Occupation). Under article 1(1)(a), the non-discrimination provision, nationality is not a prohibited ground of discrimination but may be included by a member state after consultation with representatives of employers' and workers' organizations (article 1(1)(b)). See also *Elles Report*, *supra*, Introduction, note 145 at 23, paras. 158-159.

54 *Convention No. 19 of 1925 concerning Equality of Treatment (Accident Compensation)*; *Convention No. 48 of 1935 concerning Maintenance of Migrants' Pension Rights*; *Convention No. 102 of 1952 concerning*

The most important ILO standards concerning migrant workers, however, are contained in the comprehensive instruments dealing with their protection as a separate group. In June 1939, the International Labour Conference adopted *Convention No. 66 concerning Migration for Employment* and two accompanying Recommendations: Recommendation concerning the Recruitment, Placing and Conditions of Labour of Migrants for Employment and Recommendation concerning Cooperation between States Relating to the Recruitment, Placing and Conditions of Labour of Migrants for Employment. The 1939 Convention never came into force because no state ratified it.[57] These instruments were revised and finally came into being as *Convention No. 97 of 1949 concerning Migration for Employment (Revised)* (C97) and Recommendation No. 86 of 1949 concerning Migration for Employment (Revised) (R86).[58]

The next comprehensive instrument approved by the International Labour Conference regarding migrant workers was Recommendation No. 100 of 1955 concerning the Protection of Migrant Workers in Underdeveloped Countries and Territories (R100).[59]

In the early 1970s, when many industrialized nations were undergoing the effects of a recession and the subsequent deterioration in the labour market, the ILO turned once more towards the problem of migrant workers which was growing in urgency as a result of the unfavourable economic climate. The International Labour Conference adopted three resolutions concerning migrant workers, which led to the question being placed again on the

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Social Security (Minimum Standards); Convention No. 118 of 1962 concerning Equality of Treatment (Social Security); Convention No. 157 of 1982 concerning Maintenance of Social Security Rights.

55 Recommendation No. 115 of 1961 concerning Workers Housing.

56 *Convention No. 158 of 1982 concerning Termination of Employment*; Recommendation No. 166 of 1982 concerning Termination of Employment.

57 Hasenau, *supra*, note 4 at 692-693. See also Plender, *supra*, note 48 at 297; Lillich, *supra*, chapter one, note 2 at 70.

58 ILO, *International Labour Conventions and Recommendations, 1919-1981* (Geneva: International Labour Office, 1982) at 785 and 797 respectively. See Appendix B for texts. C97 came into force on January 22, 1952 and has received 38 ratifications as of January 1, 1992: Algeria, Bahamas, Barbados, Belgium, Belize, Brazil, Burkina Faso, Cameroon, Cuba, Cyprus, Dominica, Ecuador, France, Germany, Grenada, Guatemala, Guyana, Israel, Italy, Jamaica, Kenya, Malawi, Malaysia, Mauritius, Netherlands, New Zealand, Nigeria, Norway, Portugal, Saint Lucia, Spain, Tanzania, Trinidad & Tobago, United Kingdom, Uruguay, Venezuela, Yugoslavia, Zambia.

59 *International Labour Conventions and Recommendations*, 1919-1981, *ibid.* at 811.

ILO agenda.[60] Eventually, in 1975, the 1949 instruments were supplemented by *Convention No. 143 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers* (C143) and Recommendation No. 151 concerning Migrant Workers (R151). Unfortunately, C143 has so far only been ratified by fifteen ILO member states and by even fewer major countries of employment.[61] This chapter is concerned primarily with the 1949 and 1975 instruments, particularly the latter, although references will be made to other standards when appropriate.

3.2 Migration Policy

Before discussing ILO standards pertaining to the economic, social, cultural, political and residence rights of migrant workers, it is helpful to consider these standards in the light of what may be termed as "ILO migration policy". Essentially, this policy has ebbed and flowed with global economic fluctuations and developments. Originally, the objective of ILO policy was to promote organized migration for employment from developing countries to developed countries where the labour of foreign migrant workers was in demand. Gradually, however,

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60 Resolution concerning ILO Action for Promoting the Equality of Migrant Workers in All Social and Labour Matters, adopted June 22, 1971 at the 56th Session; Resolution concerning Conditions and Equality of Treatment of Migrant Workers, adopted June 27, 1972 at the 57th Session; Resolution concerning Future ILO Action in the Field of Migrant Workers, adopted in June 1974 at the 59th Session. The texts of the first two resolutions are reproduced in *Migrant Workers VII(1)*, *supra*, note 49 in Appendix I at 72-75. The 1971 Resolution invited the ILO Governing Body to request the Director-General to prepare a coordinated programme of action to encourage the creation of an environment favourable to migrant workers and the promotion of equality between foreign migrant workers and nationals of the host country and to submit a study on general developments in the living and working conditions of migrant workers. The 1972 Resolution reiterated the urgency of the problem and invited the Governing Body to place the question of migrant workers on the agenda of an early session of the International Labour Conference, preferably the 59th Session. *Migrant Workers VII(1)*, *ibid.* at 1; *ILO Action on Behalf of Migrants*, *supra*, note 17 at 1-2, para. 5. The 1973 resolution laid particular stress on the employment problems of migrant workers. See Note, "The 59th Session of the International Labour Conference, June 1974" (1974) 110 ILR 277 at 287.

61 *International Labour Conventions and Recommendations*, *supra*, note 58 at 821 and 827 respectively. See Appendix B for texts. C143 came into force on December 9, 1978 and has received 15 ratifications as of January 1, 1992: Benin, Burkina Faso, Cameroon, Cyprus, Guinea, Italy, Kenya, Norway, Portugal, San Marino, Sweden, Togo, Uganda, Venezuela, Yugoslavia. Venezuela is the only major country of immigration in this list. See also Plender, *supra*, note 48 at 304. The only two migrant-receiving countries in Europe are Italy and Sweden, although Portugal has also recently recorded illegal migrants within its borders. See *infra*, chapter five, notes 66 and 68.

with the economic downturn in the western industrialized world and a greater understanding of the negative consequences of migration, in particular on countries of origin, the policy shifted to the support of more restrictive and controlled migration with sensitivity to the problems faced by developing countries.

The essential focus of the 1949 instruments concerning migrant workers was upon the organization and regulation of the movements of migrant workers who were needed in the industrialized countries.[62] The original ILO policy regarding migration is clearly outlined in paragraph 4(1) of R86:

> It should be the general policy of Members to develop and utilize all possibilities of employment and for this purpose to facilitate the international distribution of manpower and in particular the movement of manpower from countries which have a surplus of manpower to those countries that have a deficiency.[63]

According to Roger Böhning, this policy was in line with the neo-liberal international economic order existing at that time:

> The *leitmotif* of the neo-liberal order... was that economic growth should not be held up in one country for lack of labour so long as there was suitable labour available elsewhere, irrespective of the skills involved and quite irrespective of the short-term or long-term interests of the emigration countries involved. The objectives and the instruments were clearly biased in favour of the immigration countries.[64]

A shift in ILO migration policy was detectable in 1955 in R100. Part III of R100 is concerned with measures to discourage migration of workers when considered undesirable in

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62 Kellerson, *supra*, note 14 at 41. In addition to the demand for labour in industrialized countries, it was also necessary, according to the American Federation of Labour, to adopt standards in order to reduce the difficulties which might otherwise arise from the absorbtion of millions of refugees. Plender, *ibid.* at 298.

63 See also Böhning, *supra*, note 19, c. 1, "International Migration and the International Economic Order" 3 at 7. See also *supra*, Introduction, note 1. Böhning refers to paragraph 14(1) of R86 and article 5(3) of the Model Agreement on Temporary and Permanent Migration for Employment annexed to R86, which advocate the speedy technical selection of qualified migrants.

64 *Ibid.* at 7.

the interests of the migrant workers and of the communities and countries of origin; the object being to improve the conditions of life and to raise living standards in the countries of emigration.[65] The policy proposes, *inter alia*, the adoption in emigration areas of economic development and vocational training programmes in order to make fuller use of available manpower resources as well as the adoption of job-creation schemes.[66] The effect of this shift in ILO migration policy in R100, however, is questionable due to the relative weakness of an ILO Recommendation which "stands alone" without the normative validity which an accompanying Convention may arguably provide.[67] The approach taken by the ILO to migration was essentially reiterated in Recommendation No. 122 of 1964 concerning Employment Policy, although, here too, there was a suggestion that employment migration is damaging to developing countries.[68]

Moves to develop and implement the changes hinted at in R100 were made during the drafting of the 1975 instruments on migrant workers. The ILO was urged to refer to the following matters: the need to create employment in countries from which migrants originate, particularly by international cooperation and investment in industrialization in those countries;[69] the danger of giving priority to short-term economic requirements without examining the long-term consequences of migration;[70] and the need to undertake efforts to secure full employment

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65 Paragraph 16. See also Böhning, *ibid.* at 7 (endnote 8); Plender, *supra*, note 48 at 307-308; *Migrant Workers VII(1)*, *supra*, note 49 at 11.

66 Paragraph 17(a).

67 Cf. Böhning, *supra*, note 63 at 7.

68 Paragraph 33 of the Recommendation reads:

> International migration of workers for employment which is *consistent with the economic needs of the countries of emigration* and immigration, including migration from developing countries to industrialized countries, should be facilitated... (Emphasis added).

69 *Migrant Workers*, Report VII(2), International Labour Conference, 59th Session, 1974, at 28 (opinion of Finland) (International Labour Office: Geneva, 1974) [hereinafter *Migrant Workers VII(2)*]. Similar opinions were expressed during the proceedings of the 59th Session of the Conference relating to migrant workers. *Migrant Workers*, Report V(1), International Labour Conference, 60th Session, 1975, at 4 (general discussion in the Conference Committee), at 40 (Mr. Vercellino, Workers' advisor, Italy), and at 42 (Mr. Haase, Government delegate from the former Federal Republic of Germany) (Geneva: International Labour Office, 1974) [hereinafter *Migrant Workers V(1)*].

70 *Migrant Workers VII(2)*, *ibid.* (opinions of France and Austria respectively).

in the host country before recruiting foreign labour.[71] A coherent international migration policy, taking into account all the elements referred to, was advocated by the ILO.[72] Eventually, the new ILO policy on migration crystallized in paragraph 1 of R151:

> Members should apply the provision of this Recommendation within the framework of a coherent policy on international migration for employment. That policy should be based upon the economic and social needs of both countries of origin and countries of employment; it should take account not only of short-term manpower needs and resources but also of the long-term social and economic consequences of migration for migrants as well as for the communities concerned.

This provision should be read with the fourth paragraph of the Preamble to C143:

> [I]n order to overcome underdevelopment and structural and chronic unemployment, the governments of many countries increasingly stress the desirability of encouraging the transfer of capital and technology rather than the transfer of workers in accordance with the needs and requests of these countries in the reciprocal interest of the countries of origin and the countries of employment...;

In addition to the desirability of economic investment in developing countries, another limb of the migration policy, in the preceding paragraph of the Preamble to C143, also stresses the "need to avoid the excessive and uncontrolled or unassisted increase of migratory movements because of their negative social and human consequences".[73] The ILO, therefore, recognizes the link between the lack of economic opportunities in the country of origin and the migration of illegal labour.[74]

It must be emphasized that this new policy approach germinated in a harsh economic

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71 *Ibid.* (opinion of Finland).

72 *Migrant Workers VII(1), supra*, note 49 at 58-59; *Migrant Workers VII(2), ibid.* at 27.

73 Paragraph 3 of the Preamble to C143 (1975).

74 See also *General Survey, supra*, note 49 at 145, para. 501. In its *General Survey* on the four main ILO instruments relating to migrant workers, the Committee of Experts, *ibid.*, observed that the pressure to emigrate "illegally" could only be relieved by long-term action, which calls for collaboration among the countries concerned.

climate. Whether the same concern for migrant-sending countries would have been shown if the demand for labour in industrialized nations was still substantial is a matter for debate. Nonetheless, this new policy has continued to develop. Recommendation No. 169 of 1984 concerning Employment Policy (Supplementary Provisions) emphasizes the promotion of employment in the home countries of potential migrants. The policy encourages industrialized nations to invest in, transfer technical knowledge to, and increase trade with developing states in order to establish an effective alternative to labour migration and to assist the economic and employment situation in those countries.[75] Organization of return migration and reintegration of migrants into the countries from which they came, a direct consequence of the unfavourable economic climate, is also part of the ILO's present approach to the problem of migrant workers and is evident in a number of policy declarations.[76]

Present ILO migration policy cannot be considered in isolation from international efforts to reduce the gap between rich and poor countries. Real progress in this regard, however, lies in fundamentally altering the present international economic order by a system of redistribution and compensation. In the field of migration, this would entail the deliberate and explicit channelling of the gains of migration in favour of the poorer emigration countries.[77] The ILO has yet to expressly endorse such an approach.[78]

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75 Paragraphs 39(a) and 40. See also Plender, *supra*, note 48 at 308 and Kellerson, *supra*, note 14 at 41-42.

76 Paragraph (h) of the ILO Resolution concerning Future ILO Action in the Field of Migrant Workers, cited in *ILO Action on Behalf of Migrants*, *supra*, note 17 at 20, para. 55. Paragraph 42 of the 1976 World Employment Conference *Programme of Action*, cited in Böhning, *supra*, note 63 at 9.

77 Böhning, *ibid.* at 10. Böhning argues, *ibid.*, that behind the concern with international equity lies the realization that national policy measures on the side of individual emigration countries are insufficient to tip the balance of gains significantly in their favour since the productive effects of international migration in the sending states cannot match those in the receiving states. See also W.R. Böhning, "International Migration in Western Europe: Reflections on the Past Five Years" (1979) 118 ILR 401 at 407-411 for an elaborated version of this view.

78 According to Böhning, *ibid.* at 410, the *Programme of Action* adopted by the World Employment Conference in 1976 (see International Labour Office, *Official Bulletin*, vol. 60, 1977, Series A, No. 2 at 84-103) gives an element of recognition to the validity of the demand by poor countries for compensation with respect to the inequalities arising out of international migration. Paragraph 43(i) of the *Programme of Action* stipulates that multilateral and bilateral migration agreements should "provide ways of limiting losses in countries of origin, particularly developing countries, which may result from the departure of skilled personnel whose education and training they have provided".

Another principle of the present ILO migration policy asserts that those who profit most from migration should pay for its social cost. Paragraph 11 of R151 (1975) supports this approach in relation to the obligation of host countries to formulate and apply a social policy on behalf of migrant workers and their families:

> The policy should take account of the need to spread the social cost of migration as widely and equitably as possible over the entire collectivity of the country of employment, and in particular over those who profit most from the work of migrants.[79]

The drafting history of this provision indicates that its principal objective was to guarantee the funding of a social policy in respect of migrant workers. The ILO view was that the policy should as far as possible be financed by receiving countries and that the allocation of social costs should be determined according to national conditions. In addition, the general perception was that some of these costs also ought to be borne by the employers of migrant workers.[80]

4. The Scope of ILO Standards relating to the Protection of Migrants

4.1 General Standards

It is widely acknowledged that the majority of ILO labour standards, with few exceptions, apply to alien migrant workers and nationals equally.[81] In a number of more

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79 John Claydon observes that the principle in this provision recognizes the benefits of migration to receiving countries. Claydon, *supra*, Introduction, note 24 at 357.

80 *Migrant Workers VII(2)*, *supra*, note 69 at 43-45. Not surprisingly, this provision was opposed by employers. See *Migrant Workers V(1)*, *supra*, note 69 at 28-29 and *Record of Proceedings*, International Labour Conference, 60th Session, Geneva, 1975, at 650, para. 119 (Geneva: International Labour Office, 1976).

81 *General Survey*, *supra*, note 49 at 3, para. 7; *ILO Action on Behalf of Migrants*, *supra*, note 17 at 3, para. 8; Böhning, *supra*, note 19 at 239; Lillich, *supra*, note 57 at 70; Valticos, *supra*, note 46 at 208; G.S. Goodwin-Gill, "Immigration, Nationality and the Standards of International Law" in *Towards a Just Immigration Policy*, *supra*, note 14, 3 at 16; Trebilcock, *supra*, note 1 at 1883. Trebilcock adds, *ibid.*, that this is notably the case for ILO instruments on general conditions of work, such as those concerning wages, hours,

ger ' O Conventions, standards are specified to apply to "all persons employed", to "every person employed", or to workers "without distinction as to nationality", or "without distinction whatsoever".[82] A notable exception to this principle is *Convention No. 111 of 1958 concerning Discrimination (Employment and Occupation)* and Recommendation No. 111 of the same title and year. The non-discrimination provision in Article 1(1)(a) of both instruments does not include "nationality" amongst the prohibited grounds of discrimination, although article 1(1)(b) stipulates that additional grounds may be added after consultation with workers' and employers' organizations and other appropriate bodies.[83]

4.2 The Migrant Workers Instruments of 1949 and 1975

(a) Coverage and Subject-matter

The most important instruments concerned with the protection and promotion of the rights of migrant workers and their families are those adopted by the International Labour Conference in 1949 and 1975.[84] These instruments, however, cannot deal with all the rights' concerns of this group because of the limited competence of the ILO with respect to the protection of human rights generally. Strictly speaking, the ILO is primarily concerned with

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minimum age, safety and health.

82 Valticos, *ibid.* at 210-211. For example, see article 2 of *Convention No. 87 of 1948 concerning Freedom of Association and Protection of the Right to Organize* with respect to the latter term:

> Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization.

For an in-depth analysis of this provision, see Hodges-Aeberhard, *supra*, note 39.

83 See also Goodwin-Gill, *supra*, note 81 at 16; *Elles Report*, *supra*, note 53 at 23, paras. 158-159. In addition, some of the ILO instruments, particularly those relating to the social security of migrant workers, operate on the basis of reciprocity. In other words, migrants may only benefit from the provisions in these instruments if their country of origin and the country in which they reside have both ratified the convention in question. More explicit references to these standards are made below in the section on the social security rights of migrant workers. Reciprocity is a feature of most Council of Europe instruments, with the exception of the *European Convention on Human Rights*. See *infra*, chapter six.

84 *Supra*, notes 58 and 61 and accompanying text.

the economic and social rights of workers pertaining to questions of labour.[85] Matters of immigration,[86] expulsion,[87] political rights,[88] and rights to education and culture[89] essentially do not fall within the ILO's jurisdiction. However, the interdependence of civil and political rights with economic and social rights makes it difficult to separate questions of labour from the broader economical, social, cultural and political context in which migrant workers and their families find themselves. Indeed, to do so would be to treat migrants as objects of labour rather than as fully integrated social beings. Fortunately, as shall be seen below, the ILO interprets its protective function towards migrant workers very broadly. The measures in the migrant workers instruments cover a wide range of questions going beyond the employment situation to include general conditions of life.[90]

Although the standards laid down in the comprehensive ILO instruments on migrant workers constitute the ILO's principal method of dealing with the protection of this group, they are only part of a broader ILO programme which has migrant workers' interests at heart and which includes the collection and dissemination of information, studies and research, and the provision of technical assistance for developing countries.[91]

With regard to the subject-matter generally, the 1949 instruments are concerned with the organization of migration and equality of treatment between migrants and nationals under law and administrative practice, whereas the 1975 instruments supplement those of 1949 and deal, in particular, with the suppression of clandestine migration and the illegal employment of

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85 Leary, *supra*, note 36 at 12.

86 Kellerson, *supra*, note 14 at 33.

87 Claydon, *supra*, note 78 at 363.

88 *Migrant Workers V(1)*, *supra*, note 69 at 12, para. 60 (discussions in the Committee on Migrant Workers during the 59th Session of the International Labour Conference in 1974); *General Survey*, *supra*, note 49 at 88, para. 316. Both of the above observations were made with respect to the phrase "individual and collective freedoms" in article 10 of C143. *Infra*, note 247 and accompanying text.

89 *General Survey*, *ibid.* at 88, para. 315.

90 *Ibid.* at 141, para. 487. The provisions also go beyond the actual *period* of employment and cover the initial phases of recruitment, travel and settlement in the receiving country as well as post-employment problems, such as return to the country of origin, arrangements for continued residence in host countries and the regulation of rights arising out of employment and continuing after its termination. *Ibid.*

91 *ILO Action on Behalf of Migrants*, *supra*, note 17 at 20, para. 59.

migrants and with the promotion of equality of opportunity and treatment.[92]

(b) Form and Structure

The form and structure of the migrant workers instruments, and the two Conventions in particular, are rather complicated. C97 (1949) consists of a general treaty of core provisions and three Annexes, some or all of which may be excluded by ratifying states.[93] Annexed to R86 (1949) is a Model Agreement on Temporary and Permanent Migration for Employment. The object of this Model Agreement was to serve as inspiration for bilateral agreements,[94] but it has had, according to one commentator, little impact on state treaty practice.[95] C143 (1975) is divided into two parts dealing with migration in abusive conditions and with equality of opportunity and treatment. States are free to exclude either of these parts on ratification of C143.[96] As a result, the structure of C143 is controversial, for it effectively enables ratifying states to avoid substantial obligations towards migrant workers. The drafting history of the document reveals the reasons for this approach and also provides a valuable insight into the position of ILO member states and employers' and workers' organizations with respect to the tenet of equality of opportunity and treatment underlying Part II of the instrument. Part by part ratification of C143 was introduced by the International Labour Conference Committee on

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92 *General Survey*, *supra*, note 49 at 3, para. 10.

93 See also Plender, *supra*, note 48 at 299 and Lillich, *supra*, note 57 at 70. Annexes I and II deal with recruitment and conditions for migrants recruited by private groups and under government-sponsored arrangements, whereas Annex III is concerned with the import into countries of employment of migrants' personal effects.

94 Plender, *ibid.* at 301.

95 Lillich, *supra*, note 57 at 72.

96 Article 16(1) of C143. The exclusion of either part of C143 does not, however, enable ratifying states, when reporting on C143, to escape from their reporting obligations in respect of the excluded part. Article 16(3) reads:

> Every Member for which a declaration made under paragraph 1 of this Article is in force shall indicate in its reports upon the application of this Convention the position of its law and practice in regard to the provisions of the Part excluded from its acceptance, the extent to which effect has been given, or is proposed to be given, to the said provision and the reasons for which it has not yet included them in its acceptance of the Convention.

Migrant Workers as "a compromise solution"[97] in order to appease those (mainly states and employers) who wanted either to exclude the question of equality of opportunity and treatment altogether,[98] to impose conditions and restrictions upon it,[99] or to deal with the matter in a recommendation[100] and to accommodate those (mainly workers' representatives) who argued that Part II of the instrument was complementary to the first section dealing with the suppression of migrations in abusive conditions, if not essential to the success of Part I.[101]

4.3 Definition of "Migrant Worker"

The definition of "migrant worker" for the purposes of C97 (1949) and C143 (1975) is similar:

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97 *Record of Proceedings*, *supra*, note 80 at 792 (Mr. Yllanes Ramos, Employers' delegate, Mexico and Vice-Chairman of the Conference Committee on Migrant Workers). See also F. Russo, "Migrant Workers: Existing and Proposed International Action on their Rights" (1975) The Review of the International Commission of Jurists, No. 15, 51. Russo observes, *ibid.* at 56, that the delegates were concerned that if states were otherwise forced to choose between ratifying all or none of the Convention's provisions, the more controversial elements of Part II would doom the whole Convention to a low number of ratifications. Even so, C143 has still only received fifteen ratifications as of January 1, 1992. *Supra*, note 61.

98 *Migrant Workers VII(2)*, *supra*, note 69 at 19 (opinion of France).

99 The kinds of conditions and restrictions proposed included: requirements of residence for a certain period of time before equality of opportunity and treatment could be enjoyed by migrant workers [*Ibid.* at 20 and 30 (opinion of Switzerland) and *Migrant Workers*, Report V(2), International Labour Conference, 60th Session, 1975, at 16 (opinion of Denmark) (Geneva: International Labour Office, 1975) [hereinafter *Migrant Workers V(2)*]]; and restrictions on their access to employment in the receiving country, for example, by according priority to nationals (*Record of Proceedings*, *supra*, note 80 at 644, para. 54).

100 *Migrant Workers V(2)*, *ibid.* at 4, 6 and 16 (opinions of Finland, the United Kingdom, and the Norwegian Employers' Confederation). See also Note, "The 60th Session of the International Labour Conference, June 1975" (1975) 112 ILR 231 at 235. According to some states and employers' delegates, Parts I and II of C143 deal with entirely different subjects and to have combined them in one Convention would have weakened the chances for ratification of the instrument. Moreover, migration in abusive conditions posed a serious and urgent problem on which there existed widespread agreement, whereas the problem of equality of opportunity and treatment was more controversial. *Record of Proceedings*, *supra*, note 80 at 638, para. 13 and at 639, para. 17.

101 *Record of Proceedings*, *ibid.* at 639, para. 17. The latter point was made by Mr. Vercellino, the Workers' advisor from Italy, during the 59th Session of the International Labour Conference, who argued that illicit traffic in manpower and the guarantee of genuine equality of treatment and rights

> were, in fact, two inseparable and inter-related aspects of the same problem. Without eliminating limitations and discrimination (whether in law or in practice) it was impossible to take effective action against the black market in manpower which stemmed from this discrimination.

Migrant Workers V(1), *supra*, note 69 at 40.

> a person who migrates from one country to another [or who has migrated from one country to another] with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment [migrant worker].[102]

This definition, therefore, excludes self-employed persons and illegal migrant workers. Moreover, in C143 it pertains solely to Part II (provisions concerning equality of opportunity and treatment) which applies only to legal migrants.[103] The definition also goes on to explicitly exclude other categories of persons, namely: frontier workers, members of the liberal profession and artistes entering a country on a short-term basis, seamen, those who enter specifically for the purposes of education and training, and workers who are employed in the receiving country for a specific period of time to complete a particular job.[104] This last category does not exclude all workers admitted to a country to work for a specific length of time or who are recruited collectively to do so.[105] It is the nature of the employment which seems to determine this question. A distinction may be made between workers who enter a country to undertake employment not limited in time, but who hold a work permit of limited duration, and those who are admitted for the purpose of specific employment or a specific

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102 Article 11(1) in both C97 and C143. The wording in parenthesis refers to the additional and alternate wording used in article 11(1) of C143. Refugees and displaced persons who are also migrant workers are included within the ambit of the definition by paragraph 2 of R86 (1949). See also Plender, *supra*, note 48 at 301.

103 *General Survey*, *supra*, note 49 at 10, para. 36. The equality provision in C97, article 6(1), is also restricted in its application to "immigrants lawfully within its territory". The drafting history of article 11 of C143 indicates that efforts were made to exclude illegal migrant workers *expressly* from the definition. *Migrant Workers V(2)*, *supra*, note 99 at 19 (opinion of the Netherlands).

104 The last two categories were added to C143 (1975). The exclusion of "frontier workers" from the definition was opposed by some delegates to the Conference as well as by states during the drafting of C143. *Migrant Workers V(1)*, *supra*, note 69 at 41 (Mr. Vercellino, Workers' advisor, Italy, during discussions at the 59th Session of the International Labour Conference); *Migrant Workers V(2)*, *ibid.* at 18-19 (opinions of Italy and Yugoslavia). However, an amendment to include frontier workers was also opposed by a number of state members and employers' representatives on the basis that many of the provisions in the proposed Convention could not be applied to frontier workers because of their special situation. Consequently, the amendment was rejected by the Conference. *Record of Proceedings*, *supra*, note 80 at 645, para. 64. There is no definition at all of "frontier workers" in the ILO instruments on migrant workers.

105 *General Survey*, *supra*, note 49 at 10, para. 35.

project that will be finished after a certain period.[106]

The migrant workers instruments apply also by implication to "seasonal workers" in spite of a number of attempts to exclude this group from the definition.[107] Seasonal workers, however, are at an inherent disadvantage with respect to measures concerned with affording them equal opportunity and treatment with nationals because their stay in the receiving country is often short in duration.[108]

Finally, the definition of "migrant worker" does not refer to the family of the migrant worker, but it is clear that members of the worker's family are at the core of many of the instruments' protective provisions. Measures concerned with family reunification, equality of opportunity and treatment and health are but a few significant examples,[109] and these are discussed in greater detail below.

5. The Rights of Migrant Workers and their Families

This part of the chapter examines in greater detail the economic, social and cultural rights of migrant workers and their families and the protection of these rights by ILO instruments. Other rights such as basic rights and political and residence rights are also discussed to underline their interdependence with the former group of rights. A separate section is also devoted to a discussion of protection by the ILO of the rights of undocumented migrants. The standards under review are mainly those found in the four migrant workers

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106 Böhning, *supra*, note 19 at 238. Böhning labels the latter "project-tied" migrants as opposed to "individual contract" migrants. Although excluded from the protection of the migrant workers instruments, this group is nonetheless protected by most of the other ILO standards on the basis that these standards apply to all workers irrespective of their nationality. *Ibid.* at 239. See also, *supra*, notes 81 and 82 and accompanying text.

107 *Migrant Workers V(1)*, *supra*, note 69 (opinion of Switzerland during discussions of the proposed C143 at the 59th Session of the International Labour Conference); *Migrant Workers V(2)*, *supra*, note 99 at 18 (opinion of Denmark).

108 *General Survey*, *supra*, note 49 at 83, para. 290. See also *Migrant Workers V(2)*, *ibid.* at 19. Because, under C143, migrant workers only have free choice of employment after a certain period of time (article 14), the possibility of seasonal workers benefitting, for example, from vocational training, is limited in practice. *General Survey*, *ibid.*

109 *General Survey*, *ibid.* at 10-11, para. 37.

instruments, with a particular emphasis on the 1975 Convention and Recommendation, although references are also made to other relevant standards. Much of C97 (1949) and the accompanying R86 are concerned with the recruitment, introduction and placing of migrant workers and Part I of C143 (1975) deals chiefly with the suppression of migrations in abusive conditions. These questions are not the object of the discussion below, with the exception of the application of Part I of C143 to the protection of illegal migrants.

The objective of this part of the chapter is to reconsider, in the practical context of ILO activity with respect to the protection of migrants' rights, the following normative questions posed in the previous chapter: To what extent is the ILO protecting the economic, social, cultural, political and residence rights of migrant workers and their families? Is this protection consistent with a conception of the national community which seeks to genuinely include all those who work and reside within its borders? Finally, does this protection go so far as to remove the bonds of state sovereignty by affording migrant workers the right to stay in the receiving country, up to and including affording them citizenship rights?

5.1 Rights specifically covered by ILO Instruments

(a) Basic Rights

Article 1 of C143 (1975) reads:

> Each Member for which this Convention is in force undertakes to respect the basic human rights of all migrant workers.

Article 1 was a late addition to C143 and was only introduced at the 60th Session of the International Labour Conference, at which the 1975 instruments were adopted.[110] The

110 The provision was introduced as a result of an amendment submitted by the government members of Algeria and Mexico, and which was later sub-amended by the workers' members. *Record of Proceedings, supra,*

provision lays down a general obligation to respect the basic rights of all migrant workers irrespective of their legal status in the country of employment.[111] It was stressed, however, during the drafting discussions that this obligation did not affect the state's right to control migratory movements.[112]

In spite of its promise as a broad state obligation for the protection of migrant workers' rights, article 1 is quite limited in scope. According to the ILO Committee of Experts on the Application of Conventions and Recommendations, the obligation in article 1 is restricted to "basic" rights or only to those rights considered to be most "fundamental".[113] Further, the provision is located in Part I of C143 which deals with migration in abusive conditions and although it encompasses *all* migrant workers, including those in an irregular situation, the rights provided for by Part II of C143, which apply solely to lawfully admitted migrants, are not covered by article 1.[114]

(b) Equality of Opportunity and Treatment

It is not an exaggeration to say that it is the principle of equality of opportunity and treatment which is at the centre of the protection of the rights of migrant workers by the ILO; the objective being to ensure that migrant workers and their families are afforded equal treatment with nationals not only in respect of labour matters, but other conditions of life as well.

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note 80 at 641, para. 29.

111 *General Survey*, *supra*, note 49 at 69, para. 257. See also Trebilcock, *supra*, note 1 at 1830 and Lillich, *supra*, note 57 at 73.

112 *Record of Proceedings*, *supra*, note 80 at 641, para. 29 and at 791 (Mr. Yllanes Ramos, Employers' delegate, Mexico and Vice-Chairman of the Conference Committee on Migrant Workers).

113 *General Survey*, *supra*, note 49 at 69, para. 256. For example, the right to life, the right to protection against torture, cruel, inhuman, degrading treatment or punishment, the right to liberty and security of the person and protection against arbitrary arrest, and the right to a fair trial (articles 6, 7, 9 and 14 of the ICCPR). *Ibid.* at 69, para. 257.

114 *Ibid.* at 69, para. 258. The Committee of Experts, *ibid.*, also underlined that article 1 does *not* cover those rights in the two 1966 Covenants (the ICCPR and the ICESCR) whose exercise presupposes lawful residence as a member of a given society.

(i) Proscription of Discrimination

The principle of equality of treatment for *all* workers residing in a country was enshrined in the earliest ILO constitutional documents.[115] The ILO applied this principle to migrant workers in article 6(1) of C97 (1949) in respect of a number of matters, *inter alia*: the employment situation (including equality of remuneration), trade union rights, accommodation and social security. The weakness of this provision, however, is that it only proscribes inequality of treatment arising out of laws, measures or administrative action taken by public authorities. There is no obligation upon states to promote equality and eliminate discrimination in practice.[116]

(ii) Promotion of Equality and Elimination of Discrimination in Practice

Standards to promote equality of opportunity and treatment are to be found in *Convention No. 111 of 1958 concerning Discrimination (Employment and Occupation)* and in Recommendation No. 111,[117] but discrimination based on nationality is not covered.[118]

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115 Article 427 of the *Treaty of Versailles* and article 41 of the original ILO Constitution. See *supra*, note 49 and accompanying text.

116 Article 6(1) reads (in part):

> 1. Each Member for which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that to which it applies to its own nationals in respect of the following matters:
>
> (a) in so far as such matters are regulated by law or regulations, or are subject to the control of administrative authorities--
>
> [matters outlined in the text...but in greater detail]

See also *Migrant Workers VII(1)*, *supra*, note 49 at 17-18 and *General Survey*, *supra*, note 49 at 81, para. 281. Article 17 of the Model Agreement annexed to R86 contains a provision similar in spirit to article 6(1) of C97.

117 Article 2 of the Convention reads:

> Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view

Indeed, the Preamble to C143 (1975) takes note of this fact in paragraph 10 and calls for further standards "to promote equality of opportunity and treatment of migrant workers".

During the drafting of the 1975 migrant workers instruments, voices were raised to widen the ambit of the equality provision to include the promotion of equality of opportunity and treatment and the elimination of discrimination in practice. Formal equality before the law was regarded as insufficient protection for migrant workers and their families.[119] The need for promotional measures and positive programs to secure real equality in practice was therefore underlined.[120] It was recognized that migrant workers are more likely to be victims of prejudice and other unfavourable attitudes in their workplace and where they live than as a result of discriminatory laws.[121] Furthermore, their opportunities for seeking redress are limited.[122] These concerns are largely tackled in Part II of C143 and the accompanying R151.

Article 10 in Part II of C143 is the basic equality provision in the 1975 ILO instruments on migrant workers:

> Each Member for which the Convention is in force undertakes to declare and pursue a national policy to promote and 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 individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory.

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to eliminating any discrimination in respect thereof.

Article 3 outlines what the requirements of such a policy entail. See also, *Migrant Workers VII(1)*, *ibid.* at 21-22.

118 *Supra*, note 83 and accompanying text. See also *Migrant Workers VII(1)*, *ibid.* at 22.

119 *Migrant Workers V(1)*, *supra*, note 69 at 35 (opinion of Mr. Öberg, Government advisor, Sweden and Reporter of the Conference Committee on Migrant Workers during the discussions at the 59th Session of the International Labour Conference).

120 *Migrant Workers V(1)*, *ibid.* at 5, para. 15 (consensus during the general discussion at the 59th Session of the International Labour Conference). See also *General Survey*, *supra*, note 49 at 100, para. 375.

121 *General Survey*, *ibid.* at 82, para. 285.

122 Because of a lack of information and knowledge compounded by linguistic difficulties, migrant workers are frequently unable to avail themselves of their rights. *Ibid.* Consequently, complaint mechanisms which enable independent persons to take initiatives on behalf of migrants may be a useful weapon in the struggle against discrimination. Cf. *ibid.* at 100, para. 374.

Although the provision omits to specify whether equality in the enumerated areas is to be sought with nationals, paragraph 2 of the accompanying Recommendation, which elaborates on this policy, indicates that this is the case.[123] With regard to the nature of the national policy in article 10, the ILO Committee of Experts has stated that this policy may take any form (not necessarily that of legislation) and be implemented progressively under a coordinated programme of positive measures.[124] Such a programme is outlined in article 12 of C143.[125]

The broad ambit of the principle of equality of opportunity and treatment in the 1975 instruments is further reflected in R151, which elaborates on some of the provisions in C143, particularly those concerned with employment and cultural rights, and which advocates the formulation of a national social policy in the areas of family reunification and health and social services to ensure that migrant workers not only benefit from the same advantages enjoyed by nationals, but also that their particular needs are catered for.[126] Such an approach subscribes to the thesis that the realization of genuine equality between migrant workers and nationals requires special measures to enable the latter group to adapt to the society of the country of employment.

The concern in C143 (1975) with the promotion of equality of opportunity and treatment was underlined by the Committee of Experts in an observation to the Government of Italy in 1988. In response to a direct request from the Committee, the Italian Government submitted information on new legislation (Act No. 943 of December 30, 1986) providing, *inter alia*, for equality of treatment with nationals for migrant workers from outside of the European Community. The Committee requested further information on the practical measures taken by

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123 Plender, *supra*, note 48 at 304; Lillich, *supra*, note 57 at 74.

124 *General Survey*, *supra*, note 49 at 82-83, paras. 287-288 and at 148, para. 519.

125 This programme involves: co-operation between employers' and workers' organizations in the promotion of the acceptance and observance of the policy; the enactment of legislation and the promotion of educational programmes including programmes which inform and assist migrant workers with respect to their rights and obligations; the repeal of statutory or administrative practices inconsistent with the policy; the formulation of a social policy which takes account of the special needs of migrant workers in consultation with employers' and workers' organizations; the promotion of the cultural rights of migrant workers and their children; and the guarantee of equality of treatment with regard to the working conditions of migrant workers.

126 Paragraph 9 of R151. The areas covered by the social policy in R151 are discussed in greater detail below.

the Italian Government to promote and ensure the observance of this legislation.[127]

(iii) Problems with the Application of the Equality Principle

A number of problems exist with the application of the equality principle in respect of migrant workers. The need, at times, to accord migrant workers special measures in order to guarantee genuine equality with nationals may be problematic. Article 9 of R151 (1975) concerned with social policy stresses that special measures for migrant workers should not adversely affect the principle of equality of opportunity and treatment. The International Labour Office has stated that a distinction is to be drawn between the promotion of effective equality between migrants and nationals and the granting of rights to migrants which nationals do not enjoy.[128]

Since the equality sought is that with nationals, a problem arises if the treatment that nationals themselves receive is hardly adequate, especially if the economic and social conditions are poor as is the case in developing countries. Although other ILO and human rights standards are also a relevantly applicable yardstick, little progress in this regard may seriously undermine the rights of migrant workers and their families. All countries, not just developing ones, tend to give priority to nationals in most walks of life, but this preference may be implemented to an extreme in those countries with scarce resources.

A further problem does not concern the lack of resources, but the absence of a comparison on the basis of which to measure equal treatment of migrant workers with nationals, particularly in respect of employment conditions. In many countries, migrants

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127 *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III(24A), International Labour Conference, 75th Session, 1988 at 363-364 (Geneva: International Labour Office, 1988) [hereinafter *Committee of Experts Report 1988*]. This observation was repeated in 1989 and 1990. *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III(4A), International Labour Conference, 76th Session, 1989, at 459-460 (Geneva: International Labour Office, 1989) and *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III(4A) International Labour Conference, 77th Session, 1990, at 425 (Geneva: International Labour Office, 1990). For an explanation of "observations" and "direct requests" see *supra*, note 29 and accompanying text.

128 *Migrant Workers VII(2)*, *supra*, note 69 at 31.

perform work not performed by nationals. Although there are usually some standards of comparison among western countries in the form of legislation, judicial decisions or collective agreements, these are largely absent, for example, in the Arab Gulf states where migrants sometimes work in occupations or sectors which contain few local workers and where there are no labour institutions or social legislation of the kind found in more developed countries.[129]

The problem of the application of the equality provisions in the migrant workers instruments to short-term migrants has already been mentioned in respect of seasonal workers.[130] This problem is exacerbated by article 14 of C143 (1975), which effectively places a two-year restriction on migrant workers' free choice of employment.[131] The ILO Committee of Experts noted that some countries find it difficult to apply a policy of equality of opportunity and treatment to migrant workers whose access to employment is subject to restrictions for a specified period.[132] It is difficult to see how such restrictions, perhaps with the exception of the inability of migrant workers to profit from vocational training in other areas of employment, might justify denying to them equal opportunity and treatment with nationals generally. Böhning argues that discrimination, like equality, is indivisible. If some rights are granted to migrant workers and others refused, discrimination subsists. Therefore, if the grant of rights is effectively made subject to a qualifying period, there is no equality.[133]

Finally, it has already been noted that Part II of C143, including articles 10 and 12, does not apply to illegal migrants.[134] There are, however, provisions which cater specifically for this group; for example, article 9(1) in Part I of C143 which articulates the principle of

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129 Böhning, *supra*, note 19 at 243.

130 *Supra*, note 108 and accompanying text.

131 The importance of this controversial provision and its potentially wide-reaching effects is discussed below.

132 *General Survey*, *supra*, note 49 at 83, paras. 290 and 148, para. 520.

133 *Supra*, note 63 at 14. Böhning concedes, *ibid.*, that granting migrant workers equal treatment with nationals from the start makes permanent migration more likely. He maintains, however, that the stay of most migrants in the country of employment is longer than anticipated which eventually leads to the acquisition of these rights in any case and that, moreover, there has always been and there will always be a considerable portion of migrants who return voluntarily to their home countries.

134 *Supra*, note 103 and accompanying text.

equal treatment between irregular and regular migrant workers in respect of rights arising out of past employment. There is a strong argument to be made, with the support of the ILO, for affording illegal migrants equal treatment with regular migrants and nationals in other areas. This question is discussed further in the section on illegal migrants below.

(c) Employment Rights

(i) Employment and Work Conditions

The principle that all migrant workers should receive the same treatment as nationals in respect of employment and work conditions is well recognized in the four main ILO instruments on migrant workers. Article 10 of C143 (1975) imposes the obligation on ratifying states to promote and guarantee equal opportunity and treatment between migrant workers and nationals in respect of, *inter alia*, "employment and occupation". From the migrant workers instruments, rights to employment and occupation include the following rights concerned with employment and work conditions: equal remuneration for work of equal value, equal work conditions, access to vocational training, promotion or advancement, security of employment including the provision of alternative employment, relief work and retraining, and rest periods and leisure.[135] As indicated in chapter two, this principle is relatively uncontroversial, although some problems do exist with its application.[136]

States have contended that absolute security of employment for migrant workers is not

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135 See respectively article 6(1)(a)(i) of C97, article 17(2)(a)(i) of Annex I to R86 and paragraph 2(e) of R151; article 12(g) of C143 and paragraph 2(f) of R151; articles 9 and 17(2)(a)(iii) of Annex I to R86 and paragraph 2(b) of R151; paragraph 2(c) of R151; article 8(2) of C143 and paragraph 2(d) of R151; article 17(2)(a)(i) and (iv) of Annex I to R86 and paragraph 2(f) of R151. Rights to employment and occupation also comprise free access to employment (article 14(a) of C143, paragraph 6 of R151 and paragraph 2(b) of R151), considered below, which includes access to employment services. *General Survey*, *supra*, note 49 at 95, para. 351.

136 The difficulty of granting to migrant workers equal treatment with nationals in respect of access to vocational training, particularly for those migrants whose stay in a country is of a short duration, has already been outlined. See *supra*, notes 108 and 130 and accompanying text.

feasible because, in market economies, no such guarantees are provided to nationals either.[137] Although such a position may seem obvious in difficult economic times, a tendency may still exist to accord priority to nationals and to terminate the employment of migrants first.[138] The objective of ILO provisions in this regard is to ensure that migrant workers enjoy job security on the *same terms* as nationals.[139] If the employment of lawfully resident migrant workers is terminated, article 8(1) of Part I of C143 provides that this shall not mean that migrant workers are to be regarded in an irregular situation or imply in itself the withdrawal of their residence or work permits.

(ii) The Right to Free Choice of Employment

The right of migrant workers to "free choice of employment" is very problematic. Without doubt, the more this right is recognized and respected with regard to migrant workers, the greater is the likelihood that migrants and their families will stay indefinitely in the country of employment.

Both 1949 and 1975 ILO instruments concerning migrant workers provide that migrant workers should have the right to free choice of employment after a specified period of work and residence in the country of employment. According to paragraph 16(2)(b) of R86 (1949), any restrictions on the free choice of employment for migrant workers and their families are to be lifted after five years of regular and lawful residence in the host country. A right to free choice of employment is elevated to a Convention obligation in article 14(a) of C143 (1975) (this clause is repeated in paragraph 6 of the accompanying R151). The time period at the expiration of which limitations on this right are to be removed is also reduced considerably. Under this provision, a member state may

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137 *Migrant Workers VII(2), supra*, note 69 at 29 and 31 (opinions of Austria and Switzerland).
138 *General Survey, supra*, note 49 at 91 and 149, paras. 334 and 524 respectively.
139 *Ibid.* at 149, para. 524.

> 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 within 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.

Two years is the *maximum* period for which restrictions may be imposed on free choice of employment.[140] Further, any restriction must not limit the geographic mobility of migrant workers, although mobility may be indirectly affected as a result of the issue of work permits which have certain occupational conditions attached to them.[141]

The adoption of article 14(a) was very controversial and involved heated debate in the drafting process. Originally, the prescribed period of residence, during which restrictions on free choice of employment could be imposed, was to be five years, as in paragraph 16(2)(b) of R86 (1949). A number of countries, however, were of the opinion that the residence qualification of five years was too long.[142] A second draft proposal for article 14(a) eliminated reference to a specified time period altogether and merely asserted that migrant workers should have free choice of employment after the completion of their first work contract.[143] After

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140 See also *General Survey*, *supra*, note 49 at 92-93, para. 339. In other words, migrant workers may have free choice of employment within two years if their work contracts are less than two years in duration. Free choice of employment is absolute, with the exception of access to the public service, and does not depend on the discretion of the state. The Committee of Experts clarified this point by stating that the position of the Kenyan Government, which insisted on retaining discretion in this regard in the framework of its localization policy, was in conflict with article 14(a) of C143. *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III(4A), International Labour Conference, 78th Session, 1991, at 453-454 (Geneva: International Labour Office, 1991). Assuming that the employment contract provides the right for migrant workers to resign from their jobs, it is arguable that they may exercise the right of free choice of employment before two years by resigning before the contract has ended, provided that such resignation constitutes completion of the "first work contract" for the purposes of article 14(a).

141 *General Survey*, *ibid.* at 95-96, paras. 354-355. The Committee of Experts provided examples of such work permits, which are issued to migrant workers in western Germany and France for a given post or employer, or for a given region. A further restriction on employment is article 14(b) of C143, which stipulates that a state may make regulations, after consultation with representative organizations of employers and workers, concerning recognition of occupational qualifications acquired outside its territory.

142 *Migrant Workers VII(2)*, *supra*, note 69 at 23-24 (opinions of Finland, Sweden and Norway). On the other hand, some countries insisted that it should be left entirely up to the state of employment to decide how long restrictions on free choice of employment for migrant workers should last. *Ibid.* at 22-24 (opinions of Bangladesh, Denmark, Egypt, Iran, Malaysia, Morocco and Sudan).

143 *Migrant Workers V(2)*, *supra*, note 99 at 21.

receiving requests from a number of countries to impose a prescribed waiting-period,[144] the International Labour Office recommended that restrictions on free choice of employment should only be permitted for a maximum of two years.[145] Some countries, however, continued to press for the retention of the five year waiting-period or opposed the provision altogether.[146]

Article 14(a) is a remarkable achievement which, on its face at least, greatly decreases state control over the employment of migrant workers and contributes to an overall reduction in their exploitation. According to Frank Russo, this provision, if implemented, would "free migrants from working exclusively in the least desirable and lowest paid jobs, promote their equality with nationals, and enable them to compete for other occupations based on their ability and effort".[147] Old habits die hard, however, and practice shows that state restrictions on migrants' free choice of employment go beyond limitations based on the two-year waiting-period. In its *General Survey* of 1980, the Committee of Experts found the following additional restrictions: in many countries, the waiting-period is longer than two years; priority in employment is frequently given to nationals; in certain states, migrant workers cannot

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144 *Ibid.* at 21-22. Finland and Sweden recommended a waiting-period of two years, whereas Norway advised that the waiting-period be one year only.

145 *Ibid.* at 23. This time-period was finalized at the 60th Session of the International Labour Conference in 1975. *Record of Proceedings, supra*, note 80 at 646, para. 77.

146 *Migrant Workers V(2), ibid.* at 21-22 (opinions of France and the Netherlands respectively). This provision was unacceptable to the United States because short-term migrant workers are not granted any free choice of employment in that country. *Record of Proceedings, supra*, note 80 at 792 (Mr. Sehgal, U.S. Government advisor) and at 796 (Mr. Sorn, Employers' advisor). At the 60th Session of the International Labour Conference, an amendment by the former Federal Republic of Germany to add a further qualification to the proposed article 14(a) in order to take into account the situation of the labour market was rejected. *Ibid.* at 646, para. 78. The views of this government were reiterated by its delegate, Mr. Haase, *ibid.* at 795, during the discussions of the Report of the Conference Committee on Migrant Workers:

> [M]ost countries are asked to relinquish any possibility of regulation if the foreign worker has completed his first -- and perhaps very short -- contract of employment. Such a provision would cause my Government great difficulty. We have had an extremely liberal policy for the employment of foreigners, thus, reducing, the employment market difficulties of many other countries... But the Federal Republic of Germany, with its high density of population, is not a country of immigration in the classical sense. It must therefore reserve some possibility of control for a certain period -- at present five years -- during which it can ensure the indispensable priority of employment for national workers.

147 Russo, *supra*, note 97 at 57. Russo adds, *ibid.*, that when read with article 8(1) of C143, which stipulates that loss of employment by legally resident migrants does not place them in an irregular situation (see also, *supra*, note 139 and accompanying text), article 14 "enables migrants of two years residence to refuse to accept exploitative conditions in the occupations they were restricted to in their original work permits, and should provide an incentive for improvements to be made by employers of those migrants".

change jobs without applying for a new work permit irrespective of the duration of their stay; and the prohibition on access by foreigners to employment services in some countries severely compromises any free choice of employment they may have. Finally, these restrictions are also applicable to the families of migrant workers.[148]

Not surprisingly, article 14(a) has been the most serious obstacle to the ratification of Part II of C143 (1975).[149] It has been labelled as "probably the most problematical provision of the Convention", even though it cannot support a right to stay.[150] Nonetheless, article 14(a) unquestionably encroaches upon the realm of state sovereignty in the traditionally secure field of employment and immigration. Its application, though not immediately evident, may well be far-reaching. These broader implications of the provision have been recognized by the ILO Committee of Experts:

> The question of free choice of employment for migrant workers is a... complex one, involving as it does national policy in the fields of immigration and employment generally and the concern to protect the employment position of a country's own citizens.[151]

(d) Trade Union Rights

"Trade union rights" are described by Anne Trebilcock as embodying two aspects: that of the individual worker and that of the trade union organization to act effectively in defence of its members' interests. If a trade union cannot defend its foreign members to the same extent as its national members working in the same enterprise then it will itself be weakened as an

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148 *General Survey*, *supra*, note 49 at 149, para. 523. For specific country references in respect of these restrictions on migrants' free choice of employment see *ibid.* at 94-95, paras. 346-353.

149 *Ibid.* at 149, para. 523.

150 Kellerson, *supra*, note 14 at 38. The provision does not, however, preclude a state from withdrawing migrants' residence rights even if they have resided and worked in a country for over two years and are entitled to free choice of employment. Nor does article 14(a) affect the state's right to admit or to refuse to admit the entry of a foreigner to its territory. *General Survey*, *ibid.* at 92, para. 338. See also Trebilcock, *supra*, note 1 at 1841.

151 *General Survey*, *ibid.* at 151, para. 532.

institution.[152] This second aspect is in line with the view expressed in chapter two, namely that *all* workers suffer if employers are able to exploit one section of their class.[153]

"Trade union rights" encompass the right to freedom of association and collective bargaining, which constitute fundamental tenets of the ILO.[154] As mentioned earlier, the principle of freedom of association was first enshrined in the ILO Constitution and is endowed with a special procedure devoted to its implementation. Furthermore, *Convention No. 87 of 1948 concerning Freedom of Association and Protection of the Right to Organize* prohibits discrimination on the basis of nationality in respect of the formation and membership of trade unions.[155]

C97 (1949) provides for equal treatment between migrant workers and nationals in respect of "membership of trade unions and enjoyment of the benefits of collective bargaining".[156] Article 10 of Part II of C143 (1975) uses the broader term "trade union rights".[157] These are defined in paragraph 2(g) of R151 (1975) to also encompass "eligibility for office in trade unions and in labour-management relations bodies, including bodies representing workers in undertakings".

The ILO Committee of Experts found that migrant workers are permitted to join trade unions on the same terms as nationals in most countries but that their eligibility for trade union office is more likely to be the subject of restrictions.[158] In the latter case, the Committee of Experts has stated that legislation in this area should be flexible in order to allow trade union

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152 *Supra*, note 1 at 1837-1838.

153 *Supra*, chapter two, note 101 and accompanying text.

154 Böhning, *supra*, note 19 at 244.

155 See *supra*, notes 37-39 and 82 and accompanying text.

156 Article 6(1)(a)(ii). The same provision is included in article 17(2)(a)(ii) of the Model Agreement in Annex I to R86 (1949).

157 See also Böhning, *supra*, note 19 at 245. Although article 10 does not apply to illegal migrant workers, paragraph 8(3) of R151 (1975) maintains that these workers ought to receive equal treatment with nationals in respect of trade union membership and the exercise of trade union rights.

158 *General Survey*, *supra*, note 49 at 91, paras. 328-331 and at 149, para. 525. See also *General Survey on the Applications of the Conventions on Freedom of Association, the Right to Organize and Collective Bargaining and the Convention and Recommendation concerning Rural Workers' Organizations*, Report of the Committee of Experts on the Application of Conventions and Recommendations, Part III(4B), International Labour Conference, 69th Session, 1983, at 31, para. 96 and at 53, para. 159 (Geneva: International Labour Office, 1983) [hereinafter *General Survey on Freedom of Association*].

organizations to choose their leaders without hindrance and also to permit foreign migrant workers to hold trade union office, at least after a reasonable period of residence in the country of employment.[159] The drafting history of the 1975 instruments reveals that states have justified these restrictions on the basis of non-interference in union affairs or national sovereignty.[160] The existence of these restrictions on the trade union rights of migrant workers is unfortunate. Broader participation by migrant workers in trade unions not only gives migrants a say in labour matters that affect them,[161] but is also an important aspect of an active programme to increase co-operation between minority and immigrant groups and the majority population.[162] Moreover, as observed in chapter two, the exercise of trade union rights by migrant workers constitutes an important aspect of their broader social participation in society, which according to the communitarian model is essential to their acquisition of further rights.

Article 10 of C143 also guarantees equal treatment between migrant workers and nationals in respect of "individual and collective freedoms". The Committee of Experts has noted that this text is intended to cover freedoms, such as freedoms of information, expression and assembly, upon which the full exercise of trade union rights depends.[163]

(e) Social Security Rights

The protection of the social security rights of migrant workers and their families is one of the main areas in which the standard-setting activities of the ILO regarding migrant workers

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159 *General Survey on Freedom of Association, ibid.* at 53, para. 160.

160 *Migrant Workers VII(2)*, note 69 at 29 and 30 (opinions of Austria and Libya, and Malaysia respectively).

161 The Committee of Experts observed that restrictions based on nationality may prevent migrant workers from playing an active role in the defence of their interests, especially in sectors where they constitute the major source of labour. *General Survey on Freedom of Association, supra*, note 158 at 31, para. 97.

162 *General Survey, supra*, note 49 at 119, para. 417, referring to the Swedish policy aimed at assisting immigrants in retaining their cultural identity.

163 *Ibid.* at 89, para. 317. This observation was made in connection with the assertion that, for the purpose of article 10 of C143, "individual and collective freedoms" do not encompass "political rights". See also the commentary by the International Labour Office in *Migrant Workers V(2), supra*, note 99 at 17.

have been specifically concentrated. The object of these activities has been to establish the right to equal treatment between nationals and aliens and to set up a system for the maintenance of acquired rights and rights in the course of acquisition for workers who move from one country to another.[164]

The principle of equal treatment between migrant workers and nationals in respect of social security appears in article 6(1)(b) of C97 (1949) which also defines social security.[165] Social security benefits which are financed on a non-contributory basis, namely from public funds, may, however, be restricted to nationals.[166] C143 (1975) restates this fundamental principle of equal treatment in article 10, which in contrast to the 1949 provision, applies to both contributory and non-contributory forms of social security.[167] Reciprocity is not required under either C97 and C143. So long as the country of employment has ratified the Convention in question, the social security rights of migrants are to be respected, regardless of whether the migrant worker's home country has ratified the instrument.[168]

References to social security were not included in the draft 1975 Convention prepared by the International Labour Office because this matter was considered to have been adequately

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164 *General Survey*, *supra*, note 49 at paras. 8-9. See also Böhning, *supra*, note 19 at 250. Trebilcock, *supra*, note 1 at 1846, adds that two other basic principles, upon which the protection of migrant workers and their families must be founded, are the determination of the applicable law and the provision of benefits abroad.

165 Social security is defined as:

> legal provision in respect of employment injury, maternity, sickness, invalidity, old age, death, unemployment and family responsibilities, and any other contingency which, according to national laws or regulations, is covered by a social security scheme.

R100 (1955) (paragraphs 45 to 47) also refers to the need to make appropriate arrangements in order to guarantee the social security of migrant workers and their families, particularly in the field of health care (paragraph 46(a), (b) and (j)) and in the event of employment injury (paragraph 46(d)).

166 Article 6(1)(b)(ii) of C97. See also *The ILO and Human Rights*, *supra*, note 16 at 54.

167 *General Survey*, *supra*, note 49 at 86, para. 306. The 1975 instruments make other references to social security rights. Provisions of note are article 9(1) of C143, which protects the social security rights of irregular migrant workers arising out of "past employment" and paragraph 2(f) of R151, which provides that all migrant workers should be accorded equal treatment with nationals in respect of "conditions of work, including... social security measures and welfare facilities and benefits provided in connection with employment". R151 also stipulates that *all* migrant workers, who leave the country of employment, should be entitled to "reimbursement of any social security contributions which have not given and will not give rise to rights under national laws or regulations or international arrangements" (paragraph 34(1)(c)(ii)).

168 *Ibid.* at 86, para. 303.

articulated elsewhere.[169] A reference to social security was eventually added in article 10 on the understanding that it constituted merely a restatement of a fundamental principle and that it would not contradict other more technically-oriented conventions in this area.[170] This strategy is in line with the ILO approach to the question of social security rights generally. Although bilateral or specific regional multilateral treaties are arguably the best method of dealing with the technical matters arising in this complex and diverse field, the affirmation and maintenance of fundamental principles and general guidelines are better ensured at the universal multilateral level.[171]

Social security is the object of a number of other ILO Conventions and Recommendations. These standards have evolved considerably since 1919:

> Great strides have been made since the ILO started to be active in this field. These can be seen especially in the gradual extension of the range of application of instruments of co-ordination to all branches and schemes, whether contributory or not, as well as to all workers, whether employees or self-employed, and even to beneficiaries who do not form part of the economically active population. They can also be seen in the widening of the advantages to which the various categories of persons covered by these instruments are entitled, including in particular entitlements to short- or long-term benefits outside the country whose legislation is applicable.[172]

The ILO Committee of Experts has observed that the social security provisions in the migrant workers instruments should be read in the context of other ILO standards concerned with this field.[173] There are three major ILO social security conventions, the contours of

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169 *Ibid.* at 85-86, para. 302. See below.

170 *Ibid.* at 86, paras. 302 and 150, para. 527. See also *Migrant Workers V(2)*, *supra*, note 99 at 16 (opinions of Finland and Italy) and 17-18 (commentary by the International Labour Office) and *Record of Proceedings*, *supra*, note 80 at 644, para. 53 (opinion of Spain). The employers' members at the 60th Session of the International Labour Conference were opposed to the insertion of social security in article 10 of draft C143 on the ground that it involved special technical problems treated in *Convention No. 118 of 1962 concerning Equality of Treatment (Social Security). Record of Proceedings, ibid.*

171 Cf. Böhning, *supra*, note 19 at 250.

172 Böhning, *supra*, note 36 at 135.

173 *General Survey*, *supra*, note 49 at 86, para. 303.

which warrant description.[174] *Convention No. 102 of 1952 concerning Minimum Standards of Social Security*[175] enunciates, in article 68(2), the principle of equality of treatment between national and alien workers in respect of *contributory* social security schemes subject to any conditions of reciprocity provided for in bilateral agreements. *Convention No. 118 of 1962 concerning Equality of Treatment (Social Security)* provides for equal treatment in respect of benefits and applies to all branches of social security.[176] Benefits are to be awarded without any condition of residence, although non-contributory benefits, with the exception of medical care, employment injury benefit and family benefit, may be subject to conditions of residence of a prescribed duration. *Convention No. 157 of 1982 concerning Maintenance of Social Security Rights* deals with maintenance of rights in the course of acquisition (Part III) and the maintenance of acquired rights (Part IV), and also applies to all branches of social security. The Convention, however, specifies that the bilateral and multilateral agreements, which member states undertake to conclude under the Convention in order to give effect to its provisions, need not apply to all persons nor cover all branches of social security.[177]

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174 See generally the observations of Trebilcock, *supra*, note 1 at 1848-1849, Böhning, *supra*, note 19 at 250-252 and note 36 at 134-136; and Plender, *supra*, note 48 at 307.

175 *Convention No. 102 of 1952 concerning Minimum Standards of Social Security*: entry into force April 27, 1955; ratified by 34 states as of January 1, 1992: Austria, Barbados, Belgium, Bolivia, Costa Rica, Cyprus, Czech and Slovak Federal Republic, Denmark, Ecuador, France, Germany, Greece, Iceland, Ireland, Israel, Italy, Japan, Libyan Arab Jamahiriya, Luxembourg, Mauritania, Mexico, Netherlands, Niger, Norway, Peru, Senegal, Spain, Sweden, Switzerland, Turkey, United Kingdom, Venezuela, Yugoslavia, Zaire.

176 *Convention No. 118 of 1962 concerning Equality of Treatment (Social Security)*; entry into force April 25, 1964; ratified by 37 states as of December 31, 1989: Bangladesh, Barbados, Bolivia, Brazil, Cape Verde, Central African Republic, Denmark, Ecuador, Finland, France, Germany, Guatemala, Guinea, India, Iraq, Ireland, Israel, Italy, Jordan, Kenya, Libyan Arab Jamahiriya, Madagascar, Mauritania, Mexico, Netherlands, Norway, Pakistan, Rwanda, Suriname, Sweden, Syrian Arab Republic, Tunisia, Turkey, Uruguay, Venezuela, Vietnam, Zaire. Equal treatment is enunciated in articles 4(1), 5(1) and 6 of the Convention. See also M. Hasenau, "Setting Norms in the United Nations System: The Draft Convention on the Protection of the Rights of All Migrant Workers and their Families in Relation to ILO in Standards on Migrant Workers" (1990) 28 IM 133 at 144. The branches of social security are listed in article 2(1): medical care, sickness benefit, maternity benefit, invalidity benefit, old-age benefit, survivors' benefit, employment injury benefit, unemployment benefit and family benefit. Medical care is not included in the definition of social security in article 6(1)(b) of C97 (1949). *Supra*, note 165. However, the Preamble to Recommendation No. 69 of 1944 concerning Medical Care declares that medical care is "an essential element in social security". Furthermore, paragraph 12 of R86 (1949) provides that migrants under Government-sponsored arrangements for group transfer should benefit from medical assistance on the same terms as nationals and article 17(2)(d) of the Model Agreement annexed to R86 extends the equality principle to include medical assistance for migrant workers and their families. R151 (1975) also maintains that migrant workers and their families should enjoy effective equality of opportunity and treatment with nationals in respect of, *inter alia*, "the benefits of... health facilities" (paragraph 2(i)).

177 These agreements must, however, include the following social security benefits: invalidity, old-age and

Under the ILO social security Conventions, however, in contrast to the 1949 and 1975 migrant workers instruments, equal treatment with nationals is only accorded to migrants (and their survivors) on the basis of reciprocity, in other words, to nationals of member states which have ratified the instruments.

(f) Cultural Rights

Although questions of cultural and linguistic identity are generally separable from those relating to employment and the workplace and therefore strictly-speaking outside the competence of the ILO, the 1975 migrant workers instruments are concerned with these questions, which were included towards the end of the drafting process largely as a result of concerns expressed by certain countries and workers' members.[178]

Article 10 of C143 (1975) refers to "cultural rights" as one of the objectives of the national policy which states are under an obligation to declare and pursue in order to promote and guarantee equality of opportunity and treatment.[179] According to the ILO Committee of Experts, the rationale for the inclusion of "cultural rights" in article 10 is "to give express recognition to the right of migrant workers to participate in the cultural life of the country and to maintain and develop their own cultural heritage in the same condition as nationals".[180] It is

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survivors' benefits and employment injury pensions, including death grants. The 1982 Convention, therefore, remains subject to the conclusion of agreements between those states which have ratified it. Böhning, *supra*, note 36 at 135, 136. In spite of these restrictions, Plender has remarked, *supra*, note 48 at 307, that the 1982 Social Security Convention "aspires to achieve ambitions exceeding formal equality of treatment". As of 31 December 1989, however, only Spain and Sweden had ratified the instrument.

178 Regarding the need for special measures to maintain and develop the cultural identity of migrant workers see *Migrant Workers VII(2)*, *supra*, note 69 at 29-30 and 36 (opinion of Finland) and *Migrant Workers V(2)*, *supra*, note 99 at 20 (opinion of Yugoslavia); regarding the need for migrants to maintain ties with their own countries see *Migrant Workers V(1)*, *supra*, note 69 at 6, para. 18 (view of Workers' members and some Government members during the proceedings of the 59th Session of the International Labour Conference) and see *Migrant Workers V(2)*, *ibid.* at 20 (opinion of Yugoslavia); and regarding the need to teach the native language to children of migrant workers see *Migrant Workers VII(2)*, *ibid.* at 9 and 37 (opinion of Sweden) and *Migrant Workers V(2)*, *ibid.* at 27 (opinion of Finland).

179 "Cultural rights" were added to article 10 as a result of an amendment introduced by workers' members during the 60th Session of the International Labour Conference in 1975. *Record of Proceedings*, *supra*, note 80 at 644, para. 55.

180 *General Survey*, *supra*, note 49 at 88, para. 313.

difficult to gauge the exact scope of this reference to "cultural rights" in article 10. The Committee of Experts has observed that "cultural rights" do not encompass a right to education in general on the basis that education does not lie within the competence of the ILO, although the Committee conceded that an amendment regarding equality of opportunity in respect of general education was withdrawn as pursuing similar objectives.[181] In any case, it is difficult to see how the maintenance and development of the cultural identity of migrants might proceed without some provision for the teaching to their children of the mother tongue and culture of the country of origin. Indeed, this proposition is supported by article 12(f) of C143 which imposes an obligation upon states to

> 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.[182]

The Committee of Experts has noted that states only have to "assist and encourage" the efforts of migrant workers to preserve their cultural identity. The onus, therefore, is on the migrants themselves to take the initiative.[183] Examples of state measures to teach the mother tongue to the children of migrant workers include bilateral arrangements between the home country and the country of employment, assistance to schools run by immigrant associations, and the placing of school premises at the disposal of the consular authorities of the country of emigration.[184] More general measures aimed at the preservation of the cultural identity of

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181 *Ibid.* at 88, para. 315. The Committee added, *ibid.*, that the inclusion of cultural rights cannot be considered as anything more than a statement of principle whose purpose is not to regulate all questions resulting from its application, particularly those concerned with educational assistance.

182 This provision arose as a result of an amendment introduced by workers' members and the government members of Algeria, Greece and Yugoslavia during the 60th Session of the International Labour Conference in 1975. *Record of Proceedings*, *ibid.* at 646, para. 72.

183 *General Survey*, *supra*, note 49 at 107, para. 405. This approach is based on the premise that adaptation by migrant workers to the living and working conditions of the country of employment involves continuing efforts on the part of states as well as of the immigrants themselves. *Ibid.* at 151, para. 533. For more on the question of adaptation and integration see below.

184 *Ibid.* at 107, paras. 406-408.

migrant workers and their families and the maintenance of cultural ties with their countries of origin consist of radio and television broadcasts in the native language, assistance to immigrant associations and special arrangements enabling migrant workers to take leave from their employment for the celebration of their principal national or religious holidays.[185]

The terms of article 12(f) of C143 are repeated in paragraph 7(1) of the accompanying R151 as part of a broader programme to enable migrant workers and their families to take full advantage of their rights and opportunities in employment and occupation and as a means to promoting their adaptation to the society of the country of employment. The ILO Committee of Experts has stressed that adaptation and integration (as opposed to assimilation) of migrant workers into the society of the country of employment and the preservation of their national identity is the keystone of ILO social policy. The dual objective of special measures aimed at the integration of migrants and the preservation of their identity should be considered within the broad framework of equality of opportunity and treatment with nationals.[186] This approach is valid regardless of whether migrant workers and their families stay in a country indefinitely or go back home within a short space of time.[187] In the latter case, measures aimed at the preservation of the cultural identity of migrants facilitate their reintegration into the country of origin on their return.[188]

(g) Family Reunification

In a preliminary report on *Migrant Workers*, issued by the International Labour Office

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185 *Ibid.* at 107-108, paras. 409-412.

186 *Ibid.* at 118, para. 413. Special measures are also necessary in other areas, such as health and housing (see below) and not just in relation to culture, in order to assist the integration of migrant workers and their families into the host society.

187 An interesting "independent" approach to integration noted by the Committee of Experts is that taken by Sweden. The emphasis in Sweden is upon the need for immigrants to retain their cultural identity, with the assistance of the state, but only to the extent that they wish to do so. *General Survey*, *ibid.* at 119, para. 417. See also *infra*, chapter eight, note 42 and accompanying text.

188 *Ibid.* at 118, para. 414. In addition to this latter objective, the preservation of the cultural identity of migrants contributes to the enrichment of contacts between the country of origin and country of employment. *Ibid.*

in 1973, the problem of family reunification was described as follows:

> Uniting migrant workers with their families living in the countries of origin is recognized to be essential for the migrants' well-being and their social adaptation to the receiving country. Prolonged separation and isolation lead to hardships and stress situations affecting both the migrants and the families left behind and prevent them from leading a normal life. The large numbers of migrant workers cut off from social relations and living on the fringe of the receiving community create many well known social and psychological problems that, in turn, largely determine community attitudes towards migrant workers.[189]

Given the social importance of the matter and the prominence given to respect for family life in other international human rights instruments,[190] it is surprising that there is no firm state obligation in ILO instruments to reunify migrant workers with their families. R86 (1949) only concerns itself with this question from the standpoint of permanent migration.[191] Article 13(1) of C143 (1975) reads:

> A Member may take all necessary measures which fall within its competence and collaborate with other Members to facilitate the reunification of the families of all migrant workers legally residing in its territory.

This provision relates to *all* migrants but leaves to states a discretion as to whether to facilitate family reunification. The drafting history reveals that article 13(1) was introduced as an amendment at the 60th Session of the International Labour Conference by the workers' members and the Italian Government delegation, but was not couched in terms of a strict obligation because of the restrictions on free choice of employment in article 14.[192]

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189 *Migrant Workers VII(1)*, *supra*, note 49 at 27.

190 *Supra*, chapter one, notes 131-132 and accompanying text. See also *Social Integration. Pertinent Regulations concerning the Welfare of Migrant Workers and their Families*, Report of the Secretary-General to the UN Commission for Social Development, 28th Session (Vienna, February 7-16, 1983), at 21, para. 63, UN Doc. E/CN.5/1983/10 [hereinafter *Welfare of Migrant Workers and their Families*] and Goodwin-Gill, *supra*, note 81 at 17.

191 Paragraph 15.

192 *Record of Proceedings*, *supra*, note 80 at 647, para. 81.

Nonetheless, C143 has been described as being "weak on family reunification".[193]

R151 (1975) uses stronger language with regard to this question. Paragraph 13(1) of R151 begins: "All possible measures *should* be taken both by countries of employment and by countries of origin to facilitate the reunification of families of migrant workers *as rapidly as possible*..."[194]

For the purpose of family reunification, "the family" in C143 and R151 is defined as "the spouse and dependent children, father and mother".[195] The ILO Committee of Experts noted from state practice that the spouse and unmarried minor children of migrant workers are usually permitted to enter the country of employment but difficulties exist in a number of countries with regard to the admission of dependent adult children and parents.[196] These problems are especially acute in the case of adult disabled children, students in full-time education and those children unable to find work in the country of origin because of the lack of employment opportunities.[197]

In addition to the inclination of states not to admit family members as provided for in the C143 definition, the Committee of Experts also found that the entry of migrant workers' families was subject to a number of prerequisites, for example: a proscribed period of residence, health requirements, the possession of sufficient resources or adequate housing.[198] This approach is not surprising given the views of states during the drafting of the 1975 instruments, particularly with regard to the prerequisite of adequate housing.[199] Consequently,

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193 Russo, *supra*, note 97 at 57.

194 Emphasis added. See also Lillich, *supra*, note 57 at 74; Kellerson, *supra*, note 14 at 39.

195 Article 13(2) and paragraph 15 respectively. This definition is broader than that found in R86 (1949), which is limited to the migrant worker's wife and minor children with favourable consideration to be given to other dependent family members.

196 *General Survey*, *supra*, note 49 at 121, paras. 421-422. The extension of the definition of "family" to dependent adult children and parents was opposed at the drafting stage by a number of governments which preferred to retain discretion with respect to the admission of adult or married children and other relatives. *Migrant Workers V(2)*, *supra*, note 99 at 30 (opinions of New Zealand and the United Kingdom). The United Kingdom justified its position with the claim that it is impossible to ascertain the degree of dependence and precise relationships in the case of those migrants who are members of extended families. *Ibid.*

197 *General Survey*, *ibid.* at 120, para. 422.

198 *Ibid.* at 121, para. 426.

199 *Migrant Workers VII(2)*, *supra*, note 69 at 46, 49 and 61 (opinions of the former Federal Republic of Germany, United Kingdom and Norway respectively).

paragraph 13(2) of R151 provides that the migrant worker should have "appropriate accommodation" which meets the standards normally applicable to nationals. This requirement is tempered somewhat by paragraph 16 which asserts that states should take full account of the needs of migrant workers, *inter alia*, in their housing policy in respect of the construction of housing and assistance in obtaining housing.[200]

During the drafting of the 1975 instruments, concerns were expressed by states with regard to the difficulties of encouraging the reunification of short-term migrant workers with their families.[201] These have been recognized by the ILO Committee of Experts, which has conceded that family reunification in the case of short-term or seasonal workers may not be possible. The fact that workers have to find suitable accommodation before their families are permitted to join them indicates that the provisions in R151 were not drawn up with short-term stays in mind.[202] For those workers, however, who cannot have their families join them, R151 does outline some measures in mitigation by allowing migrants to visit their families (or have their families visit them) after one year of residence without the loss of their employment or residence rights.[203] But these measures are not watertight and they provide no protection to migrant workers against the termination of their employment while on leave if their dismissal is valid otherwise.[204]

The ILO approach to family reunification in C143 and R151 was criticized during the 60th Session of the International Labour Conference for failing to recognize explicitly that the migrant worker has a right to a normal family life which cannot be refused or restricted by the

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200 This provision was introduced by the United States during the 60th Session of the International Labour Conference. *Record of Proceedings*, *supra*, note 80 at 650, para. 126. In its *General Survey*, *supra*, note 49 at 121, para. 429, the Committee of Experts noted the Norwegian government's efforts in this regard. The government issues grants to local authorities for housing immigrants and has established a government-financed society to acquire and make available housing for immigrants.

201 *Migrant Workers VII(2)*, *supra*, note 69 at 46 and 59 and 61 (opinions of the Netherlands and France respectively).

202 *General Survey*, *supra*, note 49 at 122, para. 431.

203 Paragraph 17. The following paragraph of R151 adds that consideration should be given to the possibility of providing financial assistance to migrant workers towards the cost of travel or a reduction in the normal cost of transport, for example by the arrangement of group travel.

204 *General Survey*, *supra*, note 49 at 123, para. 433.

state.[205] Undoubtedly, this approach is influenced by the perception that family reunification is a decisive stage in the migration process which may lead to the indefinite residence of migrant workers and their families, a situation unacceptable to those countries which do not consider themselves to be countries of immigration.[206]

(h) Health

Concern with the health of migrants in the country of employment has two objectives: to provide adequate health care for migrant workers and their families on the same basis as that provided for nationals and to ensure that migrant workers are protected in their work environment from special health risks.[207]

(i) The Right to Health Care

There is no explicit provision in the ILO migrant workers instruments dealing with the right of migrant workers and their families to health care. As noted earlier, the definition of social security in C97 (1949) does not include medical care, although references to equal treatment between migrant workers and nationals in respect of medical assistance are made in R86 (1949), the Model Agreement annexed to R86 and in R100 (1955).[208] The equality provision in C143 (1975) does not specifically mention medical care, although it does include social security, which is defined under Recommendation No. 69 of 1944 concerning Medical

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205 *Record of Proceedings, supra*, note 80 at 794 (opinion of Mr. Stark, representative of the International Catholic Migration Commission). Mr. Stark conceded, however, that the prerequisite of appropriate accommodation in R151 was necessary, but argued that the instrument should have stated that the condition was satisfied once the worker in question possessed reasonable employment stability.

206 *Migrant Workers VII(2), supra*, note 69 at 47 (opinion of the former Federal Republic of Germany).

207 Article 5 of C97 provides for measures protecting the health of migrants at the time of recruitment, travel and arrival in the country of employment. Since the object of this chapter is to analyze the protection by the ILO of the rights of migrant workers while resident in the host country, these measures are not discussed here.

208 *Supra*, notes 176 and 165 respectively.

Care and the latter two ILO Social Security Conventions (Nos. 118 and 157) to include medical care.[209] The strongest support for the above right is paragraph 2(i) of R151 (1975) which asserts that migrant workers and their families should enjoy effective equal opportunity and treatment with nationals in respect of "conditions of life, including... the benefits of... health facilities".[210]

Genuine equal treatment between migrant workers and their families and nationals in respect of health or medical care requires a particular sensitivity to the special health problems of migrants. Paragraph 20 of R151 provides that all appropriate measures should be taken to prevent any special health risks to which migrant workers may be exposed. Three types of special health risk were identified by the preparatory work of the ILO on the 1975 instruments: conditions already suffered from by migrants in their countries of origin; disorders contracted in host countries where migrants may have inadequate immunity to certain diseases; and physical and psychological disorders peculiar to the process of adaptation to a new environment.[211] In addition, the health concerns of migrant women and children may be especially acute.[212] The health problems of migrant workers and their families are exacerbated by their linguistic and financial difficulties, their unfamiliarity with the health care system, the different cultural attitudes they may have towards this system, and by the generally poor socio-economic conditions under which they live.[213] Clearly, special measures are required to identify the disorders to which migrants are vulnerable and to assist migrant workers and their

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209 *Supra*, notes 176 and 177 and accompanying text.

210 See also *supra*, note 176. Plender, *supra*, note 48 at 305-306, observes that this clause is probably a satisfactory statement of the principle of equal treatment between migrants and nationals in respect of access to health care. Nonetheless, it is only to be found in a non-binding Recommendation.

211 *Migrant Workers VII(1)*, *supra*, note 49 at 33 and also cited by the ILO Committee of Experts. *General Survey*, *supra*, note 49 at 123, para. 436.

212 *Welfare of Migrant Workers and their Families*, *supra*, note 190 at 16. Migrant women face particular problems with the control of health during pregnancy. Moreover, delivery is complicated by language problems, attachment to a particular tradition and unfamiliarity with the hospital environment. *Ibid.* Migrant women, if married and not working, are also particularly prone to suffer from isolation in the host country in which their husbands are employed. See also *Migrant Workers VII(2)*, *supra*, note 69 at 69 (opinion of Sweden).

213 *Welfare of Migrant Workers and their Families*, *ibid.* at 16-17. See also *General Survey*, *supra*, note 49 at 123-124, para. 437.

families in obtaining the health care to suit their particular needs. Specially adapted social services may play an important role in providing such assistance.[214]

(ii) Occupational Health and Safety

Measures dealing with the occupational health and safety of migrant workers are located in paragraphs 21 to 22 of R151 (1975). Employment training should include instruction in occupational safety and hygiene. Migrants should be informed, in their own language if necessary and during paid working hours, of the laws, regulations and collective agreements concerned with the protection of workers. Finally, employers should ensure that migrant workers understand all the warnings, symbols and other signs relating to safety and health hazards at work. The training and instruction given to nationals may be inadequate for migrant workers and special measures are necessary to counteract their particular problems, which place them at a substantially greater risk of suffering an industrial accident than nationals.[215]

(i) Housing

The 1973 ILO report on *Migrant Workers* observed that housing migrant workers and their families is one of the major problems faced by countries of employment. The housing that migrant workers often seek is of the low to medium-rent variety in urban industrial areas, which is likely to be in short supply. Such accommodation is chiefly to be found within the public housing sector and long waiting-lists make it difficult for newcomers to obtain it. In the private housing market, migrants encounter excessive rents, poor living conditions and face a

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214 Paragraph 24 of R151 asserts that social services in the country of employment should provide migrant workers and their families every assistance in adapting to the economic, social and cultural environment of the country of employment (paragraph 24(a)) and help them to make full use of, *inter alia*, health services (paragraph 24(b)).

215 Paragraph 22(2) of R151 emphasizes the need for special measures to ensure that migrant workers fully understand their training and instruction. See also *General Survey*, *supra*, note 49 at 124, para. 440.

greater risk of exploitation, especially if they are in an irregular situation.[216] The provision of adequate housing to all migrant workers and their families residing in the country of employment has particular social significance, for it plays a vital role in assisting their integration into the society of that country.[217]

ILO instruments contain a number of explicit provisions concerned with the entitlement of migrant workers and their families to suitable housing. The equality provision in C97 (1949) maintains that migrant workers are to be treated equally with nationals in respect of accommodation. R86 (1949) provides that migrants receive adequate accommodation on arrival in the country of immigration and the Model Agreement annexed to R86 imposes an obligation on the host country to provide, subject to availability, suitable and hygienic housing to migrants and their families.[218] In R100 (1955), housing for migrant workers meeting approved standards is to be provided at the expense of the employer or by other appropriate financial aid and the competent local authority is responsible for the establishment of satisfactory housing conditions and for the definition of minimum housing standards and the rights of workers with respect to accommodation.[219] Recommendation No. 115 of 1961 concerning Workers' Housing is the only ILO instrument entirely devoted to the question of workers' accommodation. Article 2 of Part I of the Recommendation, which is concerned with the objectives of a national housing policy, reads:

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216 *Migrant Workers VII(1)*, *supra*, note 49 at 43.

217 *Welfare of Migrant Workers and their Families*, *supra*, note 190 at 12, para. 39. Perhaps more so than the enjoyment of other rights, since the existence of suitable housing for migrant workers and their families establishes a social and materially secure base upon which these other rights can flourish. See also, *supra*, note 186 and accompanying text.

218 Article 6(1)(a)(iii) of C97, paragraph 10(a) of R86 and article 20 of the Model Agreement. The reference to hygienic accommodation in the Model Agreement annexed to R86 is not repeated in article 6 of C97. Although the International Labour Conference was concerned with this question, it was excluded from C97 on the basis that it might have been interpreted as granting more favourable treatment to foreigners than to nationals. *General Survey*, *supra*, note 49 at 89, para. 319.

219 Paragraphs 21 and 22. Although employers should provide, or assist with the finding of, accommodation for migrant workers recruited through official channels (*Migrant Workers VII(1)*, *supra*, note 49 at 46), the provisions in R100 appear to be the only measures specifically referring to such an obligation. Böhning observes, *supra*, note 19 at 249, that the Recommendation concerning Workers' Housing (see below) does not concern itself with this question.

> It should be an objective of national policy to promote, within the framework of general housing policy, the construction of housing and related community facilities with a view to ensuring that adequate and decent housing accommodation and a suitable living environment are made available to *all workers and their families. A degree of priority should be accorded to those whose needs are most urgent.*[220]

In article 5 of Part II of the Recommendation, which deals with suggestions concerning methods of application, special attention is to be given to the problem of housing migrant workers and their families "with a view to achieving as rapidly as possible equality of treatment between migrant workers and national workers in this respect". Unfortunately, this Recommendation is not accompanied by a binding Convention and its effectiveness, like R100 (1955), is therefore substantially reduced.[221]

The only references to housing in the 1975 migrant workers instruments are to be found in R151. Paragraph 2(i) states that migrant workers and their families should enjoy effective equality of opportunity and treatment with nationals in respect of, *inter alia*, "conditions of life, including housing..." The other references to housing in R151 deal with the question of accommodation as a prerequisite for family reunification as well as the requirement that states take the needs of migrant workers and their families into account in their housing construction and assistance policies. These were discussed in the section on family reunification.[222]

The drafting documents relating to the 1975 instruments on migrant workers and the *General Survey* carried out by the ILO Committee of Experts in 1980 identify a number of problems which states encounter in their attempts to provide adequate accommodation for migrant workers and their families. Given that there is a shortage of accommodation in the public housing sector, short-term migrants face a struggle in obtaining this sort of accommodation for themselves and their families. Countries of employment may therefore

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220 Emphasis added.

221 *Supra*, note 67 and accompanying text.

222 *Supra*, notes 199 and 200 and accompanying text.

have difficulty in providing for this particular group when there are long lists of nationals waiting for public housing.[223]

In addition to these long waiting-lists which disadvantage new applicants, some states expressly discriminate in favour of nationals with regard to the allocation of public housing. In an observation in 1988, the Committee of Experts noted that this was the case in Spain, where regulations accorded priority to Spaniards in the allocation of accommodation built under the auspices of the National Accommodation Institute. The Committee added that these regulations were contrary to the principle of equal treatment in respect of accommodation laid down in article 6(1)(a)(iii) of C97 (1949) which had been ratified by Spain. Accordingly, the Spanish Government altered its laws to ensure equal treatment between foreigners and nationals in respect of subsidized housing.[224]

The existence of local autonomy, particularly over the allocation of public housing, is another factor which may limit the extent to which states are able to fulfil their housing obligations towards migrant workers and their families.[225] Another problem arises if migrant workers' accommodation is connected to their employment and if that employment is terminated. Although there are measures preventing the establishment of a link between loss of job and the expulsion of migrant workers from the host country, no equivalent provision exists protecting migrants from the loss of accommodation tied to their previous employment. Efforts to include such a clause in R151 (1975)[226] were regarded by the tripartite working party, set up by the Committee on Migrant Workers at the 60th Session of the International Labour

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223 Cf. *Migrant Workers VII(2), supra*, note 69 at 31 (opinion of the United Kingdom). According to the United Kingdom, similar difficulties exist in respect of the provision of long-term social services and education for migrant workers and their families who stay for short periods, such as twelve months. In the view of the United States, however, *ibid.* at 61, assistance to make available housing suited to the needs of migrant workers and their families, admitted for brief periods for specific short-term employment, should be provided by public and private agencies working together.

224 *Report of the Committee of Experts, 1988, supra*, note 127 at 191-192.

225 *Migrant Workers VII(2), supra*, note 69 at 83 (opinion of the United Kingdom). This is a problem which applies equally to other matters, such as education, and is particularly an issue in federal states in which the constituent units possess exclusive spheres of jurisdiction.

226 *Migrant Workers V(2), supra*, note 99 at 35 (proposal of Yugoslavia).

Conference, as too specific for inclusion in a Recommendation dealing with general policy.[227]

In a number of countries, access to home ownership by foreigners is restricted. The Committee of Experts stated, however, that this question does not come within the scope of the migrant workers instruments and that the equality provision in C97 (1949) in respect of accommodation cannot be taken to refer to access to home ownership or to the various forms of public assistance which may be granted to facilitate home ownership.[228]

It would be spurious to leave the discussion of the problems countries face in housing migrant workers and their families without mentioning the realities which exist in developing countries, particularly those of Latin America and Africa, to which migrants come to work. In these countries, the availability of adequate accommodation for both nationals and migrants leaves much to be desired, to the extent that it is difficult to isolate the problems of migrant workers and their families or to envisage special programmes for them. These problems are particularly acute in urban centres, which attract national migrants from rural areas and international migrants seeking employment. These two groups mingle and congregate in large shanty-towns where conditions of housing and life in general are extremely poor indeed.[229]

5.2 Rights not specifically covered by ILO Instruments

Throughout this chapter, references have been made to matters that fall outside the ambit of the ILO in relation to the protection of migrant workers and their families. However, what is and is not within the ILO's scope is disputable. Towards the beginning of the chapter, the view was expressed that economic and social rights constitute the Organization's basic thrust,[230] and yet the preceding section indicates that the protection of the cultural rights of migrant workers and their families is also a specific concern of ILO instruments. Furthermore,

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227 *Record of Proceedings, supra*, note 80 at 650, para. 145.
228 *General Survey, supra*, note 49 at 89, paras. 319-320.
229 *Migrant Workers V(1), supra*, note 49 at 50.
230 *Supra*, notes 6 and 7 and accompanying text.

it is by no means self-evident why the ILO Committee of Experts considers the obligation "to respect the basic human rights of all migrant workers" in article 1 of C143 to apply only to certain so-called fundamental rights and not to others, for example, economic and social rights, such as the right to food and education, and political rights.[231] The only conceivable explanation that might be offered for such an approach, is that to extend the concept of "fundamental rights" to the above-mentioned matters would risk attracting disapproval from those states that do not consider these rights to be so fundamental or at all applicable to migrant workers and their families, especially to those who reside and work in a country illegally.[232] This section examines a number of "rights" which are supposedly excluded from ILO concern, but which nonetheless find some support in the ILO instruments relating to the protection of migrant workers and their families.

(a) Education

In its *General Survey* on the 1949 and 1975 migrant workers instruments, the ILO Committee of Experts maintained, in assessing the scope of "cultural rights" in article 10 of C143 (1975), that education did not in principle lie within the competence of the ILO.[233] Educational rights, however, are referred to both expressly and by implication in the migrant workers instruments. Arguably, the very objective to secure effective equality of opportunity and treatment between migrant workers and nationals is severely compromised without some provision for the education of migrants. Indeed, paragraph 2(i) of R151 (1975) seeks to realize this objective in respect of "conditions of life, including... the benefits of...

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231 *Supra*, note 113 and accompanying text.

232 See also *supra*, note 114, for the possible explanation that article 1, because it applies to both regular and irregular migrants, may only cover those "fundamental rights" whose exercise does not presuppose lawful residence in the country of employment. An approach, however, which seeks to deny a basic right, such as the right to education, to the children of illegal migrant workers, appears to be extraordinarily harsh and hardly justified in the light of the United States Supreme Court ruling in *Plyler* v. *Doe*. *Supra*, chapter two, notes 110-113 and accompanying text.

233 See *supra*, notes 89 and 181 and accompanying text.

educational... facilities".[234] Similarly, education is a crucial component in the general programme aimed at the adaptation and integration of migrant workers into the society of the receiving country.[235] The question of the education of migrant workers and their families has essentially two facets: workers' education and the education of migrant children.

(i) Workers' Education: Vocational Training and Language Instruction

Workers' education must not be considered in isolation but within a broader context which includes language training, pre-vocational and vocational training and basic civic and political training.[236] Elements of these kinds of training are provided for in the migrant workers instruments. Article 6(1)(a)(i) of C97 (1949) ensures to migrant workers equal treatment with nationals in respect of "apprenticeship and training".[237] Article 12(c) of C143 (1975) obliges member states to

> take measures, encourage educational programmes and develop other activities aimed at acquainting migrant workers as fully as possible with the policy (national equality policy), with their rights and obligations and with activities designed to give effective assistance to migrant workers in the exercise of their rights and for their protection.

This provision must be viewed within the ambit of a general social policy which, in addition to enabling migrants to share in the advantages enjoyed by nationals, takes into account the special needs which migrants might have during their adaptation to the society of the country of

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234 Article 17(2)(a)(iii) of the Model Agreement in the Annex to R86 (1949) expands the equality provision in article 6 of C97 (1949) with respect to the question of education. The clause imposes an obligation on the country of employment to secure equal treatment between migrant workers and nationals in respect of "admission to schools, to apprenticeship and to courses or schools for vocational or technical training, provided that this does not prejudice nationals of the country of immigration".

235 *Migrant Workers VII(1)*, *supra*, note 49 at 41.

236 *ILO Action on Behalf of Migrants*, *supra*, note 17 at 7, para. 29.

237 See also *supra*, note 234.

employment.[238] Measures to familiarize migrants with the language or languages of the latter country play an important role in this process. Paragraph 7(1)(b) of R151 (1975) provides for the teaching of such languages to migrant workers during paid time. There are also similar provisions enabling migrants to receive information and instruction in their own language about their rights in the host country.[239] Equal access by migrant workers with national workers to vocational training is also ensured in paragraph 2(b) of R151. The difficulties, however, of making such training available to "seasonal" or short-term workers, given the restrictions imposed on free choice of employment, have already been noted.[240]

(ii) Education of Migrant Children

The education of the children of migrants involves teaching in their native language and culture and general instruction in the country in which their parents reside and work. The former question has already been discussed in the section on cultural rights together with examples as to the ways teaching the native language and culture to the children of migrant workers is carried out in a number of countries.[241]

As far as general instruction to the children of migrant workers is concerned, special measures are necessary to tackle a number of problems which arise largely as a result of the enrolment of large numbers of these children in the educational system of the host country. The practical problems of lack of classroom space, shortage of teachers and the difficulties in matching by age group the educational level of migrant children to local children in schools are exacerbated by xenophobic public fears that the enrolment of migrant children lowers the level of education generally, thus affecting the welfare of local children. In addition, the children of

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238 *General Survey*, *supra*, note 49 at 104, para. 390 with reference to article 12(e) of C143. See also the section on social policy in R151 (Part II).

239 Paragraphs 7(1)(a) (generally) and 21(2) (with respect to occupational health and safety). See also *supra*, note 215 and accompanying text.

240 *Supra*, note 108.

241 *Supra*, note 184 and accompanying text.

migrant workers face a personal struggle of adapting to life in two cultures.[242] One way of attempting to deal with some of these problems is the establishment of special adaptation classes for children of migrant workers with a view to integrating them into the regular educational system.[243] Although there are no specific provisions in the ILO migrant workers instruments concerned with special educational measures for the children of migrant workers, this question should be considered together with the broader objective of the adaptation and integration of migrant workers and their families into the society of the receiving country, as outlined in paragraph 7(1)(b) and in the social policy in R151 (1955).[244]

Two other matters are worth briefly noting with regard to the education of the children of migrant workers. First, claims to equal treatment with nationals in respect of the granting of scholarships and educational assistance, particularly relevant to the pursuit of higher education, are weak under ILO instruments.[245] Second, as in the case of migrant workers' housing, the chronic shortage of educational facilities in developing countries adversely affects both the children of foreign migrant workers and nationals alike.[246]

(b) Political Rights

Political rights were defined in the previous chapter as participation in public affairs, including the right to vote, the holding of public office and employment in the public service. The ILO instruments relating to migrant workers only contain an implied reference to the latter

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242 *Migrant Workers VII(1)*, *supra*, note 49 at 41.

243 *Ibid.*; *General Survey*, *supra*, note 49 at 105, para. 395. Collaboration between countries of origin and countries of employment with regard to the education of the children of migrant workers should also be encouraged. *Migrant Workers VII(2)*, *supra*, note 69 at 83 (opinion of Turkey).

244 *Supra*, notes 186 and 238 and accompanying text.

245 The ILO Committee of Experts maintained in the *General Survey*, *supra*, note 49 at 88, para. 315, with reference to "cultural rights" in article 10 of C143, that this general principle cannot regulate all questions resulting from its application, particularly those concerned with the granting of scholarships and other forms of educational assistance. The Committee also noted that the UNESCO *Convention against Discrimination in Education* of 1960 only expressly prohibits different treatment with regard to scholarships and other forms of educational assistance as between nationals (article 3(f)).

246 *Migrant Workers VII(1)*, *supra*, note 49 at 42.

two questions.

The International Labour Conference Committee on Migrant Workers and the Committee of Experts have explicitly stated that "political" rights, in particular the right to participation in public affairs, are not included in the expression "individual and collective freedoms" in article 10, the equality provision of C143 (1975).[247] The drafting history of C143 reveals a conflict between states that wanted to exclude questions of political participation from the instrument and those states and workers' members that insisted on granting a degree of political participation to migrant workers. One country argued that political rights should be outside the scope of the proposed C143 and that reference to voting rights, in particular, was inappropriate for an international labour instrument.[248] Proponents of according to migrant workers some form of political participation viewed it as a necessary aspect of their integration into the country of employment: "[I]t was not only possible but desirable, in order to promote genuine integration of the workers in the host country, to seek to have them enter into certain commitments at the level of the local community".[249] In the end, the International Labour Conference Committee on Migrant Workers decided not to expressly exclude "political rights" from C143 in order to avoid the negative effects that might have resulted from such express exclusion in view of the changing attitudes in a number of countries to granting migrant workers rights to political participation at the local level.[250] Arguably, such participation is necessary in order to guarantee to migrant workers the enjoyment of their rights in C143:

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247 *Supra*, note 88 and accompanying text.

248 *Migrant Workers VII(2)*, *supra*, note 69 at 24 (opinion of the United Kingdom); *Migrant Workers V(1)*, *supra*, note 69 at 42 (Miss Green, Government delegate, United Kingdom).

249 *Migrant Workers V(1)*, *ibid.* at 46 (Mr. Cavazutti, Workers' advisor, Italy and Vice-Chairman of the Committee on Migrant Workers at the 59th Session of the International Labour Conference).

250 *Migrant Workers V(1)*, *ibid.* at 12, para. 60; *General Survey*, *supra*, note 49 at 89, para. 316. For example, during the 60th Session of the International Labour Conference, the French Government wanted to add the words "within the competence of the ILO" after the expression "individual and collective freedoms" in draft article 10 of C143. Although this amendment was supported by employers' members, it was opposed by workers' members on the grounds that public opinion was evolving in many countries *vis-à-vis* freedoms and civic rights for migrant workers. *Record of Proceedings*, *supra*, note 80 at 644, para. 57. See also *Migrant Workers V(2)*, *supra*, note 99 at 16 citing the opinion of Finland supporting the political participation of migrant workers at the local level. For examples where migrants have voting rights at the municipal level in European countries of employment see *infra*, chapter eight, notes 62-66 and accompanying text.

> In order to fully implement the spirit and letter of the (1975) ILO Convention and to secure equal economic, social and cultural rights for migrants, their participation in politics, at least on a local level, is imperative... Political parties are more likely to pay attention to the needs of migrants if their success at the polls is determined, in part, on the votes of migrant workers... It seems only reasonable that, since migrants contribute to the development of the countries they are in by undertaking those tasks citizens are not willing to perform and by paying taxes, they should have some say in how these funds are spent.[251]

The question whether migrant workers may hold public office or work in the public service is considered implicitly by article 14(c) of C143 which permits states to "restrict access to limited categories of employment or functions where this is necessary in the interests of the State" (the same provision is found in paragraph 6(c) of R151). In preparatory work on the 1975 instruments, the International Labour Office noted that foreigners are often excluded in many countries from certain sectors of employment, such as the public service or certain occupations that are regarded as being better reserved, in the public interest, for nationals.[252] The Committee of Experts observed that the concept of "public service" may cover a very wide range of activities which vary from country to country. With this point in mind, the Committee has drawn the attention of governments to the conditions which they must fulfil in article 14(c) before restricting the access of foreign migrant workers to the public service. The exceptions which states make must only apply to "limited categories of employment or functions" and must also be necessary "in the interests of the State".[253] Once these conditions are satisfied, it is noteworthy that access to the specified employment may be restricted indefinitely in contrast to article 14(a), which only permits restrictions on the access of migrant workers to other

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251 Russo, *supra*, note 97 at 57-58.

252 *Migrant Workers VII(1)*, *supra*, note 49 at 19.

253 *General Survey*, *supra*, note 49 at 96, para. 359. The Committee referred, *ibid.* at 96, para. 359 (endnote 87), to an interesting development in Australia where the Royal Commission on Australian Government Administration recommended that the requirement of Australian citizenship be abolished as a general condition of entry into the Australian civil service and that it should only be retained as a condition of qualification for certain special posts, for example, in national security and diplomatic services. In Canada, the Supreme Court has rejected the claim that lawyers need to be citizens because of the public functions they perform. See *Andrews* v. *Law Society of British Columbia* [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1, 10 C.H.R.R. D/5719.

employment for a period of not more than two years.[254]

(c) Residence Rights, Protection from Expulsion and the Right to Stay

On the basis of their economic and social participation in and contribution to the country of employment and the fact that they establish ties to this country, it was contended in chapter two that migrant workers and their families should, with time, be afforded the right to stay and an opportunity to obtain citizenship status.

The ILO instruments relating to migrant workers make no explicit reference to a right to stay in the state of employment or to naturalization. Provisions do exist, however, providing a limited right of residence to migrant workers, such as those protecting them against unfair expulsion from the host country on termination of their employment. Article 8 of C97 (1949) prohibits the expulsion of migrant workers and their families admitted to the territory of a member state on a permanent basis because of loss of occupation on account of illness or injury arising after entry to the country of employment. Paragraph 18(1) of R86 (1949) is a similar provision, but applies to all lawfully admitted migrant workers and urges member states to refrain "as far as possible" from expelling migrants on account of their lack of means or the condition of the employment market unless there is an agreement to this effect between the countries of emigration and immigration. Paragraph 18(2)(a) maintains, however, that such an agreement should take into account the length of a migrant's stay in the country of employment and that, in principle, no migrant is to be removed after five years residence. C143 (1975) contains more forceful provisions against unfair removal. Article 8(1) provides that legally resident migrants are not to be regarded as in an irregular situation simply because of their loss of employment, which does not in itself imply the withdrawal of a work or residence permit.[255] Such measures are necessary to prevent the potential exploitation of migrants by

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254 *General Survey*, *ibid.* at 96, para. 357.

255 See *supra*, note 139 and accompanying text. See also Plender, *supra*, note 48 at 302 and 306 and

employers who, by terminating the employment of migrant workers, might effectively determine their stay in the host country.[256] Despite the obvious justice of article 8(1) of C143, the drafting history of the clause indicates, nonetheless, that some countries were opposed to it on the basis that the expulsion of migrants upon termination of their employment might be deemed necessary in order to safeguard the interests of national workers in a declining labour market.[257] Such an attitude still persists in spite of the above ILO provisions. According to Guy Goodwin-Gill, these standards

> have not been noticeably followed in many of the labour-importing countries in Western Europe, where the unemployment of the migrant labour force has been viewed as a social and economic burden that is best re-exported to the home state. Studies also have confirmed, for example, that ethnic minorities in Western Europe, which is what the migrant labour force has become, remain vulnerable to dismissal during recession and generally have high rates of unemployment.[258]

In connection with the debate during drafting on the right to free choice of employment for migrant workers, calls were also made by states, workers' members and non-governmental organizations for a "right to stay" to be included in the 1975 instruments. An argument was advanced by one state to accord the right to stay to those migrant workers who have been accepted for residence.[259] Another argued that no limits should be imposed on the residence of

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Goodwin-Gill, *supra*, note 81 at 17-18. The ILO Committee of Experts underlined in the *General Survey*, *ibid.* at 146, para. 511, that this provision does not require the renewal or extension of the residence permits of migrant workers. Paragraphs 30-34 of R151 (1975), however, elaborate on article 8 of C143 and also appear to be more generous in their application to the above question. Paragraph 31 provides that migrants who lose their employment should be given sufficient time to find alternative employment at least for a period corresponding to that during which they may be entitled to unemployment benefit. Moreover, the residence permit should be extended accordingly.

256 *Migrant Workers VII(1)*, *supra*, note 49 at 51. These provisions, however, are not watertight. Even if migrants are permitted to stay in the host country in order to seek alternative employment, they may effectively be prevented from doing so by the restrictions on their free choice of employment in article 14(a) of C143. See also *General Survey*, *supra*, note 49 at 65, para. 234.

257 *Migrant Workers VII(2)*, *supra*, note 69 at 74 (opinion of Austria). It is noteworthy that article 8 of C143, introduced as a result of an amendment by the workers' members of Finland and Sweden, was opposed by the government members of the former Federal Republic of Germany, France and the United States. *Record of Proceedings*, *supra*, note 80 at 642, para. 45.

258 Goodwin-Gill, *supra*, chapter one, note 140 at 535.

259 *Migrant Workers VII(2)*, *supra*, note 69 at 5 (opinion of Sweden). Otherwise, benefits ensured by laws

migrants in the country of employment with the exception of skilled workers.[260] One government was of the opinion, though not going so far as to propose an explicit right to stay for migrant workers, that the length of employment and residence of workers as well as other relevant social factors should be taken into consideration before a state decides not to renew a residence permit.[261]

The workers' members, however, were most vociferous in advocating the inclusion of a right to stay in the 1975 ILO instruments. Indeed, during discussions in the Conference Committee during the 59th Session of the International Labour Conference, the workers' members proposed that the following provision be included in R151: "The migrant workers who have regularly occupied a job in a country will be authorized to reside in this country as long as they desire and to obtain employment there". This amendment was strongly opposed by the employers' members and several government members and was subsequently withdrawn.[262] According to one workers' member, a blind deferment to sovereignty by states in this regard was unjustified and merely relegated the labour performed by migrant workers to that of a commodity.[263]

Finally, a clear definition of a right to stay in R151 was advanced at the 60th Session of the International Labour Conference on the basis that the country of employment had a duty to grant this right to migrant workers within its territory:

> The host country should assume an obligation towards a worker whom it has encouraged to come and contribute to its economic development and, in exchange, should give him a veritable permanent right to reside there and to renew his employment contract.[264]

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and international agreements are rendered illusory if residence is subject to a time-limit. *Ibid.*

260 *Migrant Workers V(2), supra*, note 99 at 83 (opinion of Turkey).

261 *Ibid.* at 75 (opinion of Iran).

262 *Migrant Workers V(1), supra*, note 69 at 24, para. 153.

263 *Ibid.* at 38 (opinion of Mr. Cavazutti, Italy and Vice-Chairman of the Conference Committee). Mr. Cavazutti added: "It would be inhuman to prevent migrant workers, who had legally occupied a job in a country, from staying there if they so wished or from obtaining employment there". *Ibid.*

264 *Record of Proceedings, supra*, note 80 at 794 (Mr. Stark, International Catholic Migration Commission).

In spite of these powerful moral pleas, however, there is no right to stay or to naturalization in the ILO instruments on migrant workers.

5.3. Illegal Migrant Workers

This chapter has so far mainly considered the protection by the ILO of those migrant workers and their families who are lawfully resident and legally employed in the host country. Although the protection of illegal migrants by the ILO would appear to be inconsistent with one of its objectives as set out in its Constitution, namely the "equitable economic treatment of all workers *lawfully resident*" in member states,[265] the plight of those who have entered the country in a clandestine fashion to work or those who have taken up employment without authorization cannot be ignored by the ILO. Indeed, to do so would be to ignore a problem affecting a considerable number of workers in the world today. As observed in the introductory chapter, the phenomenon of illegal migration is to be found everywhere, but it is predominant in certain parts of the developing world, such as Africa, South America and South-East Asia.

References to illegal migration in the 1949 migrant workers instruments are minimal, probably because this question was not considered as much of a problem as it is today. It is worth recalling in this context that labour migration from countries with a surplus of manpower to those with a deficiency received official ILO backing in 1949.[266] The only explicit reference in the 1949 instruments to illegal migration concerns the state obligation to penalize, by way of "appropriate penalties", those promoting clandestine or illegal immigration.[267]

The 1975 migrant workers instruments were largely influenced by the growth in

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265 *Supra*, note 49 and accompanying text. Emphasis added.

266 Paragraph 4(1) of R86 (1949). For the complete text of the provision see *supra*, note 63 and accompanying text. See also paragraph 33 of R86. *Supra*, note 68.

267 Article 8 of Annex I and Article 13 of Annex II to C97 (1949).

clandestine migration during the 1960s and early 1970s.[268] Indeed, Part I of C143 (1975) is entirely devoted to the suppression of migrations in abusive conditions. Chapter two recognizes that it is best for nationals and legal migrants alike if the problem of illegal migration does not exist. Measures to prevent entry and to detect illegal migrants immediately after entry are therefore necessary. Once illegal migrants have resided and worked in a country for some time, however, rights accrue to them on the basis of their equal moral worth as human beings and their participation in the host society. Although this section focuses on the situation of illegal migrants and their families already in the country of employment and the provisions relating to their protection, it is clear that the effectiveness of the measures in much of Part I of C143, designed to prevent clandestine and abusive migrations, will determine the number of undocumented workers who enter the host country in the first place. The importance of these measures, therefore, should not be minimized.

In its preparatory work for the 1975 instruments, the International Labour Office acknowledged that undocumented migrant workers are particularly vulnerable to exploitation in the host country, for example: in employment, they are unlikely to complain about unfavourable conditions and forego certain rights to which they are entitled for fear of losing their job or being deported;[269] in housing, the situation of these migrants is especially severe, since they rarely have access to accommodation provided by the employer or subsidized by the state;[270] and, if their families are with them, similar problems arise in respect of education, health and welfare, because these families, of course, cannot arrive legally under normal family reunification arrangements and therefore they also acquire an irregular status in the country of employment.[271]

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268 *ILO Action on Behalf of Migrants*, *supra*, note 17 at 6, para. 17. This report, *ibid.*, refers to the second paragraph of the Preamble to the 1972 Resolution concerning Conditions and Equality of Treatment of Migrant Workers adopted by the International Labour Conference in 1972 (see also, *supra*, note 60 and accompanying text), which seeks to "combat as soon as possible... the unlawful and semi-lawful forms of recruitment and treatment of migrant workers, in particular, certain specially unacceptable forms of phenomena such as black marketing procedures and trading in migrant workers... ".

269 *Migrant Workers VII(1)*, *supra*, note 49 at 24 and 51.

270 *Ibid.* at 43. See also, *supra*, note 216 and accompanying text.

271 *Ibid.* at 32.

The scope of the 1975 instruments with respect to undocumented workers is substantial. Although the state duty in article 1 of C143 to respect the basic human rights of *all* migrant workers extends to illegal migrants,[272] the rights to be protected under this provision are "fundamental" rights only and do not include the right to equal opportunity and treatment with nationals.[273] Illegal migrants are excluded from the protectional ambit of this right in both C97 (1949) and C143.[274]

In spite of these restrictions, the 1975 instruments still contain much greater protection for the rights of illegal workers than those of 1949. Article 2 of C143 obliges member states to systematically seek to determine whether there are illegally employed migrant workers on their territories and whether, *inter alia*, the conditions to which they are subject during their period of residence and employment contravene relevant international multilateral or bilateral instruments or agreements, or national laws or regulations. It is noteworthy that the terms of article 2 cover not only employment conditions but also living conditions such as housing standards, which are governed by relevant international agreements or national laws.[275] In addition to this general duty to be aware of the conditions in which illegal migrants reside, states are also under an obligation in article 6(1) of C143 to define and apply sanctions in respect of the illegal employment and trafficking of migrant workers.[276] The provision provides member states with the discretion to define the offence of "illegal employment",[277] but this should not mean that the imposition of punishments is to be transferred from employers to migrant workers themselves. According to Richard Plender, article 6 presupposes that national law renders

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272 *Record of Proceedings*, *supra*, note 80 at 641, para. 29; *General Survey*, *supra*, note 49 at 69, para. 257; Lillich, *supra*, note 57 at 73. See also *supra*, note 114 and accompanying text.

273 *Supra*, notes 113, and 103 and 134 respectively and accompanying texts.

274 Article 6 of C97 and Part II of C143. Both article 6 of C97 and article 10 of C143 apply to those migrant workers "lawfully" within the territory of the country of employment. It should be recalled that the division of C143 into two separate parts was criticized during the drafting on the basis that providing equality of treatment to *all* workers, regular and irregular alike, would greatly contribute to discouraging illicit trafficking in manpower. *Supra*, note 101. See also *Record of Proceedings*, *supra*, note 80 at 638, para. 15.

275 *General Survey*, *supra*, note 49 at 65, para. 234.

276 These are to be administrative, civil and penal sanctions, which include imprisonment in their range. Article 6(2) of C143, however, enables employers, in the event of prosecution for hiring illegal workers, to furnish proof of their good faith, namely that they were unaware of the migrant's undocumented status.

277 *General Survey*, *supra*, note 49 at 66, para. 241.

unlawful the employer's act and not the alien's presence.[278] The ILO Committee of Experts found, however, that under the laws of some countries only the worker is guilty of an offence.[279]

Although the equality provisions in Part II of C143 are inapplicable to migrants in an irregular situation, article 9(1) provides that illegal migrant workers should enjoy, together with their families, equality of treatment "in respect of rights arising out of past employment as regards remuneration, social security and other benefits".[280] Equal treatment, in this case, is with regular migrant workers and not with nationals.[281] The purpose of this clause is to ensure that illegal migrant workers receive wages and other benefits for the work which they have actually performed,[282] and to prevent employers from claiming that the illegality of the employment precludes them from paying the worker or from making the appropriate social security contributions resulting from the employment.[283] The application of equal treatment

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278 *Supra*, note 48 at 304.

279 *General Survey*, *supra*, note 49 at 66, para. 239. In its preparatory work on the 1975 instruments, the International Labour Office also found that undocumented workers in a number of countries were not only subject to deportation, but also to fines. *Migrant Workers VII(1)*, *supra*, note 49 at 12-16. Article 9(3) of C143 provides that migrant workers and their families are not to bear the cost of their expulsion from the country of employment (the same provision exists in paragraph 8(5) of R151). The Committee of Experts emphasized, however, that migrants are only exempt from payment of the administrative or judicial costs (or both) of the expulsion proceedings and not from payment for travel to the country of origin. *General Survey*, *ibid.* at 72, para. 274 and at 147, para. 516. See also Kellerson, *supra*, note 14 at 37. This may, therefore, constitute a form of financial penalty for those migrants who are caught and who have sufficient funds to cover the cost of their journey home.

280 The full text of the provision reads:

> Without prejudice to measures designed to control movements of migrants for employment by ensuring that migrant workers enter national territory and are admitted to employment in conformity with the relevant laws and regulations, the migrant worker shall, in cases in which these laws and regulations have not been respected and in which his position cannot be regularized, 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.

See also *supra*, note 134 and accompanying text and *supra*, note 167 (in respect of social security rights).

281 *General Survey*, *supra*, note 49 at 69, para. 260; Goodwin-Gill, *supra*, note 81 at 18.

282 *General Survey*, *ibid.*; Kellerson, *supra*, note 14 at 37. States were concerned during the drafting process that article 9(1) should not have too broad a coverage and that it should be restricted strictly to employment matters. *Migrant Workers VII(2)*, *supra*, note 69 at 39-40 (opinions of Belgium, the former Czechoslovakia, the former Federal Republic of Germany, Sweden and the United States). Nonetheless, paragraph 8(3) of R151, a similar provision to article 9(1) of C143, extends equal treatment between illegal migrants and lawful migrants to trade union membership and exercise of trade union rights. See also *supra*, note 157.

283 Kellerson, *ibid.*

between illegal migrants and regular migrants in respect of social security rights is limited in scope and also gives rise to a number of problems. The Committee of Experts has emphasized that equal treatment only applies in respect of social security rights "arising out of past employment" and does not extend to benefits which are not dependent on a period of work. In addition, illegal migrants must complete other qualifying conditions required in the case of legally employed migrants. Problems arise, however, when, as the Committee found, countries make benefits conditional upon legal residence or upon the possession of a valid work permit.[284]

The 1975 instruments also contain two provisions referring to the regularization of undocumented migrant workers. Article 9(4) of C143 asserts that "nothing in this Convention shall prevent Members from giving persons who are illegally residing or working within the country the right to stay and to take up legal employment". This clause is declaratory only and does not constitute an obligation.[285] Further, paragraph 8(1) of R151 urges member states to decide speedily whether an undocumented migrant's situation may be regularized or not.

In its *General Survey*, the Committee of Experts found that the provisions relating to illegal migrant workers in Part I of C143 constitute further obstacles to the ratification of the instrument. Practical problems such as lack of administrative machinery and length of land frontiers make enforcement of these provisions difficult in some countries. Furthermore, the employer sanctions clause is simply not acceptable in those countries in which it is not an offence for employers to hire illegal migrants or in which imprisonment is not included among the penalties.[286] Despite these obstacles, the 1975 migrant workers instruments, particularly C143, are to be commended in that they, at least, acknowledge that the problem of illegal

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284 *General Survey, supra*, note 49 at 71, paras. 265-266. Paragraph 34(1) of R151 provides that *all* migrant workers, on leaving the country of employment, are entitled to the following benefits in addition to any outstanding remuneration for work performed: severance pay normally due; employment injury benefits in respect of any employment injury suffered; compensation in lieu of holiday entitlement acquired but not used; and reimbursement of any social security contributions which have not accorded and will not accord rights under national laws or regulations or international arrangements.

285 *General Survey, ibid.* at 73, para. 277.

286 *Ibid.* at 145 and 146, paras. 501 and 508.

migration exists and endeavour to deal with this problem by not only drawing up measures to suppress this kind of migration altogether, but also by providing some protection for those irregular workers already in the country of employment. These protective measures are far from comprehensive, but they are a step in the right direction. They should be seen, however, not as an end in themselves, but only as a means to achieving real solutions to the problem of illegal migration, which as the ILO Committee of Experts acknowledges, will only be resolved through collaboration between countries of immigration and emigration as well as long-term action to alleviate the lack of economic opportunities existing in the latter countries.[287]

6. Conclusion

This chapter has provided a comprehensive analysis of the protection of the economic, social, cultural, political and residence rights of migrant workers and their families under the auspices of the ILO. The standards applicable to migrants under ILO instruments represent only the minimum required for their protection,[288] but they are also innovative, rich in detail and break new ground, particularly with respect to the question of free choice of employment, economic and social rights, such as rights to social security and housing, and the education of migrant children. Furthermore, C143 is the first international convention to expressly afford rights to migrants in an irregular situation.

Unfortunately, the ILO instruments concerning migrant workers seem to have been generally ignored by the international community, particularly by countries to which migrant workers and their families tend to migrate. The latest instruments were adopted in 1975 and yet C143 has received only fifteen ratifications as of the beginning of 1992, with only a handful from migrant-receiving countries.[289] In 1980, the ILO Committee of Experts admitted

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287 *Ibid.* at 145, para. 501. See also *supra*, note 74 and accompanying text.

288 *Welfare of Migrant Workers and their Families*, *supra*, note 190 at 22, para. 64.

289 See *supra*, note 61 and accompanying text.

that the ratification prospects for C143 were not very encouraging in view of the numerous problems which both of its parts give rise to in a number of member states.[290]

Have ILO efforts, therefore, to protect this vulnerable and frequently exploited group of workers and human beings been in vain? It is easy to succumb to cynicism and point to the perceived ineffectiveness of international human rights instruments to breach the walls of state sovereignty, especially in areas such as employment and immigration which countries hold as cornerstones of national self-interest and which they are loath to submit to even the slightest tinkering. Nonetheless, ILO standards for the protection of migrant workers and their families, although effectively dormant at present, continue to be important. In many respects, they are superior to the provisions of the recent UN Convention and to many of the standards devised in Europe for the protection of migrants, considered respectively in chapter four and chapters six to eight of the thesis. In contrast to other international human rights instruments, over whose design states have greater if not exclusive control, the unique tripartite contribution by states, employers and workers to the content of ILO standards make them a worthy foundation on which to build further protections for migrant workers and their families.

In times of substantial employment instability in Western industrialized countries, political, economic and social uncertainty in Eastern Europe and continuing poverty in the developing world, which results in increasing pressures for migration, the principles proclaimed by these standards must remain a constant and welcome reminder of our moral obligation to choose the dignity of human labour over the pursuit of a blind economic expediency.

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290 *General Survey*, *supra*, note 49 at 150, para. 528.

CHAPTER FOUR

THE UNITED NATIONS INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES

1. Introduction

The UN *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (UNCMW) was adopted by the General Assembly without a vote on December 18, 1990.[1] It is said to be the "culmination of [an] evolutionary process" which has seen the development of universal standards protecting the rights of non-nationals.[2] This process began, as examined in chapter one, with the endorsement of international human rights standards applicable to all human beings, the adoption of the UDHR and its "codification" in the two UN Covenants. As observed in chapter three, the adoption by the ILO of international labour standards pertaining specifically to migrant workers, particularly Convention No. 143 of 1975, was a further step in this process.

The question which begs an answer is whether UNCMW is indeed the culmination of this "evolutionary process" or whether it reflects a step backwards in the protection of migrant workers and their families. In gauging the extent to which UNCMW protects the economic, social, cultural, political and residence rights of migrants, this chapter also seeks to answer the above question by comparing its standards with those of other international instruments examined earlier, particularly ILO Convention No. 143. References are also made, where appropriate, to some of the European instruments which are the focus of Part III of the thesis. Because UNCMW is only a recent addition to the plethora of international human rights instruments, any attempt to provide an authoritative interpretation of its provisions risks being

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1 Resolution 45/158. See Appendix C for text.

2 See A. Helton, "The New Convention from the Perspective of a Country of Employment: The U.S. Case" (1991) 25 IMR 848 at 849.

rather a speculative exercise. Consequently, by resorting extensively to the *travaux préparatoires*, some of this speculation concerning the interpretation of UNCMW may be avoided.

The UNCMW text and the *travaux préparatoires* reflect numerous tensions and compromises. In their attempt to cover, almost without exception, *all* the human rights of *all* migrant workers and their families, the drafters of UNCMW embarked on a thorough definition of "migrant worker" and chose to separate those migrants with legal status from those in an irregular or non-documented situation and provide the former with more rights. This division is the clearest illustration of the schism between the protection of migrants' rights and the principle of state sovereignty underlying the whole text. Chapter two argued that the challenges posed by the presence of legal alien migrant workers and their families to national sovereignty in terms of the socio-economic and cultural security of the state of employment are significant, but the presence of a substantial number of illegal migrants endangers the physical security of the state and hence the very essence of the liberal-democratic community.

Protection of national interests is further evident in the drafting debate between sending and receiving countries and between developed and developing countries. UNCMW also reveals a jurisdictional conflict between the UN and the ILO. This conflict came to the fore when the decision was taken to draft a convention concerning migrant workers and their families within the framework of the UN and not the ILO.

The tensions and compromises in UNCMW give rise to a complex instrument. It is not the intention of this chapter to unravel completely the intricacies of this document, but to concentrate on the following question: does UNCMW indeed advance the rights of migrant workers and their families? This question must also be considered in the light of the startling fact that not a single state has ratified UNCMW as of the end of 1991. In contrast, the UN *Convention on the Rights of the Child*, which was adopted just one year earlier, has already received over one hundred ratifications.

2. UN Concern for the Protection of the Rights of Migrant Workers and Their Families

2.1 The Early Resolutions

The UN's concern for the protection of migrant workers and their families commenced in earnest in 1972 with Economic and Social Council Resolution 1706 (LIII), which noted with alarm incidents involving the illegal transportation and exploitation of workers. The Resolution condemned these malpractices, appealed to governments to combat and prevent them and instructed the UN Human Rights Commission to consider the matter and to recommend further action.[3]

The late entry of the UN into the migration debate was probably the result of a 1947 agreement between the UN and the ILO. This agreement set out the competencies of both organizations with respect to migration. The ILO was to be concerned with migrants as workers and the UN was to be concerned with their status as aliens.[4] The work of the UN with respect to the protection of the rights of aliens or non-citizens, culminating in the 1985 Declaration, has been examined in chapter one. It appears, however, that this agreement between the UN and the ILO has now been invalidated by the adoption of UNCMW.

The UN General Assembly expressed its concern for migrants in a series of resolutions in the 1970s.[5] This was a period of great flux for migrants everywhere. In Europe, for example, the soaring economic growth of the 1960s and early 1970s was shattered by the oil crisis of 1973-74 and the deep recession which followed. Official migration to certain European countries of employment was halted, but few migrant workers returned home. Instead, the number of migrants in countries of employment actually increased because of

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3 Cited in *UN Action in the Field of Human Rights*, *supra*, chapter one, note 139 at 250.

4 "Co-ordination of International Responsibility in the Field of Migration" (1947) 30 ILO Official Bulletin 417, cited by Hasenau, *supra*, chapter three, note 4 at 693.

5 Resolutions 2920 (XXVII) (15/11/72), 3224 (XXIX) (6/11/74), 3449 (XXX) (9/12/75), 31/127 (16/12/76), 32/120 (16/12/77), 33/163 (20/12/78).

family reunion. Restrictions on immigration also led to an increase in clandestine movements. An overview of international migration for employment in Europe is provided in chapter five.

The General Assembly resolutions focused on a number of migration questions of concern. The first Resolution in 1972 considered the exploitation of labour through illicit and clandestine trafficking and also expressed alarm at the discriminatory treatment meted out to foreign workers, particularly in Europe.[6] Subsequent resolutions called for efforts to be undertaken by states to combat the problems that existed. In particular, these resolutions advocated the promotion of bilateral agreements to reduce the illicit traffic in foreign workers as well as measures to ensure equal treatment between legal migrants and nationals in the country of employment. They also appealed to states to respect the human rights of those workers who succeeded in breaching the barriers of national sovereignty by entering illegally and finding unauthorized employment.[7] The equality principle was further elaborated in Resolution 32/120 of 1977 which invited states to accord to regular migrants equal opportunity and treatment with nationals in respect of employment, social security, trade union and cultural rights and individual and collective freedoms (paragraph 2(a)). The Resolution also called for state policies relating to training, health, social services, housing and educational and cultural development for migrant workers and their families (paragraph 3), and recognized the importance of information, both for migrants and the general public, in the realization of migrants' rights (paragraphs 4, 5 and 7). Finally, the normalization of family life through family reunion was emphasized (paragraph 8). The General Assembly resolutions also urged states to ratify existing ILO instruments protecting migrant workers, especially Convention No. 143 of 1975.

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6 Resolution 2920 (XXVII).

7 See especially Resolutions 3224 (XXIX) and 31/127.

2.2 The Dawning of a Convention

In the meantime, the Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed Halima Warzazi of Morocco as Special Rapporteur to prepare a study on the *Exploitation of Labour Through Illicit and Clandestine Trafficking*.[8] The Special Rapporteur submitted a series of draft recommendations in 1975. In them, she expressed the view that the elaboration of future international instruments relating to migrant workers should involve the UN in order "to ensure that all humanitarian aspects of the problem are covered". The Special Rapporteur noted that the ILO had acknowledged that its competence to deal with human rights in general was limited.[9]

Moves to elaborate an international convention on the protection of the human rights of all migrant workers gathered momentum in the late 1970s. The World Conference to Combat Racism in August 1978 adopted a Programme of Action, which recommended, *inter alia*, the elaboration of an international convention on the protection of all migrant workers and their families.[10] Later that same year, UN General Assembly Resolution 33/163 requested the UN Secretary-General to explore, and particularly with the co-operation of the ILO, the possibility of drawing up such a convention. The Secretary-General received a favourable response to this project from member states and from the international organizations concerned.[11] One year later, the General Assembly, in Resolution 34/172 (17/9/79), decided to create, at its 35th Session in 1980, an open-ended Working Group to elaborate an international convention on the protection of the rights of all migrant workers and their families.

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8 *Exploitation of Labour Through Illicit and Clandestine Trafficking* [Consolidated Report], *supra*, Introduction, note 3.

9 *Exploitation of Labour Through Illicit and Clandestine Trafficking (Draft Recommendations submitted by Mrs. Halima Embarek Warzazi, Rapporteur)*, at 1, UN Doc. E/CN.4.Sub.2/L.636 (9/9/75).

10 *Report of the World Conference to Combat Racism and Racial Discrimination*, Geneva, August 14-25, 1978, UN Doc. A/CONF.92/40 (New York: UN, 1979). See also Cissé, *supra*, Introduction, note 117 at 141-142. The Conference Programme of Action stressed, *inter alia*, "the urgent need to protect the rights of immigrants, migrant workers, including all those who are undocumented, and their families all over the world". *Ibid.* at 14 (paragraph 24 of the Declaration).

11 UN Doc. A/34/535 and Add.1.

2.3 UN General Assembly Resolution 34/172

The adoption of Resolution 34/172 was by no means a formality. A division arose mainly between developed countries that wanted to elaborate a convention within the framework of the ILO and a number of developing countries that insisted on the project taking place under the auspices of the UN. An amendment to the draft resolution submitted by Sweden would have given the ILO time to come up with proposals for revising or expanding existing instruments before proceeding with a new convention in the UN. This amendment, however, was rejected by the developing nations.[12]

2.4 Why the UN and not the ILO?

Roger Böhning, the Chief of the International Migration for Employment Branch of the ILO, suggests a number of reasons why developing countries preferred the UN as a forum for the drafting of the new convention. These reasons are based largely upon their dissatisfaction with Convention No. 143 and with the ILO system of working and supervision. The emphasis in Convention No. 143 on the suppression of migrations in abusive conditions threatened to reduce remittances to developing countries from those migrants illegally employed in Western states. Second, as described in the previous chapter, the ILO is not solely a "state forum" like the UN, and the position of developing countries on issues such as migration is subject to challenge, not only from developed nations, but also from employers' and workers' representatives. The trade union voice, in particular, is less acceptable to developing nations.

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12 R. Böhning, "The ILO and the New UN Convention on Migrant Workers: The Past and Future" (1991) 25 IMR 698 at 700-701. Although Resolution 34/172 was adopted by a majority of 118 in favour and 0 against, 19 delegations, including the Nordic countries and many other developed countries abstained. J. Lönnroth, "The International Convention on the Rights of All Migrant Workers and Members of their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotiation" (1991) 25 IMR 710 at 726.

Third, the "automatic majority" of third world countries in the UN is not guaranteed in the ILO.[13]

On a wider front, the prevailing view that the competence of the ILO is limited to economic and labour rights, as pointed out in the Warzazi report, combined with the small number of ratifications of ILO Convention No. 143,[14] made the UN the most appropriate arena for further standard-setting action in the field of migration. Not only would the protection afforded migrant workers and their families cover a broader range of rights, but also a UN convention was more likely to gain greater international support than an analogous ILO instrument.[15]

In addition to insisting that any new instrument be drafted within the ILO framework, opponents of a UN convention were also of the opinion that a new instrument was unnecessary in the light of existing international standards protecting migrants. Fears were expressed that the rights in the convention would not only overlap with ILO and regional standards, but might even undermine them to the extent of weakening the international protection already enjoyed by migrant workers and their families.[16] The ILO advised that duplication or conflict would be avoided if general human rights standards were drafted in contrast to the detailed and technical ILO provisions and if these standards also dealt with those aspects which are not considered, or only considered partially, in existing international instruments. In the event of duplication, however, the ILO emphasized the need to exercise special care to ensure the greatest possible consistency among the various international instruments.[17]

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13 Böhning, *ibid.* at 699-700. See also S. Hune & J. Niessen, "The First UN Convention on Migrant Workers" (1991) 9 NQHR 131 at 133 with regard to the second point.

14 As noted in chapter three, the low rate of ratification of this instrument is primarily the result of article 14(a), the liberal free choice of employment clause.

15 Hune & Niessen, *supra*, note 13 at 132. See also S. Hune, "Drafting an International Convention on the Protection of the Rights of All Migrant Workers and their Families" (1985) 19 IMR 570 at 571 with regard to the latter point. The question of migrants' rights was more likely to receive greater attention in the international community if the new convention was drafted under the guidance of "the world's political conscience", the UN General Assembly. Lönnroth, *supra*, note 12 at 726-727.

16 Cf. Nafziger & Bartel, *supra*, chapter one, note 55 at 779-780, citing from UN Docs A/34/535 (1979) and A/36/378 (1981).

17 *Report of the Open Working Group*, UN Doc. A/C.3/35/13 (25/11/80) [hereinafter *Working Group Report (November 1980)*] Annex II, "Possible Contents of a United Nations Convention on Protection of the

3. The Drafting History

3.1 The Political and Economic Context

The drafting of UNCMW took ten years, from 1980 to 1990. During this period, a number of political and economic developments occurred which considerably affected migration for employment and the way migrants are perceived in countries of employment. The 1980s in Western Europe were characterized by a tightening of immigration controls with regard to the admission of migrant workers and by the gradual transformation of migrants into permanent ethnic minorities in the receiving country. This latter process has also led to an escalation of racism and xenophobia directed towards migrants from the host population.[18] The end of this decade, however, saw a dramatic shift in political power, especially in the European context, which threatens to augment East-West migration. Moreover, the approaching single internal market of the European Community also foresees an increase in migration for employment generally in response to the economic growth that this market is expected to produce.[19]

The actual drafting of UNCMW occurred in the 1980s, but the impetus for the instrument dates back to the migration concerns of the 1960s and 1970s, which heavily influenced the initial debate in the UN Working Group. Issues such as South-North migration, the situation of migrants in industrialized Europe and illegal migration to the United States pervade this debate.[20]

Rights of All Migrant Workers and Their Families", paper prepared by the International Labour Organization, UN Doc. A/C.3/35/WG.1/CRP.2 (7/10/80) at 1-2, para. 3.

18 Cf. J. Niessen & P. Taran, "Using the New Migrant Workers' Convention" (1991) 25 IMR 859 at 859-860.

19 See generally the conclusion in chapter five, *infra*.

20 See Lönnroth, *supra*, note 12 at 716, who also observes that, in formulating a definition of "migrant worker", the focus was initially upon the traditional industrial migrant as opposed to the modern mobile professional.

3.2 Working Method

The UN Working Group was open to all UN member states and not just restricted to selected countries. Although such an open and flexible approach to the drafting of UNCMW gave the drafting work a somewhat haphazard nature because of the continuous change in the number of participants, it also allowed for the participation of a broad range of countries which was vital to the universality of the exercise.[21]

The principal working method of the Working Group was based upon consensus rather than upon a majority vote. Consensus was the natural outgrowth of the lengthy negotiation process, which began in an atmosphere of mistrust and hostility.[22] This method of work also averted friction between the developed or industrialized countries and the majority of developing countries, which would have undoubtedly ensued if proposed provisions were put to a vote. The principal disadvantage of the consensus approach, however, is that it inevitably breeds compromise to the extent that certain proposals with a strong "rights" content at the beginning of the drafting process were diluted to mere recommendations by the end.[23]

The drafting of UNCMW was divided into two readings. The first was largely an exploratory exercise in which state delegates were freer to express their own opinions and visions. The second reading involved the finalization of the text and, therefore, was subject far more to the attention of states and hence the demands of national sovereign interests. It is at this stage that many of the "rights" in UNCMW were whittled down to less binding obligations.[24]

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21 *Ibid.* at 724-725. It is estimated that approximately one half of UN member states took part in the drafting process. *Ibid.*

22 *Ibid.* at 715. The consensus approach was also suited to the open-endedness of the Working Group, since it avoided the unpredictability that would have resulted from majority voting in a forum with ever-changing participation. *Ibid.* at 724.

23 *Ibid.* In spite of the numerous compromises in UNCMW, the consensus approach has not resulted in a spate of ratifications.

24 *Ibid.* at 721-723.

3.3 Country Participation

Commentators on the drafting history of UNCMW have identified four loose country groupings that contributed most to the final outcome. The most influential grouping was the European MESCA group composed of seven Mediterranean and Scandinavian states.[25] Originally, the MESCA countries preferred that UNCMW be drafted within the ILO, but once General Assembly Resolution 34/172 was adopted, these countries endeavoured to ensure that UNCMW would be as universal an instrument as possible, which would adequately protect individual rights and move into those areas not previously covered. These objectives were in line with their interests, as medium-sized states, to preserve a structured and well-functioning international order without which their influence would be minimal.[26]

MESCA was firmly against illegal migration and came about largely as a response to Group 77, the authors of the first draft of UNCMW in 1981, which, according to MESCA members, actually encouraged this form of migration, or, at least, made it very difficult for states to prevent it.[27] Group 77 was composed of various sending countries, mostly from Africa, Asia and Latin America.[28] The countries in this grouping were plainly allied by their concern to ensure the protection of their nationals in states of employment.[29]

The socialist countries also formed their own grouping, but their influence appears to be relatively nominal. Their principal aims were to ensure that UNCMW would not deviate from the human rights language of the international covenants and that persons travelling

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25 MESCA was composed of the following countries: Finland, Greece, Italy, Norway, Portugal, Spain and Sweden. France also participated in the deliberations of this group, but retained an independent position. More country delegations took part in MESCA meetings as the drafting of UNCMW progressed. *Ibid.* at 731; Hune & Niessen, *supra*, note 13 at 133-134.

26 Lönnroth, *ibid.* at 733-734.

27 Böhning, *supra*, note 12 at 702.

28 Group 77 consisted of the following countries: Algeria, Mexico, Pakistan, Turkey, Egypt, Barbados and Yugoslavia. Morocco and India belonged to Group 77, but also pursued independent policies. Lönnroth, *supra*, note 12 at 731.

29 *Ibid.* at 733. Lönnroth contends that the approach of Group 77 states was motivated largely by collective or political interests in their position as countries of origin rather than by their concern for individual human rights. Indeed, in some quarters, the aim may have been to use the negotiations and the drafting of UNCMW as a tool to condemn some states of employment for their discriminatory use of migrant labour. *Ibid.*

between their countries for the purpose of employment (for example, Poles to the former German Democratic Republic) would not be classified as "migrant workers", but rather as "socialist exchange of labour".[30] This grouping now is of historical interest only, since the opinions expressed by these countries are hardly likely to constitute their views today.

The final grouping consisted of those industrialized nations outside MESCA.[31] These countries shared three common concerns. First, they wanted to retain sovereign control over crucial matters of immigration policy, such as admission of immigrants and regularization of illegal migrants. Second, they showed a special interest in those provisions involving positive obligations and hence social cost. As observed in chapter two, one of the arguments posited against extending full economic and social rights to migrants is that they may become a burden on state resources, thereby reducing the benefits which accrue to members of the polity. This argument justifies limitations upon immigration, but cannot be a reason for limiting the economic and social rights of those already in the country who, although non-members, participate fully in, and contribute to, the national community. Third, the industrialized countries were intent on ensuring that UNCMW was flexible enough to accommodate different political, legal and administrative systems.[32]

Although somewhat imprecise, this alignment of state interests during the drafting debate is illuminating. Many of the controversial provisions of UNCMW came about as compromises between the different country groupings. Rights were watered down to recommendations or non-binding obligations when no other solution was possible using the

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30 *Ibid.* at 723 and 732 respectively.

31 These countries included the United States, Australia, Germany, the Netherlands, Denmark, Canada and Japan. *Ibid.* at 731. Denmark was aligned with this grouping rather than with MESCA, because of its shift towards a more restrictive immigration policy at the beginning of the 1980s. Immigration pressures in Japan persuaded that country to support the arguments of the Western states of employment. *Ibid.* at 719.

32 *Ibid.* at 733-734. For example, the first concern was clearly reflected at the beginning of the drafting process in the position of the United States, which drew attention, *inter alia*, to the following considerations: (2) "The obligations of "migrant workers", however defined, to comply with the laws and regulations of both States of origin and Receiving States" and (4) "The sovereign right of every State to determine and apply its own immigration laws and policies concerning admission to its territory". *Working Group Report (November 1980), supra*, note 17, Annex VI, working paper presented by the United States of America, UN Doc. A/C.3/35/WG.1/CRP.6 (19/11/80) at 1.

consensus approach. The position of a particular country or countries during the drafting process is also a pointer to whether ratification of UNCMW will follow.

3.4 Participation by the ILO

Officially, ILO participation in the drafting of UNCMW was minimal. It consisted of papers submitted to the General Assembly and the dispatch of a representative to the meetings of the Working Group.[33] Unofficially, the ILO contribution was significant, largely as a result of its special relationship with MESCA. Because the MESCA countries maintained good relations with the ILO, they requested the ILO to formulate draft articles. The ILO's influence, however, in its role as draftsperson for MESCA was limited, since the proposals were closely scrutinized by MESCA members.[34]

4. Objectives of the Convention

Three of UNCMW's objectives may clearly be identified from the Preamble: to improve the situation of migrant workers and their families by building upon existing international standards and by recognizing the contribution of other international organizations in the migration field; to underline the link between the importance and extent of the migration phenomenon and the hardships it causes to those human beings involved; and to prevent clandestine migration, but at the same time to recognize the fundamental human rights of illegal migrants.

Not all the objectives, however, are conspicuously outlined in the Preamble. For example, as mentioned earlier, UNCMW constitutes a delicate balance between the protection

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33 See respectively *supra*, note 17 and Böhning, *supra*, note 12 at 704. An ILO supplementary paper was submitted to the General Assembly in 1981. UN Doc. A/36/378 (1981), Annex II, cited by Böhning, *ibid.*

34 Böhning, *ibid.*

of migrants' rights and the principle of state sovereignty. This principle finds no place in the Preamble, although it pervades the entire document.[35]

4.1 Improvement of the Situation of Migrant Workers and Their Families

(a) Building on Other International Standards

UNCMW builds on other international human rights instruments, but it does not necessarily incorporate them. This was made clear during the drafting of paragraph 1 of the Preamble, which "takes into account" the principles embodied in general international human rights instruments. These words were preferred to the term "reaffirming", which according to the representatives of France, Germany and the United States, would have implied that the previous instruments are tied to UNCMW even though several states were not parties to them.[36] The second paragraph of the Preamble refers to the "principles and standards" set forth in ILO Conventions. It is interesting to observe that the United States delegation found difficulty in accepting the word "standards".[37]

In addition to referring to the above Conventions and other international instruments, including regional and bilateral treaties (Preamble, paragraph 7), the *raison d'être* for UNCMW

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35 The United States, however, supported by the Netherlands, urged the Working Group to take into account, in a further examination of the text of the Preamble, the following considerations: (i) the obligation of migrants to comply with the laws and regulations of both receiving and sending countries and (ii) the "sovereign right" of every State to determine and apply its own immigration law and policies concerning admission to its territory. *Report of the Open-ended Working Group*, UN Doc. A/C.3/36/10 (23/11/81) [hereinafter *Working Group Report (November 1981)*] at 8, para. 29. It has been argued, however, that a "distant aim" of UNCMW should seek to undermine the traditional understanding of international law which views citizens as subjects and states as institutions to protect their own nationals. T. Ansay, "The New UN Convention in Light of the German and Turkish Experience" (1991) 25 IMR 831 at 842.

36 *Report of the Open-ended Working Group on the Elaboration of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families*, UN Doc. A/C.3/40/1 (20/6/85) [hereinafter *Working Group Report (June 1985)*] at 17, para. 68.

37 *Ibid.* at 18, para. 74. This attitude is not surprising considering that the United States has not ratified either of the two major ILO conventions concerning migrant workers. However, it does appear to conflict with the efforts of that same country to underline the importance of the ILO's work in the field of migration (see below).

is proclaimed in paragraph 11 of the Preamble: "*Convinced* that the rights of migrant workers and members of their families have not been sufficiently recognized everywhere and therefore require appropriate international protection".

(b) Recognition of the Contribution of International Organizations

The Preamble to UNCMW recognizes the work of numerous other organizations in the UN system, particularly the ILO, in advancing the rights of migrant workers and their families. Separate reference is made to the ILO in paragraph 5:

> *Recalling also* that one of the objectives of the International Labour Organization, as stated in its Constitution, is the protection of the interests of workers when employed in countries other than their own, as well as the expertise and experience of the said Organization in matters related to migrant workers and members of their families.

The wording of this paragraph represents a compromise between countries, such as the United States, that wanted to recognize the ILO's "unique competence, expertise, and experience in migrant worker matters" and those states that preferred to down play the ILO's influence in UNCMW by including less assertive terms.[38]

4.2 The Migration Phenomenon

The link between the migration phenomenon and the hardships it causes for those that participate most in its dynamics, the migrants themselves, is reflected in paragraphs 8 to 12 (for paragraph 11, see above) of the Preamble. These paragraphs refer respectively to the importance and the extent of the migration phenomenon, the impact of migration upon the

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38 *Working Group Report (November 1981), supra*, note 35 at 4-5, paras. 15-17. The latter consisted of the following migrant-sending countries: Jamaica, Yugoslavia and Morocco. See also *Working Group Report (June 1985), ibid.* at 20-21, paras. 82-83.

states and people concerned, the vulnerability of migrant workers and their families and the disruptive effect of migration upon families *per se*. It is this link which constitutes another rationale for UNCMW.

4.3 Prevention of Clandestine Migration

The specific problems of migrants in a non-documented or irregular situation and the way UNCMW attempts to deal with them are analyzed later in the chapter. The Preamble sets out in paragraphs 13 to 15 the general policy of UNCMW *vis-à-vis* this exploited group. UNCMW approaches this question on the basis that irregular migrant workers and their families face greater human hardships than regular migrants, generally as well as in the employment context, and hence advocates action to prevent and eliminate illegal labour migration. It takes care, however, to ensure that the fundamental human rights of irregular migrants are assured at the same time. Through the broader protection of the fundamental rights of *all* migrants, UNCMW hopes to discourage the employment of illegal migrant workers.

5. Structure and Scope

UNCMW is divided into the following nine parts: scope and definitions; non-discrimination with respect to rights; human rights of all migrants; other rights of migrants who are in a regular situation; provisions applicable to particular categories of migrants; the promotion of sound, equitable, humane and lawful conditions in connection with international migration; application of the Convention (which contains the supervisory machinery and complaint procedures); general provisions; and final provisions (which contains the provision on reservations).

5.1 Prohibition on Excluding Certain Parts of the Convention and Categories of Migrant Workers

UNCMW applies to *all* migrant workers and their families without distinction of any kind (article 1). States parties are prohibited by article 88 of UNCMW from excluding certain categories of migrants. Moreover, article 88 stipulates that all parts of UNCMW must be accepted by states parties *in toto*, unlike, for example, ILO Convention No. 143 and the *European Social Charter* (ESC) which permit the selective ratification by states of their provisions. The ESC and its application to the protection of migrants is considered in chapters six to eight of the thesis.

Efforts were made during the drafting process to enable states to specify certain parts or provisions of UNCMW that would only apply to nationals of states parties on the basis of reciprocity or to completely exclude certain parts of UNCMW or categories of migrants on ratification of the instrument.[39] These efforts, however, were unsuccessful. Reciprocity for certain parts of UNCMW was rejected primarily on the basis that the concept "was inconsistent with the universality of human rights and could lead to discrimination in the treatment by host countries of migrant workers depending upon which country they came from".[40] Blanket

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39 A broad proposal on reciprocity potentially applicable to the whole of UNCMW (later amended to Parts III and IV only) was originally submitted by Italy and supported by Germany, France and Japan. The proposal was opposed by the MESCA countries (bar Italy) and by Canada, Yugoslavia, Algeria, Australia, China, Colombia, the Netherlands, Morocco, Mexico and China. Reciprocity is a feature of most Council of Europe instruments relevant to the protection of migrant workers and their families. See *infra*, chapter six, note 6 and accompanying text. The second proposal on exclusion of certain parts of UNCMW or categories of migrant workers was originally submitted by Denmark (later withdrawn), but opposed by Greece, Spain, the former Byelorussian SSR, Cameroon, Tunisia and Finland. *Report of the Open-ended Working Group on the Elaboration of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families*, UN Doc. A/C.3/39/4 (11/10/84) [hereinafter *Working Group Report (October 1984)*] at 24-26, paras. 72-78 and *Reports of the Open-ended Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families*, UN Docs. A/C.3/44/1 (19/6/89) [hereinafter *Working Group Report (June 1989)*] and A/C.3/45/1 (21/6/90) [hereinafter *Working Group Report (June 1990)*] at 41-42, paras. 239-247 and 14-17, paras. 52-71 respectively.

40 *Working Group Report (June 1989)*, *ibid.* at 42, para. 242. Moreover, the Moroccan representative added, *ibid.*, that the principle of reciprocity would be "particularly harmful to nationals of poor countries". On a practical level, states against reciprocity argued that it would have the effect of detracting from the purpose of UNCMW and would invite its more arbitrary application. *Working Group (October 1984)*, *ibid.* at 24, para. 75. States in support of reciprocity contended that not all the provisions in UNCMW related strictly to human rights (Italy, France and Germany) and that, from a practical perspective, reciprocity would have the effect of attracting more ratifications (Italy). *Working Group Report (June 1989)*, *ibid.* at 42, para. 243; *Working Group*

exclusion by states of parts of UNCMW or categories of migrant workers was also considered unacceptable. Consequently, the insertion of draft article 88 was proposed by Finland to expressly preclude such an eventuality and to emphasize the "indivisibility" of UNCMW.[41]

5.2 Reservations

As with most international human rights instruments, UNCMW, in article 91, allows for reservations to specific provisions. States were concerned about reservations which are contrary to the spirit of UNCMW.[42] Hence, article 91(2) precludes reservations that are "incompatible with the object and purpose of the present Convention". An example of a prohibited reservation provided in the drafting debate is one which aims to exclude a whole category of migrant workers.[43] Nothing, however, would prevent states from submitting reservations to specific articles which deal with the rights of illegal migrants nor even from subjecting particular provisions to reciprocity.[44]

6. Definition

Part I of UNCMW contains the most comprehensive definition of "migrant worker"

Report (June 1990); *ibid.* at 16-17, para. 68; and *Working Group Report (October 1984)*, *ibid.* at 24, para. 74.

41 *Working Group Report (June 1990)*, *ibid.*, at 14, para. 53. Draft article 88 (as amended) received the support of the Netherlands, Morocco, Mexico, India, Sweden, the United States, France, Australia, China, the former USSR and Italy. *Ibid.* at 15-16, paras. 55-64. The representative of Germany (supported by Japan) was opposed to draft article 88 on the grounds that "the draft Convention went into too 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 the many categories of migrant workers it sought to cover". *Ibid.* at 15, para. 54. This concern was largely motivated by the discomfort some states felt about the applicability of UNCMW to illegal migrants. Bosniak, *supra*, chapter one, note 145 at 763.

42 *Working Group Report (June 1989)*, *supra*, note 39 at 50, para. 283 (Morocco); *Report of the Open-ended Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families*, UN Doc. A/C.3/44/4 (17/10/89) [hereinafter *Working Group Report (October 1989)*] at 67, para. 324 (Mexico and Germany).

43 *Working Group Report (October 1989)*, *ibid.* at 67, paras. 328-329 (declaration of Finland, supported by Italy, Yugoslavia and Mexico).

44 See respectively Bosniak, *supra*, note 41 at 763-764 and *Working Group Report (June 1990)*, *supra*, note 39 at 17, para. 71 (Italy). See also Nafziger & Bartel, *supra*, note 16 at 786 with regard to the latter point.

found in any international instrument concerned with this group. This, in itself, has been described as a "major accomplishment".[45] The definition strives to be inclusive rather than exclusive. It therefore encompasses many of the groups of migrant workers excluded from other international conventions. For example, the definition of "migrant worker" is much broader than those found in ILO Conventions Nos. 97 and 143 and the definition in the *European Convention on the Legal Status of Migrant Workers* (EMW).[46] The aim of this section is to concentrate on the broader aspects of the definition of "migrant worker" in UNCMW.

Part I of UNCMW also defines what persons constitute the "members of the family" of a migrant worker and when migrants are considered to be in a regular or irregular situation. These definitions are considered separately under the sections relating to family reunion and illegal migrants.

6.1 General Definition

As mentioned earlier, UNCMW is applicable to *all* migrant workers (article 1). In this sense, it most resembles the definition found in ILO conventions. UNCMW also applies to all migrant workers residing and working in the territory of a state party regardless of whether the country from which they came has ratified UNCMW.[47] UNCMW avoids, therefore, the inequality which migrant workers face from the start under Council of Europe instruments and the European Community regime, described in Part III of the thesis, which only extend protection to migrants whose countries have ratified the convention in question, with the

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45 S. Hune, "Drafting an International Convention on the Protection of the Rights of All Migrant Workers and their Families" (1987) 21 IMR 123 at 124.

46 Despite the tension existing between the ILO and the UN with regard to the drafting of UNCMW, Böhning has noted, *supra*, note 12 at 705, that the ILO Secretariat and members of the Governing Body are satisfied with this extended definition of "migrant worker" found in UNCMW. For an analysis of the definition of "migrant worker" in the EMW see *infra*, chapter six, notes 101-105 and accompanying text.

47 As discussed earlier, attempts to enable states parties to apply certain provisions on a systematic basis solely to nationals from other states parties failed. See *supra*, notes 39 and 40.

exception of the *European Convention on Human Rights* (ECHR), or to migrant workers and their families whose countries are members of the European Community. Moreover, in accordance with a major objective of UNCMW, "all migrant workers" refers to migrants in an irregular situation, in spite of attempts by some states to confine the definition solely to regular migrants.[48]

The term "migrant worker" is defined in article 2(1) 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". The drafting debate sheds more light on this definition. The term "to be engaged" refers to potential migrant workers who hold a work contract, even if they have not yet left the country of origin to take up employment in the host country. Such a contract or a similar document constitutes the "starting-point" for the recognition of a person as a migrant worker. The words "has been engaged" were included to protect the rights of migrant workers under UNCMW and to maintain their quality as "migrant workers" after completing employment, for whatever reason, in the host state.[49] It was also made clear that this provision did not cover someone who was "seeking employment" for the first time.[50] Finally, although the term "remunerated activity" was not defined, it was understood that it did not refer to an activity

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48 *Report of the Open-ended Working Group on the Elaboration of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families*, UN Doc. A/C.3/38/5 (11/10/83) [hereinafter *Working Group Report (October 1983)*] at 24, para. 78 and *Report of the Open-ended Working Group on the Elaboration of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families*, UN Doc. A/C.3/39/1 (14/6/84) [hereinafter *Working Group Report (June 1984)*] at 33, para. 105 (United States); *Working Group Report (June 1985)*, *supra*, note 36 at 28, para. 122 (Germany).

49 *Working Group Report (June 1985)*, *ibid.* at 37, para. 168. For example, the term "has been engaged" would include: persons who have contracted an occupational disease which only manifests itself after they have left the country of employment; unemployed migrant workers seeking re-employment; those who were victims of work accidents and have to remain in the country of employment to collect invalidity benefits; and those who depart from the host country on temporary leave. *Ibid.* at 37, paras. 168-169. This term also suggests that once a person has been employed in a remunerated activity at some point, he or she is *always* a migrant worker. Nafziger & Bartel, *supra*, note 16 at 786. One of the concerns which the United States delegation had with the broad definition of "migrant worker" was based on the term "has been engaged". For example, a person who once worked in a state of which he or she is not a national might return there as a tourist and might still be classified as a migrant worker under the definition because he or she has "been engaged" there in a remunerated activity. *Working Group Report (June 1985)*, *ibid.* at 35, para. 153.

50 The inclusion in the definition of an additional term, such as "seek to engage", was opposed by a number of state representatives who were of the view that the application of UNCMW "should not be extended to persons having the mere intent to migrate" (Sweden, Finland, Morocco, Cape Verde, Greece and Italy). *Working Group Report (June 1985)*, *ibid.* at 32, para. 141. Under EC law, the definition of "worker" includes those "seeking employment". See *infra*, chapter six, *Antonissen* case, note 114.

regarded by state laws as contrary to the rules of *ordre public*.[51]

6.2 Included Categories

As mentioned above, the comprehensive definition of "migrant worker" in UNCMW covers many categories of migrant workers excluded from other international conventions. Seasonal workers are expressly included.[52] Moreover, frontier and self-employed workers, excluded under the two major ILO Conventions concerning migrant workers are covered by UNCMW.[53] A self-employed worker is defined in article 2(2)(h) as

> a migrant worker who is engaged in a remunerated activity otherwise than under a contract of employment and who earns his or her living through this activity normally working alone or together with members of his or her family, and to any other migrant worker recognized as self-employed by applicable legislation of the State of employment or bilateral or multilateral agreements.

This rather restrictive interpretation of a "self-employed" worker was the result of a compromise between those states which wanted to exclude the category altogether[54] and those

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51 *Ibid.* at 38, para. 174.

52 Article 2(2)(b) defines "seasonal workers" as those migrant workers "whose work by its character is dependent on seasonal conditions and is performed only during part of the year". Seasonal workers are only implicitly included in the ILO conventions concerning migrant workers and expressly excluded from the EMW. *Supra*, chapter three, note 107 and accompanying text and *infra*, chapter six, notes 103-104 and accompanying text. Indeed, a proposal by Denmark (later withdrawn) to transpose the definition of "migrant worker" in article 1 of the latter instrument to that of UNCMW was rejected as "too restrictive and unacceptable" to a number of countries, since the mandate of the Working Group was to draft a global convention for the protection of all migrant workers and members of their families. *Working Group Report (October 1984)*, *supra*, note 39 at 6, para. 15 (Yugoslavia, Greece, Spain, Sweden and Finland.

53 Article 2(2)(a) defines "frontier worker" as a migrant worker "who retains his or her habitual residence in a neighbouring State to which he or she normally returns every day or at least once a week". Indeed, according to the Chairman of the Working Group, the proposal to include frontier workers under UNCMW was prompted by their exclusion from the application of other international conventions concerning migrant workers. *Working Group Report (June 1985)*, *supra*, note 36 at 41, para. 195. Self-employed workers are expressly covered by the ESC, unless excluded individually by states parties under the selective ratification procedure. Frontier and self-employed workers are also excluded explicitly under the EMW. *Infra*, chapter six, notes 98-102 and accompanying text.

54 *Working Group Report (October 1983)*, *supra*, note 48 at 23, para. 76 (Morocco) and at 23-24, para. 78 (Netherlands); *Working Group Report (June 1985)*, *ibid.* at 32, para. 141 (Germany) and *Working Group Report (October 1989)*, *supra*, note 42 at 8, para. 28 (Germany), at 9, para. 29 (Australia) and at 9, para. 31 (Japan).

which strove to ensure that they were included, but on condition that coverage would be confined to "poor" or "underprivileged" persons employed on their own account, and not to "highly privileged" categories of self-employed migrants.[55] The provision was clarified somewhat towards the end of the drafting process by the Vice-Chairman of the Working Group. It covers only self-employed workers who earn a living through their own means or with the help of their families. The inclusion of self-employed workers who employ others would only be permitted if consistent with applicable legislation of the state of employment (or with bilateral or multilateral agreements).[56]

UNCMW also creates, in article 2(2)(g), a special category of migrant workers, namely "specified-employment workers", which essentially refers to those workers who enter a country to take up employment for a "restricted and defined period of time". Under article 62 in Part V of UNCMW, the provisions concerned with equal treatment between migrant workers and nationals in respect of vocational training, free access to employment after a defined period of time, and access to alternative employment in the event of loss of work are inapplicable to specified-employment workers. These two clauses were part of another compromise in order to satisfy the demands of those non-European countries of immigration, such as the United States, Australia and Canada, which do not permit migrant workers the right to free choice of employment after a period of work and residence.[57]

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55 *Working Group Report (October 1983), ibid.* at 23, para. 76; *Working Group Report (June 1984), supra*, note 48 at 33, para. 108; *Report of the Open-ended Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families*, UN Doc. A/C.3/40/6 (15/10/85) [hereinafter *Working Group Report (October 1985)*] at 7-8, paras. 17-19 (Spain, India, Italy, Argentina, Finland, Greece, Norway, Sweden and Portugal).

56 *Working Group Report (October 1989), supra*, note 42 at 8, para. 26.

57 See also cf. Lönnroth, *supra*, note 12 at 730-731. The representative of Australia justified the inclusion of article 62 as follows: "Australia's views on this category of worker [specified-employment worker] proceeded from the basis that it was a country of immigration. Australia made a basic distinction between those accepted as permanent members of its society and those admitted on a temporary basis. As a legitimate exercise of its sovereignty, Australia limited the right freely to choose employment to the former". *Report of the Open-ended Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families*, UN Doc. A/C.3/43/1 (20/6/88) [hereinafter *Working Group Report (June 1988)*] at 59-60, para. 317.

6.3 Excluded Categories

The categories of persons excluded from UNCMW's coverage are listed in article 3. Employees of international organizations and government officials as well as "persons sent or employed by a State or on its behalf outside its territory who participate in development programmes and other co-operation programmes" are excluded (articles 3(a) and (b)).[58]

Article 3 also excludes investors, refugees and stateless persons, students and trainees and non-national non-resident seafarers and workers on an offshore installation. To exclude investors was largely the concern of developing countries who wanted to confine UNCMW to the protection of the most vulnerable migrants.[59] It is essentially this group of countries which was also interested in a restrictive interpretation of the definition of "self-employed" worker. Refugees and stateless persons are excluded because they are protected under other international instruments and possess a "specific international status".[60] Nonetheless, their exclusion creates the anomalous situation whereby persons claiming asylum are defined as "migrant workers" if they are permitted to work in a country, but lose their "migrant worker" status under UNCMW once they are granted refugee status.[61] Although students and trainees are not covered by any other international instrument relating to migrant workers, their exclusion from UNCMW's application was by no means automatic. The rationale for eventually excluding this category is to discourage the effects of a "brain drain" from

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58 This latter provision was inserted at the request of the grouping of socialist countries in order to exclude the so-called "socialist exchange of labour" between those states from the application of UNCMW. This provision is unlikely to hold much significance today. Lönnroth, *ibid.*, note 12 at 714, 732. See also *supra*, note 30 and accompanying text.

59 The proposal to exclude investors was originally put forward by the Mexican delegation. *Working Group Report (June 1984)*, *supra*, note 48 at 34, para. 110.

60 *Working Group Report (October 1985)*, *supra*, note 55 at 25, para. 112. The representative of Italy, supported by France and Germany, observed, however, that such instruments said very little on the subject of employment and that this group of persons should neither be expressly included nor expressly excluded from the application of UNCMW. *Ibid.* at 25-26, para. 113. Indeed, refugees and stateless persons, as migrant workers, are not expressly excluded from the application of the two ILO conventions concerning migrant workers nor are they expressly excluded from the EMW. Moreover, the Appendix to the ESC urges states parties to grant refugee migrant workers the most favourable treatment possible. See *supra*, chapter three, note 102 and *infra*, chapter six, notes 100 and 102 and accompanying text.

61 Böhning, *supra*, note 12 at 707-708.

developing to developed countries.[62] Efforts undertaken to provide protection to those students who are granted a work permit were unsuccessful.[63]

Finally, UNCMW excludes non-national *non-resident* seafarers and workers on offshore installations. Indeed, in contrast to other conventions relating to migrants, the original intention of UNCMW was to provide comprehensive protection for this category of worker, despite the opposition of certain states.[64] UNCMW does protect non-national *resident* seafarers and offshore installation workers (articles 2(2)(c) and (d)), but the exclusion of *non-residents* was introduced in the final stages of drafting in order to conform to the policies of those Western countries which pay differential wages to seafarers on the basis of their nationality. This provision was introduced despite the ILO observation that such a practice was contrary to general ILO international labour standards concerning discrimination in employmet [65]

7. Rights

Parts III and IV of UNCMW are devoted to the protection of the rights of migrant workers and their families. Part III (articles 8 to 35) concerns the protection of the "human rights of *all* migrant workers and members of their families" and hence applies to irregular migrants, whereas Part IV (articles 36 to 56) is restricted to those migrant workers and their families "who are *documented or in a regular situation*".[66] The rights covered in Part IV are more extensive and specific than those in Part III. This section examines both Parts III and IV

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62 *Working Group Report (October 1985), supra*, note 55 at 28, para. 126 (Morocco and Germany).

63 *Ibid.* at 28, para. 127 (Greece). The representative of Finland proposed that students be classified as "migrant workers" if they engage in a remunerated activity that is not considered as part of their course of studies. *Ibid.* at 30, para. 145.

64 *Working Group Report (October 1989), supra*, note 42 at 10, paras. 41-42 (Germany and Japan).

65 ILO Convention No. 111 of 1958 concerning *Discrimination in Respect of Employment and Occupation. Working Group Report (October 1989), ibid.* at 10-11, para. 43. See also Hasenau, *supra*, chapter three, note 176 at 135.

66 Emphasis added. Variations on these rights as they apply to specific categories of migrant workers are found in Part V (articles 57-63).

under the relevant rights' headings, although a separate section also considers specific issues concerning irregular migrants, such as the prevention of clandestine migration, employer sanctions and regularization, which are mainly the subjects of Part VI (articles 64 to 71) of UNCMW.

7.1 Equality and Non-discrimination

(a) Non-discrimination with respect to Rights in the Convention

Article 7 of UNCMW (Part II) places an obligation upon states parties to guarantee the rights of migrant workers and their families provided for therein "without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status". This is not a substantive anti-discrimination clause, because it only refers to rights enumerated in UNCMW.[67] As such, it resembles article 14 of the ECHR which also ties non-discrimination to the rights enumerated therein and which is examined in chapter six of the thesis. In addition to article 7, article 1(1) of UNCMW contains a general provision underlining its applicability to all migrant workers and their families "without distinction of any kind" and lists the same prohibited grounds of discrimination as enumerated in article 7. The difference between these two provisions is that article 7 is an obligation specifically imposed upon states, whereas article 1(1) is more general and may also encompass companies and private employers.[68] Both provisions, however, appear to only prohibit distinctions between different migrant workers and their families. This interpretation,

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67 Hune & Niessen, *supra*, note 13 at 135. The Chairman of the Working Group pointed out that "the essence of the provision was the obligation of every State to apply every article of the Convention, without distinction of any sort". *Report of the Open-ended Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families*, UN Doc. A/C.3/41/3 (10/10/86) [hereinafter *Working Group Report (October 1986)*] at 18, para. 106.

68 *Working Group Report (October 1986)*, *ibid.* at 19, para. 108 (Chairman of the Working Group).

therefore, precludes the reference to "nationality" as a prohibited ground of discrimination in article 7 from affording migrants general equal treatment with nationals in respect of the rights covered by UNCMW.

(b) General

As with other international instruments concerning migrant workers, UNCMW strives to realize equal treatment between migrant workers and nationals, but also as with these other instruments, this equality is by no means complete. The very fact that the rights in UNCMW are divided into two categories, those applying to *all* migrants and those confined to regular migrants, means that the extent of equal treatment enjoyed by migrant workers and their families with nationals depends on their status in the country.

(i) Part III Rights

Part III of UNCMW enumerates rights applicable to all migrant workers and their families. Many are civil and political rights and the majority of them may be classified as "fundamental" or "basic" rights.[69] Equality in respect of these rights is absolute with the exception of any limitation provision which is applicable to both nationals and alien migrant workers. The approach in Part III is consistent with the principle of non-discrimination with respect to the rights of nationals and aliens (regardless of the status of the latter) found in general international human rights treaties and with article 1 of ILO Convention No. 143 which guarantees equal treatment in respect of "basic human rights" between *all* migrant workers and nationals, regardless of their status. In the ILO Convention, however, these rights are not

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69 Indeed, the wording in these provisions repeats textually much of that found in the ICCPR. Hasenau argues, *supra*, note 65 at 137 that the repetition in a subsidiary human rights instrument of human rights principles found in the ICCPR and the ICESCR risks a divergent interpretation of these standards by different supervisory bodies. This conflict in interpretation is most likely to occur with regard to the interpretation of limitation clauses.

specified as they are in Part III of UNCMW.[70]

With regard to economic, social and cultural rights, Part III specifically provides for equal treatment between migrant workers and nationals in respect of remuneration, work and employment conditions (article 25), social security (article 27), emergency medical care (article 28), and access to education (article 30). These rights are discussed in more detail below under the relevant headings.

(ii) Part IV Rights

In addition to extending some of the Part III rights in respect of regular migrant workers and their families, especially in the field of employment (articles 54 and 55), Part IV also contains, in articles 43 and 45, two general equality provisions which resemble those found in the two ILO Conventions concerning migrant workers.[71] Article 43(1) guarantees to migrant workers equal treatment with nationals in respect of access to educational institutions and services, vocational guidance and training, housing, social and health services, co-operatives and self-managed enterprises and access to and participation in cultural life. Article 43(2) imposes an obligation upon states parties to

> 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.

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70 According to Hasenau, however, the ILO approach to the protection of the "basic" or "fundamental" rights of all migrant workers is better, because it avoids misunderstandings based on conflicting interpretation. *Ibid.* Hasenau contends that only *additional* civil and political rights should have been elaborated in UNCMW. UNCMW contains few such rights, such as the right to have recourse to the protection of consular and diplomatic authorities (article 23) and protection against collective and arbitrary expulsion (articles 22 and 56). *Ibid.* at 137-138. During the drafting of UNCMW, the United States and Dutch delegations expressed their doubts on quoting in UNCMW human rights provisions from other international instruments "which were not exclusively relevant to the question of migrant workers". *Working Group Report (November 1981), supra*, note 35 at 9-10, para. 33.

71 ILO Convention No. 97, article 6(1)(a); ILO Convention No. 143, article 10. See also article 19(4) of the ESC, *supra*, chapter six.

This provision resembles article 10 of ILO Convention No. 143, which also obliges states parties to "promote and guarantee" the rights enumerated in the provision. This approach recognizes that to eliminate discrimination between migrant workers and nationals, the prohibition of discriminatory laws and measures is insufficient. A positive effort has to be undertaken to ensure equality in practice.[72]

Article 45(1) guarantees to the *family* of migrant workers equal treatment with nationals in respect of practically the same rights as those found in article 43(1). However, there is no equivalent provision to article 43(2) promoting effective equality of treatment with respect to the enumerated rights.[73] The contents of these provisions are examined in greater detail under the relevant headings below.

The drafting history of articles 43 and 45 reveals an endeavour by states to downplay the effect of both provisions. Attempts to make equal treatment in articles 43(1) and 45(1) subject to the "national legislation of the State of employment" were rejected on the basis that such an approach would "open doors for the State of employment not to allow migrant workers to enjoy equality of treatment with nationals".[74] The French representative, for example, was generally opposed to article 45 on the basis that families of migrants were admitted to the state of employment on humanitarian grounds and therefore were not entitled to all the rights

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72 By way of contrast, see article 6(1)(a) of ILO Convention No. 97 and article 19(4) of the ESC (largely modelled on the latter), which, on their face, confine the state obligation to the proscription of discriminatory legislation and administrative measures.

73 See also Hasenau, *supra*, note 65 at 146.

74 *Report of the Open-ended Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families*, UN Doc. A/C.3/42/6 (9/10/87) [hereinafter *Working Group Report (October 1987)*] at 27, para. 134 with respect to article 43(1). This proposal, in connection with article 43(1), was supported by Germany, the United States, Australia and France and specifically opposed by Finland, Yugoslavia, the Netherlands and Greece; *ibid.* Similarly, both the United States and German delegations advocated that equal treatment in article 45(1) be made subject to the "national legislation of the State of employment". *Ibid.* at 45, para. 237. The ILO representative noted earlier in the drafting process that international conventions, rather than merely recording national legislation, should constitute "a means of promoting social justice throughout the world". *Report of the Open-ended Working Group on the Elaboration of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families*, UN Doc. A/C.3/37/7 (19/11/82) [hereinafter *Working Group Report (November 1982)*] at 19, para. 71.

enumerated in the provision.[75]

Articles 43(1) and 45(1) can best be compared with article 10 of ILO Convention No. 143, which obliges states parties

> to declare and pursue a national policy to promote and guarantee... equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory.

Articles 43(1) and 45(1) do not contain all the rights of article 10, although these rights are found elsewhere in UNCMW. Article 43(1) was to include an express reference to equal treatment in respect of "trade union rights", but this was deleted during drafting leading to criticism from some delegations.[76] Even though these "omitted" rights are found elsewhere in UNCMW, they are not subject to the policy of "promotion" in article 43(2), which is expressly confined to the rights enumerated in article 43(1).[77] Furthermore, article 10 of ILO Convention No. 143 is buttressed by article 12, which outlines a coordinated programme of measures through which such a policy is to be pursued.[78]

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75 *Working Group Report (October 1987), ibid.* at 45, para. 236. In particular, access to vocational guidance and training facilities which might imply the right to work.

76 *Ibid.* at 30, para. 150. Although, as shown below, trade union rights are covered in both Parts III and IV of UNCMW, some delegations regretted the deletion of "trade union rights" because not all the elements contained therein were included in other parts of UNCMW. *Working Group Report (October 1987), ibid.* at 30, para. 151 (Netherlands and Finland).

77 Hasenau, *supra*, note 65 at 145-146.

78 *Supra*, chapter three, note 125; Cf. Hasenau, *ibid.* at 146.

7.2 Employment Rights

(a) Equal Work and Employment Conditions

(i) Part III Rights

Article 25(1) in Part III of UNCMW guarantees equal treatment between all migrant workers and nationals in respect of remuneration, "other conditions of work" and "other terms of employment" which are enumerated in the provision. The former includes overtime, hours of work, weekly rest, holidays with pay, safety, health, and termination of the employment relationship (article 25(1)(a)). The latter includes minimum age of employment and restriction on home work (article 21(1)(b)). Both are open in that they may be "extended" by national law and practice.[79] Article 25(2) prohibits derogation from the equal treatment principle in private contracts of employment.[80] Because article 25 is situated in Part III of UNCMW, it applies to irregular as well as to regular migrant workers, which is underlined in article 25(3):

> States parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle [of equality of treatment] by reason of any irregularity in their stay or employment. In particular, employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of any such irregularity.

The application of the broad list of rights in article 25 to irregular as well as regular migrants met with some opposition during drafting. The German representative claimed that placing all

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79 The debate during drafting concerned the question whether it was necessary to have a list defining work conditions. In the end, an illustrative list was agreed upon, permitting variations according to national law. *Report of the Open-ended Working Group on the Elaboration of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families*, UN Doc. A/C.3/37/1 (11/6/82) [hereinafter *Working Group Report (June 1982)*] at 5, para. 14.

80 See also article 82 which prohibits, *inter alia*, derogation by contract from any of the rights recognized in UNCMW.

migrant workers, including illegal migrant workers, on an equal footing with national workers in respect of social conditions and working life "would prove increasingly impracticable".[81] The Austrian delegation recorded a reservation to article 25(3) on the grounds that Austrian labour legislation does not entitle foreign workers, if they are employed without a work permit, to claims arising in connection with notice of dismissal or termination of employment.[82]

(ii) Part IV Rights

Further rights with respect to work and employment conditions are granted to regular migrant workers in Part IV under articles 54 and 55. Article 54(1) ensures equal treatment between these workers and nationals in respect of protection against dismissal, unemployment benefits, access to public work schemes intended to combat unemployment and access to alternative employment in the event of loss of work or termination of other remunerated activity. Many of these rights are guaranteed in Part III of UNCMW which applies to all workers.[83] Equal treatment in respect of protection against dismissal from work is already safeguarded in article 25(1)(a) under "termination of the employment relationship", whereas equality in respect of the receipt of unemployment benefits is implicitly covered by article 27(1) on social security.[84] Rights to equal access to public work schemes and to alternative employment in the event of loss of work are also safeguarded by articles 49 and 51, which

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81 *Report of the Open-ended Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families*, UN Doc. A/C.3/42/1 (22/6/87) [hereinafter *Working Group Report (June 1987)*] at 40, para. 196. The whole of the provision, however, was expressly supported by the former Soviet Union, Finland, Italy, India and the Netherlands. *Ibid.* at 40, para. 197.

82 *Ibid.* at 41, para. 208.

83 The rights in article 54 do not necessarily "augment or modify" those afforded to migrant workers in article 25(1) or in article 27 concerning social security. *Working Group Report (June 1988)*, *supra*, note 57 at 31, para. 151 (Australia). See below.

84 See also Hasenau, *supra*, note 65 at 143. Indeed, a number of states emphasized that article 54(1)(b) concerning equal treatment between migrant workers and nationals in respect of unemployment benefits would only operate if these benefits were not part of the national social security system to which article 27(1) is applicable. *Working Group Report (June 1988)*, *ibid.* at 31, para. 153 (Norway, Germany, Netherlands, France and the United States).

regulate in more detail migrant workers' rights in the event of loss of employment (see the section on "Residence Rights" below).[85]

Article 55 guarantees equal treatment with nationals in the exercise of a remunerated activity to those migrant workers granted permission to engage in that remunerated activity. Although this provision, on its face, appears to be covered by the content of article 25, the drafting history reveals that those migrant workers who exercise activities or professions on an independent basis do not come within the ambit of article 25, which applies only to employees.[86] In this sense, therefore, article 55 supplements the provisions in article 25.

The UNCMW provisions governing equal work and employment conditions are quite advanced compared with other international standards in this area. They have a wider coverage than equivalent ILO standards because they guarantee rights to migrant workers directly as against their employers as well as against the state. Rights, therefore, are paramount, in contrast to state duties to prevent the discriminatory practices of public authorities or to promote equal opportunity with regard to work and employment conditions found in ILO provisions.[87] As far as detail is concerned, the UNCMW provisions most resemble European Community standards, although their scope is broader because they also encompass irregular migrant workers.[88]

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85 See also Hasenau, *ibid.* Article 54(2) entitles migrant workers to bring a claim before the competent authorities if the terms of their work contract have been violated by the employer.

86 *Working Group Report (June 1988), supra*, note 57 at 34, para. 176 (Chairman of the Working Group). Indeed, an earlier draft version of article 55 submitted by the MESCA grouping of countries referred to migrant workers who have been granted permission to work "in a defined profession or occupation". *Working Group Report (June 1988), ibid.* at 32, para. 157.

87 See also cf. Hasenau, *supra*, note 65 at 139. In this regard, it is interesting to observe that the United States representative wanted to have the opening phrase of article 25(1) commence with the following words: "States parties to the Convention shall ensure that...". *Working Group Report (June 1987), supra*, note 81 at 40, para. 201.

88 Hasenau notes that the employment of illegal migrant workers becomes a less economically attractive proposition when their rights as against employers are secured in law. The enforcement of these rights, however, is more problematic. Hasenau, *ibid.* at 140. This question is considered in greater detail below in the section on illegal migrants.

(b) Free Choice of Employment

The tension in UNCMW between the protection of the rights of migrant workers and their families and the preservation of the principle of state sovereignty is evident in articles 52 and 53, which are concerned with their right to free choice of employment. Not surprisingly, this right is confined to legal migrants. In contrast to the comprehensive rights protections provided by UNCMW in respect of work and employment conditions, the right to free choice of employment is subject to a number of significant restrictions reflecting the interest of states to retain sovereign control in this sensitive area which has important economic implications.

Article 52(1) of UNCMW enunciates the principle that "migrant workers in the State of employment shall have the right freely to choose their remunerated activity". The remainder of article 52 lists a number of qualifications on this principle. The first two limitations apply to "any migrant worker". A state of employment may restrict their access "to limited categories of employment, functions, services or activities where this is necessary in the interests of this State and provided for by national legislation" (article 52(2)(a)). Although this restriction is largely aimed at confining public service positions to nationals,[89] its wording appears sufficiently broad to cover other categories of employment. Under article 52(2)(b), a state may also limit free access to employment "in accordance with its legislation concerning recognition of occupational qualifications acquired outside its territory".[90]

Further restrictions are imposed in respect of "migrant workers whose permission to work is limited in time". The reason for the distinction in article 52 between these workers and others was to distinguish between temporary workers admitted to a country for a limited period of time and permanent immigrants, such as those admitted to the United States and Australia, who are given free access to employment, with certain minor exceptions, from the moment of

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89 Hasenau, *ibid.* at 140.

90 States parties are also obliged under this clause to "endeavour to provide for recognition of such qualifications".

entry.[91] With respect to the former category of migrant workers, a state of employment may also make free choice of employment subject to the condition that migrant workers have been lawfully resident and employed in its territory for a period not exceeding two years (article 52(3)(a)). The two-year period was the subject of extensive discussions during drafting. A number of states wanted a longer specified time-period, others preferred no defined time-period, while the ILO representative was concerned that any period of time over two years would deviate from article 14(a) of ILO Convention No. 143.[92]

Access to employment may be limited further in respect of temporary migrant workers in accordance with a national policy granting priority in employment to nationals and to others by virtue of national legislation or bilateral or multilateral agreements, for example regional free movement of labour regimes, such as those operating within the European Community or the Nordic Council. Such a limitation must be lifted, however, if migrant workers have been lawfully resident and employed in the host country for five years (article 52(3)(b)).[93]

The time limits in the above provisions are only recommendatory. Consequently, the state of employment has discretion whether to increase these limits without necessarily infringing UNCMW. This approach was criticized by some states on the basis that it weakened existing international norms, especially ILO standards.[94] With regard to self-employed migrant workers, the state of employment is free to determine the conditions under which such persons may work within its territory, although the period of lawful residence is to be taken into account in prescribing such conditions (article 52(4)).

Article 53 concerns the question of free choice of employment for members of the

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91 Hasenau, *supra*, note 65 at 140.

92 See respectively *Working Group Report (June 1988)*, *supra*, note 57 at 21, para. 92 and 93 (Norway and the Netherlands), at 20, para. 90, at 23, para. 105 and at 21, para. 95 (Germany and Australia) and at 21-22, para. 98 (International Labour Office representative).

93 Both of these restrictions on the right of temporary workers to free choice of employment must be prescribed in the national legislation of the state of employment.

94 *Working Group Report (June 1988)*, *supra*, note 57 at 22-23, para. 104 (Finland and Greece). These countries also underlined the need to ensure that any restrictions imposed upon the free choice of employment for migrant workers are not indefinite in duration. *Ibid.* Hasenau has argued, *supra*, note 65 at 141, that the formulation of a mere recommendation in article 52(3) is a considerable step back in comparison with existing ILO standards because it enables states to restrict access to employment without limitation.

migrant worker's family. A similar distinction to that in article 52 is made between 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" (article 53(1)) and those who "are not permitted freely to choose their remunerated activity" (article 53(2)). The former have the same rights to free choice of employment as those accorded migrant workers under article 52, namely migrant workers admitted indefinitely to the host country, whereas states of employment need only give favourable consideration to granting the latter priority in obtaining permission to work over other workers who seek admission to the state of employment.[95] It was pointed out during drafting that article 53 included those family members who were born and had remained in the territory of the host country at the required age as well as those who already had authorization of residence, as members of the migrant worker's family, on entering the territory of the state of employment.[96]

The free choice of employment provisions in UNCMW hardly advance the economic and social situation of migrant workers and their families in the host country.[97] Indeed, they significantly undermine the progress made in this area by article 14(a) of ILO Convention No. 143, which grants migrant workers free access to most categories of employment after two years of residence and employment, regardless of whether they are admitted indefinitely or on a temporary basis into the state of employment. Unfortunately, the importance of the ILO Convention was greatly minimized by a number of state delegations during the drafting of UNCMW.[98] As a result, the restrictions on access to employment found in articles 52 and 53

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95 Concern was expressed during drafting by some state representatives that this provision would require states parties to give priority to family members of migrant workers coming to the state of employment to work temporarily over migrant workers entering the state for the purpose of permanent settlement. *Working Group Report (June 1988)*, *ibid.* at 26, paras. 122-123 (Australia, United States and Canada).

96 *Ibid.* at 28, para. 138 (France).

97 By virtue of article 62, neither articles 52 nor 53 apply to specified-employment workers. See also *supra*, note 57 and accompanying text.

98 The representative of the Netherlands opined that the ILO Convention was ratified only by a small number of states and therefore cannot be regarded as part of accepted international human rights law. The representatives of Germany and Australia, while recognizing the contribution of the ILO Convention to UNCMW, stressed that states parties which had not ratified ILO instruments could not be considered bound by them and that, in any case, in the network of international human rights standards, the instruments comprising the International Bill of Rights, namely the UDHR, the ICCPR and the ICESCR, were regarded as

of UNCMW resemble more the convoluted approach taken by some Council of Europe instruments, such as the *European Convention on Establishment* (ECE), rather than an evolution of the simplicity manifested by article 14(a) of ILO Convention No. 143.[99] In conclusion, the UNCMW provisions concerning the right to free choice of employment reflect a marked deference to state sovereignty, and considerably weaken UNCMW as a rights-oriented instrument.

7.3 Trade Union Rights

UNCMW introduces two-tier protection in respect of the trade union rights of migrant workers and their families. The two provisions dealing with trade union rights are article 26 and article 40, located in Parts III and IV of UNCMW respectively. The former provides the following rights: "to take part in meetings and activities of trade unions and of any other associations established in accordance with law, with a view to protecting their economic, social, cultural and other interests..." (article 26(1)(a)); "to join freely any trade union..." (article 26(1)(b)); and "to seek the aid and assistance of any trade union..." (article 26(1)(c)). Since article 26 is located in Part III of UNCMW, it applies to *all* migrant workers and their families, including those with an irregular status, despite the opposition of some states to extending trade union rights to illegal migrants.[100] Article 40(1) provides to migrant workers and their families in a regular situation "the right to form associations and trade unions in the

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"paramount". *Working Group Report (June 1988)*, *supra*, note 57 at 22, paras 99 and 100 respectively.

99 The Moroccan representative remarked that the series of restrictions in article 52 effectively rendered the phrase "the right freely to choose their remunerated activity" in article 52(1) redundant. *Ibid.* at 20, para. 84. For a description of the free choice of employment provisions of the ECE see *infra*, chapter seven, notes 22-25 and accompanying text.

100 *Working Group Report (June 1982)*, *supra*, note 79 at 6, para. 18. The German representative espoused the following argument against granting trade union rights to migrant workers in an irregular situation: "In his delegation's opinion, guaranteeing trade union freedom to persons, who, on account of their irregular situation which obliged them to refrain from joining in any public demonstration, would never be able to exercise that right, would, in a way, be tantamount to not taking seriously the trade union freedom to which his Government attached the highest importance". *Working Group Report (June 1987)*, *supra*, note 81 at 43, para. 211.

State of employment for the promotion and protection of their economic, social, cultural and other interests".[101] Both provisions also permit identical limitations on the rights expressed therein.[102]

This two-tier protection in UNCMW has been criticized as a departure from existing international standards in the ICCPR, the ICESCR and ILO instruments, especially with regard to the protection of the trade union rights of migrant workers and their families in an irregular situation. Both article 22 of the ICCPR and article 8 of the ICESCR provide for the right to freedom of association to *all* persons, including the right to *form* and join trade unions. On their face, therefore, these general international human rights instruments grant illegal migrant workers the right to form trade unions for the protection of their interests, notwithstanding that the exercise of this right seems redundant in practice. Furthermore, both provisions also assert that they do not impair the obligations of states parties to ILO Convention No. 87 of 1948 on *Freedom of Association and Protection of the Right to Organize*, which proscribes discrimination on the basis of nationality with respect to the *formation* and membership of trade unions.[103] Finally, as noted in the section on "equality and non-discrimination", a reference in draft article 43 to equal treatment between regular migrant workers and nationals in respect of "the exercise of trade union rights" was deleted during the second reading.[104]

The trade union rights protected by UNCMW appear not to include the right of migrant

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101 A number of state delegations expressed their opposition to this provision because they "could not support the establishment of unions based on the national origin of their members in the state of employment, which would compete with existing national trade unions and would thus exclusively serve the interests of foreign nationals" (Argentina, Malaysia and Venezuela). *Working Group Report (November 1982)*, *supra*, note 74 at 12, para. 43. It is interesting to note that article 40(1) speaks of the "promotion and protection" of the specified interests of migrant workers, whereas article 26(1) speaks merely of "protecting" those interests. Obviously UNCMW does not "promote" the interests of illegal migrants.

102 Under articles 26(2) and 40(2) restrictions may be imposed on the exercise of trade union rights in the interests of national security, public order (*ordre public*) or the protection of the rights and freedoms of others. These restrictions must be prescribed by law and necessary in a democratic society.

103 Article 2. See also cf. Hasenau, *supra*, note 65 at 138-139. Hasenau observes, *ibid.* at 139, that these deviations from the International Covenants and ILO Convention No. 87 have to be considered as "a considerable depreciation of trade union rights of migrant workers in an irregular situation". Indeed, the representative of the Netherlands only agreed to the consensus of the Working Group on article 26 on the understanding that the provision in no way limited the rights of migrant workers and their families in the ICCPR and the ICESCR. *Working Group Report (June 1987)*, *supra*, note 81 at 46, para. 244.

104 *Supra*, note 76 and accompanying text.

workers to electoral participation in trade unions or work councils. It is unlikely that the words "to take part in meetings and activities of trade unions..." in article 26(1)(a) cover this right, especially as this term is located in Part III of UNCMW and is not elaborated upon in article 40 in the context of regular migrants, where such a right would most likely be found. Indeed, the deleted provision in draft article 43, referring to equal treatment between regular migrant workers and nationals in respect of trade union rights, went on to extensively define these rights as including "eligibility for office in trade unions, in bodies of an occupational, economic or social character, and in labour-management relations bodies, including bodies representing workers in undertakings".[105] Consequently, the UNCMW provisions depart from ILO standards, where "trade union rights" in article 10 of ILO Convention No. 143 have been defined by paragraph 2(g) of Recommendation No. 151 as encompassing "eligibility for office in trade unions and in labour-management relations bodies, including bodies representing workers in undertakings".[106]

7.4 Social Security Rights

The protection of social security rights in UNCMW resembles the approach taken to this question by ILO Convention No. 143 and the Council of Europe instruments examined in Part III of the thesis, namely the ESC and the EMW, in that it confines itself to a statement of general principle rather than being concerned with the details of this complex subject. Article 27 of UNCMW deals with two separate matters. Article 27(1) guarantees equal treatment between migrant workers and their families and nationals in the state of employment in respect of social security "in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties". Article 27(2)

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105 *Working Group Report (October 1987), supra*, note 74 at 26, para. 133.

106 As observed in chapter seven, there is no express reference to such a right in Council of Europe instruments either, although EC law explicitly provides for this right in article 8 of Regulation 1612/68. See *infra*, chapter seven, note 82 and accompanying text.

obliges states parties "to examine the possibility of reimbursing contributions" made by migrant workers and their families on an equal basis with nationals in the event that the applicable legislation does not provide for a right to receive the benefit concerned.

Although article 27 is situated in Part III of UNCMW, it is not entirely clear whether it applies to illegal migrants to the same extent as it does to regular migrants. A clause in the draft text of article 27 explicitly limiting the application of the equality principle in respect of undocumented migrants to those social security benefits to which they have contributed was shelved during the second reading.[107] Earlier during this reading some state delegations wanted to transfer the whole of article 27 to Part IV of UNCMW.[108] Other states, however, together with the Chairman of the Working Group, contended that illegal migrant workers should have the right to at least some social security benefits, especially to those benefits to which they have contributed.[109] It would appear, therefore, largely because of its location in Part III, that article 27 sets a minimum standard concerning social security applicable to *all* migrant workers and their families, although one commentator argues that, in practice, the provision merely contains a minimum standard for the protection of the social security rights of regular migrant workers and their families. By virtue of the proviso in article 27(1), which qualifies the principle of equality by "the applicable legislation of [the] State", parties to UNCMW have the discretion to make distinctions on the grounds of nationality.[110]

Article 27(2) applies to migrant workers' rights in the course of acquisition, the rights of those migrant workers who have already left the state of employment and have acquired rights in that state but not the right to receive benefits abroad, as well as to those migrants who are in an irregular situation.[111] States, however, need only "examine the possibility" of reimbursing the contributions of migrant workers and their families in cases where the

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107 *Working Group Report (October 1987)*, *supra*, note 74 at 8-9, paras. 27, 30.

108 *Working Group Report (June 1987)*, *supra*, note 81 at 50, para. 261 (Italy and Germany).

109 *Ibid.* at 50-51, paras. 262 (Chairman of the Working Group), 263 (Morocco), 266 (former Soviet Union) and 267 (Greece).

110 Cf. Hasenau, *supra*, note 65 at 143.

111 Hasenau, *ibid.* at 144.

applicable legislation does not permit them to receive benefits. Hence this provision only constitutes a "weakly worded" recommendation to reimburse such contributions.[112] The inadequate protection under UNCMW of social security rights in the course of acquisition and acquired rights is in stark contrast with ILO standards in this area.

Article 27, as a statement of general principle, differs somewhat from other similar general international standards by its lack of a specific reference point. The equality principle with respect to social security rights in article 27(1) is subject to migrant workers fulfilling the requirements provided by the applicable legislation of the state and "applicable bilateral and multilateral treaties". No specific multilateral treaty is mentioned. In contrast, article 10 of ILO Convention No. 143, which provides for, *inter alia*, equality in respect of social security rights, may quite readily be supplemented by more precise ILO standards concerning social security. Similarly, article 12 of the ESC refers specifically to ILO Convention No. 102 of 1952 concerning *Minimum Standards of Social Security*.[113] Consequently, the level of social security that migrant workers might expect is only ascertainable from the international social security treaties, if any, which a state party has agreed to, or from national legislation. One advantage of UNCMW, however, is that it does not require reciprocity for the social security provision to take effect and hence covers those migrants who are nationals of states that have not ratified it.

Because article 27 is a statement of general principle, the ambit of social security is not

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112 *Ibid.* Hasenau, *ibid.*, concludes that this provision may, therefore, be meaningless because it is not a known practice for states to reimburse nationals for either rights in the course of acquisition or for acquired rights. During the drafting of UNCMW, for example, the representative of Sweden observed that in Sweden there was no provision for the reimbursement of social security, even for Swedish citizens who had left the country and were living abroad. *Working Group Report (June 1987)*, *supra*, note 81 at 50, para. 259. Similarly, Austrian legislation does not provide for the reimbursement of contributions because the social security system in that country is based on the "insurance principle". *Working Group Report (June 1987)*, *ibid.* at 50, para. 258 and *Working Group Report (October 1987)*, *supra*, note 74 at 9, para. 33. France and the United States also noted their concern regarding the possibility of reimbursing the social security contributions of migrant workers. *Working Group Report (October 1987)*, *ibid.* at 10, para. 35.

113 *Infra*, chapter seven, note 89 and accompanying text. Indeed, article 27(1) of UNCMW rings similar, in its generality, to article 18(1) of the EMW which grants migrant workers equal treatment with nationals in respect of social security, "subject to conditions required by national legislation and by bilateral or multilateral agreements already concluded or to be concluded between the Contracting Parties concerned". See *infra*, chapter seven, note 104 and accompanying text.

defined, although at least two branches of social security seem to be covered by other UNCMW provisions.[114] This problem of definition is exacerbated by the lack of a reference in article 27 to a specific international social security instrument. Similarly, the lack of a definition of "social security" raises doubts whether the term includes non-contributory benefits, which are not provided to migrant workers in some countries.[115] During the drafting of article 27, some state delegations pointed out the need for a definition of "social security".[116] The Working Group Chairman, however, underlined the practical difficulties and complexities involved in finding a universally acceptable definition, and suggested that the Working Group would be better advised to adopt a very general provision.[117]

7.5 Right to Health

UNCMW covers the rights of migrant workers and their families to equal treatment with nationals in respect of access to health care and occupational health and safety, but in somewhat qualified and fleeting terms. Article 28, situated in Part III of UNCMW, reads as follows:

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

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114 Article 25(1) would arguably cover the right to employment injury benefit, and article 28 provides for the right to emergency medical care (see below). Articles 43(1)(e) and 45(1)(c) provide for equal treatment between regular migrants and nationals in respect of "access to social and health services, provided that the requirements for participation in the respective schemes are met". The *travaux préparatoires* shed little light on the meaning of this phrase. The German representative, however, stressed the need to distinguish between "social security" and "social services". *Working Group Report (October 1987), supra*, note 74 at 29-30, para. 148.

115 *Working Group Report (June 1987), supra*, note 81 at 50, para. 258 and *Working Group Report (October 1987), ibid.* at 9, para. 32 (Austria).

116 *Working Group Report (June 1982), supra*, note 79 at 9, paras. 24-26 (Netherlands, United States and the United Kingdom).

117 *Working Group Report (June 1987), supra*, note 81 at 49, para. 256.

Although this provision clearly applies to both regular and irregular migrant workers and their families, as emphasized by the final sentence, an attempt was made by the United States delegation during the first reading to transfer article 28 to Part IV of UNCMW on the basis that this Part alone dealt with social welfare rights.[118] Furthermore, article 28 merely guarantees to migrant workers and their families the right to receive *emergency* medical care necessary "for the preservation of their life or the avoidance of irreparable harm to their health". In an earlier draft of article 28, the latter part of this phrase was broader, reading "or the restoration of their health", which again was opposed by the delegation of the United States because it failed to distinguish adequately between emergency medical care actually required for the preservation of life and other forms of less urgent medical care.[119] Under Part IV of UNCMW, migrant workers and their families in a regular situation are also granted full equal treatment with nationals of the state of employment in respect of "access to... health services" (articles 43(1)(e) and 45(1)(c)). The *travaux préparatoires* provide little detail as to the possible interpretation of this text.

As far as equality between migrant workers and nationals in respect of occupational health and safety is concerned, UNCMW only contains a brief reference to this question in article 25(1)(a) concerning equal treatment in respect of remuneration and, *inter alia*, other conditions of work. Under this provision, "other conditions of work" are defined expressly to include "safety" and "health". This passing reference in UNCMW to the occupational health and safety of migrant workers should be contrasted with the more detailed and comprehensive provisions to be found in ILO Recommendation No. 151.

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118 *Working Group Report (June 1982)*, *supra*, note 79 at 11, para. 32 (United States).

119 *Ibid.* The phrase "or the avoidance of irreparable harm to their health" was introduced in an amendment proposed by the German delegation and supported by the United States representative. *Working Group Report (June 1987)*, *supra*, note 81 at 54, paras. 281-282. The latter also wanted to "downgrade" the principle of "equal" emergency medical care with nationals to "equivalent" care. *Ibid.* at 54, para. 282. This proposal was opposed by the representative of Yugoslavia who argued that the situation of migrant workers was very different to that of nationals and that "real equivalence could not exist". *Ibid.* at 54, para. 283. In the end, the German delegation was still unable to accept article 28 because of the word "any" before "medical care". *Ibid.* at 54, para. 287.

7.6 Right to Housing

Chapter three underlined the importance of adequate housing for migrant workers for facilitating family reunion, but more importantly as a prerequisite for the enjoyment by migrant workers and their families of other rights and for their successful integration in the state of employment. UNCMW, however, only contains fleeting references to the housing rights of regular migrant workers. Illegal migrant workers are entitled to no express housing rights.[120] Under article 43(1)(d) of UNCMW, migrant workers in a regular situation are afforded equality of treatment with nationals in respect of "access to housing, including social housing schemes, and protection against exploitation in respect of rents". The reference to "social housing schemes" was retained on the insistence of some state delegations,[121] and includes, therefore, public rental accommodation. Furthermore, because article 43 supports the "general equality" of migrant workers and nationals in various fields in that the matters enumerated therein need not first have to be the subject of regulation by the state, article 43(1)(d) also clearly operates to prohibit discrimination against migrant workers by private landlords. Under article 43(3), states of employment are prohibited from preventing an employer of migrant workers from establishing "*housing* or social or cultural facilities for them". It was understood during drafting, however, that this provision did not impose a positive obligation upon employers to build the aforesaid facilities.[122]

There are no other express references in UNCMW to the housing of migrant workers and their families. Contrary to most other international and regional standards, the family reunification provision in UNCMW imposes no express condition upon migrant workers to

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120 Note however the general obligation imposed upon states under Part VI of UNCMW in article 64 to "consult and co-operate with a view to promoting sound, equitable and humane conditions in connection with international migration of workers and members of their families".

121 *Working Group Report (October 1987)*, *supra*, note 74 at 29, para. 145 (Finland and Algeria).

122 *Working Group Report (October 1989)*, *supra*, note 42 at 11, para. 47 (Germany).

possess suitable family housing before family reunion may take place. This is because, as observed below, the provision is phrased in weak language, which provides broad discretion to states parties in deciding whether to permit the entry of family members. Neither are there express obligations to take into account the needs of migrants in housing construction policies, as found in ILO Recommendation No. 115 of 1961 concerning Workers' Housing and Recommendation No. 151 concerning Migrant Workers,[123] nor to promote the housing conditions of migrants. The latter obligation, however, may be implied in respect of regular migrants from article 70 of UNCMW, which imposes a duty upon states parties to

> take measures not less favourable than those applied to nationals to ensure that working and living conditions of migrant workers and members of their families in a regular situation are in keeping with the standards of fitness, safety, health and principles of human dignity.

A draft version of article 70 was more explicit with respect to the housing of migrant workers and their families. The relevant measures to be taken by states parties were to include "inspection of the working and living premises of migrant workers and members of their families by... competent authorities". The authorities were also to be empowered to "make recommendations for the improvement in the quality of these conditions".[124] Originally, the provision was also to apply to *all* migrant workers and their families, but its ambit was eventually restricted to those persons in a regular situation.[125] It was also emphasized by two

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123 *Supra*, chapter three, note 220 and accompanying text.

124 *Report of the Open-ended Working Group on the Drafting of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families*, UN Doc. A/C.3/43/7 (17/10/88) [hereinafter *Working Group Report (October 1988)*] at 30, para. 139. Opposition to the inclusion of this provision came from Finland, Italy, the United States, the former Soviet Union and Morocco and was based on the arguments that UNCMW already provided for equal treatment in respect of working conditions (article 25) and that equal treatment in respect of living conditions would be difficult to assess and "might require control which might infringe upon the right to privacy of migrant workers". *Ibid.* at 30, para. 140. The need, however, to make some statement in UNCMW on the subject of the living standards of migrants, which were deplorable in certain parts of the world, was stressed by a number of state delegations (India, Yugoslavia and China). *Ibid.* at 30, para. 141.

125 *Ibid.* at 32, paras. 151-152 (United States, Norway, Australia, Denmark, Sweden and China). The French representative regretted that the article applied only to migrant workers in a regular situation and regretted its possible consequences. *Ibid.* at 32, para. 155.

state representatives during drafting that article 70 did not mean that states parties were under an obligation to "establish for migrant workers conditions that were more favourable than those of nationals".[126]

Finally, UNCMW contains no provision expressly guaranteeing the right to acquisition of private property, although it is arguable that equal treatment accorded by article 43(1)(d) to regular migrant workers with nationals in respect of "access to housing" should include access to the purchase of private accommodation. Moreover, both the applicability of UNCMW as a whole and the rights guaranteed therein to all migrant workers and members of their families are to be secured without distinction of any kind such as, *inter alia*, "property" (articles 1 and 7 respectively).

7.7 Right to Family Reunification

The concept of "family" under UNCMW has two different connotations. For the purpose of the *whole* of UNCMW, article 4 defines the "members of the family" of a migrant worker as those

> 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 and multilateral agreements between the states concerned.

A similar definition of the family is provided under article 44(2) concerned solely with family reunification, with the exception that this provision specifically refers to "minor dependent unmarried children" and omits the reference to "other dependent persons". These definitions constituted a compromise between Western and Third World countries, particularly Third

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126 *Ibid.* at 31, para. 149 (Germany and Norway).

World countries with Islamic roots.[127] The former, being essentially countries of employment, wanted to restrict the definition to the "nuclear" family,[128] whereas the latter preferred that the definition encompass a broader group of persons in order to account for the "extended" family.[129] Muslim countries were also opposed to a definition of the family which included relationships that produce "effects equivalent to marriage" on the basis that this definition was incompatible with the concept of the family as defined by legislation in those countries, and consequently recorded their formal reservation to the provision.[130] Although such relationships cover common law marriages, it is by no means clear what other relationships may be covered.[131]

In essence, however, the general definition in article 4 is extremely flexible since relationships producing "effects equivalent to marriage" and "dependent children and other dependent members of the family" are to be determined in accordance with the "applicable law", and also in the latter case, by applicable bilateral and multilateral agreements. This flexibility favours Western countries of employment which may effectively decide who is a member of the migrant worker's family for the purpose of according rights under UNCMW or for the purpose of family reunion.[132]

The provision concerning family reunification is article 44 which is located in Part IV of UNCMW and therefore only applicable to regular migrants. To extend the right of family reunion to migrants in an irregular situation seems highly impractical because it would

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127 See also Hune, *supra*, note 45 at 124; Lönnroth, *supra*, note 12 at 730.

128 *Working Group Report (June 1985)*, *supra*, note 36 at 32, paras. 152-153 (Sweden, Denmark and Australia). In addition, the German representative argued for a restricted definition of the family of a migrant worker on the basis that "migration for remunerated activity was conceived only as a transitory phenomenon and not a permanent one". *Working Group Report (October 1986)*, *supra*, note 67 at 8, para. 37.

129 *Working Group Report (June 1985)*, *ibid.* at 32, para. 155 (Morocco, Algeria and Tunisia).

130 *Working Group Report (October 1986)*, *supra*, note 67 at 10, para. 51; *Working Group Report (October 1987)*, *supra*, note 74 at 41-42, para. 217 (Algeria, Bahrain, Egypt, Ivory Coast, Jordan, Ghana, Morocco, Oman, Iraq, the Libyan Arab Jamahiriya, Mauritania, Pakistan, Saudi Arabia, Senegal, Somalia, the Sudan, Syrian Arab Republic, the United Arab Emirates).

131 Cf. Nafziger & Bartel, *supra*, note 16 at 786-787.

132 Moreover, the "applicable law" of these countries is based on the "nuclear family concept". Lönnroth, *supra*, note 12 at 730. The countries of the Mahgreb argued that the "applicable law" should be the "personal law" of the migrants concerned. *Working Group Report (June 1985)*, *supra*, note 36 at 32-33, paras. 155, 157 (Morocco, Algeria and Tunisia).

encourage a substantial inflow of other persons into the country of employment. This approach is consistent with the argument from national sovereignty in chapter two that limitations upon uncontrolled immigration are justified if such immigration threatens the physical security of the state. On the other hand, from a communitarian standpoint, the family represents the individual's most important attachment and is fundamental to his or her well-being and to the well-being of society as a whole. Linda Bosniak maintains that confining the right to family reunification to legal migrants also conflicts with the basic human right tenet outlined in article 44(1):[133]

> States Parties, recognizing that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, shall take measures to ensure the protection of the unity of the families of migrant workers.

Unfortunately, the principle espoused in article 44(1) appears to have been "abandoned" in article 44(2), which deals with family reunification *per se*. Under article 44(2), states parties are under an obligation "to take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their [families as defined above]". This provision is phrased in terms of a "mere recommendation"[134] and may only be viewed as "guidance"[135] to states parties in the exercise of their discretion in deciding which members of the migrant worker's family, if any, to admit. The broad discretion accorded to states parties by article 44(2) would appear to permit the imposition of a number of conditions on family reunification such as the possession of appropriate accommodation and resources to maintain the family,[136] which were, in fact, expressly referred to in an earlier

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133 Cf. Bosniak, *supra*, note 41 at 759 (footnote 38).

134 Hasenau, *supra*, note 65 at 149.

135 *Working Group Report (October 1987)*, *supra*, note 74 at 42, para. 219 (Norway).

136 The French delegation interpreted the provision as permitting the state to set conditions on family reunification, namely in terms of duration of stay of migrant workers before their families arrive and in terms of housing and resources. *Ibid.* at 42, para. 222.

draft. Indeed, this draft also provided for family reunion as a qualified *right* of the migrant worker.[137] As drafting progressed, however, this right was eroded. Finally, article 44(3) imposes the duty upon states parties to "favourably consider" facilitating the reunification of migrant workers with *other* family members "on humanitarian grounds". Even this weak obligation was opposed during drafting by some states of employment which wanted to delete the word "favourably".[138]

In conclusion, to speak of a "right" to family reunification in UNCMW is a misnomer. In line with other international instruments in this area, with the exception of the EC regime, states parties are given ample discretion to regulate the entry of the members of a migrant worker's family. What is most troubling about the family reunion provisions in UNCMW, however, is that this discretion is afforded states to an extraordinary degree.[139] Article 44 is a significant step backwards in the efforts to realize this important right of migrants. At this stage in the development of international human rights standards protecting migrant workers and their families, the more progressive approach would have been to grant migrant workers the *right* to family reunion and to subject this right to strict control. Instead, article 44 constitutes a *carte blanche* provision, permitting states parties to regulate and restrict at will the entry of migrant workers' families. Consequently, the "compromise" between the protection of human rights and the principle of state sovereignty in this important area is effectively no compromise at all.

7.8 Right to Education

The right of migrant workers and their families to education, particularly the education

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137 *Working Group Report (June 1982)*, *supra*, note 79 at 21, para. 74.

138 *Working Group Report (October 1987)*, *supra*, note 74 at 43, para. 229 (United States, France and Australia). However, the delegations of the Netherlands, Ghana, Denmark, Morocco and Algeria insisted on retaining the term "favourably". *Ibid.* at 43, para. 227.

139 Article 12 of the EMW also accords states parties considerable discretion in applying the principle of family reunion, but this discretion is circumscribed and also subject to a number of safeguards. See *infra*, chapter seven, notes 192-201 and accompanying text.

of their children, is clearly outlined in UNCMW.

(a) Vocational Guidance and Training

Equality between migrant workers and nationals in respect of access to vocational guidance and placement services, vocational training and retraining facilities and institutions is guaranteed under articles 43(1)(b) and (c).[140] Because of their location in Part IV of UNCMW, these provisions in article 43 apply only to regular migrant workers. Under article 25, however, *all* migrant workers are afforded equal treatment with national workers in respect of, *inter alia*, other conditions of work and employment. Vocational guidance or training are not specifically enumerated in this provision, but the list in article 25 is not exhaustive and room is made for additional conditions of work and employment in accordance with "national law and practice". If a state party, therefore, considers vocational guidance and training as a necessary component of its labour legislation, illegal migrant workers may be encompassed by such legislation, although in practice this is highly unlikely.

Article 45(1)(b) extends the equality principle in respect of "access to vocational guidance and training institutions and services" to members of the family of regular migrant workers. The express application of equality in this area to migrant workers' families is a welcome addition at a time when migrant youth, particularly second- and third-generation migrants in Western Europe, face considerable difficulties in ascending the occupational ladder.[141] The extension of vocational guidance and training rights to members of the families

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140 The United States delegation objected to the application of equal treatment of migrant workers with nationals to "placement services" because workers temporarily admitted to the United States for a specific job are unable to benefit from such services. *Working Group Report (October 1987)*, *supra*, note 74 at 29, para. 146. This concern is reflected in article 62, which excludes the application of articles 43(1)(b) and (c) from the rights to be enjoyed by specified-employment workers.

141 *Infra*, chapter five, notes 84-85 and accompanying text. Only EC provisions and the EMW specifically refer to equal treatment between nationals and migrant workers' children in respect of vocational guidance and training (article 12 of EC Regulation 1612/68 and article 14(1) of the EMW respectively). See *infra*, chapter eight, notes 10-13 and 16 respectively and accompanying text. Such a right may also be implied from articles 6(1)(a)(i) of ILO Convention No. 97, articles 10 and 12(c) of ILO Convention No. 143 and from the provisions of the ESC. See *supra*, chapter three, note 237 and accompanying text and *infra*, chapter eight, note 3 and

of migrant workers was opposed, however, by the representative of France on the grounds that such entitlements might imply a right to work.[142] Article 45(1)(b) is qualified by the phrase "provided that requirements for participation are met", which was introduced by the United States delegation in order to exclude the application of the provision to the families of those migrant workers admitted temporarily to the United States, because such families might not possess authorizations to work.[143]

(b) Education of Migrant Children

Article 30 in Part III of UNCMW guarantees to migrant children "the basic right of access to education on the basis of equality of treatment with nationals". This right applies to *all* such children, irrespective of whether they or their parents are in an irregular situation. It applies to children of pre-school and school age, but is limited to access to "public" educational institutions only.[144] Although there was widespread support for the inclusion of a basic right to education in UNCMW, several states of employment were of the opinion that this right should have been confined to those in a regular situation and preferred to see the provision in Part IV.[145] In practice, however, the broad exercise of the right to education by the children of irregular migrants is unlikely, because of the dangers involved for these migrants in coming into contact with public authorities.[146]

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accompanying text.

142 *Working Group Report (October 1987)*, *supra*, note 74 at 45, para. 239. See also *supra*, note 75 and accompanying text.

143 *Working Group Report (October 1987)*, *ibid.* at 46, para. 244. There are no explicit references in UNCMW to the need to provide local language instruction to migrant workers, such as those found in ILO Recommendation No. 151 and the EMW, nor to equal treatment between migrants and nationals in respect of financial assistance for vocational training, as interpreted by the Committee of Experts and the Court of Justice of the European Communities under the ESC and EC law respectively. See respectively, *supra*, chapter three, note 239 and accompanying text and *infra*, chapter eight, notes 9 and 17 and accompanying text.

144 The restriction to "public" educational institutions was inserted as a result of a proposal by the United States representative. *Working Group Report (June 1987)*, *supra*, note 81 at 55, para. 292.

145 *Working Group Report (June 1982)*, *supra*, note 79 at 12, para. 36 (United States) and *Working Group Report (June 1987)*, *ibid.* at 55, paras. 289 (Germany), 290 (Australia) and 293 (France).

146 Hasenau, *supra*, note 65 at 146.

Under articles 43(1)(a) and 45(1)(b) in Part IV of UNCMW, the right to "access to educational institutions and services" on an equal footing with nationals is extended in general (and not just to children) to migrant workers and members of their families in a regular situation "subject to the admission requirements and other regulations of the institutions and services concerned".[147] It was stressed by the United States representative during drafting that equality in respect of "educational services" does not include financial assistance for education.[148] Such an interpretation is in line with other international instruments, with the exception of the EC regime, where the grant of scholarships and government assistance to foreigners is left to the discretion of states.

Finally, UNCMW obliges states of employment under article 45(2) to:

> 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.

The importance of integrating the children of migrant workers into the school system was stressed during drafting.[149] It was also understood that the phrase "where appropriate in collaboration with the States of origin" did not imply an obligation to collaborate, but left the initiative for any kind of collaboration to the discretion of the state of employment.[150] This provision resembles similar clauses in the EMW and in European Community law, analyzed in chapter eight, which seek to integrate the children of migrant workers into the educational system through emphasis on teaching them the language of the host state.

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147 This provision only applies to migrant workers, who continue to be migrant workers and does not enable them to change their status. *Working Group Report (October 1987)*, *supra*, note 74 at 28, para. 141 (Norway). Furthermore, it was stressed by the Finnish and Algerian delegations that the inclusion of the criterion of "admission requirements" concerning access to educational institutions "must not authorize discrimination against migrant workers as regards [these] requirements". *Ibid.* at 29, para. 144.

148 *Ibid.* at 28, para. 139.

149 *Ibid.* at 47, para. 251 (Morocco).

150 *Ibid.* at 47, para. 252 (Norway).

7.9 Cultural Rights

Under article 31(1) in Part III of UNCMW, states parties are under a duty to "ensure respect for the cultural identity of migrant workers and members of their families". The corresponding duty not to prevent migrants from "maintaining their cultural links with their State of origin" is also included in this provision. Article 31 applies to *all* migrant workers and their families, but as with the basic right to education, some states of employment preferred to see this provision transferred to Part IV of UNCMW.[151] The United States delegation was also opposed to the approach in article 31(1), which in their opinion placed a "positive obligation on states parties to protect the cultural rights of all migrant workers".[152] Any implication of a positive state duty in article 31(1), however, was considerably tempered by the introduction later in the drafting of a second paragraph (article 31(2)), which reads: "States Parties may take appropriate measures to assist and encourage efforts in this respect [namely, to preserve the cultural identity of migrant workers and their families and their ties with their country of origin]". The original draft proposal contained the word "shall" instead of "may",[153] but the "watering-down" of the obligation in this paragraph merely reflected the position that "it was the sovereign right of each State to decide whether to encourage and assist in the cultural activities of the migrant workers".[154] As chapter two pointed out, the required commitment from the state of employment to assist migrants in the maintenance and development of their cultures and languages conflicts with the aspiration of the national community to retain a distinctive cultural identity. Finally, the cultural rights of regular migrant workers and their families are buttressed by articles 43(1)(g) and 45(1)(d) which guarantee

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151 *Working Group Report (June 1982)*, *supra*, note 79 at 13, para. 42 (United States).

152 *Ibid.* The United States delegation proposed the adoption of similar wording to that found in article 15 of the ICESCR "in order to shift the initiative from the State to the migrant workers themselves, with the State in the secondary role of enforcing the rights concerned". *Ibid.*

153 This proposal was submitted by five sending countries. *Working Group Report (October 1987)*, *supra*, note 74 at 56-57, para. 302 (Algeria, Morocco, Senegal, Turkey and Yugoslavia).

154 *Ibid.* at 57, para. 306 (Finland). See also Hasenau, *supra*, note 65 at 148, who observes that article 31(2) does *not* oblige states parties to take any "concrete" measures.

them equal treatment with nationals of the state of employment in respect of "access to and participation in cultural life".

As shown in chapter three and in Part III of the thesis (chapter eight), the enjoyment of cultural rights by migrant workers and their families is incomplete in the absence of measures assisting children in the maintenance and development of their mother tongue and culture. This concern is addressed in articles 45(3) and 45(4). Under the former provision, states of employment are under a duty to "endeavour to facilitate for the children of migrant workers the teaching of their mother tongue and culture". Under the latter provision, these states "may provide special schemes of education in the mother tongue of children of migrant workers". In both cases, collaboration with the states of origin is advocated.[155] Neither provision appears to impose a positive obligation on states parties because both effectively constitute recommendations.[156] With regard to article 45(3), this opinion is supported by the cumbersome phrasing of the duty to "endeavour to facilitate" the teaching of the mother tongue and culture to the children of migrant workers.[157] Article 45(4) is clearly worded in terms of a recommendation, as evidenced by the use of the word "may" instead of "shall".[158]

Despite the weaknesses in the text, general opposition to the concept of obliging states of employment to provide teaching of the mother tongue and culture, as well as some instruction in that language, to the children of migrants, was also voiced by some countries of employment. The French representative observed that many children of migrant workers were

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155 As with the obligation in article 45(2) to "facilitate the integration of children of migrant workers in the local school system" and to teach them the local language, collaboration with states of origin appears to be optional only. *Working Group Report (October 1987), ibid.* at 47, paras. 258-259 (Norway and Finland with respect to article 45(3)). See also *supra*, note 150 and accompanying text.

156 See also Hasenau, *supra*, note 65 at 148.

157 According to the representative of the United States, article 45(3) does not impose an affirmative obligation on states parties to teach other languages, "but only to endeavour to make the teaching of such languages possible". *Working Group Report (October 1987), supra*, note 74 at 48, para. 264. This view was supported by the German delegation, which asserted that states of employment could not be required to provide the teaching of the mother tongue in all cases. *Ibid.* at 48, para. 265.

158 The original draft proposal submitted by the Yugoslav delegation contained the word "shall", but this was changed to "may" on a proposal of the Italian representative specifically to introduce the concept of special educational schemes in the mother tongue of children of migrant workers in the form of a recommendation rather than an obligation on states of employment. *Ibid.* at 48, para. 261.

provided with the teaching of their culture and mother tongue in France, but insisted that such instruction "was not a matter for States of employment to initiate, but rather it was exclusively for countries of origin to promote, often in co-operation with countries of employment".[159] Moreover, the German delegation was unable to accept article 45(4) on the basis that "it would open the door to the principle of national classes in educational establishments, a principle which was at variance with the concept of integration".[160] Nonetheless, articles 45(3) and 45(4) are a considerable improvement on other similar international standards existing in this area, particularly those found in article 15 of the EMW and EC Directive 77/486, which are examined in chapter eight of the thesis.

7.10 Political Rights

In contrast to other international standards concerned with the protection of migrant workers and their families, the political rights of migrant workers are relatively well defined in UNCMW. In principle, all migrant workers and their families, by virtue of articles 26 and 40, considered earlier in the section on "Trade Union Rights", have a right to participate in political activities in the state of employment. Article 26(1) recognizes the right of migrant workers and members of their families "to take part in meetings and activities of trade unions and of any other associations established in accordance with law, with a view to protecting their economic, social, cultural and other interests". Article 40(1) extends this right, with respect to migrants in a regular situation, "to form associations and trade unions in the State of employment for the promotion and the protection" of those same interests. The reference to "other interests" in both provisions appears to encompass "political activities". On the other hand, the drafting debate reveals that many countries, both sending and receiving states, wanted to exclude migrants

159 *Ibid.* at 48, para. 266.
160 *Ibid.* at 49, para. 268.

from participating in political activities in the host country.[161] Indeed, the original draft text of article 26 expressly excluded participation in "political parties and organizations".[162] In the light of this debate, therefore, an interpretation of UNCMW provisions which accords a right to general political activity to all migrants is hardly watertight. Nonetheless, states are permitted to restrict the rights of migrants in both articles 26(1) and 40(1) on the grounds of, *inter alia*, "national security" and "public order" or "*ordre public*" (articles 26(2) and 40(2) respectively).

To restrict the political activity of migrants is arguably inconsistent with the limited rights to political participation granted to them by articles 41 and 42 of UNCMW. These rights are located in Part IV and are therefore confined to migrants in a regular situation. Article 41(1) guarantees migrant workers and members of their families "the right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State, in accordance with its legislation".[163] As far as political participation by migrants in the state of employment is concerned, article 42 outlines two state obligations. Article 42(1) urges states parties to

> consider the establishment of procedures or institutions through which account may be taken, both in States of origin and in States of employment, of special needs, aspirations and obligations of migrant workers and members of their families and shall envisage, as appropriate, the possibility for migrant workers and members of their families to have their freely chosen representatives in those institutions.

Article 42(2) imposes a duty on states of employment to "facilitate, in accordance with their

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161 *Working Group Report (June 1982), supra*, note 79 at 6, para. 19; *Working Group Report (June 1987), supra*, note 81 at 43, para. 213 (Venezuela), at 43, para. 216 (Morocco, Yugoslavia and India) and at 44, para. 220 (Ghana). This approach resembles the somewhat outdated philosophy enshrined in article 16 of the ECHR. See *infra*, chapter six, notes 18-24 and accompanying text.

162 *Working Group Report (June 1982), ibid.* at 6, para. 20.

163 Article 41(2) imposes an obligation on the "states concerned... to facilitate the exercise of these rights" as appropriate and in accordance with their legislation. It is not clear whether a positive duty is implied by this provision requiring the state of employment to take active measures in order, for example, to set up voting booths within its territory. Both the United States and Norway disputed such an interpretation at the drafting stage. *Working Group Report (October 1987), supra*, note 74 at 34, para. 172.

national legislation, the consultation or participation of migrant workers and their families in decisions concerning the life and administration of local communities". The first obligation concerns the establishment of participatory mechanisms enabling migrants to articulate their interests to the state authorities in question. The second obligation is actually more substantial and may entail granting the possibility to migrants of electoral participation in the state of employment at the municipal level, despite the opposition of some countries to such a notion.[164] Any obligation to "facilitate" the participation of migrants in local elections, however, is subject to the "national legislation" of host states. The reference to "national legislation" provides those countries opposed to affording migrants electoral rights with the discretion to continue such policies.[165] The extent of these two obligations is confused somewhat by article 42(3) which declares that "migrant workers may enjoy political rights in the State of employment if that State, in the exercise of its sovereignty, grants them such rights". It is not clear whether this provision leaves the granting of *further* political rights to the discretion of states of employment or whether it is an additional restriction to the rights already accorded to migrants in the preceding two paragraphs.[166] Despite their limitations, the *potential* political rights which article 42 of UNCMW offers migrants in a regular situation "represent the highest standard reached in international instruments".[167]

In line with other international instruments relating to the protection of migrant workers, UNCMW also restricts, in article 52, their access to employment in the public

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164 For example, the representative of the United Kingdom expressed her reservation to article 42(2) if it were to be interpreted to mean granting migrant workers and their families the right to vote in local affairs in the state of employment. *Working Group Report (November 1982), supra*, note 74 at 15, para. 59.

165 The delegation of the Netherlands, however, a country which grants migrant workers the right to vote in local elections, did not deem it necessary to include any reference to "national legislation" in article 42(2). *Working Group Report (October 1987), supra*, note 74 at 36-37, paras 185, 191. It is not clear whether the reference to "national legislation" would permit limitations on the political rights of migrants by municipal by-laws.

166 For example, the representative of the Netherlands agreed to this provision, but only on the understanding that it did not limit the scope of article 42(2). On the other hand, the United States delegation understood the limitations on political rights of migrant workers in the state of employment provided by article 42(3) as applying to any political rights that might arise out of the previous paragraphs. *Ibid.* at 37, paras. 191 and 192 respectively.

167 G. Kojanec, "The UN Convention and the European Instruments for the Protection of Migrants" (1991) 25 IMR 818 at 826.

service. By virtue of article 52(2)(a), a state of employment may restrict for any migrant worker in a regular situation "access to limited categories of employment, functions, services or activities where this is necessary in the interests of this State and provided for by national legislation".[168] This provision is very similar to article 14(c) of ILO Convention No. 143, with the exception that the latter does not refer to "services" and "activities" nor to the added safeguard that the restriction must be "provided for by national legislation". All that can be ascertained from the text of article 52(2)(a) is that the restriction must be prescribed by law, apply to limited categories of employment, and be necessary in the "interests of [that] State". The drafting process provides no further clues as to the possible interpretation of this provision.

7.11 Residence Rights

(a) The Right of Residence

As with ILO and European standards relating to the protection of migrant workers and members of their families, UNCMW ties the right of residence to the employment of the migrant worker. This principle is clearly reflected in article 49(1) obliging states of employment that operate a dual-permit system to align authorizations of residence with work permits by stating that the former are to be issued for at least the same period of time as the latter.[169]

UNCMW also provides protection for migrant workers in a regular situation whose employment is terminated prior to the expiration of their work permits. This protection differs

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168 Under article 53(1), members of a migrant worker's family, in possession of an authorization of residence or admission that is without time limit or is automatically renewable, are subject to the same conditions as are applicable to the migrant worker in respect of free access to employment in accordance with article 52.

169 In principle, therefore, this provision is broader than article 9(2) of the EMW, which, in the case of work permits of an indefinite duration, only requires states parties to issue residence permits for at least one year. See *infra*, note 116 and accompanying text.

slightly depending on whether these migrant workers have the right to free choice of employment. In either case, however, migrant workers are not to be regarded as in an irregular situation nor are they to lose their residence authorizations if their employment is terminated (articles 49(2) and 51 respectively).[170]

With respect to migrant workers who have the right to free choice of employment, article 49(3) provides them with the right to stay in the state of employment "at least for a period corresponding to that during which they may be entitled to unemployment benefits" in order to enable them to find alternative work. The provision does not place an upper ceiling upon the time migrant workers may stay in the state of employment under these circumstances, despite proposals from some state delegations to limit the period of residence of migrant workers to a maximum of five months, as in article 9(4) of the EMW, or to ensure that this period does not exceed the duration of the work permit.[171]

Migrant workers in the state of employment who are not permitted to freely choose their remunerated activity are also provided, under article 51, with rights to seek alternative employment as well as "participation in public work schemes and retraining".[172] These rights, however, may only be exercised "during the remaining period of their authorization to work, subject to such conditions and limitations as are specified in the authorization to work".[173]

The rights accorded to migrant workers in articles 49 and 51 in respect of the

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170 Except where in the case of migrant workers who are not permitted freely to choose their remunerated activity in the state of employment, "the authorization of residence is expressly dependent upon the specific remunerated activity for which they are admitted" (article 51).

171 *Working Group Report (October 1987)*, *supra*, note 72 at 63, paras. 348-349 (Sweden and Norway). For a discussion on article 9(4) of the EMW see *infra*, chapter eight, notes 117-119.

172 In this sense, article 51 is broader than article 49(3) because this group of migrant workers, on loss of employment, is provided with the opportunity to seek retraining or other employment alternatives (such as access to public work schemes) rather than being made to rely merely on unemployment compensation. *Working Group Report (June 1988)*, *supra*, note 57 at 12, para. 56 (Finland). But article 49(3) should also be read in the light of article 54(1)(c) which ensures equal treatment between migrant workers and nationals in respect of "access to public work schemes intended to combat unemployment". See also *supra*, note 85 and accompanying text.

173 Hasenau, *supra*, note 65 at 142, observes that the migrant worker must be given a reasonable period of time within the duration of the work permit in order to make effective use of the right granted in article 51. Any other interpretation would render the provision meaningless. He suggests that a period of six months or the length of time during which a migrant worker is entitled to unemployment benefits might be sufficient.

termination of their employment should be read with article 52 regulating the free access of migrant workers to employment in the host country. The opportunities open to migrant workers to find alternative employment are restricted by the operation of this provision. In contrast, ILO standards, in particular article 8 of Convention No. 143, offer migrant workers in the host country greater opportunities to find alternative work because, in accordance with article 14(a) of the Convention, restrictions on their right to free choice of employment must be lifted after two years of residence or on completion of the first employment contract, if shorter in duration.[174]

(b) Right to Remain and to Naturalization

UNCMW accords no right to remain to migrant workers and members of their families. Nor is there any right to acquire naturalization or citizenship in the host country. An interesting provision, however, is article 50. Article 50(1) imposes an obligation on states parties, "in the case of death of a migrant worker or dissolution of marriage,... [to] favourably consider granting family members of that migrant worker residing in that State on the basis of family reunion an authorization to stay". In considering whether to grant such an authorization, the state of employment is to take into account "the length of time [family members] have already resided in that State". The objective of this provision is to ensure that family members of a migrant worker do not find themselves in an irregular situation in the event of his or her death or because of divorce.[175] The extent of article 50(1) is ambiguous, however. No time-limit is given specifying how long members of the migrant worker's family may stay in the host country. The drafting process reveals that the intention of the provision is not to grant an "absolute right" to family members of a migrant worker to remain in the state of employment,

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174 See also Hasenau, *ibid.* Consequently, ILO standards guarantee a considerable degree of security and stability to migrant workers and their families. *Ibid.* See also *supra*, chapter three, note 256 and accompanying text.

175 *Working Group Report (June 1988)*, *supra*, note 57 at 7, para. 24 (Netherlands).

but rather to encourage states "to consider granting such permission taking into account humanitarian grounds".[176] Article 50(2) confers upon those members of a migrant worker's family, who are not granted an authorization to stay, a "reasonable period of time" before departure "to enable them to settle their affairs in the State of employment".

(c) Expulsion and Procedural Protection against Expulsion

The provisions in UNCMW protecting migrant workers and their families against unfair and arbitrary expulsion are extensive. Article 22 in Part III enumerates a number of procedural safeguards to be followed before an expulsion decision may be valid and before it may actually be enforced. Because it applies to both regular and irregular migrants, article 22 is broader than corresponding procedural safeguards against the expulsion of aliens found in article 13 of the ICCPR and in article 1 of Protocol No. 7 to the ECHR, which apply only to aliens *lawfully* resident within the territory of states parties.

Article 22(1) prohibits collective expulsion adding that each case of expulsion is to be examined and decided individually. Article 22(2) asserts that a decision of expulsion must be taken "by the competent authority in accordance with law". Article 22(3) requires that the migrants in question receive notification of the decision in a language that they understand. If they so request, such a decision must be communicated to them in writing together with the reasons for the decision.[177] This latter requirement may be waived in exceptional circumstances on account of national security.

Article 22(4) provides migrants facing expulsion with the right to submit reasons against the expulsion and to have the case reviewed by a competent authority, unless the

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176 *Ibid.* at 9, para. 39 (the Canadian delegation supported by the representatives of Australia and Norway). The Finnish delegation expressed the view that the state of employment was not under a duty to favourably consider granting dependants their own right to remain in that state beyond the period allowed to the migrant worker. *Ibid.* at 10, para. 41. The location of article 50 between articles 49 and 51, considered above, would support such an interpretation.

177 During drafting, the United States delegation questioned whether this requirement constituted "a fundamental human right". *Working Group Report (June 1987), supra*, note 81 at 26, para. 107.

decision is a final one pronounced by a judicial authority or unless compelling reasons of national security require otherwise. This right is not strictly-speaking a right of appeal because it does not entitle migrants access to an administrative authority of higher instance or to a judicial body.[178] Article 22(4) also specifically provides migrants facing expulsion with the right to seek a stay of the decision pending review. Although the guarantee is only to "seek" a stay of expulsion, the provision offers migrants the opportunity to remain in the country pending review of the decision and hence is phrased in stronger language than other international instruments concerned with this question.[179]

If an expulsion decision, which has already been executed, is subsequently annulled, article 22(5) gives the person concerned the right to seek compensation and underlines that the earlier decision is not to be used to prevent that person from re-entering the state from which he or she was originally expelled.[180]

Article 22(7) permits migrant workers and their families subject to a decision of expulsion to seek entry into a state other than their state of origin and article 22(8) exempts migrants who are being expelled from "the costs of expulsion", with the exception of travel expenses. The costs in question relate to the costs of administrative and judicial procedures leading up to the expulsion order and the expense of ensuring that migrants leave the country.[181]

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178 Hasenau, *supra*, note 65 at 150. The original draft version of article 22(4) expressly granted migrants the right to "appeal" a decision of expulsion. The word "appeal" was substituted by "review" on the insistence of a number of state delegations. *Working Group Report (June 1987)*, *ibid.* at 27, paras. 117 and 120 (Norway and China). On the other hand, the Tunisian delegation strongly supported the concept of a right of all migrant workers and their families to have an opportunity to appeal against a decision of expulsion to higher (administrative or judicial) authorities. *Ibid.* at 27, para. 119.

179 For example, Council of Europe and EC standards which provide aliens and migrant workers procedural protection against expulsion do not require that the decision of expulsion be stayed pending review of the decision. See respectively *infra*, chapter eight, notes 144 and 155 and accompanying text.

180 The need for such a provision may be justified in the light of the remarks made by the Swedish representative during drafting, who noted that although compensation was possible under Swedish law in the event of wrongful expulsion, there was no general right of compensation. *Working Group Report (June 1987)*, *supra*, note 81 at 28, para. 127.

181 Hasenau, *supra*, note 65 at 151. This provision corresponds to article 9(3) of ILO Convention No. 143. During the drafting of article 22(8), however, the Norwegian and Australian delegations wished to place on record that, under their respective laws, the costs of physical removal from the country and the detention costs prior to departure constituted the responsibility of the persons concerned. *Working Group Report (June 1987)*,

Finally, articles 22(6) and 22(9) were included to protect rights which migrant workers and their families acquire out of past employment. The former provision provides a person facing expulsion with "a reasonable opportunity before or after departure" to settle any wage claims and other entitlements due to them and any pending liabilities.[182] The latter assures migrants that expulsion from the state of employment does not prejudice their acquired rights.

Article 22 is only concerned with procedural safeguards protecting migrant workers and their families from *arbitrary* or *unfair* expulsion. So long as the correct procedures are followed, states parties may expel migrants from their territory quite liberally. There are no provisions specifying the grounds upon which expulsion must be based.[183]

Article 56 in Part IV of UNCMW provides additional safeguards against the expulsion of migrant workers and their families in a regular situation. Article 56(1) maintains that migrants "may not be expelled from a State of employment, except for reasons defined in the national legislation of that State". These reasons, however, are not elaborated. An earlier draft of article 56(1) stipulated that migrants in a regular situation could only be expelled for reasons of "national security, public order (*ordre public*), or morals", but no agreement could be reached regarding the inclusion of these grounds. It was agreed, however, that article 56(1) should go beyond article 13 of the ICCPR, which is limited to procedural protection only. Hence the wording, "for reasons defined in the national legislation of the State", which implies the need to stipulate substantive grounds for expulsion.[184]

Article 56(2) provides that expulsion cannot be resorted to in order to deprive regular migrants "of the rights arising out of the authorization of residence and the work permit".

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ibid. at 32-33, para. 153.

182 The French delegation claimed that the words "after departure" in article 22(6) might be interpreted as giving the right to migrants to re-enter the territory of the state concerned in order to settle their affairs. According to the delegation, "such readmissions were within the exclusive sovereignty of states and should not be covered in an international instrument". *Working Group Report (October 1987)*, *supra*, note 74 at 6, para. 19.

183 *Working Group Report (June 1988)*, *supra*, note 57 at 36, para. 188.

184 *Ibid.* at 42, para. 219. See also Hasenau, *supra*, note 65 at 150. In addition, there is no reference in article 56(1) to "compelling reasons of national security", such as there is under article 13 of the ICCPR, permitting states to waive some of the prescribed safeguards against the unfair expulsion of migrants. Hasenau, *ibid.*

According to a number of state delegations, the intention of this provision is to ensure that expulsion is not motivated by the desire to deprive the migrant workers of their rights "as a result of the employment situation or other economic considerations".[185] This intention to prevent expulsion on economic grounds, however, is not defined clearly in the text.[186] Finally, article 56(3) urges states parties to take account of "humanitarian considerations and of the length of time that the person concerned has already resided in the State of employment" in determining whether to expel a migrant worker or a member of his or her family.

7.12 Omissions: Migrant Women and Youth

Although UNCMW is a comprehensive document, it fails to give adequate attention to the protection of two particular groups of migrants, namely migrant women and youth.

It is indisputable that UNCMW clearly protects women, as migrant workers and as members of the family of the migrant worker. It uses inclusive language throughout, and its provisions apply equally to both male and female migrant workers.[187] UNCMW also contains specific provisions protecting women as family members, notably article 45 relating to equality rights and article 50 which provides for the possibility for women as family members to stay in the state of employment if the migrant worker dies or in the event of the dissolution of marriage.[188]

Many of the concerns, however, affecting women as migrant workers and as members of the family of the migrant worker, as Shirley Hune explains, are not explicitly dealt with.

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185 *Working Group Report (June 1989)*, *supra*, note 39 at 6, para. 17 (Australia, Finland, Germany, Italy, Mexico, Morocco, Sweden and Yugoslavia).

186 The Algerian representative claimed that if the sponsors of the text of article 56(2) really wanted to give effective protection to migrant workers threatened with arbitrary expulsion for economic reasons, the provision should have been "worded more clearly so as to avoid any ambiguity". *Ibid.* at 7, para. 20.

187 Moreover, article 7 prohibits discrimination on the ground of, *inter alia*, sex with respect to rights provided for in UNCMW. Shirley Hune also observes that the Working Group only agreed to use inclusive language, namely "he or she", etc., throughout UNCMW towards the end of the drafting process. Originally, such language was only to be included in the provision concerned with definitions. Hune, *supra*, Introduction, note 138 at 809.

188 See generally Hune, *ibid.* at 812.

UNCMW fails to protect migrant women's particular vulnerability as victims of prostitution and of sexual as well as other forms of physical abuse. Nor does UNCMW recognize that women's and men's work is not the same and that women, as migrant labourers, are more likely to be found in employment, such as light manufacturing and "home" or "domestic" work, where there are generally no organized trade unions and no records to measure entitlements to social benefits. Because women nationals of the state of employment also tend to find work in large numbers in similar activities, guarantees of equal treatment between nationals and migrant workers in this case will not alleviate the situation of women migrant workers. Finally, UNCMW does not address the fact that women are the primary care-givers for children and that the lack of child care, together with the requirement that migrant women move in and out of the paid labour force to care for their children, leaves them in a vulnerable position. This position is exacerbated by the lack of guarantees in UNCMW for teaching the local language to adult migrants. Because women, as family members in particular, tend to be more isolated than their male counterparts, they have fewer opportunities to learn the language of the host state.[189]

UNCMW also neglects to give specific attention to the situation of migrant youth, or second- or third-generation migrants. As is observed in the first chapter of the case study on the regional protection of migrants in Europe in Part III of the thesis (chapter five), the primary social problem facing migrants as a whole in Western Europe largely concerns this group. Although migrant youth are either migrant workers themselves or fall into the category of "members of the family" of the migrant worker, UNCMW does not refer specifically to them, particularly in those areas which are most important to them, such as employment, education and naturalization.[190]

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189 See generally Hune, *ibid.* at 810-813.

190 See also Hune, *ibid.* at 813. For example, UNCMW contains no provisions facilitating naturalization in the state of employment. See *supra*, note 175 and accompanying text. See also *infra*, chapter five, note 80 and accompanying text.

8. Illegal Migrants

The question of illegal migration is at the forefront of UNCMW. Initially, the principal aim of UN General Assembly resolutions leading up to the establishment of the open-ended Working Group was to prevent the exploitation of labour through illicit and clandestine trafficking. Later, the resolutions also called for the protection of the human rights of illegal migrants in the country of employment.[191] This dual concern is reflected in the Preamble to UNCMW, particularly paragraph 13 which calls for action to be taken "to prevent and eliminate clandestine movements and trafficking in migrant workers, while at the same time assuring the protection of their fundamental human rights",[192] and is, as shown below, also prevalent in some of the substantive provisions.

8.1 Definition

UNCMW makes it clear that it applies to *all* migrant workers and their families, including those who are in an irregular situation. For the purposes of UNCMW, article 5(a) considers migrant workers and members of their families to be documented or in a regular situation "if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a Party". By virtue of article 5(b), migrant workers and members of their families are expressly considered as "non-documented or in an irregular situation if they do not comply with the conditions provided for in subparagraph (a)". Earlier drafts of this text contained a more extensive definition of illegal migrants.[193] The text, as it stands, provides a "subjective"

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191 *Supra*, notes 6 and 7 and accompanying text.

192 See also *supra*, Section 4.3, "Prevention of Clandestine Migration".

193 For example, one such draft defined migrant workers and their families as undocumented or in an irregular situation: "[I]f they have not been granted the authorizations of the State in whose territory they are that are required by law in respect of admission, [duration of] stay or employment [for economic activity] or if they have failed to comply with their conditions to which their admission, [duration of] stay or employment [or economic activity] are subject". *Working Group Report (October 1984)*, *supra*, note 39 at 11, para. 27.

definition, leaving it up to the law of the state of employment to determine whether migrant workers and members of their families are non-documented or in an irregular situation.[194] The provisions defining migrant workers and their families in articles 2 to 4 are all applicable to illegal migrants. Consequently, illegal migrants who "have been engaged in any remunerated activity" *at any time* in the host country are encompassed by the appropriate UNCMW provisions (article 2(1)) and the persons most closely related to the migrant worker are also protected (article 4).[195] Illegal non-resident migrant seafarers, however, are not protected (article 3(f)). On the whole, UNCMW actually protects most illegal immigrants in the territory of a state party, with the exception of those who have overstayed their visa authorizations but are not employed and those who do not meet a state's definition of "members of the family".[196]

8.2 The Drafting Debate

Throughout the drafting debate, various views were expressed regarding the extent of protection that should be afforded illegal migrants. These views have been analyzed and summarized by Linda Bosniak into four separate arguments.[197]

First, there were those countries which considered according substantial rights to irregular migrants as extremely "problematic" on the basis that providing more rights for this group encourages and even rewards violating a country's borders.[198]

The opposite approach was taken by those states which considered the protection of the

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194 In essence, the definition of irregular migrants rings similar to that provided by the Committee of Experts under the ESC, which defines the concept of "lawful residence" as "the possession [by migrant workers] of all papers legally required by the country of residence, including if need be, a residence permit and a work permit". This definition is also a "subjective" one. See also *infra*, chapter six, note 136 and accompanying text.

195 Bosniak, *supra*, note 41 at 740 (footnote 7).

196 Bosniak, *ibid.*

197 Bosniak, *ibid.* at 747-750.

198 This view was shared by the United States and Germany, who wanted, for example, to limit the definition of "migrant worker" only to those migrant workers in a regular situation. *Supra*, note 48 and accompanying text.

human rights of illegal migrants as a question of universal values and which stressed the recent movement within the international community extending special protection to vulnerable groups.

Another argument for according more rights to illegal migrants was based on instrumental as opposed to normative reasoning. It was contended that extending rights to illegal migrant workers would discourage employers from hiring such workers and improve conditions for domestic workers. Indeed, this reasoning is reiterated by paragraph 15 of the Preamble to UNCMW which maintains that "recourse to the employment of migrant workers who are in an irregular situation will be discouraged if the fundamental human rights of all migrant workers are more widely recognized".[199] These arguments for according extensive rights to illegal migrant workers and members of their families may be buttressed by further arguments, also referred to in chapter two, which partly shift the responsibility for irregular migration to host countries: the constant demand of states for cheap migrant labour; the history of political and economic exploitation of the countries from which illegal migrants come; and the contribution of illegal migrants to the national community.

Finally, the argument was advanced that strict controls on entry combined with effective enforcement measures to penalize those who exploit and hire non-documented migrants constituted the best method of preventing the phenomenon of clandestine labour. Such an approach, however, had to be combined with a human rights policy directed towards those who had already entered the state of employment without authorization. It is this approach which seems to have been adopted by UNCMW *vis-à-vis* illegal migrants.

8.3 Convention Policy: Rights for Illegal Migrants versus Prevention of Illegal Migration

The dual policy of UNCMW to protect the human rights of illegal migrants and at the

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199 See also Bosniak, *supra*, note 41 at 750.

same time to prevent the continuation of trafficking in, and the occurrences of, clandestine labour is evident throughout UNCMW. It has been argued that this policy, however, leads to a great deal of ambivalence in respect of the protection of this vulnerable group because it attempts to achieve a compromise between two essentially irreconcilable principles.[200] Chapter two of the thesis suggested that a possible implementation of this compromise might be to exclude illegal immigrants on arrival or as soon as possible thereafter, but to accord rights and greater protection to those non-documented workers who have resided and worked in a country for a considerable length of time.

Part III of UNCMW lists rights applicable to *all* migrant workers and members of their families. As outlined earlier, non-documented migrants receive express protection with respect to the following rights of concern to this thesis: rights to equal conditions of employment and work, trade union rights, social security rights, rights to health care, and rights to education and culture.[201] They are also afforded certain specific protections with regard to expulsion. All of these rights, however, are augmented and strengthened in Part IV of UNCMW in relation to migrants in a regular situation, to the extent that some of the protections afforded illegal migrants in Part III fall below generally recognized international human rights standards. For example, the trade union rights guaranteed to non-documented migrant workers appear to fall into this category, because these workers are not guaranteed the right to *form* trade unions.[202] In addition, Part IV of UNCMW also accords rights to regular migrants, which are denied to those in an irregular situation, mainly because these rights most affect the sovereign interests of the state of employment, namely rights to free choice of employment, family reunion and political participation.

The objective of preventing illegal migration is largely the concern of Part VI of

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200 See also Bosniak, *ibid.* at 741 and Nafziger & Bartel, *supra*, note 16 at 784.

201 Although non-documented migrants have no express right to housing under UNCMW, it is arguable that states parties are under an obligation to ensure that the living conditions of all migrant workers and their families are, at minimum, "sound" and "humane" (article 64). See *supra*, note 120 and *infra*, note 203.

202 *Supra*, note 103 and accompanying text.

UNCMW, entitled, "Promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families".[203] Under article 68, states parties, including states of transit, are obliged to "collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation".

The measures to be taken to this end by states of employment are to include the imposition of employer sanctions in order to "eliminate the employment in their territory of migrant workers in an irregular situation" (article 68(2)).[204] Article 68(2) further provides that the "rights of migrant workers *vis-à-vis* their employer arising from employment shall not be impaired by these measures". This provision came about as a result of proposals from the delegations of Italy and India, which were concerned that employers should not be able to escape their responsibilities with respect to the protection of the employment rights of illegal migrant workers on account of the existence of measures imposing employer sanctions.[205] It was emphasized during the drafting of article 68(2), however, that the rights protected were only those that had "already accrued at the point the employment was terminated owing to its illegality".[206] Article 68(2) does not define the extent of the employer sanctions to be imposed in contrast with article 6(1) of ILO Convention No. 143, which asserts that the sanctions to be applied are to consist of "administrative, civil and penal sanctions, which include imprisonment in their range".

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203 Article 64 obliges states parties to "consult and co-operate with a view to promoting sound, equitable and humane conditions in connection with international migration of workers and members of their families".

204 Opposition to a provision relating to employer sanctions was voiced by the representative of the United States, who argued that "the question of imposing sanctions on employers of undocumented workers was a matter exclusively within the jurisdiction of the State of employment and should not be discussed in [article 68]". *Report of the Open-ended Working Group on the Elaboration of an International Convention on the Protection of the Rights of All Migrant Workers and Their Families*, UN Doc. A/C.3/38/1 (16/6/83) at 34, para. 109.

205 *Working Group Report (October 1983)*, *supra*, note 48 at 9, para. 27.

206 *Working Group Report (October 1988)*, *supra*, note 124 at 25, para. 112. On this interpretation, the provision resembles article 9(1) of ILO Convention No. 143 which guarantees illegal migrant workers equal treatment with regular migrant workers in respect of "rights arising out of past employment as regards remuneration, social security and other benefits". For a discussion on article 9(1) see *supra*, chapter three, notes 280-284 and accompanying text.

Bosniak contends that the provision concerning employer sanctions and the exercise of UNCMW rights by illegal migrants are in conflict. The action of an employer, who dismisses a non-documented migrant worker on account of his or her participation in trade union activities (article 26(1)) in order to comply with sanctions laws, is contrary to article 25(1)(a), but it is in accordance with these laws. Even if the employer is found to have violated the non-documented worker's rights by "pretextual" use of sanctions against the employee, he or she is still precluded by these same sanctions laws from re-instating the worker. UNCMW does not provide an answer to such difficulties.[207] This example also illustrates the problems which illegal migrants face with respect to the exercise of their UNCMW rights. This question is considered in more detail in the following section.

Article 79 of UNCMW reiterates the principle of state sovereignty in matters of immigration:

> 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.

According to the United States representative, the purpose of this provision is to reaffirm "the well recognized principle that all States have the sovereign right to adopt and enforce their own immigration policies".[208] The insertion of article 79, however, was opposed by a number of state delegations on the basis that it was not indispensable to UNCMW.[209] The representative of Sweden added that article 79 may undermine the other provisions of UNCMW, and this is of particular concern given the need to ensure the protection of the fundamental human rights

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207 Bosniak, *supra*, note 41 at 761-762 (footnote 43).

208 *Working Group Report (June 1988)*, *supra*, note 57 at 5, para. 13.

209 *Working Group Report (November 1982)*, *supra*, note 74 at 5, para. 17; *Working Group Report (October 1987)*, *supra*, note 74 at 19, para. 94; *Working Group Report (June 1988)*, *ibid.* at 5, para. 10.

laid down in UNCMW which "always have to be respected by all States".[210] The scope of article 79 is ambiguous because of the debate during drafting over the interpretation of the word "admission". Some state representatives from "immigration countries" argued for a broad interpretation of "admission", claiming that the state's sovereign rights in respect of the "admission" of migrant workers and their families are not only concerned with border control, but also extend to questions of residence and expulsion.[211] Although the second sentence of article 79 appears to preclude such an interpretation, the Swedish concern, according to Bosniak, "attests to the enormous, almost talismanic power that assertions of state sovereignty have had often in the area of human rights for aliens".[212]

8.4 Problem of the Exercise of Convention Rights

Expressly granting rights to illegal migrants in a universal multilateral instrument is a considerable step forward in the international protection of this vulnerable group, but it does little to alleviate the practical problems which exist in respect of their exercise of UNCMW rights. This chapter has already referred to some of the obstacles these individuals may face if they attempt to enforce claims to rights to equal work and employment conditions and to the right of their children to education.[213] Attempts by illegal migrants to exercise their Part III UNCMW rights may be thwarted if they are subject to detection, prosecution and punishment as a result and, ultimately, expulsion. Indeed, the threat of detection and expulsion is usually sufficient to prevent these migrants from seeking redress for any violations.[214] There is no provision in UNCMW which guarantees any protection, for example some form of immunity

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210 *Working Group Report (June 1988)*, *ibid.* at 6, para. 20.

211 *Ibid.* at 5-6, paras. 13, 14, 15 and 17 (United States, France, Canada and Germany respectively). See also Bosniak, *supra*, note 41 at 756-757.

212 Bosniak, *ibid.* at 757.

213 *Supra*, notes 88 and 146 respectively and accompanying text.

214 See also Bosniak, *supra*, note 41 at 759. According to Bosniak, this is essentially the experience of many non-documented migrant workers in those states of employment which formally extend rights to them. *Ibid.* at 759-760.

from prosecution for violating immigration law, to illegal migrants who approach state authorities to complain about infringement of their rights under UNCMW.[215] Indeed, other UNCMW provisions seem to preclude such protection. For example, article 79, examined above, reaffirms state sovereign rights in respect of the admission of migrant workers and their families. Furthermore, article 34, strategically placed in Part III of UNCMW, also asserts that nothing in that Part operates to relieve migrants from "either the obligation to comply with the laws and regulations of any State of transit and the State of employment or the obligation to respect the cultural identity of the inhabitants of such States".

8.5 Regularization

There is no obligation in UNCMW to regularize the status of illegal migrants. Article 69(1) in Part VI imposes a duty on states parties to take appropriate measures to ensure that a situation whereby illegal migrants are present within their territory does not persist. Juxtaposed to this provision, however, is article 69(2) which provides that whenever states parties are considering the possibility of regularizing the situation of such persons they should take into account "the circumstances of their entry, the duration of their stay in the States of employment and other relevant considerations, in particular those relating to their family situation". Some states were of the opinion that this provision might imply an obligation to regularize irregular migrant workers.[216] Clearly, however, no such strict obligation is intended. The provision only requires that certain matters be taken into account once a state has decided to proceed with regularization or an amnesty programme for illegal migrants.

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215 Bosniak, *ibid.* at 760, observes that such provisions do exist in national legislation. For example, the *Immigration Reform and Control Act* of 1986 in the United States contains a "confidentiality" clause which maintains that information provided in an application for regularization of status by non-documented immigrants shall not be used for any other purpose than to make a determination on the application. Failure to apply this clause may result in criminal prosecution.

216 *Working Group Report (October 1988), supra*, note 124 at 27-28, paras. 122, 127 (Canada and Germany). Indeed, the representative of Germany argued that article 69(2) *explicitly* assumed that "regularization was an appropriate method of combatting irregular migration", whereas the first paragraph *implicitly* assumed the same.

The only other international measures that deal with the question of regularization are article 9(4) of ILO Convention No. 143 and paragraph 8(1) of ILO Recommendation No. 151. The former declares that nothing in the Convention shall prevent states parties from according the right to stay and to take up employment to illegal migrant workers, whereas the latter urges member states to arrive at a speedy decision whether the non-documented status of the migrant may be regularized or not. Neither of these provisions imply an obligation to regularize the situation of illegal migrants and are, therefore, similar to article 69(2) of UNCMW. Article 69(2) should also be contrasted with article 35 in Part III of UNCMW, which provides that nothing in that Part is to 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.

The reference in this article to Part VI makes it clear that the provision does not conflict in any way with article 69(2).[217]

The lack of a clear obligation in UNCMW to regularize the illegal status of migrant workers, particularly if they have resided in and contributed to the economy of the country of employment for some considerable time, or at least to move towards some gradual redefinition of their situation, further undermines their exercise of UNCMW rights in the absence of provisions providing them with protection against detection if they attempt to avail themselves of these rights.[218] This schism is a direct result of the compromise in UNCMW between the protection of human rights and the principle of state sovereignty, which is most prevalent in the

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217 The representative of Germany, who opposed article 69 as a whole on the additional grounds that it would pose problems of verification and for the functioning of the supervisory body entrusted with examining state reports, also contended that this provision conflicted with article 35. *Ibid.* at 26, para. 117.

218 Cf. Bosniak, *supra*, note 41 at 763. Bosniak argues that such an approach threatens "to take away with one hand what has been offered by the other", although she also recognizes that, in practice, constantly resorting to amnesties is a self-defeating exercise because it encourages further illegal entry and stay in the country, in expectation of yet further regularization. *Ibid.* and footnote 45.

area of illegal migration. Nonetheless, UNCMW constitutes a significant advance in the protection of the human rights of illegal migrant workers and their families in contrast with, for example, European instruments which, as indicated in chapter six, do not refer to this question. Indeed, it represents a meaningful effort, although by no means an entirely successful one given the constraints of state sovereignty, to implement the universal principles of human rights protection:

> The inclusion of undocumented migrants within the protective framework of the international human rights regime is also significant for what it reveals about the development of human rights law more generally. In an international society in which state sovereignty remains the paramount ordering principle, undocumented migrants present human rights law with an especially hard case. By promulgating this Convention, and by including the breadth of protections for undocumented immigrants that it has, the United Nations has demonstrated a notable, albeit partial, willingness to rise to the challenge of universality which the international law of human rights has posed.[219]

9. Supervision and Enforcement

9.1 Supervision

The application of UNCMW is the subject of Part VII. The body created for the purpose of reviewing the application of UNCMW is the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (article 72). The Committee is to consist of ten experts at the time of entry into force of UNCMW, and of fourteen experts after its ratification by 41 states.[220] These experts are to be of "high moral standing,

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219 Bosniak, *ibid.* at 765.

220 The size of the Committee was an issue of contention during drafting. Some state delegations, largely for financial reasons but also to ensure an effective implementation of UNCMW, preferred a small Committee consisting of a maximum of ten or twelve experts. Indeed, this approach was in line with the present preference in the UN for smaller supervisory committees. Under both the Rights of the Child and Torture Conventions, ten-member monitoring committees had been established. Other delegations were of the view that a larger Committee would do greater justice to the complexity of UNCMW and better ensure equitable geographical representation, including the maintenance of a balance between migrant-sending and -receiving countries. The ten- to fourteen-member Committee constituted a compromise solution between these two approaches.

impartiality and recognized competence in the field covered by the present Convention". They are to be nominated and elected by states parties to UNCMW to serve in their personal capacity for a four-year term.

The Committee's supervisory functions are threefold. It is to examine reports on the application of UNCMW submitted by states parties and it may also receive complaints from states and individuals. These functions are therefore similar to those established under other UN human rights instruments.

(a) State Reporting

Under article 73, states parties are under an obligation to submit reports on the "legislative, judicial, administrative and other measures they have taken to give effect to the provisions of the Convention". Initially, these reports must be submitted one year after the entry into force of UNCMW and thereafter every five years and whenever the Committee so requests. Under article 74(1), the Committee is to examine these reports and may transmit appropriate comments to the state party concerned. It may also request supplementary information when considering the reports and receive observations from state parties on any comments made.

(b) State Complaints

Article 76 provides for an inter-state complaints procedure involving the Committee. Under this provision, a state party, if it considers that another state party is not fulfilling its obligations under UNCMW, may bring the matter, in writing, to the attention of the latter. If the matter is not resolved within six months of the initial communication, either state may refer

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Working Group Report (October 1988), supra, note 124 at 36-40, paras. 172-175, 179, 181-188 and at 42-43, paras. 196-202.

it to the Committee. The Committee is to make its good offices available to the states parties concerned with a view to reaching a friendly settlement of the matter. The inter-state complaints procedure is optional and only becomes operational if both states concerned have made a declaration accepting it and if ten states parties in total have made such a declaration. During drafting, the view to make this procedure optional prevailed over that of those state delegations that preferred a mandatory inter-state complaints mechanism.[221] The former considered a mandatory procedure as inappropriate because of the complexity of UNCMW and also because it would discourage potential states parties from ratifying it.[222] The latter were of the opinion that such a procedure would ensure the effective implementation of UNCMW.[223] This debate is another example of the conflict between the principle of state sovereignty and the international protection of human rights that permeates UNCMW and its whole drafting process.[224]

(c) Individual Complaints

Article 77 of UNCMW provides for an individual complaints procedure. The Committee is empowered to receive communications from or on behalf of individuals who allege that their individual rights as established by UNCMW have been violated by a state party. Communications must meet a set of admissibility requirements in order to be accepted,

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221 *Working Group Report (June 1989), supra*, note 39 at 18-22, paras. 81-109.

222 For example, the representative of Germany did not consider such a mandatory procedure suitable for UNCMW, because it

> imposed a large number of sometimes very detailed obligations on States relating to the rights of migrant workers and their families in areas such as labour relations, employment, social security, residence and schooling. He also felt that a mandatory procedure would discourage potential States parties from ratifying the Convention.

Ibid. at 19, para. 85. See also the opinion of the United States delegation with regard to the latter point. *Ibid.* at 20, para. 89.

223 *Ibid.* at 20, para. 87 (Algeria and China).

224 Bosniak, *supra*, note 41 at 752, footnote 27.

including the exhaustion by the petitioner of all available domestic remedies.[225] The Committee must bring any communications submitted to it to the attention of the state party concerned, which is obliged, within six months, to submit to the Committee "written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by the State". The Committee shall then forward its views to the state party concerned and to the individual. As with state complaints, this procedure is optional. It applies only to those states parties that have made a declaration to this effect under article 77 and comes into force when ten states parties have made this declaration.

A proposal to include an individual complaints mechanism in UNCMW was introduced by the Dutch delegation during the drafting process in the latter stages of the second reading to complement the inter-state complaints procedure.[226] Further justification for a provision allowing individual communications was based on the practice established under other international human rights instruments, which had shown that individual complaints mechanisms had proved to be relatively efficient in contrast to inter-state grievance machinery which was rarely used.[227] Opposition to such a provision was voiced by a number of states of employment.[228] The representative of Canada supported the inclusion of a procedure allowing for the communication of individual complaints, but expressed concern that it would apply to a

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225 A communication is inadmissible if it is, according to the Committee, anonymous, an abuse of the right of submission of such communications, or incompatible with the provisions of UNCMW (article 77(2)). The Committee will also not consider communications that have been or are being examined under another procedure of international investigation or settlement (article 77(3)(a)). The Committee may waive the need to exhaust all domestic remedies by the petitioner if it considers that the application of the remedies is "unreasonably prolonged or is unlikely to bring effective relief to that individual" (article 77(3)(b)).

226 *Working Group Report (June 1989)*, *supra*, note 39 at 18 and 19, paras. 82, 92.

227 *Working Group Report (October 1989)*, *supra*, note 42 at 58, para. 274.

228 *Ibid.* at 59, paras. 278-279 (Germany, United States and France). The objections of the German representative were similar to those made in respect of the inter-state complaints mechanism. *Ibid.* at 57, para. 267 and *supra*, note 222. Originally, the MESCA grouping of countries was also opposed to an optional individual complaints procedure "in view of the broad range of the Convention's stipulations and having regard to the state of the law in the field". See "Reflections on a System for Supervision of the Application of the Convention", Working Paper submitted by Finland, Greece, Italy, Norway, Portugal, Spain and Sweden: Further Suggestions Relating to Proposals presented in Document A/C.3.35/WG.1/CRP.15 and Corr.1 and 2 (Part VI) on the Draft International Convention on the Protection of the Rights of All Migrant Workers and Their Families. This document is annexed to *Working Group Report (October 1983)*, *supra*, note 48 at 34, para. 8.

broad range of rights, "including those of an economic, social and cultural nature", which might give rise to problems of interpretation for the Committee and result in the Committee being "burdened with an overwhelming number of unsubstantiated, frivolous complaints". Nevertheless, because most state delegations supported the inclusion of such a procedure in UNCMW and because its opponents were unwilling to block the consensus, article 77 was added to the final draft.[229]

(d) Participation of the ILO

The question of ILO participation in UNCMW's supervision was the topic of a lively debate.[230] The opinions in this debate ranged from those of state delegations which wanted to transfer the whole supervision process to the ILO Committee of Experts on the Application of Conventions and Recommendations[231] to those which preferred that the ILO have no or very little say in the application of UNCMW.[232] In between were the MESCA countries which advocated a substantive role for the ILO within a distinct supervisory mechanism. Initially, this grouping of countries proposed that the Governing Body of the ILO be empowered to appoint six independent experts to an eighteen-member Committee. The rationale for this proposal was based on the special competence and experience of the ILO in the field of labour migration.[233] Because of the opposition to this proposal by those states which preferred a greatly reduced role for the ILO,[234] the MESCA countries submitted a compromise proposal

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229 The delegations of the Netherlands, Algeria, Mexico, Canada, Sweden, Australia, Finland and Morocco provided their express support for this procedure. *Working Group Report (October 1989)*, *ibid.* at 57-60, paras. 270-271, 273-275, 281-282. The Moroccan representative even advocated the adoption of a mandatory individual complaints mechanism. *Working Group Report (October 1989)*, *ibid.* at 59, para. 275.

230 See also Hasenau, *supra*, note 65 at 152-153.

231 *Working Group Report (June 1984)*, *supra*, note 48 at 14, para. 47 and at 17, para. 60 (United States).

232 *Ibid.* at 15, para. 48 and at 17, para. 56 (Morocco, Algeria, Tunisia and India).

233 "Reflections on a System for Supervision of the Application of the Convention", *supra*, note 228 at 34, paras. 10-11.

234 Arguments during drafting submitted against the participation of the ILO Governing Body in the appointment of a number of experts to the UN Committee were as follows: (i) UNCMW was to cover many matters considered outside the competence of the ILO; (ii) the ILO would be placed in a privileged position with respect to states as far as participation is concerned because states would only be permitted to appoint one expert

which was eventually accepted. Article 74(5) stipulates that the ILO "shall be invited by the Committee to appoint representatives to participate, in a consultative capacity, in the meetings of the Committee". The Working Group interpreted the words "consultative capacity" to have the same meaning as the words "without the right to vote".[235] Michael Hasenau has argued that the presence of non-voting ILO representatives in the Committee is unlikely to have much influence on that body's work. Indeed, a similar advisory role given to the ILO during the meetings of the Working Group did not prevent, according to this commentator, the adoption of watered-down provisions which jeopardize existing international labour standards.[236]

Further to its participation in the deliberations of the Committee, the ILO is provided with additional but less significant status with respect to UNCMW's application. Article 74(2) instructs the UN Secretary-General to transmit to the Director-General of the International Labour Office copies of state reports submitted by states parties and information relevant to the consideration of these reports in order to enable the Office to assist the Committee with any expertise relevant to the matters falling within the competence of the ILO. Under article 74(8), the UN Secretary-General is also specifically required to transmit the Committee's annual report to, *inter alia*, the International Labour Office.

9.2 Enforcement

UNCMW contains no formal enforcement mechanism beyond the inter-state and individual complaint procedures examined above. If a state party is found to have infringed

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each, whereas the ILO would be able to appoint several; (iii) the proposal for ILO participation constituted a departure from established practice in the supervision of a UN instrument; and (iv) the proposal might result in the appointment of persons from states which are not parties to UNCMW. *Working Group Report (June 1984)*, *supra*, note 48 at 15, para. 50. See also *Working Group Report (October 1988)*, *supra*, note 124 at 34, para. 167.

235 *Working Group Report (October 1988)*, *ibid.* at 62, para. 330.

236 Hasenau, *supra*, note 65 at 153. Böhning, *supra*, note 12 at 704-705, maintains that the aim of the ILO representatives will be to persuade the UN Committee that provisions in UNCMW, which are similar to ILO standards, should be interpreted and applied on the lines already drawn by the ILO independent Committee of Experts.

UNCMW, there are no binding sanctions available to the Committee to enforce against the state party concerned. The lack of a binding enforcement mechanism is a trait of all UN human rights conventions.

The only specific instructions with regard to enforcement are directed to states parties by articles 83 and 84, which respectively oblige them to provide an effective remedy and a review of that remedy to any person whose rights are violated under UNCMW and to adopt the legislative and other measures necessary to implement the provisions of UNCMW. Otherwise, those wishing to "enforce" UNCMW must rely on informal mechanisms, which are essentially limited to publicity and action by non-governmental organizations (NGOs). NGOs may play a significant role not only in obtaining acceptance of UNCMW, but also in making use of the supervisory procedures so as to put pressure upon states parties to comply with its provisions.

(a) Publicity

Article 73(4) of UNCMW obliges states parties to make their reports "widely available to the public in their own countries". This provision was introduced by Sweden late into the drafting process and received widespread support.[237] The clause, however, was opposed by the German delegation on the grounds that it dealt with a "politically sensitive" matter. A requirement, therefore, that states give broader dissemination to reports submitted under article 73 of UNCMW was unacceptable to the German delegation.[238]

(b) Action by Non-governmental Organizations (NGOs)

NGOs may play a vital role in ensuring state acceptance and effective compliance with

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237 *Working Group Report (June 1990), supra*, note 39, at 13, para. 49. See also Ansay, *supra*, note 35 at 844.

238 *Working Group Report (June 1990), ibid.* at 13-14, para. 50.

UNCMW.[239] The first priority for NGOs is to urge states to ratify UNCMW so that the minimum of 20 ratifications necessary for its entry into force are obtained as quickly as possible. Strategies for realizing this objective may concentrate on convincing those states of employment which presently secure some rights to migrants that their laws are already more or less in conformity with UNCMW or on encouraging sending countries, who are concerned with the living and working conditions of their nationals resident in receiving countries, to ratify UNCMW.[240]

Once UNCMW comes into force, NGOs may also play a considerable role in its supervision. Under article 77(1), NGOs may assist individuals by submitting communications to the Committee on their behalf alleging a violation of UNCMW's provisions.[241] Because few states have accepted the right of individual complaint under international human rights instruments,[242] the NGO role in the UNCMW supervisory system is more likely to be confined to the submission of state reports and to the Committee's examination of those reports. NGOs may involve themselves in the former by requesting governments to organize public hearings before finalizing their reports and then by stimulating political and public debate once these reports have been issued and publicized.[243] Article 74(4) gives NGOs a "quasi-formal" role in the Committee's examination of state reports. Under this provision, the Committee may invite, *inter alia*, "other concerned bodies to submit, for consideration by the

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239 The potential role of NGOs in this regard is considered more extensively in the following two articles: Hune & Niessen, *supra*, note 13 at 140-141 and Niessen & Taran, *supra*, note 18.

240 Niessen & Taran, *ibid.* at 862. Secondary strategies may include emphasizing the optional nature of some of UNCMW's provision as well as the clause permitting reservations (article 91).

241 See also Niessen & Taran, *ibid.* As a concrete example of such assistance, these authors note the success of a NGO-assisted communication by a Turkish woman resident in the Netherlands alleging a violation of her rights under ICERD, which resulted in the payment to her of compensation by the Dutch Government. Niessen & Taran, *ibid.* at 863, citing from the *Report of the Committee on Racial Discrimination*, UN Doc. A/40/18 (1985).

242 For example, Niessen & Taran observe, *ibid.* that out of 128 states parties to ICERD only fourteen have recognized the right of individual complaint. This figure has now risen to fifteen out of 130. Under the ICCPR, however, 60 out of 100 states parties have ratified the Optional Protocol to the Covenant which permits individuals to submit complaints to the Human Rights Committee. See also *supra*, chapter one, notes 133-134 and accompanying text.

243 *Ibid.* at 863-864. See article 73(4) with respect to publicity. *Supra*, notes 237 and 238 and accompanying text.

Committee, written information on such matters dealt with in the Convention as fall within the scope of their activities". The Working Group understood the words "other concerned bodies" to include NGOs in consultative status with the UN Economic and Social Council.[244] The response to this inclusion of NGOs was mixed. The German delegation preferred to explicitly exclude NGOs as a source of information arguing that many NGOS, whose activities centred on the international migration of workers, "were often inspired more by their partisan alignment than by their competence and objectivity and it was difficult to distinguish between such organizations". The Swedish representative, on the other hand, supported an explicit reference to NGOs in article 74(4) on the basis that NGOs carried out important work in the field of human rights all over the world and that UNCMW should include an express recognition of this contribution.[245] Notwithstanding article 74(4), which requires an invitation from the Committee, NGOs may submit their own reports to the Committee alongside those of states, as they do in practice to other international human rights supervisory bodies.[246] Finally, NGOs might wish to establish an "international watch committee" in order to coordinate advocacy and public pressure with regard to the supervision, application and implementation of UNCMW.[247]

The UNCMW supervisory mechanism is arguably weaker than that found within the ILO tripartite structure, although this may lead to its wider ratification in contrast to the poor record of ratifications under corresponding ILO instruments. Böhning writes in this regard:

> As far as the proposed system of supervision of the future convention is concerned, judging by the track record of the UN one can only be sceptical that it will match the thoroughness and effectiveness of the ILO's multi-stage and

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244 *Working Group Report (October 1988)*, *supra*, note 124 at 62, para. 330.

245 *Ibid.* at 61-62, paras. 323 and 324 respectively.

246 Niessen & Taran, *supra*, note 18 at 864.

247 Niessen & Taran, *ibid.* Indeed, such a committee was in the process of being established by the World Council of Churches and the Churches Committee for Migrants in Europe. See Hune & Niessen, *supra*, note 13 at 141.

multi-faceted system.

There is a danger, therefore, that the UN convention will be considered a "soft option" and ratified with more enthusiasm than is the case for ILO Conventions 97 and 143.[248]

The potential for the widespread ratification of UNCMW, however, will not hide the fact that it contains no binding enforcement mechanism, which is a weakness suffered by all UN Conventions. In this respect, therefore, UNCMW cannot compare with the enforcement machinery available under the ECHR and the European Community regime. Numerous references are made to this machinery in the case study in Part III of the thesis on the regional protection of the rights of migrants in Europe.

10. Conclusion

The initial reaction to UNCMW has been mixed. UNCMW contains a number of innovative features, which take it beyond what is already offered elsewhere with respect to the international protection of the economic, social, cultural, political and residence rights of migrant workers and their families. It constitutes the first comprehensive universal codification of migrants' rights. The only other universal approach is found within the ILO, which has limited competence to deal with such concerns as culture, education and political participation. UNCMW also contains the most comprehensive definition of "migrant worker" offered to date and clearly applies to *all* migrant workers and their families, including those in an irregular situation. It extends and strengthens a number of rights applicable to migrants in other international human rights instruments, such as the right to equal treatment with nationals in respect of work and employment conditions and the right to protection against arbitrary expulsion. It also creates new rights, such as limited political rights for documented migrants.

Another valuable characteristic is the participation of the ILO in the meetings of the

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248 Böhning, *supra*, chapter three, note 36 at 143.

supervisory body, which although less extensive and active than some states would have wished for, is nevertheless a concrete step towards the realization of productive cooperation between the UN and the ILO in the field of international migration.[249] It is true that UNCMW has encroached upon a sphere of competence, which has traditionally been reserved for the ILO. This does not mean, however, that the rights of migrants are any poorer. Although ILO standards for the protection of migrant workers and their families are in general stronger, the UN is more "visible", especially in the present international political climate. UNCMW, therefore, regardless of whether it receives rapid ratification, stands a chance, as a UN instrument, of remaining in the limelight longer.

UNCMW has the potential to become a "standard norm among the major human rights instruments".[250] It can constitute a framework for the adoption of other international instruments in this area, particularly bilateral agreements between labour-sending and labour-receiving countries.[251] In the European context, it may also serve as a minimum standard of treatment for migrant workers and their families from Eastern European and from Third World countries who, as indicated in Part III of the thesis, are not protected by other Council of Europe instruments, with the exception of the ECHR, or under the European Community regime.[252] More importantly, UNCMW offers a minimum standard of treatment for illegal migrants in Europe, who are ignored by analogous European standards.

The innovations that UNCMW affords with respect to the international protection of the rights of migrant workers and their families should not eclipse its failings. The tension between the principle of national sovereignty and the protection of human rights, evident in the text and pervasive throughout the drafting debate, is clearly resolved in favour of states with respect to certain crucial matters of concern to migrants affecting their living and working conditions in the host country. In particular, the "rights" to access to employment and to

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249 See generally Lönnroth, *supra*, note 12 at 735-736.
250 Cf. *ibid.* at 734.
251 Cf. *ibid.* at 735.
252 See also Kojanec, *supra*, note 167 at 829 and 818 respectively.

family reunification are reduced effectively to mere recommendations. The extent of protection offered with regard to these "rights" also falls below that found in other international instruments pertaining to migrants, particularly those of the ILO. Other rights in UNCMW which clearly fall below recognized international standards are trade union entitlements and the right of migrant workers and their families to adequate accommodation. Any such conflict between standards constitutes an impediment to the establishment of a uniform law on the international protection of migrants' rights.[253] Furthermore, there is no right to stay and to naturalization in UNCMW, which together with the weak protections offered in terms of access to employment and family reunification, prevent migrant workers from planning a secure life in the state of employment.[254] As mentioned earlier, UNCMW also neglects to adequately protect migrant women, as workers and as family members, and second- and third-generation migrants, who constitute a "sociological time-bomb" in many states of employment.[255] Finally, UNCMW, like many other UN human rights instruments, does not contain any binding enforcement machinery. Enforcement is dependent on NGO activity and national action.

Clearly, the success of UNCMW depends on action at the national level.[256] The more states that ratify it, the more likely it is that UNCMW will become a recognized and authoritative statement of the protection of migrants' rights. A number of obstacles to ratification, however, may be identified. First, explicit provisions granting substantive rights

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253 Hasenau writes, *supra*, note 65 at 153, with regard to the co-existence of UNCMW and ILO standards:

> The elaboration of the United Nations Convention has led to the existence of two distinct sets of standards on the rights of migrant workers and their family members, subject to separate supervisory mechanisms. Some provisions of the UN Convention fall below ILO standards, while others are more progressive and thus erode existing international labour standards.

Even if some standards are essentially similar, different interpretations by different supervisory bodies may lead to conflict. UNCMW offers no solution as to what is to be done in the event of such conflict. Nafziger & Bartel, *supra*, note 16 at 784-785. See also Hasenau, *ibid.*

254 Cf. Ansay, *supra*, note 35 at 842.

255 Hune, *supra*, note 187 at 813, citing from International Labour Office, *World Report*, vols. 1-2 (Oxford: Oxford University Press, 1987) at 74. See also *supra*, notes 187-190 and accompanying text.

256 See also Hune, *ibid.* at 814.

to illegal migrants and to the families of all migrants may hinder ratification.[257] Indeed, throughout the drafting process, both Germany and the United States opposed granting rights to migrants in an irregular situation.[258] Second, UNCMW is a complex and detailed instrument, and contains new wording, which in many cases departs from established human rights language.[259] Third, the recent proliferation of specific human rights conventions hardly facilitates the acceptance of UNCMW's sizeable text.[260] Technical questions alone, therefore, may prevent many states from speedily accepting its provisions. Fourth, some commentators have argued that the present international political and economic situation is hardly conducive to the protection of the rights of migrant workers and their families. The end of the Cold War, the developments in Central and Eastern Europe, the uncertain global economy, the continuing gulf between poor and wealthy nations and the growth of permanent migrant populations with different racial and cultural backgrounds has resulted in less sympathy for the condition of migrant workers and their families resident in developed countries of employment.[261] From the developing nations' perspective, the "new wind of liberalism" sweeping the world endangers the already precarious situation of certain vulnerable groups, such as migrant workers and their families, by failing to cater for their fundamental needs.[262]

As mentioned earlier, UNCMW will enter into force three months after twenty states have ratified the instrument (article 87). A second landmark is 41 ratifications, after which the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families will commence operating to its full fourteen-member capacity. Early UN projections were that 20 states would ratify UNCMW in 1991 or 1992 and that it would receive 41

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257 Lillich, *supra*, chapter one, note 2 at 76.

258 See *supra*, notes 48 and 198 and accompanying text.

259 Nafziger & Bartel, *supra*, note 16 at 787. These authors also point out, *ibid.* at 786-787, that ambiguous drafting may also "haunt" UNCMW's future, particularly in respect of article 2 (definition of "migrant worker") and article 4 (definition of "members of the family" of a migrant worker).

260 Cf. A. Boudahrain, "The New International Convention: A Moroccan Perspective" (1991) 25 IMR 866 at 867.

261 Hune, *supra*, note 187 at 814.

262 Boudahrain, *supra*, note 260 at 872.

ratifications by 1993.[263] These estimates are very optimistic considering the obstacles mentioned above and that a number of major countries of employment, such as Germany, the United States and the Gulf states, expressly asserted during drafting that they were unlikely to ratify UNCMW.[264] On the other hand, it is expected that the smaller MESCA countries, other states of employment and many labour-sending countries will ratify it.[265] UNCMW, however, will be considerably weakened if it is not endorsed by some major countries of employment. At present, its entry into force in the near future is wishful thinking. As of December 10, 1991, almost one year after UNCMW was adopted by the UN General Assembly, only two states, Mexico and Morocco, had signed it. No ratifications had been deposited with the UN Secretary-General.[266] This figure speaks volumes and shows that the application and implementation of UNCMW will require a Herculean effort on behalf of individual states, NGOs and the international community at large.

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263 Böhning, *supra*, note 12 at 706 (footnote 5), citing from *Programme Budget Implications of Draft Decision A/C.3/45/L.62*, UN General Assembly, UN Doc. A/C.5/45/60 (New York: UN, 1990). See also Hune & Niessen, *supra*, note 13 at 139.

264 It would appear from the deliberations in the Working Group that Germany, the United States, Australia, Japan and the Gulf states are unlikely to ratify UNCMW. See Böhning, *ibid.* and Hune & Niessen, *ibid.* Indeed, the German representative made this view categorically clear in the following statement:

> [The German] delegation maintained its substantive reservations with respect to the need for the adoption of a new convention on the protection of the rights of migrant workers, since, in its view, such protection was already amply afforded by the Universal Declaration of Human Rights and the International Covenants on Human Rights, which should not be diminished through the elevation of supplementary rights to the rank of human rights. As regards rights relating to employment, social security and the stay of migrant workers, the International Labour Organization was the competent organization. Apart from such substantive reservations,... [the] delegation had objections to a great many provisions adopted on second reading. The most important of these objections related to the fact that migrant workers in an irregular situation should become subjects of an international convention, that such a convention should accord them too many rights and that article 2, paragraph 2, included within the scope of the draft Convention categories of persons which... were not truly migrant workers. In the light of all those objections, it seemed highly unlikely that... Germany would ratify the Convention.

Working Group Report (October 1987), *supra*, note 74 at 66, para. 376.

265 According to Hune & Niessen, *ibid.*, in addition to MESCA countries, Canada, Venezuela, Argentina, Mexico, Morocco, Tunisia, Algeria and the Netherlands are likely to ratify UNCMW.

266 *Status of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, UN Commission on Human Rights, 48th Session, Report of the Secretary General, at 2, para. 3, UN Doc. E/CN.4/1992/38 (10/1/92).

PART THREE

CASE STUDY OF THE REGIONAL PROTECTION OF THE RIGHTS OF MIGRANT WORKERS AND THEIR FAMILIES IN EUROPE

INTRODUCTION

Chapters five to eight constitute a case study of international migration for employment in Europe and the protection of the economic, social, cultural, political and residence rights of migrant workers and their families on this continent.

Europe has been chosen as the most suitable region of study for a number of reasons. First, international migration for employment has a long history in Europe, particularly since the Second World War when it began to resemble other major population movements. Hence the volume of human beings involved is hardly insignificant. Second, there are a plethora of developed international standards in Europe applicable to the human rights of aliens and foreign workers, which have not yet been matched in other regions of the world. Third, some of these standards flow from a series of overlapping economic regional regimes which also provide for free movement of labour among member countries. The principal regime is the European Community (EC). Others include the Nordic Council and that operating between the Benelux countries. The study of these regional systems is a complex, but nonetheless interesting and challenging task. Fourth, the continent today is undergoing dramatic and far-reaching political and economic changes, especially in Central and Eastern Europe, which have led to the expected increase in labour migration from East to West. Finally, political and economic migrants from the Third World have always flocked to Western Europe. Given the ever-widening gulf between the countries of the developed North and the developing countries of the South, this migratory flow without doubt will continue.

Frequent references are made throughout the case study to the legal condition of

migrant workers and their families in some of the major European labour-receiving countries. Because the purpose of this case study, however, is to examine the protection of migrant workers and their families from a regional perspective, these references are only cursory and by no means purport to constitute a comprehensive treatise on the treatment of migrants in each country. It is recognized, however, that regional protection is not necessarily superior and that in some cases, national law or bilateral agreements between labour-sending and receiving states may afford migrant workers and their families greater protection. Indeed, examples of such superior protection are provided where appropriate.

Chapter five serves as an extensive descriptive and empirical introduction to the legal content of chapters six to eight by providing a brief overview of the history of European migration for employment, focusing mainly on the post-war era. Among the objectives of this chapter are to cast light upon the volume of migrant workers involved, the dynamics of past and present migratory movements, and to examine some of the causes of these movements. A description of a number of the principal characteristics of migrant workers and their families residing and working in Europe is also provided, especially those pertaining to some of the most disadvantaged groups of migrants in Europe, such as low-skilled workers, undocumented immigrant workers and migrant women and youth.

Chapters six to eight survey the multifarious international standards pursuant to the protection of alien migrant workers and their families in Europe. These standards should not be considered in isolation from universal norms, such as those contained in the International Bill of Rights examined in chapter one, and those exclusively focusing on migrants, such as the four ILO instruments and the recent UN *International Convention on the Protection of the Rights of All Migrant Workers and their Families* analyzed in chapters three and four respectively. Indeed, if the ratification record for the two ILO Conventions is an indicator of the concern European countries show for the protection of the rights of alien migrant workers and their families, the signs are not encouraging. Although most of the major European migrant-receiving countries have ratified the 1949 instrument, very few have ratified the 1975

Convention.[1]

Chapter six introduces the relevant treaties and systems in Europe for the protection of the rights of migrant workers and their families. It proceeds to analyze the various definitions of "migrant worker" that exist and the level of protection which illegal migrants may expect to receive. The final part of the chapter undertakes an examination of the way these treaties and systems implement the principle of equal treatment between migrants and nationals of the country of employment.

The focus of chapters seven and eight is the protection of the economic, social, cultural, political and residence rights of migrant workers and their families. Chapter seven is concerned with the protection of most economic and social rights, whereas chapter eight examines the rights of migrants to education, culture, political participation and residence, including naturalization and protection from unfair expulsion. The right to education is a social right, but it is considered together with the right to culture because of the interrelationship between the two insofar as the education of the children of migrants is concerned. This is not to say, however, that the right to education is not considered in its broader context, as indicated in earlier chapters of the thesis. It also encompasses workers' education, including the right to vocational training and language instruction. Rights to culture, political participation and residence in the country of employment are grouped together, because they are, at present, poorly protected in Europe, with the exception of provisions according a right to remain to EC nationals. Concrete steps have also been recently taken to grant EC nationals residing in other

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1 The ILO *Convention No. 97 of 1949 concerning Migrant Workers* has been ratified by the following European states as of January 1, 1992 (date of ratification in parenthesis): Belgium [27/7/53], Cyprus [23/9/60 - excluding the provisions of Annex I to III], France [29/3/54 - excluding the provisions of Annex II], Germany [22/6/59], Italy [22/10/52], Netherlands [20/5/52], Norway [17/2/55], Portugal [12/12/78], Spain [21/3/67], United Kingdom [22/1/51 - excluding the provisions of Annex I and III], and Yugoslavia [4/12/68 - excluding the provisions of Annex III]. The ILO *Convention No. 143 of 1975 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers* has been ratified by the following European states as of January 1, 1992 (date of ratification in parenthesis): Cyprus [28/6/77], Italy [23/6/81], Norway [24/1/79], Portugal [12/12/78], San Marino [23/5/85], Sweden [28/12/82], and Yugoslavia [19/6/81]. Italy is the only major migrant-receiving country in this group, although Norway and especially Sweden have admitted immigrant workers in the past. The UN Convention had not been ratified by a single state as of January 1, 1992. *Supra*, chapter four.

member states the right to full political participation in local elections.

In chapters six to eight, the principal instruments of protection examined are the human rights treaties adopted under the auspices of the Council of Europe (CoE). Alongside this discussion, however, comparative examples are also juxtaposed from the provisions (and from the case law interpreting these provisions) of the EC regime, which are far more advanced than the analogous CoE provisions. The liberal EC standards, however, operate in a uniquely integrated system, and are probably, for the time being at least, inapplicable outside of the EC context.[2] It is important to emphasize also that EC standards are applicable only to the most "privileged" class of migrants on the continent. Similarly, CoE instruments, with the exception of the *European Convention on Human Rights*, apply only to those nationals of states parties which have ratified the instrument in question. Therefore, the most vulnerable groups of migrant workers and their families in Europe, which are essentially the concern of chapter five, may, in most cases, only claim protection under the *European Convention on Human Rights* and under the ILO instruments examined in chapter three of the thesis, assuming of course that these apply.[3]

The advanced protection to EC nationals afforded by EC law should not, however, be considered in isolation, without reference to a global context. With a trend in the world today towards economic regionalization in the shape of free trading zones, EC standards are bound to gain importance as countries in other regions seek to bring down trade barriers and to move towards the progressive implementation of free movement of labour.

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2 T. Stein & S. Thomsen, "The Status of the Member States' Nationals under the Law of the European Communities" in Max Planck Institute of Comparative Law, ed., *The Legal Position of Aliens in National and International Law*, vol. 2 (Berlin: Springer Verlag, 1987) 1775 at 1776 [hereinafter *The Legal Position of Aliens*].

3 See also *supra*, note 1 and accompanying text.

CHAPTER FIVE

INTERNATIONAL MIGRATION FOR EMPLOYMENT IN EUROPE

> The fundamental flaw of postwar Western European guestworker policies was the implicit assumption that the economic man could be divorced for the purposes of public policy from the social, political, and cultural being.[1]

1. Introduction

This chapter sets the context for the subsequent examination in chapters six to eight of the regional human rights standards concerned with the protection of the economic, social, cultural, political and residence rights of alien migrant workers and their families living and working in Europe. To describe these standards and, above all, to assess their effectiveness, without a complementary descriptive and analytical appraisal of the historical, political and economic milieu in which international labour migration in Europe has taken place, would be a fruitless exercise, because it is this changing milieu which has to some extent determined the content of these standards.

The first part of this chapter provides a historical summary of international migration for employment in Europe since the late nineteenth century. It documents the various labour migratory movements that have occurred and are occurring, their economic, social and political context, the origin and destination of these movements and the volumes of migrants involved. There then follows a brief analysis of the exclusionary temporary worker phenomenon which these movements spawned and the recent trend towards the development of policies in Western Europe aimed at the permanent integration of migrant workers and their families into the economic, social and political fabric of host societies.

The second part of the chapter focuses on the migrants themselves: their motivations

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1 P.L. Martin & M.J. Miller, "Guestworkers: Lessons from Western Europe" (1980) 33 Industr. & Lab. Rel. Rev. 315 at 327.

and the reasons causing them to come to the country of employment; the various types of migrants, including the phenomenon of illegal migration in Europe; and their principal characteristics, namely their youthfulness and birth rate, their low occupational status and the situation of migrant women.

2. Historical Overview

International migration for employment in Europe is not a new phenomenon. Essentially, it may be divided into three distinct periods: 1880-1945, 1945 to 1973-74, and 1973-74 to the present day. Arguably, and as is discussed below, Europe stands on the brink of a new migratory phase as a result of the recent political and economic developments in the Central and Eastern parts of the continent.

2.1 Pre-1945

In the late nineteenth and early twentieth centuries, industrialization in Europe fuelled not only large-scale migration from rural to urban areas but migration across frontiers as well. Although these labour migrations, in keeping with the economic *laissez-faire* approach of the time, were mostly spontaneous and unorganized, France, Germany and Switzerland began recruiting migrant workers in an orderly fashion so as to prevent them from settling in the country of employment.[2] In France, there were already more than 1.1 million foreign migrant workers in 1886. By 1888, measures were adopted by the French Government requiring foreigners to register with the locality in which they resided. Post-First World War reconstruction necessitated the negotiation of bilateral contracts with Poland, Czechoslovakia and Italy for the employment in France of workers from those countries.[3] In 1907, there were

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2 S. Castles, "The Guest-Worker in Western Europe - An Obituary" (1986) 20 IMR 761 at 761.

3 Power, *supra*, Introduction, note 176 at 9. For a description of the French bilateral agreements with

almost 800,000 alien migrant workers in Germany, rising to 1.2 million in 1914, although a drastic reduction in the numbers of foreign workers took place during the inter-war years. These workers were mainly engaged in agriculture, industry, construction and mining.[4] An example of early restrictions was the employment of Poles in Prussia in the latter part of the nineteenth century which was structured so as to ensure that the workers returned home for a certain period each year (*Karenzzeit*). Otherwise, they would have acquired long-term settlement rights.[5] Nonetheless, settlement did occur and was followed by a policy of forced assimilation.[6] In 1910, 14.7 per cent of the Swiss population were foreigners, although restrictions on the employment of foreigners in Switzerland were only really introduced after the Second World War.[7]

International migration for employment in Europe was overshadowed significantly before 1939 by emigration overseas. It is estimated that in the period 1846-1932 approximately 34 million people emigrated to the United States, with 18 million and 10 million respectively emigrating from the United Kingdom and Italy alone.[8]

The period under discussion ended with the compulsory recruitment of foreigners by the Nazis to work in the German war industries. By 1943, there were 5.2 million such workers (*Zwangsarbeiter*) in Germany.[9]

Poland and Czechoslovakia see Lillich, *supra*, chapter one, note 2 at 34. The number of foreign migrants in France increased to 1.4 million in 1919, 2.5 million in 1926 and to 3 million (seven per cent of the population) in 1940. Power, *ibid.*

4 Power, *ibid.*

5 T. Hammar, "Economy and Ideology" in T. Hammar, ed., *European Immigration Policy: A Comparative Study* (Cambridge: Cambridge University Press, 1985) 239 at 241 [hereinafter *European Immigration Policy*]; Castles, *supra*, note 2 at 761.

6 Castles, *ibid.*

7 Power, *supra*, note 3 at 10. Another European country with a considerable intake of foreign workers during this period was Belgium where Poles and Italians were engaged in the coal mines of the Charbonnage. Power, *ibid.*

8 Hammar, "Economy and Ideology", *supra*, note 5 at 241.

9 Power, *supra*, note 3 at 9-10.

2.2 1945 to 1973-74

After the end of the Second World War, the combination of a number of factors resulted in a labour shortage in Western Europe. The population of this region, which was also aging, had been depleted because of losses suffered during the war, low fertility rates and emigration overseas. Post-war economic recovery was followed by rapid economic growth, which could only be sustained by the importation of additional labour.[10] The expanding economy also opened up employment opportunities further up the occupational ladder which were taken up by better educated domestic workers previously in blue-collar positions, leaving incoming migrants to carry out the least desirable, low-paid and hardest jobs.[11] This process led to the phenomenon whereby immigrant labourers were engaged not only to fill in labour shortages, but also to complement the national working class by performing the low-status, manual jobs which the latter had come to spurn:[12]

> Rising expectations fuelled by extended education and the mass media as well as a favourable labour market situation have led... to the growing aversion of large sections of Western Europe's workers to heavy, dirty, dangerous or unpleasant jobs and latterly also to jobs involving monotonous assembly-type work or inconvenient working hours; these kinds of jobs are classified... under the term "socially undesirable jobs". Foreign workers have been engaged to fill the vacancies.[13]

The migrants who came to fill these low-level vacancies fell into two categories. First, there were migratory flows from former overseas colonies: Algerians to France; West Indians,

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10 Hammar, "Economy and Ideology" *supra*, note 5 at 242-243; R.E. Krane, "Introduction and Overview" in R.E. Krane, ed., *International Labor Migration in Europe* (New York: Praeger, 1979) 1 at 3.

11 Hammar, *ibid.* at 244; Martin & Miller, *supra*, note 1 at 319.

12 R. Stavenhagen, "New Expressions of Racism in Europe" (1989) 70 International Foundation for Development Alternatives (IFDA) Dossier 47 at 51; S. Castles & G. Kosack, *Immigrant Workers and Class Structure in Western Europe*, 2nd ed. (Oxford: Oxford University Press for the Institute of Race Relations, 1985) at 489.

13 *Some Growing Employment Problems in Europe: Manpower Aspects of Recent Economic Developments in Europe*, International Labour Organization, Second European Regional Conference, Report II, Geneva, January 1974 (Geneva: International Labour Office, 1973) c. IV, "Migration of Workers as an Element in Employment Policy" 81 at 82 [hereinafter *Growing Employment Problems in Europe*].

Pakistanis, Bangladeshis and Indians to the United Kingdom; and immigrants from Surinam and the Netherlands Antilles to the Netherlands.[14] These newcomers usually held the citizenship of the host country, had the right to settle and were generally expected to do so.[15] The second category of migrants involved "temporary" workers. These workers were either recruited under official "guestworker" programmes and bilateral agreements or directly by private employers. They also arrived spontaneously to take up these tasks.[16]

"Temporary" workers came initially from Italy, Spain, Portugal and Greece. They were followed by migrant labourers from Yugoslavia, Turkey and North Africa and then from other parts of the Third World.[17] Italian workers travelled primarily to Switzerland and, to a lesser extent, to France, Germany and Belgium. Spanish workers and Portuguese workers went to France and Switzerland. Portuguese workers also constitute the largest national group in Luxembourg's foreign labour force. North African workers went mainly to France, and later to the Netherlands, Yugoslavs to the former Federal Republic of Germany and, to a lesser extent, to Austria and Sweden, and Turks to Germany in great numbers as well as to other Western European countries.[18] There were also more local movements; Finnish workers to Sweden and Irish migration for employment to the United Kingdom.[19]

International migration for employment in Europe continued relentlessly (with the exception of a short recession in 1966-1967) until the early 1970s. An exemplar of the dramatic rate of growth of migrant labour in this period was the situation in the former Federal

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14 Cf. R. Penninx, "International Migration in Western Europe Since 1973: Developments, Mechanisms and Controls" (1986) 20 IMR 951 at 953. There was also post-colonial migration to Portugal from Angola, Mozambique and Cape Verde, but these flows are poorly recorded. *Ibid.*

15 Cf. Castles & Kosack, *supra*, note 12 at 488. This form of migration was curtailed in the United Kingdom in 1962. *Ibid.*

16 D.G. Papademetriou, *supra*, Introduction, note 30 at 347; *Report to the Conference on Migrant Workers from the Mahgreb in the EC, supra*, Introduction, note 18 at 2, para. 1.3. Spontaneous migration was tolerated by France, which permitted migrant workers to enter the country, seek employment and, upon finding it, to apply for "regularization" of their status. Papademetriou, *ibid.*

17 Penninx, *supra*, note 14 at 957, 960.

18 T. Hammar, "Introduction" in *European Immigration Policy, supra*, note 5, 1 at 4-5; *SOPEMI 1990, supra*, Introduction, note 19.

19 Hammar, *ibid.* at 5; Penninx, *supra*, note 14 at 951, 955; J.S. Gundara, "Racism and the National Question in Western Europe" (1988) NQHR [SIM Newsletter Special No. 7 - New Expressions of Racism - Growing Areas of Conflict in Europe, Seminar, Amsterdam City Hall, October 19-21, 1987] 30 at 32.

Republic of Germany. In 1962, there were over 650,000 foreign workers in western Germany. This figure rose to 1.3 million in 1966, 2 million in 1970 and to 2.6 million by the middle of 1973.[20] It is estimated that there were approximately six million foreign workers in Western Europe in the early 1970s, accompanied by almost as many dependents.[21]

2.3 1973-74, 1980s and Beyond

(a) Western Europe

The energy crisis of 1973-74, brought on by the oil embargo, the increase in the price of oil and the subsequent recession represents the "turning point" for international labour migration in Western Europe. These years were followed by a long period of economic restructuring in Western European countries. Modernization eliminated many manufacturing jobs and labour-intensive production processes were shifted to low-wage Third World countries. Therefore, the demand for the kind of labour which migrants performed decreased.[22]

At the time of the energy crisis, some major labour-receiving countries, such as France and Germany, abruptly halted the influx of new migrant workers, whereas others, such as the United Kingdom, stopped immigration much earlier.[23] This "turning point" occurred in

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20 Power, *supra*, note 3 at 10; Castles, *supra*, note 2 at 768.

21 W.R. Böhning, "International Migration in Western Europe: Reflections on the Past Five Years" (1979) 118 ILR 401 at 401. The figure of six million does not include migrants from former overseas colonies nor illegal migrants. With respect to the latter group, the Committee of the World Council of Churches estimated that by the summer of 1973, there were half a million foreigners working illegally in Europe. Churches Committee of Migrant Workers, World Council of Churches, *Illegal Migration* (Geneva: World Council of Churches, 1974) at 6, cited by Power, *ibid.* at 24.

22 Hammar, "Economy and Ideology", *supra*, note 5 at 246; Castles and Kosack, *supra*, note 12 at 489. Contrary to many forecasts, however, few nationals after the 1973-74 economic downturn replaced migrants in these lowly occupations. *Report to the Conference on Migrant Workers from the Mahgreb in the EC*, *supra*, note 16 at 3, para. 1.5.

23 Cf. Hammar, "Introduction", *supra*, note 18 at 6; E.-J. Thomas, "Summing-up and Points of Comparison" in E.-J. Thomas, ed., *Immigrant Workers in Europe: Their Legal Status, A Comparative Study* (Paris: UNESCO Press, 1982) 211 at 215 [hereinafter *Immigrant Workers in Europe*]. Indeed, the "turning point" in Switzerland and Sweden occurred before 1973-74, in 1970 and 1972 respectively. Hammar, *ibid.* In

France, Germany and Sweden without any public debate, parliamentary discussion and without any formal, official decisions.[24] The sudden halt to migration for employment, however, was not a result of pure economics alone. Rosemary Rogers has speculated that the "stop" on migrant workers would have been imposed even if there had been no economic downturn in Western Europe on account of the social and cultural costs of labour migration which had begun to surface.[25]

Migrant workers were not returning as had been the earlier assumption of the original guestworker programmes. Long-term resident migrant workers were unwilling to risk returning home as this would have amounted to an irreversible decision given the difficult economic situation. They resolved, therefore, to bring their families, a process which made their settlement in host countries more likely.

Although the principle of family reunification is incompatible with the philosophy of a temporary migrant worker programme, it was a fact from the very beginning of post-war labour migration to Europe. The economic boom of the 1960s and the subsequent competition for labour, together with the interest of employers in a stable workforce, led to increased residence and family reunification rights.[26] The economic situation in the 1970s was very different, but it resulted in a steady and continued increase in family reunions as migrant workers, particularly those who had acquired permanent residence rights, decided to remain in host countries and to have their families join them. Moreover, migrant workers refused to accept "the denial of the basic human right of living with their wives, husbands and

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Denmark, work permits were no longer issued to new applicants from 1970, with only a brief three month resumption in 1973. E. Singer, "Migrant Workers' Rights in Denmark" (1990) 2 International Movement Against All Forms of Discrimination and Racism (IMADR) Yearbook 25 at 27-28. The "stop" on migrant labour was declared in Germany in November 1973 and in France in July 1974. Castles, *supra*, note 2 at 769 and 764 and T. Hammar, "The Policymaking Process" in *European Immigration Policy*, *supra*, note 5, 277 at 284-285. In the United Kingdom, this process had begun much earlier with the gradual elimination of the rights of "post-colonial citizens", whereas in the Netherlands, immigration was only reduced from January 1970, but no serious restrictions on immigration were imposed until 1980. Thomas, *ibid.*; Hammar, "Introduction", *ibid.* at 6.

24 Hammar, "Introduction", *ibid.* at 6; Hammar, "The Policymaking Process", *ibid.* at 284-285.

25 R. Rogers, "Post-World War II European Labor Migration: An Introduction to the Issues" in *Guests Come to Stay*, *supra*, Introduction, note 177 at 15.

26 Castles, *supra*, note 2 at 771; Castles & Kosack, *supra*, note 12 at 488.

children".[27] Economic considerations and rights, therefore, combined curiously to ensure that family reunification in Europe became a major concern.

Migrants began to strain the social and educational infrastructures of receiving states. The permanent settlement of migrant workers and their families in these states was imminent and undoubtedly formed a significant factor in the subsequent draconian restrictions on labour immigration.[28]

The post-1973 recession also led to a growth of migrant unemployment. Before the recession, the unemployment rate among foreigners was lower than that of nationals of host countries, but it gradually increased to twice the unemployment rate for nationals. Moreover, unemployment had a disproportionate effect upon certain national groups, such as the Turks and those from the Mahgreb region of North Africa, and upon migrant women and youth.[29] A period of return migration resulted. It is estimated that at least 1.5 million citizens of Mediterranean countries left for their homelands. The bulk of the returning migrants departed during 1974-76.[30] The return flows of migrants, especially to Italy, Spain, Portugal and Greece, were bolstered by the steady improving economic and political conditions in these traditional sending countries.[31] Return rates, however, were much lower for migrants from other countries, such as those in North Africa and Turkey, where the economic outlook was significantly bleaker.[32]

Countries of employment tried in vain to encourage return by a variety of incentives,

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27 Castles, *ibid.*

28 Cf. Hammar, "Economy and Ideology", *supra*, note 5 at 247-248; Castles, *ibid.* at 773-774; Castles & Kosack, *supra*, note 12 at 488. According to Eric-Jean Thomas, the system of free movement for workers within the European Community, which became a reality in the early 1970s, was a major reason for the halt to migration from non-EC countries. "Summing-up and Points of Comparison", *supra*, note 23 at 214. Later Thomas adds: "It is one of the paradoxical aspects of this (restrictive) trend that, at the same time as states were closing their frontiers to migratory flows, they were opening them to nationals of member countries of regional groupings". E.-J. Thomas, "Conclusion" in *Immigrant Workers in Europe*, *supra*, note 23, 239 at 241.

29 Thomas, "Summing-up and Points of Comparison" *ibid.* at 230-231.

30 Böhning, *supra*, note 21 at 404. According to Jonathan Power, *supra*, note 3 at 9, the Italian Federation of Migrant Workers estimated that about 250,000 Italian workers returned home in the first five months of 1975 from the former Federal Republic of Germany and Switzerland alone.

31 Penninx, *supra*, note 14 at 952, 957.

32 *Ibid.* at 960, 969-970.

which are still continuing today. One of the most blatant is the offering of departure bonuses to those wishing to return.[33] For example, France introduced a departure bonus programme in 1977 which was discontinued in 1980. It was found that this premium on return was only claimed by those who had made up their minds to return in any case and that it did not generally serve to increase the number of returning migrants.[34] Other incentives include the establishment of development schemes in sending countries and reintegration assistance programmes. The former aim to stimulate development in sending countries by the creation of employment opportunities and the provision of legal and technical assistance.[35] The latter focus on individual migrants with a view to facilitating their successful re-integration into their home countries through training programmes in the host country and assistance to migrants in setting up their own businesses in the country of origin.[36]

Returning migrants, however, find it difficult to re-integrate successfully into their home societies. Not only are the living and working conditions generally inferior to those in the former country of employment (although in relative terms they may be better), but migrants are also unwilling to perform the kind of industrial work which they performed in that country, preferring employment in the service sector instead.[37] In addition, they are psychologically ill-

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33 Papademetriou, *supra*, note 16 at 344; Penninx, *ibid.* at 966.

34 Penninx, *ibid.*, citing A. Lebon, "Return Migration from France", Paper presented to the first European Conference on International Return Migration, Rome, 1981, at 37; Rogers, "Post-World War II European Labor Migration: An Introduction to the Issues", *supra*, note 25 at 18. In 1983-84, the former Federal Republic of Germany flirted briefly with a cash incentive-to-return scheme. See Plender, *supra*, chapter three, note 48 at 316; Penninx, *ibid.* According to Penninx, however, this scheme suffered from the same pitfalls as the French programme in that only those migrants who had already decided to return profited from the arrangement. The same author also refers to a small-scale Belgian premium-based return programme. *Ibid.* Repatriation allowances were also offered by the Netherlands. *Report to the Conference on Migrant Workers from the Mahgreb in the EC*, *supra*, note 16 at 3, para.1.5, citing from J. Condé, "Measures to Encourage Return Migration and Reintegration of Returned Migrants in their Home Country" in OECD, *The Impact of International Migration on Developing Countries* (Paris: OECD, 1989) at 326.

35 Penninx, *ibid.* at 965; Plender, *ibid.*, with reference to German development schemes in migrant-sending countries.

36 Penninx, *ibid.* Papademetriou, *supra*, note 16 at 362, outlines a number of problems connected with re-integration assistance programmes: the funds provided are usually insignificant; the total number of trainees has also been negligible; many graduates of such schemes refuse to return to their home countries; inadequate financing has prevented the implementation of projects in the country of origin; and the latter country's institutions have made little effort to assist emigrant-led employment-generating investments. In 1984, France introduced a Resettlement Aid Scheme and since then over 70,000 persons have taken advantage of this scheme. *SOPEMI 1992*, *supra*, Introduction, note 19 at 60.

37 *Growing Problems in Europe*, *supra*, note 13 at 98. See also Papademetriou, *ibid.* at 344, with respect

prepared for return after experiencing the temptations of a consumer society.[38] The migrants that did return were the manual labourers who could offer little in terms of skills and training to their home countries,[39] and, moreover, they returned at a time of substantial unemployment, thus escalating the spiral of hardship at home.[40] Indeed, as Roger Böhning remarked in 1979, it is this process of return migration which best reflects the inherent inequality of the labour migration system:

> The period since the oil crisis reveals starkly the inequity of the migration system, both at the level of the individual, where the recent migrants and the unskilled suffered most from unemployment and profited least from the exemptions to the general recruitment freeze, and at the national level, where the rich and powerful countries shifted a burden onto the poor and weak countries which they should rightfully have borne themselves.[41]

Although migrant workers did return in substantial numbers to their home countries and the relative proportion of foreign workers declined, the total *foreign population* in Western European countries continued to rise, largely because of an increase in family reunions.[42] Statistics enumerating the total volume of migrant workers, including EC workers, and the total foreign populations, including EC nationals, in a number of major European countries of employment between 1980 and 1990 are provided in Tables A and B below.

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to the latter point. The ILO observed back in 1973 that the preference of returning migrants for marginal jobs in service activities "is a cultural phenomenon which requires a massive and sustained campaign by governments to popularize industrial employment, coupled perhaps with disincentives relating to the establishment of less productive activities in the tertiary sector". *Growing Problems in Europe*, *ibid.*

38 Power, *supra*, note 3 at 13. See also *supra*, Introduction, note 136 and accompanying text.

39 Papademetriou, *supra*, note 16 at 344; Krane, *supra*, note 10 at 9. Indeed, it is the most highly skilled, most experienced, best-trained and best-adapted workers that remain in the host countries. Krane, *ibid.*

40 Krane, *ibid.* at 8. Krane refers to the hardships that return migration may cause for home countries. It places additional strains on the already overburdened social welfare systems and causes a significant reduction in hard-currency revenues in terms of migrant workers' remittances. Indeed, if return migration to one particular country were ever to reach massive proportions, economic and political instability would probably result. See also *supra*, Introduction, note 136 and accompanying text.

41 Böhning, *supra*, note 21 at 404.

42 Castles, *supra*, note 2 at 771. E.-J. Thomas, "Migration in Europe" in A. Dummett, ed., *Towards a Just Immigration Policy* (London: Cobden Trust, 1986) 43 at 45. Thomas notes, *ibid.*, that between 1975 and 1980 the relative proportion of foreign labour declined in France by 16 per cent, in Germany by 19 per cent and in the Netherlands by 29 per cent.

TABLE A
Migrant Labour in Western European Countries, 1980-1990
(Figures in Thousands) (a)

COUNTRY	1980	1985	1990	EC workers (1990)
Austria	178.4	148.3	236	...
Belgium	...	179.7	196.4 (b)	...
France	1458.2	1649.2	1553.5	712.2
Germany (c)	2115.7	1823.4	2025.1	...
Luxembourg (d)	51.9	55	76.2 (b)	71.9 (b)
Netherlands (d)	188.1	165.8	200	93.0
Sweden	234.1	216.1	257.9	...
Switzerland	501.2	549.3	669.8	476.1
United Kingdom	...	808	933	473

... Data unavailable.
(a) Includes the unemployed except in Belgium, Luxembourg, the Netherlands and the United Kingdom. Frontier and seasonal workers are excluded unless otherwise stated.
(b) Figures for 1989.
(c) Refers to western Germany.
(d) Frontier workers included.

TABLE B
Foreign Population in Western European Countries, 1980-1990
(Figures in Thousands)

COUNTRY	1980	1985	1990	EC workers (1990)
Austria	282.7	271.7	413.4	...
Belgium	878.9	846.5	904.5	550.4
Denmark	101.6	117	160.6	...
Finland	12.8	17	26.3	...
France	3714.2 (a)	3752.2	3607.6	1308.9
Germany (b)	4453.3	4378.9	5241.8	1325.4 (c)
Italy	298.7	423	781.1	...
Luxembourg	94.3	98	104 (c)	...
Netherlands	520.9	525.5	692.4	168.4
Norway	82.6	101.5	143.3	40.6
Sweden	421.7	388.6	483.7	...
Switzerland (d)	892.8	939.7	1100.3	760.2
United Kingdom	...	1731	1875	889

... Data unavailable.
(a) Figure for 1982.
(b) Refers to western Germany.
(c) Figure for 1989.
(d) Seasonal and frontier workers excluded.

Sources: OECD, *Trends in International Migration - Continuous Reporting System on Migration - SOPEMI 1992* (Paris: OECD, 1992).
OECD,*Continuous Reporting System on Migration - SOPEMI 1990* (Paris: OECD, 1991).

The period under discussion reflected, therefore, considerably different trends to those taking place before the economic crisis of the early 1970s. The composition of the foreign population in Western European countries was undergoing a dramatic restructuring on account of the increased inflow of migrant workers' dependents.[43] The temporary sham of guestworker programmes was finally exposed. Despite the continuing difficulties connected

43 Thomas, "Summing-up and Points of Comparison", *supra*, note 23 at 216.

with naturalization,[44] many years of residence in countries of employment had given migrant workers permanent residence status and rights.[45] Host countries were no longer faced with a foreign migrant labour force destined to return home, but with developing new ethnic minorities which had to be integrated into the present fabric of the state.[46] This remains the situation today.

(b) Eastern Europe

An aspect of international labour migration in Europe which has received scant attention in the literature is the employment of foreign workers in the former socialist countries of Eastern Europe. Initially, these movements concerned the short-term employment of specialized technical staff on construction projects in other socialist countries and transfers of groups of workers with a view to the acquisition of advanced training.[47] Later, labour shortages in Eastern Europe led to the establishment of special "guestworker" arrangements with more distant socialist countries. Rough estimates for 1990 placed the number of foreign workers in Eastern Europe at anywhere between 200,000 and 300,000.[48] With the advent of democracy in the formerly communist Eastern Europe, information concerning the existence and situation of these workers has been brought to public attention. For example, the dismal

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44 In most Western European countries, naturalization is exceedingly difficult to obtain, even taking into account recent liberalization in this area. See the section on residence rights in chapter eight, *infra*.

45 Cf. T. Hammar, "Immigrant Policy" in *European Immigration Policy*, *supra*, note 5, 263 at 263.

46 See generally S. Castles, H. Booth & T. Wallace, *Here for Good: Western Europe's New Ethnic Minorities* (London: Pluto Press, 1984). See also Castles & Kosack, *supra*, note 12 at 505; Castles, *supra*, note 2 at 771; and S. Castles, *Migrant Workers and the Transformation of Western Societies*, Western Societies Program, Occasional Paper No. 22 (New York: Center for International Studies, Cornell University, 1989) at 107.

47 *Growing Employment Problems in Europe*, *supra*, note 13 at 106.

48 It has been estimated that there are about 200,000 contract workers from developing countries in Eastern Europe. Some of these have already moved to Western Europe, while others have expressed the desire to remain in the newly democratic countries of the East. Refugee Policy Group (RPG), The North American-European Dialogue on Politics and Migration, *Changing Migration in and from Eastern Europe and the Soviet Union*, Summary of the Third Meeting in Vienna, July 16-17, 1990 (Washington/Geneva: RPG, 1990) at 10. More detailed figures would suggest that there were closer to 300,000 migrant workers in Eastern Europe in 1990. These workers came mainly from Vietnam, but also from Mozambique, Cuba, Angola, Ethiopia and Nicaragua. Grecic, *supra*, Introduction, note 25 at 244.

employment conditions and treatment of Vietnamese workers in the former German Democratic Republic, the former Soviet Union, Bulgaria and the Czech and Slovak Federal Republic have only recently come to light.[49] With ever-increasing unemployment in these countries because of economic restructuring, these workers face a very uncertain future. They have been the subjects of frequent discrimination and racist attacks.[50] Moreover, some have already been dismissed from work and, consequently, have been required to return home.[51]

2.4 Recent Developments

There have been a number of recent developments which threaten to upset the present *status quo* and which reveal the dynamics of the labour migration phenomenon.

The political and economic upheavals in Central and Eastern Europe and in the former Soviet Union in the past two years and the ongoing transformations ever since have raised the spectre of mass economic migrations westward.[52] Democratization in these countries has resulted in the recognition of the right to leave, whereas the projected changes required to move

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49 See Greenspon, *supra*, Introduction, note 26 at A12 (concerning the situation of Vietnamese migrant workers in the former German Democratic Republic); G. Ginsburg, "The Case of Vietnamese Gastarbeiters in the Soviet Union" (1989) 35 Osteuropa-Recht 166; and M. Fisher, "Unhappy Vietnamese Workers Corner Illegal Bulgarian Market" *The [Toronto] Globe and Mail* (February 5, 1990) A4. Information on the situation of Vietnamese migrants in the Czech and Slovak Federal Republic may be found in J. Topol, "Slavery in a Newly Free State" (1990) 3 Uncaptive Minds 24 and in a report of the Fédération Internationale des Droits de L'Homme, *Rapport de Mission à Prague* (Paris: Fédération Internationale des Droits de L'Homme, 1990). See also Grecic, *ibid.* concerning Vietnamese workers in all Eastern European countries. In 1990, it was estimated that there were between 60,000 and 75,000 Vietnamese workers in the former German Democratic Republic (Grecic, *ibid.* and Greenspon, *ibid.* respectively), 40,000 in Bulgaria (Grecic, *ibid.* and Fisher, *ibid.*), between 33,000 and 38,000 in the Czech and Slovak Republic (Topol, *ibid.*, Grecic, *ibid.* and *Rapport de Mission à Prague*, *ibid.* at 6 respectively) and 82,000 in the former Soviet Union (Grecic, *ibid.*). There are also a handful of Vietnamese migrant workers in Hungary and Poland (Grecic, *ibid.*).

50 J. Tagliabue, "Right-Wing Attacks Worry Prague" *New York Times* (October 14, 1991) A3; Greenspon, *ibid.*; Topol, *ibid.* at 25; *Rapport de Mission à Prague*, *ibid.* at 1, 3-4.

51 Greenspon, *ibid.* As noted in the introductory chapter, this return migration seems to have been significant. *Supra*, Introduction, note 26 regarding Vietnamese workers in the Czech and Slovak Federal Republic. According to OECD figures, under 10,000 Vietnamese workers remain in that country in 1991 and only 35,000 were registered in eastern Germany at the end of 1990. *SOPEMI 1992*, *supra*, note 36 at 118 and 62 respectively.

52 For example, see C. MacKenzie, "U.S. To Lift Soviet Trade Curbs - Fear of Mass Migrations Westward Spurs Policy Reversal" and J. Simpson, "The European Countries Brace For A Potential Influx of Soviet Citizens" *The [Toronto] Globe and Mail* (December 5, 1990) A8 and A18 respectively.

this region from centrally-planned to market economies are likely to result in widespread economic hardships for some time to come. Consequently, economic migration has become an attractive option for the unemployed and underemployed in those countries.[53] Although East-West migration has increased, the anticipated substantial movements have so far not materialized.[54] Germany seems to have been the country most affected by East-West migration, primarily as a result of the collapse of the former East German regime and subsequent German reunification. For example, just before reunification of the two Germanies, figures for 1989 revealed that 343,900 migrants had entered the former Federal Republic from the east in comparison to only 39,800 the year before.[55] The new migration movements from Eastern Europe, however, have had little impact on the long-established migratory flows,[56] although, recently, new bilateral agreements with respect to short-term migrant labour and training have been signed between some principal Western European countries of employment and certain Eastern European countries.[57]

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53 *Changing Migration in and from Eastern Europe and the Soviet Union, supra*, note 48 at 4-5. At the time of this meeting, it was noted that there were already more than 500,000 people unemployed in Poland, a figure which was expected to double in 1991. Moreover, labour surpluses for the former Soviet Union were estimated to range from three to a startling 30 million persons. *Ibid.* In the East-West migration context, a distinction has been made between economic refugees and economic migrants. The former are defined as "involuntary migrants", who are forced to move against their will due to "economic disruption resulting from political conflict or persecution". The latter make a conscious and voluntary decision to move based on a desire to improve their level of welfare. European East-West migration is largely involuntary. Grecic, *supra*, note 48 at 242, citing from K.A. Kutch, "The Economics of Refugee Movements: A Framework for Analysis", paper for the EADI Working Group on Migration and Development (Geneva, 1988).

54 *SOPEMI 1992, supra*, note 36 at 12 and 98; *SOPEMI 1990, supra*, note 18 at 7.

55 *Ibid.* at 12. Indeed, the changes in Eastern Europe have resulted in an influx of ethnic Germans into the former Federal Republic from many parts of Eastern Europe and not just from the former Democratic Republic. It was estimated that between the mid-1989 and July 1990 about 700,000 ethnic Germans from Eastern Europe had come to the West. *Changing Migration in and From Eastern Europe and the Soviet Union, supra*, note 48 at 3 (Ms. Funcke, German Representative for Foreigners); Note (West Germany), "East Germans and Ethnic Germans on the Labour Market" (December 1989) Eur. Industr. Rel. Rev. 11 at 11. These ethnic Germans come mainly from Poland, the former Soviet Union and Rumania. *SOPEMI 1992, ibid.* at 19 (Table I.1).

56 *SOPEMI 1990, ibid.* at 21.

57 Such agreements have already been signed by Austria, Belgium, France, Germany and Switzerland, mainly with Hungary, Poland and the Czech and Slovak Federal Republic. *SOPEMI 1990, ibid.* at 32; *SOPEMI 1992, supra*, note 36 at 12 and 97. The *SOPEMI 1990* report observes that these agreements have revived the principle of temporary migration, although it has been shown in the past that "temporary" may mean a long time. *Ibid.* at 18. Indeed, a similar concern was expressed at the third meeting of the Refugee Policy Group of the North American-European Dialogue on Politics and Migration regarding the proposal that temporary worker programmes might provide "employment outlets" for some of the unemployed in Eastern Europe. *Changing Migration in and from Eastern Europe and the Soviet Union, supra*, note 48 at 8.

Concern has been expressed by Third World countries that the political and economic developments in Central and Eastern Europe will not only cut back trade between the Third World and the West, but also severely limit South-North migratory movements in the event of an increase in migratory flows from the former socialist states.[58] While acknowledging that these concerns are justified, it has been emphasized by the Organization for Economic Co-operation and Development (OECD) in the *SOPEMI 1990* Report that underdevelopment is the principal problem facing Third World countries and that emigration will not resolve this problem. Instead, a new form of cooperation between North and South is necessary in order to reduce the incentives to emigrate in developing countries.[59]

Recent figures also indicate that there has been a steady growth in foreign labour migration to the major labour-receiving European countries, despite continuing unemployment in the foreign workforce.[60] Although the rate of increase is fairly slow, there is a continuing demand for migrant workers because of the shortage of national workers willing to undertake low-level jobs.[61] In previous years, the total foreign populations in these countries were increasing as a result of growing family reunification, but presently the rate of increase in foreign workers is greater than that for family reunification.[62] It has been forecast that economic growth within the European Community will increase substantially with the creation of the single internal market by the beginning of 1993, and hence there will be more demand

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58 *SOPEMI 1990, ibid.* at 33. See also *Report to the Conference on Migrant Workers from the Mahgreb in the EC, supra*, note 16 at 14, para. 2.15, observing that migrant workers from developing countries will face a greater competition for jobs if there is an increase in migration from the countries of Central and Eastern Europe. Indeed, the above Conference urged a balanced migration policy to ensure that the opening of borders to the countries of Eastern and Central Europe would not be to the detriment of migratory flows from the Mahgreb countries. *Conclusions of the ICFTU/ETUC/USTMA Conference on Mahgreb Migrant Workers in the EC* (Tunis, April 18-20, 1991) [hereinafter *Conference on Mahgreb Migrant Workers in the EC - Conclusions*] at 2, para. 7.

59 *SOPEMI 1990, ibid.* at 33-34.

60 The unemployment rates for foreigners in the Netherlands, Austria, France and Belgium in 1989 were higher in proportion to those of nationals. In contrast, the labour market situation of foreigners in Germany showed an improvement with a continuation of this trend into 1990. *SOPEMI 1990, ibid.* at 19; *SOPEMI 1992, supra*, note 36 at 26.

61 *Report to the Conference on Migrant Workers from the Mahgreb in the EC, supra*, note 16 at 3, para. 1.6, with reference to continuing labour migration to EC countries.

62 *SOPEMI 1990, supra*, note 18 at 19, 25.

for labour, particularly migrant labour, in the near future.[63]

The most dramatic changes with respect to international migration for employment in Europe have occurred in the former labour-sending countries of the Mediterranean region, which have now become significant importers of labour. The importation of immigrant workers, particularly into Italy, Greece and Spain, began in the early 1970s. Most of these workers came from North Africa and other developing countries in Africa and were employed illegally.[64] This trend has continued sharply upwards. For example, between 1975 and 1981, the officially registered alien population in Italy and Greece grew by 67.6 and 61.7 per cent respectively.[65] If undocumented migrant workers were included in this calculation, this would represent quite a staggering increase in the rate of migration for employment to these countries. One recent estimate of the number of undocumented migrant workers in Greece has been put at 105,000.[66] Most of these migrants work in the "tourist industry", commercial shipping, and the underground economy.[67] According to the Italian Ministry of the Interior, there were 635,131 non-EC foreign residents in Italy by the end of 1990, of whom 321,349 had been regularized in accordance with the legislation of 1986 (105,312) and 1990 (216,037).[68] The

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63 *Report to the Conference on Migrant Workers from the Mahgreb in the EC*, *supra*, note 16 at 14, para. 2.13. See also *Conference on Mahgreb Migrant Workers in the EC - Conclusions*, *supra*, note 58 at 2, para. 7. For how the creation of this single internal market is likely to affect the situation of migrants from non-EC countries see chapter six, *infra*.

64 *Growing Employment Problems in Europe*, *supra*, note 13 at 83; Power, *supra*, note 3 at 23; Penninx, *supra*, note 14 at 955. There were 70.5 per cent non-EC residents from developing countries (excluding the countries of Eastern Europe) in Italy on December 31, 1991. Of these, only 44.1 per cent had been regularized under the laws of 1986 and 1991 (see *infra*, note 68 and accompanying text). *SOPEMI 1990*, *supra*, note 18 at 23, Table 9 (Figures worked out by calculation from Table 9).

65 Penninx, *ibid.*

66 *SOPEMI 1990*, *supra*, note 18 at 51. This is a figure provided by the Ministry of Public Order. In contrast, the Greek Ministry of Labour estimates that there are about 30,000 undocumented workers in the country. Both of these figures are considerably higher than the number of "legal" work permits issued by the Greek authorities. During 1989 and up to March 31, 1991, 23,919 such permits were issued. *Ibid.* In Spain and Portugal, the numbers of illegal migrants are estimated to be about 450,000 and 50,000 respectively. *Report to the Conference on Migrant Workers from the Mahgreb in the EC*, *supra*, note 16 at 4, para. 1.7, citing from G. Simon, "Migration in Southern Europe: An Overview" in OECD, *The Future of Migration* (Paris: OECD, 1987) at 284-289.

67 *SOPEMI 1990*, *ibid.* at 50.

68 *Ibid.* at 22. It has been suggested that this relatively low number of applications for regularization is probably due to the fact that many illegal migrants feared losing their jobs if regularized, since the employer would then have to pay minimum wages, social fund contributions, etc., and might well decide to take on other illegal migrants in their place. *Report to the Conference on Migrant Workers from the Mahgreb in the EC*, *supra*, note 16 at 4, para. 1.7. In 1991, over 100,000 illegal aliens were regularized in Spain in accordance with

great majority of those regularized were undocumented workers who had come spontaneously to Italy, initially to work in the service sector and then seasonally in agriculture and industry and in various activities within the informal sector, particularly in the southern and central parts of the country.[69] Most recently, however, Italy's apparent accommodating attitude towards illegal migrants and asylum-seekers has hardened considerably. Although the 1990 legislation (known as the "*Martelli Act*") defines the legal status of immigrants already living in Italy or of those who have been recently regularized, it also imposes stricter restrictions on future inflows and proposes firmer measures to combat illegal immigration.[70] The expulsion of approximately 17,000 Albanian "refugees" in August 1991 is an example of the new uncompromising Italian attitude towards illegal immigration.[71]

3. European Migration Policy: From Exclusion to Integration

The guestworker programmes generated little public debate when they were initiated, and although public opinion generally opposed the import of foreign labour, it was assumed that these workers were only temporary "birds of passage" and could be repatriated in economic hard times or once their services were no longer needed.[72] Indeed, this assumption

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an amnesty programme. A similar programme is being prepared in Portugal. *SOPEMI 1992, supra*, note 36 at 33-34. See also *supra*, Introduction, note 28 with regard to Spain.

69 *SOPEMI 1990, ibid.* at 24. The "informal sector" in these countries is very large employing 2 to 5 million workers in Italy alone. Simon, *supra*, note 66, argues that illegal migration to these countries can only be regulated if measures to tackle the "informal sector" are also introduced. Cited in *Report to the Conference on Migrant Workers from the Mahgreb in the EC, ibid.*

70 *SOPEMI 1990, ibid.* at 36.

71 *SOPEMI 1992, supra*, note 36 at 66. The saga of this controversial crisis may be traced in the newspaper articles cited below: Reuters and Associated Press, "Italians Seeking Deal with Albania on Refugee Crisis - Tensions High on Sweltering Dock after Worst Battle in 4-Day Standoff" *The [Toronto] Globe and Mail* (August 12, 1991) A6; Reuters and Associated Press, "Food is Cut Off after Albanians Refuse to Leave - Italian Offer of Clothes and Cash Not Enough For Determined Band" *The [Toronto] Globe and Mail* (August 13, 1991) A7; Editorial, "Italy and the Albanians" *The [Toronto] Globe and Mail* (August 13, 1991) A14; Associated Press, "Italians have Change of Heart on Refugees - Die-Hard Albanians Allowed to Remain while Their Cases are Examined" *The [Toronto] Globe and Mail* (August 15, 1991) A5; Associated Press, "Ousted Albanians 'Tricked' by Italy - Officials Accused of 'Giant Lie'" *The [Toronto] Globe and Mail* (August 19, 1991) A1, A5.

72 Martin & Miller, *supra*, note 1 at 316; Power, *supra*, note 3 at 13. The phrase "birds of passage" comes from Power, *ibid.* Indeed, the very term "Gastarbeiter" (guestworker) incorporates this assumption. Cf. Martin & Miller, *ibid.* at 315 (footnote 2).

of temporariness was central to European migration policy. The objective was to ensure that foreign workers would only stay in a country for a limited period of time and was to be achieved through the application of the "rotation principle", which held an extremely narrow conception of the individual migrant worker:

> The "rotation principle" implies a uni-dimensional view of the migrant; his economic contribution is welcomed, but at the same time his needs other than that to work and earn a living remain unsatisfied, and his freedoms are abridged: the migrant's role as a family member is ignored; he may be housed in a dormitory where the concept of privacy hardly exists; opportunities for occupational or geographical mobility are restricted; his cultural needs are neglected; and as a political actor he is in limbo.[73]

In other words, "integrative" measures such as family reunification, suitable housing, improved access to the labour market, residence rights, language instruction, the education of children and cultural and political rights were given nominal attention in contrast to the economic role of migrants in the host society.[74]

Economic and humanitarian considerations, however, prevented the strict application of the "rotation principle" in Europe.[75] A process by which migrants were recruited, trained and then discarded and replaced with new and less experienced workers was simply too inefficient

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73 Rogers, "Post-World War II European Labor Migration: An Introduction to the Issues", *supra*, note 25 at 21.

74 Cf. Rogers, *ibid.* at 3; T. Hammar, "Immigration Regulation and Aliens Control" in *European Immigration Policy*, *supra*, note 5, 249 at 250. According to Hammar's thesis, these "integrative" measures form the basis of "immigrant policy". Such a policy refers to the conditions provided to resident immigrants that influence their situation, for example: employment and housing conditions, social benefits and social services, educational opportunities and language instruction, cultural amenities, leisure activities, voluntary associations, and opportunities to participate in trade unions and political affairs. "Immigrant policy" can be either "direct" or "indirect". The former consists of special measures to improve the situation of immigrants, whereas the latter constitutes general public policy (intended to apply to all without special provision for immigrants) which affects immigrants substantially and which may be "inequitable" or "discriminatory" in its application to immigrants. "Immigrant policy" should be distinguished from "immigration regulation and aliens control", which is concerned with the technical aspects of an alien's entry into, residence in, and departure from a particular country. Hammar, "Introduction", *supra*, note 18 at 9.

75 The exception is "seasonal labour" (a good example is that of Switzerland), which comes closest in practice to an idealized model of the "rotational principle". Hammar, "Immigration Regulation and Aliens Control", *ibid.* at 250. See also the section on "Seasonal and Frontier workers" below.

and costly for employers, who preferred to retain their best employees.[76] From a humanitarian point of view, it was noted with regard to illegal migrants in chapter two that liberal democratic states find it hard to expel such persons after they have established ties with the community.[77] In addition, as already discussed, these migrants became a permanent fixture in the domestic labour force (and hence an important economic asset) by performing those menial, back-breaking and tedious tasks which national workers refused to do.[78] As the length of migrant workers' residence in the host country increased, as their families came to join them and as they gradually acquired more extensive social rights, it became unthinkable for the Western European liberal democracies to implement the "rotation principle" to its extreme and to forcibly repatriate migrants to their homelands.[79]

The reality that many migrant workers and their families are probably going to stay indefinitely compel the migrant-receiving European countries to rethink their policies towards them. According to Demetrios Papademetriou, this means the gradual acknowledgment on the part of these countries that they must extend to migrants and their families greater opportunities to adapt to their existing milieu, while at the same time keeping open for them the option of return to their home countries. Such a "dual-track" approach

> reflects the beginnings of a recognition that international migration is a system of mutual social, economic, and political vulnerabilities that is best addressed by extending to migrants legal equality in social and economic rights along with cautious steps towards limited political participation. Movement towards these objectives entails the removal of most restrictions for long-term immigrants, the easing of most obstacles to naturalization, and the taking of bold initiatives in matters involving second- and third-generation immigrants.[80]

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76 Cf. Krane, *supra*, note 10 at 6; Rogers, "Post-World War II European Labor Migration: An Introduction to the Issues", *supra*, note 25 at 14; Martin & Miller, *supra*, note 1 at 320.

77 *Supra*, chapter two, note 152 and accompanying text.

78 *Supra*, note 12 and accompanying text. See also Rogers, "Post-World War II European Labor Migration: An Introduction to the Issues", *supra*, note 25 at 17.

79 Rogers, *ibid.* at 16-17.

80 Papademetriou, *supra*, note 16 at 366. Hammar has also observed that the trend in Europe is towards convergence on migrant policy in that greater recognition is now afforded to the "integrative" measures of "immigrant policy". T. Hammar, "Towards Convergence" in *European Immigration Policy*, *supra*, note 5, 292 at 292, 293. For Hammar's definition of "immigrant policy" see *supra*, note 74.

The most pressing issue facing the major European immigration countries is the integration of this latter group into their societies.[81] It was estimated in 1986 that there were, irrespective of their present citizenship, seven million immigrant children, aged between 0 and 20, residing in European migrant-receiving countries, who had been either born there or who had immigrated there with their parents. These children represent ten per cent of that age group in those countries.[82] The tragedy of second-generation migrants is that they are essentially trapped in a void between two worlds, those of the host country and the country of their parents. In the former, discriminatory legal, social and economic structures have facilitated their marginalization and criminalization.[83] Educationally, they are far worse off than their counterparts.[84] Consequently, they tend to inherit the low-status employment of their parents, whereas they might have rightly expected to be far better off.[85] Unemployment among young migrants is proportionately greater than among young nationals of working age.[86] The country

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81 For research literature on second-generation migrants in Europe see the following: W. Czarina, *Entering the Working World: Following the Descendants of Europe's Immigrant Labour Force* (Studies in European Migration Series) (Aldershot, England: Gower, 1988); J. Widgren, "The Position of "Second Generation" Migrants in Western Europe: Policy Failures and Policy Prospects" (1986) 23 Studi Emigrazione/Etudes Migrations 7; OECD, *Migrants' Children and Employment: The European Experience* (Paris: OECD, 1983); J. Widgren, *The Position of "Second-Generation Migrants" in Europe: Policy Failures and Policy Prospects*, UNDP/ILO European Regional Project for Second-Generation Migrants (Geneva: International Labour Office, 1982); A. Lebon, *The Impact of Migrants, Especially Second-Generation Migrants, on the Demographic Situation in Selected Countries of Employment*, UNDP/ILO European Regional Project for Second-Generation Migrants (Geneva: International Labour Office, 1981); L.J. Limage, *Situation of Young Women Migrants of the Second-Generation in Western Europe*, UNDP/ILO European Regional Project for Second-Generation Migrants (Geneva: International Labour Office, 1981); R. de Montvalon, *The Aspirations of Young Migrant Workers in Western Europe* (Paris: UNESCO, 1976).

82 Widgren, *ibid.* at 11-12. These figures are for the following eleven countries: Austria, Belgium, Denmark, France, the former Federal Republic of Germany, Luxembourg, Netherlands, Norway, Sweden, Switzerland and the United Kingdom. Widgren also reaches the staggering statistical conclusion that one-third of the population in the younger age groups in Central and Northern Europe will be of foreign origin by or at the beginning of the 21st century. This calculation is based on the assumption that approximately half a million second-generation immigrants will be born each year in countries of employment. *Ibid.* at 12.

83 Gundara, *supra*, note 19 at 42. Consequently, observes Gundara, minority youth is perceived as a threat to host countries, which are unwilling to accept responsibility for their contribution to the creation of this situation. *Ibid.*

84 Widgren, *supra*, note 81 at 16.

85 Widgren, *ibid.*, citing from OECD, *Young Foreigners and the World of Work* (Paris: OECD, 1981) at 107; Gundara, *supra*, note 19 at 43. Not surprisingly, second-generation migrants are reluctant to step into their parents' jobs. Widgren, *ibid.*; Rogers, "Post-World War II European Labor Migration: An Introduction to the Issues", *supra*, note 25 at 23.

86 *Report to the Conference on Migrant Workers from the Mahgreb in the EC*, *supra*, note 16 at 6, para.

of their parents cannot be considered to be their home because many were born in the country of employment or, in large part, brought up there and are ill-prepared for return to the country of their parents,[87] particularly if they have become alienated from its language and culture on account of the absence of mother-tongue education in the host country.[88] Any sense of belonging to their adopted society which they may have is further hindered by legal obstacles to the acquisition of naturalization and citizenship.[89] The uncertain future faced by second-generation migrants is the legacy of the false assumption of temporariness which the European countries once had (and arguably still have) regarding labour migration.[90] Some of the problems faced by migrant children and youth are considered in the following chapters in the context of their rights-claims to education, culture, political participation, residence and naturalization.

4. Principal Features of Migration and Some Characteristics of Migrant Workers and their Families in Europe

The focus of this chapter now shifts to the migrant workers themselves. In the brief analysis which follows, some light is shed on why people migrate for employment in the first place, the factors which cause them to migrate to a particular country or countries and the types of labour migration which exist in Europe, including the phenomenon of illegal migration. Finally, a few of the principal characteristics of migrant workers and their families in European

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112, citing from D. Maillot, "European Receiving Countries" in *The Future of Migration*, supra, note 66 at 51, in relation to Belgium and Germany. The lack of appropriate vocational training has been cited as the major reason for the higher unemployment rate among migrant youth. *Ibid.*

87 See also *supra*, Introduction, note 136 and accompanying text.

88 Widgren observes that only about 25 per cent of all foreign pupils in the receiving countries are provided with any mother-tongue instruction. *Supra*, note 81 at 16.

89 Widgren, *ibid.* at 18; Gundara, *supra*, note 19 at 42. In the five European countries of Belgium, France, Germany, Sweden and Switzerland, approximately 3.8 million persons under 25 have not formally acquired the citizenship of the host country. S. Abadir, *Courier* (Paris: UNESCO, 1984) at 27, cited by Gundara, *ibid.*

90 Widgren, *ibid.* at 12-13. And yet, these young people offer an opportunity for those countries severely affected by the problem of an aging population. See Note, "European Migration: A Dual Status?" (1990) ILO SLB 100 at 101.

countries of employment are outlined.

4.1 Causes of and Reasons for Migration for Employment

The principal reason why people travel to work to Western European countries is the conviction that they will have a better life by residing and working in one of these countries. Of course, the driving force behind this position is the difference between Western European countries and those other countries in Europe and beyond in terms of standards of living and economic growth and development. This disparity is exacerbated by chronic unemployment in countries of origin.[91] Moreover, improvements in international transportation and its relatively low cost undoubtedly act as a catalyst for these movements.[92]

Other less obvious motivations wind their way into the migration process. Not only do these propel persons to leave their homeland to seek work, but they also determine the particular West European country of employment. Different levels of development among countries of origin and discrepancies among the economies of host countries result in certain national groups preferring to migrate to some countries and not to others.[93] The existence of ex-colonial, historical and cultural ties and bilateral agreements, together with geographical proximity, are also variables in determining particular migratory flows between sending and receiving states.[94] Another motivating factor is the phenomenon of "chain migration". This is a "networking process" by which persons migrate for employment to a particular country on the basis of advice, encouragement, as well as concrete assistance in this venture, provided by family, friends, or acquaintances from the same village, town or region, already residing and

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91 Cf. Penninx, *supra*, note 14 at 956; Cf. R. Rogers, "Western Europe in the 1980s: The End of Immigration?" in *Guests Come to Stay*, *supra*, Introduction, note 177, 285 at 288.

92 Cf. Penninx, *ibid.* at 967. See also *supra*, Introduction, note 145 and accompanying text.

93 Penninx, *ibid.* at 961. For example, the United Kingdom is an attraction pole for those citizens from its former colonies but not for EC nationals. *Ibid.*

94 Hammar, "Introduction", *supra*, note 18 at 5. For a brief summary of migration to Europe from ex-colonies see *supra*, notes 14 and 15 and accompanying text.

working in that country.[95]

4.2 Types of Migration for Employment

(a) Temporary or Permanent Migration for Employment

The process by which temporary migration for employment has led to the permanent settlement of migrant workers and their families in Europe has already been described. From the perspective of individual migrants, the intention whether to settle permanently or merely to work for some time in the country of employment and then to return home is hardly clear-cut. Immigrants from former colonies to Europe were usually settlers.[96] There were also flows of predominantly young and single people who came with a fixed objective and with the intent of obtaining it and then to return home. The great majority of migrants, however, had no fixed aim, nor any idea of how long they would stay. They simply wanted to do as best as they possibly could and to eventually be reunited with their families. It is this group that tended to settle as established members of the national labour force of the host country.[97] Low-paid work together with the high cost of living, which impede migrants in reaching their savings targets, and the temptations of consumer society are other factors preventing those who only want to stay a short while in the country of employment from leaving as planned.[98]

(b) Seasonal and Frontier Workers

Seasonal labour migration has been described as a form of "circular migration", defined

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95 Hammar, *ibid.* at 4-5; Penninx, *supra*, note 14 at 955, 967.

96 See *supra*, note 15 and accompanying text.

97 *Growing Employment Problems in Europe*, *supra*, note 13 at 116.

98 *Ibid.* at 85; Rogers, *supra*, "Post-World War II European Labor Migration: An Introduction to the Issues", note 25 at 14.

as a system of contract labour under which migrants come to work in the host country for a limited period of time, and then are required to leave the country for a period of time before being allowed to return to work on new contracts.[99] Indeed, seasonal migration comes closest to an idealized version of the "rotation principle" described earlier in that workers are required to leave the country on the expiry of their contracts.[100]

France and Switzerland are the two major countries in Europe which employ seasonal migrant workers, although recently there is evidence of employers in both Norway and Germany hiring seasonal labour from Eastern Europe. In 1991, about 90,000 persons from Hungary, Poland and the Czech and Slovak Federal Republic were employed as seasonal workers in Germany.[101] Switzerland is the best example of seasonal labour migration. Seasonal migrant workers constitute a significant percentage of the Swiss foreign workforce. In 1990, there were 121,700 seasonal workers engaged in Switzerland out of a total foreign workforce (including frontier workers) of 972,100 (12.5 per cent).[102] The residence rights of seasonal workers are minimal. They must go back home after working for nine months in the year, although they may return to Switzerland in the following year. Only seasonal workers who have been employed for a minimum of 32 months in four consecutive years are entitled to an annual residence permit.[103] The function of seasonal labour in Switzerland, however, is rather deceiving. Only a small proportion of these workers are engaged in "genuine" seasonal

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99 Rogers, *ibid.* at 1.

100 Hammar, "Immigration Regulation and Aliens Control", *supra*, note 75 at 250. See also *supra*, note 75.

101 *SOPEMI 1990*, *supra*, note 18 at 13 regarding Norway and *SOPEMI 1992*, *supra*, note 36 at 97 regarding Germany. See also Note, "Polscy profesorowie i sedziowie zbieraja niemieckie ogórki" *Glos - Niezalezny Tygodnik Polski* [Trans.: "Polish Professors and Judges Pick German Cucumbers" *Voice - The [Toronto] Independent Polish Weekly*] (August 1, 1991) regarding legal and illegal Polish seasonal agricultural labour in Germany. This article is a synopsis of an article by Michal Jaranowski writing in the Polish daily, *Zycie Warszawy*.

102 *SOPEMI 1992*, *ibid.* at 133-134 (Tables 5 and 6). In France, there were 58,200 seasonal workers in 1990, a mere 3.6 per cent of the total labour force. *Ibid.*

103 Papademetriou, *supra*, note 16 at 349. Moreover, seasonal workers are not permitted to change their jobs nor bring their families. Note (Switzerland), "New Policy for Foreign Workers" (September 1991) Eur. Industr. Rel. Rev. 14 at 14. The fact that these workers are permitted to return to Switzerland on new seasonal employment contracts is certainly in conflict with the idealized model of the "principle of rotation" described earlier. Hammar, "Immigration Regulation and Aliens Control", *supra*, note 75 at 250. See also *supra*, note 100 and accompanying text.

employment, whereas the majority are "*faux saisonniers*".[104] It has been estimated that 70 to 80 per cent of seasonal workers are employed in *de facto* year-round jobs by those industries unable to obtain migrants with annual permits.[105]

Workers from one state who travel daily across an international border to work in a neighbouring state or "frontier workers" are a common phenomenon in Europe. These workers are the most "convenient" type of migrant worker for the host country, because they do not have any socio-cultural impact on that country.[106] As with seasonal workers, frontier workers constitute a significant percentage of the Swiss foreign labour force. In 1990, there were 180,600 frontier workers in Switzerland, 18.6 per cent of the total foreign workforce.[107]

(c) Illegal Migration

The question of illegal migration in Europe has already been referred to, particularly in the context of the former sending countries of Southern Europe in which many migrant workers are in an irregular situation.[108] Most illegal immigrants in these countries are from non-EC developing countries.[109] It is has also been suggested that if "outlets" are not provided for some of the migration pressure in Eastern Europe and the former Soviet Union,[110] many citizens of this region may increasingly seek to make an illicit living in

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104 Rogers, "Western Europe in the 1980s: The End of Immigration?", *supra*, note 91 at 290. For example, in 1981 the great majority of seasonal labourers in France (95 per cent) worked in agriculture, whereas most seasonal workers in Switzerland (58 per cent) were employed in the construction industry. Rogers, *ibid.* at 289, citing from OECD, *SOPEMI 1983* (Paris: OECD, 1984).

105 Rogers, *ibid.* at 290, citing A. Messina, "Les migrants sans papiers en Suisse", Sixth Seminar on Adaptation and Integration of Immigrants, Information Document No. 19 (Geneva: Intergovernmental Committee for Migration, 1983) at 15. Annual permits are more difficult to obtain in Switzerland than seasonal permits.

106 Rogers, *ibid.* at 292. Nor do these workers "threaten" the population's long-term ethnic balance. *Ibid.*

107 *SOPEMI 1992*, *supra*, note 36 at 133-134 (Tables 5 and 6). Since 1983 there has been a steady increase of frontier workers in Switzerland. In 1983, there were 105,500 frontier workers employed in the country, 14.3 per cent of the total foreign labour force. *Ibid.* In Luxembourg, frontier workers constituted 37.5 per cent of the total foreign workforce in 1989. *Ibid.*

108 See *supra*, notes 64-71 and accompanying text.

109 See *supra*, note 64 and accompanying text with regard to Italy.

110 See *supra*, note 53 and accompanying text. Because of the ease on travel restrictions and the abolition of visa requirements for short-term stays, Eastern Europeans are travelling to the West in great numbers and

Western Europe.[111]

The many forms of illegal labour migration have already been described in the introductory chapter and equally apply to the European situation.[112] Most illegal migrant workers enter a country legally. They may enter as "tourists" without the necessary papers for employment and then become "illegal" when they start working. The number of illegal migrants is inflated substantially by the family members of workers.[113] The various forms of illegal migration and the very nature of the subject make the estimation of the number of illegal migrants in Europe a very difficult if not impossible exercise.[114] According to ILO estimates, however, there were approximately 2.6 million non-nationals in an irregular situation residing in Western Europe in 1991, including migrant workers and their families.[115]

The reasons for persons illegally migrating for employment may be numerous. Only two are briefly mentioned here. First, restrictive immigration regulations are obviously a major factor in this process, whether they are applied at the admissions stage or in the event of applications by migrants for a renewal of their residence or work permits.[116] Similarly, restrictive regulations governing the entry of workers' family members may initiate the illegal migration of those families. Second, complex requirements for obtaining work or resident permits may also deter potential migrant workers from going through the proper channels.[117]

Illegal migrants in Western Europe have been described as

> inevitably the worst exploited group of migrants: as long as their situation remains illegal, they can be sent home, usually at a moment's notice, once they

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many are taking up illegal employment there. See also Grecic, *supra*, note 48 at 245, 246.

111 *Changing Migration in and from Eastern Europe and the Soviet Union*, *supra*, note 48 at 9. See also *SOPEMI 1992*, *supra*, note 36 at 12.

112 *Supra*, Introduction, notes 174-177 and accompanying text.

113 Power, *supra*, note 3 at 24.

114 Rogers, "Western Europe in the 1980s: The End of Immigration?", *supra*, note 91 at 294.

115 Böhning, *supra*, Introduction, note 29 and accompanying text. This figure also comprises illegal seasonal workers and those asylum-seekers who have not achieved refugee status and whose presence is not officially tolerated.

116 Cf. Penninx, *supra*, note 14 at 962.

117 Rogers, "Western Europe in the 1980s: The End of Immigration?", *supra*, note 91 at 294.

> are discovered. So they have no legal recourse against exploitation or blackmail. Employers are often willing to hire them, because they can be put to work for lower wages and longer hours than native or legal migrant workers. They will also do jobs that regular migrants would consider beneath them. They are not eligible for unemployment or sickness benefits or for family allowances. Because of their vulnerability, they are unlikely to become organized or militant, and are ready targets for blackmail or other exploitation.[118]

If legal migrant workers are considered to be at the lower end of a dual labour market in Western Europe, then those workers in an irregular situation must form an even lower third labour market.[119] Although the employment of illegal workers may serve the economic interests of some employers and landlords,[120] (who put up these workers in sub-standard and expensive accommodation), it is clear that their continued existence subverts the entire labour migration system, since "though victims themselves, [illegal migrants] are the enemies of both indigenous and legal workers".[121] Illegal immigration must, therefore, be controlled. This may be done by the regularization of the status of illegal immigrants followed by the stricter control of future illegal entrants and the effective enforcement of these stricter regulations combined with severe sanctions against labour traffickers and employers.[122]

Regularization programmes for illegal migrants were instituted in the past in a number of European countries, but the largest schemes have been in France, where an estimated 1.4 million illegal aliens were regularized between 1948 and 1981,[123] and most recently, in Italy, where over 320,000 non-EC immigrants were regularized between 1986 and the end of 1990,

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118 Power, *supra*, note 3 at 24. Furthermore, if the children of illegal migrants are also residing in the country of employment, their situation is particularly harsh. They cannot attend school, because their discovery would result in their parents being sent home. *Ibid.* at 35 with respect to the situation of illegal migrants in Switzerland.

119 Hammar, "Immigrant Policy", *supra*, note 45 at 267.

120 Hammar, "Towards Convergence", *supra*, note 80 at 304.

121 Papademetriou, *supra*, note 16 at 36. See also *Growing Employment Problems in Europe*, *supra*, note 13 at 100. In the same vein, Castles, *supra*, note 2 at 762, writes that "the rightless illegal migrant is the dream-worker of many employers and the nightmare of the labor movement".

122 Cf. Power, *supra*, note 3 at 27.

123 Plender, *supra*, note 34 at 317, citing from Service des Etudes et de la Statistique, Ministre des Affairs Sociales et de la Solidarité Nationale, *Immigration Clandestine, La Régularisation des travailleurs "Sans Papiers"*, Supp. No. 106 (1983) at 9. Further regularization was initiated after the 1981 elections (won by the French Socialist party) encompassing illegal foreign workers who had entered the country before January 1981 and who had "stable employment". Plender, *ibid.*, citing from the above Report at 10.

and in Spain, where over 100,000 irregular migrants were legalized in 1991.[124] It has been argued that regularization programmes are necessary in order to prevent the creation of a permanent under-class of exploited workers unable to legally protect themselves against their employers.[125]

Severe employer sanctions were introduced in France in 1981, with the result that the employer faces, for a second offence, imprisonment of up to three years and a fine not exceeding FF 40,000 for every illegal alien hired.[126] Recently, these sanctions were strengthened. Under the new law, employers who do not declare foreign employees to the authorities risk having their profits confiscated, or if they are foreigners, being expelled from France.[127] Similar punishments for hiring illegal labour exist in Germany.[128] The effectiveness of employer sanctions, however, is questionable especially if insufficient resources are allocated to the detection of the illegal employment of migrants. At best, the policies in labour-receiving European countries have been ambivalent towards this practice.[129]

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124 See respectively *SOPEMI 1990*, *supra*, note 19 at 24 and *SOPEMI 1992*, *supra*, note 36 at 33 and 76. See also *supra*, note 68 and accompanying text and *supra*, Introduction, note 28 and accompanying text.

125 *Report to the Conference on Migrant Workers from the Mahgreb in the EC*, *supra*, note 16 at 21, para. 3.11. The Report proposes, *ibid.*, that European countries should consider adopting an amnesty regularizing illegal workers, following the above French and Italian examples, and coordinated perhaps at the level of the EC. See also *Conference on Mahgreb Migrant Workers in the EC - Conclusions*, *supra*, note 58 at 7, para. 36. As noted in chapter four, however, frequent recourse to regularization policies or amnesties defeats the object of the exercise because it ultimately encourages further illegal entry. See *supra*, chapter four, note 218.

126 Plender, *supra*, note 34 at 317. For a first offence, the term of imprisonment is not less than three months and not more than one year and the fine may range from FF 2,000 to 20,000 for the employment of every illegal alien. *Ibid.*

127 Reuters, "Immigration Crackdown" *The [Toronto] Globe and Mail* (October 16, 1991) A7. By the Act of December 31, 1991, provisions were introduced, *inter alia*, to close the loophole in the law, whereby employer sanctions could be evaded through a succession or "cascade" of sub-contracts. In future, anyone resorting to the services of an undocumented foreign worker, even if through an intermediary, is also liable for payment of fines, etc. *SOPEMI 1992*, *supra*, note 36 at 32.

128 Imprisonment for employers in Germany may range from one year, and for particularly serious offences, to three years with respect to the employment of migrants for more than five months without a work permit (*Law on the Protection of Subcontracted Labour* of June 25, 1985). Fines can be up to 50,000 DM for the employment of non-EC foreigners without a work permit (*Law on the Suppression of Illegal Employment* of 15 Dec. 1981). Plender, *supra*, note 34 at 315-316. In 1991, employer sanctions were also introduced in the Netherlands, with the result that employers are now liable for the cost of expulsion of the illegal foreigners concerned. *SOPEMI 1992*, *ibid.* In the United Kingdom, however, there is no similar system of employer sanctions. Employers are in the same position as others in that they commit an offence if they knowingly harbour an illegal entrant or assist in the commission of an offence (*Immigration Act 1971*, s. 25 as amended by the *British Nationality Act 1981*, s.39(6) and Schedule 4, para. 6). Plender, *ibid.* at 313.

129 Rogers, "Western Europe in the 1980s: The End of Immigration?", *supra*, note 91 at 295.

One of the most recent initiatives taken to prevent illegal migration involves common action towards this objective. Such an approach was proposed within the EC back in 1974.[130] In June 1990, in anticipation of the lifting of internal borders by the end of 1992, (which now appears unlikely to be strictly complied with until the end of 1994), five EC countries (Belgium, France, Luxembourg, Germany and the Netherlands) signed the *Schengen Agreement*.[131] Since then, three more EC countries (Italy, Portugal and Spain) have signed the Agreement. The Agreement aims to eliminate internal border controls between the countries concerned after 1992, subject to its ratification by the individual parliaments of these countries. Although non-EC nationals would be able to cross borders unchecked, they would have to report to the police of the country visited and would not be permitted to take up employment there.[132] In order to stem the tide of illegal migration from one country to another, which is a foreseeable consequence of the elimination of frontier checks, the external borders of the countries in question would be tightened by the imposition of common visa requirements and more effective enforcement of external border controls.[133] Furthermore, the Agreement provides for the imposition of heavy fines on transport companies which fail to ensure that their passengers are in possession of the documents required by the country of destination.[134] The *Schengen Agreement* has been criticized on the grounds that it places virtually impossible

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130 *EC Action Programme, supra*, Introduction, note 29 at 21

131 A. Cruz, "The European Community and Carrier Sanctions" (1991) 29:1 Migration World Magazine 16 at 16. See also A. Cruz, "Will the European Community make the 1992 Deadline on the Abolition of Internal Border Controls?" (1991) 29 IM 477 at 477, 480.

132 *Report to the Conference on Migrant Workers from the Mahgreb in the EC, supra*, note 16 at 15, para. 2.18, citing from A. Cruz, *An Insight into Schengen, Trevi and other European Intergovernmental Bodies*, Briefing Paper No. 1, 2d ed. (Brussels: Churches' Committee for Migrants in Europe, 1990) at 8. See also *SOPEMI 1992, supra*, note 36 at 31. The four EC countries (Denmark, Greece, Ireland and the United Kingdom) who have not signed the Agreement do not envisage the lifting of internal frontier controls in the near future. *SOPEMI 1992, ibid.*

133 *Report to the Conference on Migrant Workers from the Mahgreb in the EC, ibid.* at 15-16, para. 2.18.

134 *SOPEMI 1990, supra*, note 19 at 32. Cruz, "The European Community and Carrier Sanctions", *supra*, note 131 at 16. Another initiative in this area is the draft convention on all aspects of checks on persons at external borders, which the twelve EC states have agreed to sign in the near future. This draft convention is the brainchild of a secret ministerial intergovernmental *ad hoc* Group on Immigration, which, although composed of all the EC members, is not a supranational body of the EC and the latter's institutions have no absolute control over the Group's activities. One controversial provision of this draft convention provides for carrier sanctions for undocumented passengers. Cruz, *ibid.* Carrier sanctions for each undocumented passenger range from FF 10,000 in France to £2,000 in the United Kingdom. *SOPEMI 1992, supra*, note 36 at 32.

demands on carrier staff to act as immigration officers and prevents those fleeing persecution in their homelands from exercising the right of asylum.[135]

In spite of the enforcement measures taken and envisaged to suppress illegal migration in Europe, this phenomenon is still very much alive. Indeed, it is likely to continue and increase because of the combination of restrictive policies and the development of well-established migration communities in the countries of employment, which encourage migrants to enter illegally and which provide them with the necessary support once they have entered.[136] Given the self-perpetuating phenomenon of illegal migration, every effort should nonetheless be made to reduce its negative impact, while at the same time to ensure that migrant workers already in an irregular situation in a country have similar rights as legally employed migrants,[137] especially if they have lived and worked in a country for a considerable amount of time. In any event, their rights connected with the employment situation must be guaranteed. As argued in chapter two, the dignity of human labour demands that *all* workers, both nationals and aliens, have the right not to be exploited in the workplace. Moreover, this right does not depend upon the possession of an authorization to work.

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135 Cruz, *ibid.* at 18. Carrier sanctions are also considered to disregard article 31 of the 1951 Geneva *Convention on the Status of Refugees*, which stipulates that penalties are not to be imposed on refugees for illegal entry or presence, and article 14(1) of the UDHR, which provides for the right of asylum. *Ibid.* at 19 and endnote 10.

136 Cf. Rogers, "Western Europe in the 1980s: The End of Immigration?", *supra*, note 91 at 294. The *Report to the Conference on Migrant Workers from the Mahgreb in the EC*, *supra*, note 16 at 23, para. 3.17, observes that the principle of encouraging the controlled entry of migrant workers is generally conducive to efforts undertaken to reduce illegal migration and that the attempt since 1974 by some European countries to stop immigration altogether has simply increased the number of illegal migrants. The Report, *ibid.* and Annex III at 2-3, cites paragraphs 6 and 7 of the Framework Declaration on Integrating Extra-European Workers into the European Labour Market, approved by the Executive Committee of the European Trade Union Confederation on December 14-15, 1989:

> [S]topping immigration completely actually promotes the illegal entry of labour, the black economy, conditions of work and pay which are not covered by contract, the absence of social protection, and the development of very poor living conditions in both urban centres and rural areas. Similarly, it encourages the development of an insecure economy based on the unsound practice of social dumping (paragraph 6)... what is needed is the controlled opening of national frontiers in keeping with the demand for labour (paragraph 7).

See also *Conference on Mahgreb Migrant Workers in the EC - Conclusions*, *supra*, note 58 at 7, para. 35. Regarding the development of well-established communities in host countries encouraging illegal migration see also *supra*, note 95 and accompanying text.

137 Cf. Power, *supra*, note 3 at 27.

depend upon the possession of an authorization to work.

4.3 Some Principal Characteristics of Migrants

(a) Youth and Birth Rate

Migrant workers and their families in Europe today are young. Their youthfulness is largely due to the considerable increase in family reunification after the official "stop" on labour migration in the early 1970s.[138] Those who arrived at the height of the migratory period are still under pensionable age. Although often accused of burdening the social welfare systems of host countries, it must be emphasized that migrants also pay taxes which subsidize the welfare and retirement benefits of the aging national population of host countries.[139] The recent arrivals as well as second-generation migrants are young men and women, and thus most likely to have children. In addition, they originate from countries which have a higher fertility rate than those to which they migrate for employment.[140] The second- and third-generation of migrants are also increasing at a considerable pace.[141] Statistics for the number of migrant children born in Western European countries in proportion to the number of children of nationals make interesting reading. Figures for 1976 show that children of foreigners represented 9.7 per cent of all live births in France, 16 per cent in Germany and 29.5 per cent in Switzerland.[142] More recent percentages are lower, with the exception of France. The proportion of foreign children in the total number of births in 1989 in the above countries was

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138 Thomas, "Summing-up and Points of Comparison", *supra*, note 23 at 216; Cf. Castles & Kosack, *supra*, note 12 at 491.

139 Cf. Gundara, *supra*, note 19 at 39; Cf. Castles & Kosack, *ibid.*

140 Referring to the first generation of migrants, Power observed, however, that their fertility rates were lower than comparable age groups in their home countries. *Supra*, note 3 at 9. It would appear, however, that after about two generations, the birth rate of migrant groups tends to converge with the average rate of the host population. *Report to the Conference on Migrant Workers from the Mahgreb in the EC, supra*, note 17 at 14, para. 2.14.

141 See also *supra*, note 82 and accompanying text.

142 Martin & Miller, *supra*, note 1 at 321, citing from (1978) Sozialpolitische Umschau No. 14.

10.7, 11.7 and 15.4 per cent respectively. Over 32 per cent of children born in Luxembourg in 1989 were born to foreigners.[143] Projected fertility rates for this decade and into the 21st century indicate that the total population in EC countries, such as Germany, will actually decline, whereas fertility in the countries of Southern Europe, such as Spain and Italy, will slow further. Consequently, a labour shortage in these countries is foreseeable in the future, hence encouraging further migration into the EC.[144]

(b) Occupational Status

Initially, migrant workers came to Western Europe to take up the most "socially undesirable jobs". They came not only to fill a shortage of labour, but also formed the lower level of what is known as the "dual labour market", thus complementing the national working-class who had climbed the occupational ladder in the meantime.[145] As a result, "immigrant labour quickly became a necessity for the functioning of many of the European economies".[146] A glance at the statistics with respect to the occupational status of migrant workers in some major European immigration countries confirms this analysis. In 1976, most foreign workers were employed in the manufacturing and construction sectors, where many manual jobs are generally to be found. In western Germany, 73.8 per cent of foreign workers were employed in these occupations, whereas in France and Switzerland the proportion of migrant workers in

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143 *SOPEMI 1992*, *supra*, note 36 at 19 (Table I.2). The number of foreign children in western Germany increased by 8.6 per cent in 1989, whereas the number of births in the German population decreased by 0.3 per cent. *SOPEMI 1990*, *supra*, note 18 at 49. Germany is particularly notable for the number of Turks living within its borders and the continuing growth of this Turkish population. Between 1974 and 1980, the number of Turks increased by 43 per cent while the number of Turkish children under the age of sixteen increased by 130 per cent. Papademetriou, *supra*, note 16 at 366, citing SOPEMI Reports from 1973 to 1982. Although the number of Turks in Germany dropped from 1,552,300 in 1983 to 1,401,900 in 1985, it rose again steadily reaching 1,675,000 in 1990 in line with a general upward trend. This last figure is out of a total foreign population of 5,241,800 or 32 per cent of that population. *SOPEMI 1992*, *ibid.* at 136 (Table 10).

144 *Report to the Conference on Migrant Workers from the Mahgreb in the EC*, *supra*, note 16 at 14, para. 2.14, citing from G. Simon, *supra*, note 66 at 289.

145 See also *supra*, notes 11-13 and 78 and accompanying text.

146 Hammar, "Introduction", *supra*, note 18 at 245.

these sectors amounted to 65.5 and 56.5 per cent respectively.[147]

These figures are somewhat dated and more recent indications are that, in some countries at least, the occupational status of migrant workers is improving.[148] These changes, however, do not seem to have been significant. For example, the number of migrant men in the manufacturing and building occupations in Germany remained at the consistently high level of approximately 80 per cent of the total foreign male labour force in both 1972 and 1980. Figures for 1990 show that the manufacturing and construction sectors continue to employ over 50 per cent of all foreign workers in Germany who constitute approximately ten per cent of the total workforce in these occupations.[149] The French National Census of 1982 indicated that the great majority of Mahgreb workers in France were manual workers and that about one half of these were unskilled.[150] Recent figures for Belgium confirm the view that change is slow. According to the annual Labour Force Survey, 63 per cent of non-EC nationals are manual workers compared with 51 per cent of EC nationals and 29 per cent of Belgian nationals. In Luxembourg, the great majority of foreign workers are to be found in construction.[151] The most recent statistics indicate, however, that the fastest growing sector

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147 Martin & Miller, *supra*, note 1 at 323, citing from *SOPEMI 1977*.

148 Thomas, *supra*, note 42 at 46 and Thomas, "Summing-up and Points of Comparison", *supra*, note 23 at 228-229. In his study, Thomas found that the lowest level of qualifications among migrant workers is to be found in France and Germany. In these countries, most foreign workers are concentrated in what are traditionally "immigrant" jobs and there are no indications of any trend towards an even distribution of foreign workers among the various economic sectors. In other European countries (Sweden, Belgium and the Netherlands), however, there is a trend towards a more even distribution of foreign workers in different kinds of occupations and the average level of qualifications is on the rise. *Ibid.*

149 See respectively Castles & Kosack, *supra*, note 12 at 495-496, citing Bundesminister für Arbeit und Sozialordnung, ed., *Situation der ausländischen Arbeitnehmer und ihrer Familienangehörigen in der Bundesrepublik Deutschland, Repräsentativuntersuchung 1980* (Bonn: Forschunginstitut der Friedrich-Ebert-Stiftung, 1981) and *SOPEMI 1992*, *supra*, note 36 at 63 (Table II.11). The 1978 *Mikrozensus Survey*, cited in OECD, *Young Foreigners and the World of Work* (Paris: OECD, 1981) at 30, found that 81.1 per cent of foreign workers in Germany were manual workers. Interestingly, the survey also revealed that there were no foreign workers in the German public service which German law, with rare exceptions, reserves for nationals. Castles & Kosack, *ibid.* at 497.

150 The National Census revealed that 82 per cent of Moroccan workers, 74 per cent of Algerians and 71 per cent of Tunisians were manual workers. *Report to the Conference on Migrant Workers from the Mahgreb in the EC*, *supra*, note 16 at 4, para. 1.8, citing from ILO, *Jeunes maghrébins: issus de l'émigration*, ILO Working Paper (1986).

151 *SOPEMI 1990*, *supra*, note 19 at 43. In Belgium, the highest proportion of foreign workers to national workers is to be found in mining and quarrying, metal-working and chemicals. *SOPEMI 1992*, *supra*, note 36 at 23. The 1987 Labour Force Survey in Luxembourg indicated that 66 per cent of all workers in the construction and civil engineering industry were resident foreigners. With respect to main frame construction, a

employing foreign workers in many European countries of employment is the service industry.[152]

None of the above figures include the occupational status of illegal migrants. It is safe to assume, in the light of what has already been said regarding the exploitation faced by this group, that the jobs in which they are engaged are, with few exceptions, of the worst kind.

The reasons for the low occupational status of migrant workers are twofold; their pre-migration traits and the migration control system.[153] Migrants' lack of education and the language difficulties that they face on arrival in the host country inhibit them from finding more suitable employment.[154] More importantly, the restrictions applied by nearly all European countries of employment greatly reduce the occupational mobility of migrants, at least in their first years of residence, and confine them to the lowest-rung of the occupational ladder.[155] Eric-Jean Thomas observes that the consequences of such restrictions go beyond their immediate economic effects:

> When you have a work permit system which allows some freedom of choice and movement to the worker, he will be able to move about within the economy of the country, and perhaps to take a better job, and take advantages of the same opportunities that the economy is offering to nationals. The consequences are not only economic, but social and political. The immigration regulations have a direct effect upon the migrants' integration into the society of the host country.[156]

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staggering 90 per cent of all workers in that section of industry were resident non-Luxembourg nationals. *SOPEMI 1990, ibid.* at 56.

152 *SOPEMI 1992, ibid.* at 25-26. In France, the Netherlands, Luxembourg and Belgium, the service sector employs the most foreign workers. This does not mean, however, that the proportion of foreign workers is highest in this sector. For example, in Belgium, the hotel and catering industry employs the greatest number of foreign workers, though they still account for less than ten per cent of its total labour force. *Ibid.* at 25.

153 *Growing Employment Problems in Europe, supra,* note 13 at 85.

154 *Ibid.* In addition, many of the early migrants were also unskilled labourers, although later entry criteria were made more selective and migrants became more skilled. A. Kudat & M. Sabuncouglu, "The Changing Composition of Europe's Guestworker Population" (1980) 103 Monthly Labour Review 10 at 10.

155 Martin & Miller, *supra,* note 1 at 323.

156 Thomas, *supra,* note 42 at 47.

(c) Migrant Women[157]

The common assumption that many of the original migrant workers were young single males is fallacious. On the contrary, most of the original migratory flows to Western Europe were composed of unmarried and married female workers.[158] Although later streams of migrants were largely male, this process underwent a fundamental change with the "stop" on labour migration after the energy crisis of 1973-74 and the subsequent increase in family reunifications.[159] In 1980, it was observed that approximately one quarter of all European work permits issued to foreigners since 1970 were for women and that women constituted more than 40 per cent of the total foreign population.[160] This trend is continuing, if not growing, according to 1990 figures in Table C below, setting out the number and percentage of women in proportion to the total foreign population and foreign labour force in a number of European countries of employment.

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157 For selected literature on this subject see: A. Phizacklea, ed., *One Way Ticket: Migration and Female Labour* (London: Routledge and Kegan Paul, 1983); A. Phizacklea, "Minority Women and Restructuring: The Case of Britain, France and the Federal Republic of Germany", Paper presented at the Conference on *Racial Minorities, Economic Restructuring and Urban Decline* (Center for Research in Ethnic Relations, University of Warwick, Warwick 1985); R. Simon, J. Brettell & C. Brettell, *International Migration: The Female Experience* (Totowa, N.J.: Rowman and Allanheld, 1986); *Situation of Young Women Migrants of the Second Generation in Western Europe, supra*, note 81; *Situation and Role of Migrant Women: Specific Adaptation and Integration Problems*, Intergovernmental Committee for Migration, Fifth Seminar on Adaptation and Integration of Permanent Immigrants, Geneva, April 6-10, 1981, Doc. MC/SAI/V/GEN/VI (Geneva, 1981); M. Negrini, *Intercultural Education and Migrant Women*, Report of a Seminar held in Caserta, Italy, October 29-31, 1985 (Strasbourg: Council of Europe, 1986); J. Guyot, R. Padrun & E. Dauphinet (World Council of Churches, Churches Committee on Migrant Workers, Working Party on Women Migrants), *Migrant Women Speak: Interviews* (London: Search Press/Geneva, World Council of Churches, 1978).

158 *Growing Employment Problems in Europe, supra*, note 13 at 86. For example, in Switzerland, foreign women formed most of the resident domestic service as well as the hotel and catering workforce. *Ibid.*

159 See *supra*, notes 23-26 and accompanying text.

160 Kudat & Sabuncouglu, *supra*, note 154 at 11, citing SOPEMI Reports from 1976 to 1979.

TABLE C - Women Migrants as a Percentage of Foreign Population and Foreign Labour Force (1990) (Figures in Thousands)#

COUNTRY	Foreign Population	Foreign Labour Force
Germany	5241.8 (2295.9) [43.8%)	1940.6 (628.4) (a) [32.4%)
Belgium	904.5 (415.4) [45.9]	...
France	3607.6 (1619.3) [44.9%]	1553.5 (484.6) [31.2%]
Netherlands	692.4 (311.1) [44.9%]	200.0 (54.0) [27.0%]
Sweden	483.7 (237.5) [49.0%]	257.9 (119.3) [46.3%]
Switzerland	1100.3 (483.7) [44.0%]	669.8 (228.7) (b) [34.0%]
Norway	143.3 (66.5) [46.4%]	...
Austria	...	217.6 (76.4) [35.1%]
Luxembourg	...	76.2 (26.3) (a) [34.5%]
United Kingdom	1875.0 (985.0) [52.5%]	933.0 (413.0) [44.3%]

\# Percentages have been added.
... Data not available.
(a) Figures for 1989
(b) Not including seasonal and frontier workers. In 1990, there were 121,700 seasonal workers working in Switzerland, of which 20,300 were women or 16.7 per cent of this labour force.

Sources: OECD, *SOPEMI 1992* (Paris: OECD, 1992)
OECD, *SOPEMI 1990* (Paris: OECD, 1991)

Women migrants are also more likely to take up illegal employment than their male counterparts, largely because many women either illegally join their husbands or parents in the

country of employment or, if they enter lawfully, seek unauthorized employment once in the country in order to supplement the normally low family income.[161] In the introductory chapter, it was noted that migrant women are usually found in illegal and unskilled employment. For example, in Italy and Spain respectively, 90 and 95 per cent of all Filipino migrant women are employed as domestic servants.[162] The likelihood of women taking up illegal jobs is also increased on account of the existence of restrictive regulations in some European countries limiting access to employment for members of migrant workers' families.

5. Conclusion

In the "Postscript to the Second Edition" of *Immigrant Workers and Class Structure in Western Europe*, Stephen Castles wrote in 1983:

> A decade after the ending of mass labour migration, the trend towards multi-ethnic societies has become irreversible throughout Western Europe. But the character of these societies and the position of the new ethnic minorities within them is still in the balance. Will they be racist societies, based on the marginalization and exploitation of the minorities? Or will they be societies linking a variety of different but equal cultures, which mutually enrich each other? That is the choice to be made in the coming decade.[163]

The character of these societies is still in the balance. The following chapters consider the steps taken in regional treaties and by individual European countries to integrate migrant groups into host communities and to protect and enhance their economic, social, cultural, political and residence rights. Although mass labour migration has come to an end, its consequences are reverberating around Europe. Foreign populations are still on the rise as a result of continuing

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161 Kudat & Sabuncouglu, *ibid.* at 13-14, observe that most migrant workers working illegally in Europe are women. With a spouse in Europe, it is easier for wives to obtain resident permits than work permits. Moreover, the documentation of this illegal employment is difficult because of the dependent status of these women.

162 "Foreign Women in Domestic Service", *supra*, Introduction, note 139 at 361. See also *supra*, Introduction, notes 138 and 140 and accompanying text.

163 Castles & Kosack, *supra*, note 12 at 505-506.

family reunification and the higher migrant birth rate. Migrants continue to occupy lowly occupational positions in countries of employment.

Europe itself is undergoing profound changes. It is difficult to predict how these changes will affect international migration for employment or the situation of migrant workers and their families already residing and working in host countries. Some suggestions may, however, be provided to chart a course for the very near future.

What is overwhelmingly clear is that the labour migration phenomenon has a dynamism of its own. The post-1973 recession and the subsequent economic restructuring in Europe halted the labour migration process. The likelihood of this phenomenon ending altogether for many years to come was predicted, and yet, recent events in Europe have brought the subject of labour migration before political fora once again. Early signs indicate that migration for employment is increasing. Although the political and economic changes in Central and Eastern Europe and in the republics of the former Soviet Union have not resulted so far in mass migratory flows westward, the conditions for such movements are rife. Much depends on how quickly these countries are able to improve standards of living for their citizens. If they fail or take too long to do so, the temptation of a better life in Western Europe, together with the lifting of visa requirements for travel to a number of Western European countries, may just be too great for the citizens of Eastern Europe, even if this temptation leads to the taking up of illegal employment. Any laws designed to restrict such outflows would render meaningless in Eastern European countries the newly acquired right to leave one's country or to emigrate, so long yearned for by advocates in the West.[164]

Central and Eastern European countries are not immune themselves, however, from inflows of migrant workers. They have already experienced such inflows to a limited extent, in the case of migrants from developing socialist countries, such as Vietnam. Given that, with time, their economies will eventually prosper, they too are likely to become migratory poles of

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164 Cf. Grecic, *supra*, note 48.

attraction, particularly for citizens from Third World states. The former sending European Mediterranean countries, such as Italy, Spain, Portugal and Greece, have suddenly become, as a result of growing economic prosperity, attractive places for migrant workers from developing countries, many of whom are willing to work illegally in order to make a living. A similar fate possibly awaits the new democracies of Central and Eastern Europe in the future.

The move towards the full implementation of free movement of labour, goods and services within the EC at the beginning of 1993 is also likely to result in increased migration for employment from outside of the EC. The potential for economic growth, and hence for the creation of labour surpluses, in this newly enhanced European trading block is substantial and perhaps inevitable. The real question is probably not whether labour migration to this new Europe will increase, but rather how workers from outside the EC are going to be treated and what rights they can expect in relation to EC nationals. This issue is considered in the following chapters.

In this present state of flux, as Europeans seek to redefine themselves in response to the transformations which they are experiencing, the need for a comprehensive approach to the protection of migrant workers and their families is evident. The questions raised by Stephen Castles at the beginning of these concluding remarks are still relevant nine years on. Will those migrants who have settled in host countries as well as those who have recently arrived, or who are still to come, be given the opportunity to contribute and belong to the new Europe? Or will they continue to occupy the periphery of human existence on the continent? The following chapters assert that only a comprehensive rights-based approach to the solution of the problems faced by migrant workers and their families in European countries may bring about an improvement in their condition.

CHAPTER SIX

COUNCIL OF EUROPE INSTRUMENTS AND THE EUROPEAN COMMUNITY REGIME: DEFINITIONS OF "MIGRANT WORKER", ILLEGAL MIGRANTS AND EQUALITY RIGHTS

1. Introduction

The international protection of the economic, social, cultural, political and residence rights of migrant workers and their families in Europe is discernible on many levels. It is important to distinguish the different regimes, organizations and multilateral instruments which have a say in the protection of this vulnerable group.

The European Community (EC),[1] consisting of twelve member states,[2] is the most advanced regime applicable to migrant workers and their families. Free movement of labour within EC countries is virtually a reality today. This reality brings with it a plethora of elaborate provisions aimed at the realization of full equality between nationals of member states. Other noteworthy free movement of labour regimes in Europe are those operating between the five Nordic countries[3] and the three countries of the Benelux region.[4]

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1 The correct term for the European Community (EC) is the European Economic Community (EEC). Recently, however, most commentators as well as Community documents have been using the former terminology. See also L. Betten, "Towards a Community Charter of Fundamental Social Rights" (1989) 7 NQHR 77 at 77 (footnote 2).

2 The twelve members of the European Communities are: Belgium [1/1/58], Denmark [1/1/71], France [1/1/58], Germany [1/1/58], Greece [1/1/81], Ireland [1/1/73], Italy [1/1/58], Luxembourg [1/1/58], Netherlands [1/1/58], Portugal [1/1/86], Spain [1/1/86], United Kingdom [1/1/73]. The dates provided in parenthesis are those of accession to the principal treaty mechanism, the *Treaty Establishing the European Economic Community*, Rome, March 25, 1957; 298 U.N.T.S. 11 [hereinafter *Treaty of Rome*]

3 Norway, Sweden, Denmark, Iceland, and Finland. All these countries are members of the Council of Europe (see below), but only Denmark belongs to the EC. Free movement of labour between the Nordic countries was first introduced as early as 1954. It is now regulated by the Agreement of March 6, 1982 concerning a common labour market. The Preamble to this Agreement declares that the "liberty to take up employment and settle anywhere in the Nordic countries is a fundamental right of nationals of the Nordic countries". See N.O. Andersen, "Free Movement of Labour Within the Nordic Countries and Within the European Communities" (1988) Nordic J. Int'l L. 384 at 384.

4 Belgium, Luxembourg and the Netherlands. See *Treaty Establishing the Benelux Union*, 1959, 381 U.N.T.S. 165 and *Benelux Convention on Establishment*, 1960 VIII Annuaire Européenne (1960) 169; ratified by Belgium, Luxembourg and the Netherlands on November 1, 1960 and July 1, 1960 respectively. All three countries also belong to the EC and the Council of Europe.

All EC member states are also members of the Council of Europe (CoE), which has been enlarged to 27 states with the admission of four former Eastern European socialist countries, namely Bulgaria, the Czech and Slovak Federal Republic, Hungary and Poland.[5] The CoE is the principal organization on the continent dealing with the protection of human rights. It has sponsored a number of human rights conventions which are relevant to the protection of migrant workers and their families.

The aim of this chapter is to set the context in which a more detailed examination may be undertaken of the standards in Europe pursuant to the protection of the aforementioned rights of migrant workers and their families. The chapter examines the relevance of CoE instruments and the EC regime for the protection of these rights and human rights in general. It describes the most important CoE instruments and EC regulations in this area. It then analyzes who is a "migrant worker" under the relevant CoE and EC standards, with particular reference to the position of EC law in respect of non-EC nationals. The chapter also analyzes the extent to which CoE Conventions and EC law protect the rights of migrants in an irregular situation. It will be seen that this protection is woeful in comparison with the protection afforded by ILO and UN standards, considered earlier in chapters three and four respectively. Finally, the applicability of the principle of equality and non-discrimination to migrants and nationals under CoE and EC standards is examined.

The different regimes and instruments in Europe, concerned with freedom of movement and the protection of migrant workers and their families, overlap substantially. Their common denominator, however, is that they benefit those defined to come within the ambit of their protection, with the exception of the *European Convention on Human Rights* (ECHR) which

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5 *Statute of the Council of Europe*, May 5, 1949; Council of Europe, *European Treaty Series* No. 1, 87 U.N.T.S. 103; entry into force August 3, 1949. The members of the CoE are (date of entry in parenthesis): Austria [16/4/56], Belgium [8/8/59], Bulgaria [1992], Cyprus [24/6/61], Czech and Slovak Federal Republic [21/2/90], Denmark [14/7/49], Finland [5/5/89], France [4/8/49], Germany [13/7/50], Greece [9/8/49], Hungary [6/11/90], Iceland [7/3/50], Ireland [2/8/49], Italy [3/8/49], Liechtenstein [23/11/78], Luxembourg [3/8/49], Malta [29/4/65], Netherlands [5/8/49], Norway [30/7/49], Poland [26/11/91], Portugal [22/9/76], San Marino [16/11/88], Spain [24/11/77], Sweden [20/7/49], Switzerland [6/5/63], Turkey [13/4/50], United Kingdom [26/7/49].

applies to all persons residing within the territories of states parties, regardless of whether their country of origin has ratified it or whether this country is even a member of the CoE. The other CoE agreements, however, operate on the basis of reciprocity and apply exclusively to nationals of states parties.[6] Similarly, the free movement of labour regimes operate only between member states. The degree of protection, therefore, that migrants might receive depends on the country from which they come. For example, Italian migrant workers are able to benefit from both EC provisions and those CoE instruments that Italy has ratified. Turkish migrant workers, however, may only benefit from the weaker provisions of CoE instruments unless provisions of an Association Agreement which their country has entered into with the EC are deemed to be directly applicable in national laws. Finally, only the ECHR is applicable to nationals from non-EC or non-CoE member countries, such as those from the Mahgreb region, residing and working in a country which has ratified the ECHR. It is this latter group of migrants which is most likely to face exploitation in Europe today.

2. Council of Europe Conventions

According to the Preamble to the *Statute of the Council of Europe*, the aim of the Organization is "to achieve a greater unity between its Members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress". This aim is to be pursued, *inter alia*, in "the maintenance and further realization of human rights and fundamental freedoms". Indeed, acceptance of the principles of the rule of law and of the enjoyment by all persons within the jurisdiction of human rights and fundamental freedoms, together with collaboration in this venture, constitutes a prerequisite to membership.[7] Because of this emphasis in the CoE's role

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6 See also A.H.J. Swart, "The Legal Status of Aliens: Clauses in Council of Europe Instruments Relating to the Rights of Aliens" (1980) Netherlands Y.B. Int'l L. 3 at 47.

7 Articles 1 and 3 of the *Statute of the Council of Europe*. See also Council of Europe, Secretariat, *What is the Council of Europe doing to Protect Human Rights?* (Strasbourg: Council of Europe, 1977) at 7.

upon the protection of human rights, which arguably can only be reinforced with the admission of new countries,[8] the Organization is in a good position to pay special attention to the plight of aliens and hence migrant workers.[9]

In line with the aim of the "maintenance and further realization of human rights and fundamental freedoms", a number of human rights conventions have been drafted under the auspices of the CoE, which have a direct or indirect bearing on aliens and migrant workers and their families. The protection of the human rights of aliens generally is arguably better achieved at the multilateral level than at the national level where the interests of sovereignty hold sway.[10]

CoE member states are required to bring the question of ratification of conventions and agreements adopted by the Committee of Ministers, (the executive body of the organization), before the competent national authorities within a specified time.[11] In addition to adopting conventions and agreements, the Committee of Ministers issues resolutions and recommendations to member states proposing common courses of action.[12] The Parliamentary Assembly of the CoE (the deliberative organ of the organization) also issues resolutions and recommendations. These resolutions and recommendations are not legally binding.[13] They

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8 Cf. A. Clapham, "The Role of the European Community" (1991) 1 AEHRYB [*Perspectives of an All-European System of Human Rights Protection - The Role of the Council of Europe, the CSCoE, and the European Communities - Proceedings of the Poznan Conference*] 63 at 65.

9 Swart, *supra*, note 6 at 50.

10 There are, however, a number of problems which question the practical usefulness of multilateral instruments at the national level: the terms of these instruments are deliberately general in order to accommodate the different positions of each country; they are not widely ratified; and the weight given to them in comparison to that given domestic law and the importance provided to them once incorporated into that law is not clear. P.R. Hammond, "International Agreements - New Convention aimed at improving Condition of Migrant Workers in Council of Europe Nations. European Convention on the Legal Status of Migrant Workers, *opened for signature* Nov. 24, 1977, 16 *Int'l Legal Materials* 1381 (1977)" (1977-78) 13 Texas Int'l L.J. 353 at 359, citing from T. Buergenthal, "Interaction of National Law and Modern International Agreements: Some Introductory Observations" (1970) 18 Am. J. Comp. L. 233 at 234-236.

11 Hammond, *ibid.* at 359 (footnote 47). Member states of the ILO are under a similar obligation with respect to conventions and recommendations adopted by the International Labour Conference. See *supra*, chapter three, note 21 and accompanying text.

12 Council of Europe, Directorate of Press and Information, *The Council of Europe - Aims, Operations, Activities* (Strasbourg: Council of Europe, 1979) at 10.

13 But they do represent the consensus opinion on a particular subject and require a unanimous majority vote of the Committee for adoption. See articles 20(c)-(d) of the CoE Statute and Hammond, *supra*, note 10 at 359 (footnote 38).

proclaim "far-reaching and general lofty principles" which member states are unlikely to accept as legally binding rules in the near future. This gulf between word and deed, therefore, make their usefulness questionable.[14] References throughout this chapter and the following chapters are nonetheless made to those resolutions and recommendations which directly concern migrant workers and their families.

The CoE conventions considered below are the ECHR, the ECE, the ESC and the EMW. An overall appraisal of their relevance to the protection of the rights of migrant workers and their families is presented together with a brief analysis of the effectiveness of the supervisory and enforcement mechanisms concerned with the implementation of each instrument.

2.1 European Convention on Human Rights (ECHR)[15]

The general applicability of the ECHR to the protection of the rights of aliens was examined in chapter one. This section offers a more detailed analysis, but with specific reference to the protection of the rights of migrant workers and their families.

The ECHR, as mentioned earlier, is the only CoE instrument which is generally applicable to all individuals residing in those countries which have ratified it and not merely to nationals of other states parties. This is reflected in the all-embracing language used in the instrument such as "everyone" and "no person".[16] Despite the use of these inclusive terms,

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14 Swart, *supra*, note 6 at 48. Swart, *ibid.* at 48-49, reasons that resolutions would be more important if CoE member states were to deliberate continuously on whether it is time to convert a resolution into a convention.

15 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, November 4, 1950; Council of Europe, *European Treaty Series* No. 5; entry into force September 3, 1953; ratified by 24 states as of March 18, 1992 (date or year of ratification in parenthesis): Austria [3/9/58], Belgium [14/6/55], Cyprus [6/10/62], Czech and Slovak Federal Republic [18/3/92], Denmark [13/4/53], Finland [1990], France [3/5/74], Germany [5/12/52], Greece [28/11/74], Iceland [29/6/53], Ireland [25/2/53], Italy [26/10/55], Liechtenstein [8/9/82], Luxembourg [3/9/53], Malta [23/1/67], Netherlands [31/8/54], Norway [15/1/52], Portugal [9/11/78], San Marino [1989], Spain [4/10/79], Sweden [4/2/52], Switzerland [28/11/74], Turkey [18/5/54], United Kingdom [8/3/51]. See Appendix D for the text of relevant provisions.

16 See also Drzemczewski, "The Position of Aliens in Relation to the European Convention on Human Rights: A General Survey" in Council of Europe, Directorate of Human Rights, *Human Rights of Aliens in*

however, the ECHR's relevance to the protection of the economic, social and cultural rights of migrant workers and their families is minimal, since, with a few exceptions, it is predominately concerned with civil and political rights.

It is indisputable that the ECHR affords aliens and nationals equal treatment with respect to "absolute rights", defined as those rights from which no derogation is permissible, such as the right to life (article 2) and the right to be free from torture (article 3).[17] The only "explicit" exception[18] to the general applicability of the ECHR to alien migrant workers is article 16:

> Nothing in articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

Articles 10 and 11 concern the so-called fundamental guarantees, namely the right to freedom of expression and "the right to freedom of peaceful assembly and to association with others", including the right of persons to form and to join trade unions for the protection of their interests, whereas article 14 asserts that the enjoyment of the rights and freedoms set forth in the ECHR are to be secured without discrimination. Article 16 does not mean that states parties can deny fundamental rights to migrants *carte blanche*. States parties may not, for example, preclude migrant workers from joining trade unions to protect their interests connected with employment or from forming their own associations. Any political implication in these activities, however, may jeopardize the above rights and freedoms. The *travaux préparatoires*

Europe, Proceedings of the Colloquy on "Human Rights of Aliens in Europe", Funchal, Madeira, Portugal, 17-19 October 1983 (Dordrecht: Martinus Nijhoff, 1985) 349 at 395. For example, article 1 of the ECHR proclaims: "The High Contracting Parties shall secure to *everyone* within their jurisdiction the rights and freedoms defined in Section 1 of this Convention" (emphasis added).

17 According to Andrew Drzemczewski, human rights guarantees in the ECHR may be divided into three categories: "absolute" rights, mentioned above; "qualified" rights, specifying rights and freedoms which may be limited provided that the restrictions are prescribed by law and necessary in a democratic society and that the aims of these restrictions are deemed legitimate thereunder; and "minimum" rights, which are considered to be an acceptable common denominator found to exist within the member states of the CoE and relatively easy to determine, such as the right to a fair trial (article 6). *Ibid.* at 359.

18 See also Goodwin-Gill, *supra*, chapter one, note 30 at 79.

reveal that the aim of article 16

> is to make provision for the fact that, in accordance with a universally admitted practice, the exercise of the fundamental rights by foreigners (non-nationals) may be subject to certain restrictions not applicable to nationals. These restrictions, however, must not violate the general principles of law as recognized by civilized nations...[19]

In line with this reasoning, the political activity of aliens must include participation by vote. Therefore, restrictions probably may also be made to the application of article 3 of the Protocol to the ECHR[20] imposing an obligation upon states parties "to hold free elections...".[21] Given the recent developments in some countries granting aliens the right to vote and electoral participation at the local level and that few European states in practice restrict the other political activities of migrant workers,[22] the argument that this "anachronistic" restriction should be removed is convincing.[23] Furthermore, article 16 has yet to be seriously invoked before the European Commission of Human Rights.[24] The rights which article 16 permits states parties to restrict in respect of aliens may also be restricted in other legitimate ways by virtue of in-built limitation clauses in the provisions themselves.[25] The possible implications of article 16 are

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19 Drzemczewski, *supra*, note 16 at 355 (endnote 25), citing from *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*, vol. III (1976) CoE Doc. CM/WPI (50) 1, 246 at 266.

20 *Protocol to the European Convention on Human Rights*, March 20, 1952; Council of Europe, *European Treaty Series* No. 9; entry into force May 18, 1954; ratified by 22 states as of March 18, 1992 (date or year of ratification in parenthesis): Austria [3/9/58], Belgium [14/6/55], Cyprus [6/10/62], Czech and Slovak Federal Republic [18/3/92], Denmark [13/4/53], Finland [10/5/90], France [3/5/74], Germany [13/2/57], Greece [28/11/74], Iceland [29/6/53], Ireland [25/2/53], Italy [26/10/55], Luxembourg [3/9/53], Malta [23/1/67], Netherlands [31/8/54], Norway [18/12/52], Portugal [9/11/78], San Marino [1989], Spain [1990], Sweden [22/6/53], Turkey [18/5/54], United Kingdom [3/11/52]. See Appendix D for the text of relevant provisions.

21 According to article 3, these elections are to be held "at reasonable intervals by secret ballot, under conditions that will ensure the free expression of the opinion of the people in the choice of the legislature". See also J.E.S. Fawcett, *The Application of the European Convention on Human Rights*, 2d ed. (Oxford: Clarendon Press, 1987) at 313.

22 See the section on "Political Rights", *infra*, chapter eight. Nevertheless, Swart argues, *supra*, note 6 at 60, that even though restrictions are not applied in practice, a feeling of uncertainty persists among aliens if restrictions remain authorized by law.

23 Drzemczewski, *supra*, note 16 at 355, 399; Swart, *ibid.*

24 Drzemczewski, *ibid.*; Fawcett, *supra*, note 21 at 313.

25 Swart, *supra*, note 6 at 60. Swart concludes, *ibid.*, that article 16 "does not befit a Convention on human rights, and hardly does the Council of Europe credit" and observes that there is no comparable provision

considered again in the section on "Political Rights" in chapter eight.

Aliens are specifically referred to in a number of other ECHR provisions. Article 1 of Protocol No. 7 to the ECHR[26] provides procedural safeguards against the arbitrary expulsion of legally resident aliens.[27] There is also a blanket prohibition on the collective expulsion of aliens in article 4 of Protocol No. 4 to the ECHR.[28] With respect to illegal migrants, article 2(1) of this Protocol limits the right to freedom of movement within the territory of a state party to those lawfully within that territory,[29] and article 5(1)(f) of the ECHR guarantees the right to liberty and security of the person, but permits the arrest and detention of those who attempt to enter into the country without authorization. The applicability of these provisions and the remainder of the ECHR to migrants is examined in more detail under the appropriate sections.

Despite the all-embracing language of the ECHR, the classical distinction between aliens and citizens is still apparent.[30] Nevertheless, the very fact that states agree to this instrument limits their sovereignty with respect to the treatment of foreigners. In the words of the European Commission of Human Rights:

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to article 16 in the ICCPR. Indeed, the ICCPR contains more specific clauses protecting aliens' rights than the ECHR, although the implementation machinery of the latter is stronger. Swart, *ibid.* at 52. See also *supra*, chapter one, notes 61-78 and accompanying text.

26 *Protocol No. 7 to the European Convention on Human Rights*, November 22, 1984; Council of Europe, *European Treaty Series* No. 117; entry into force November 1, 1988; ratified by 13 states as of March 18, 1992 (date or year of ratification in parenthesis where available): Austria [14/5/86], Czech and Slovak Federal Republic [18/3/92], Denmark, Finland [10/5/90], France [17/2/86], Greece, Iceland, Italy [1991], Luxembourg [1989], Norway, San Marino [1989], Sweden [8/11/85], Switzerland. See Appendix D for the text of relevant provisions.

27 In this respect it resembles article 13 of the ICCPR. *Supra*, chapter one, notes 71 and 73 and accompanying text. The grounds on which these safeguards may be overridden, however, are wider under article 1 because they may be overturned not only for reasons of national security, but also in the interests of public order, arguably a far broader concept.

28 *Protocol No. 4 to the European Convention on Human Rights*, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, September 16, 1963; Council of Europe, *European Treaty Series* No. 46; entry into force May 2, 1968; ratified by 17 states as of March 18, 1992 (date or year of ratification in parenthesis): Austria [18/9/69], Belgium [21/9/70], Cyprus [1989], Czech and Slovak Federal Republic [18/3/92], Denmark [30/9/64], Finland [10/5/90], France [3/5/74], Germany [1/6/78], Iceland [16/11/67], Ireland [19/10/68], Italy [27/5/82], Luxembourg [2/5/68], Netherlands [23/6/82], Norway [12/6/64], Portugal [9/11/78], San Marino [1989], Sweden [13/6/64].

29 See also article 12(1) of the ICCPR, *supra*, chapter one, note 68.

30 K. Oellers-Frahm, "The Contribution of the Council of Europe to the Legal Position of Aliens" in *The Legal Position of Aliens*, *supra*, Introduction to Case Study, note 2, 1725 at 1728. Drzemczewski, *supra*, note 16 at 395.

> [A] State which signs and ratifies the European Convention on Human Rights must be understood as agreeing to restrict the free exercise of its rights under general international law, including the right to control the entry and exit of foreigners to the extent and within the limits of the obligations which it has accepted under that Convention.[31]

Restrictions on state sovereignty are further manifest in the enforcement machinery of the ECHR. The ECHR contains the most developed, effective and successful enforcement mechanism found in all the CoE conventions. The ECHR is unique among CoE conventions concerning human rights in that it allows a direct right of individual petition to the European Commission of Human Rights, which determines the admissibility of the petition. Inter-state actions are also permissible. The Commission is available as conciliator for the parties in order to assist them in securing a friendly settlement. If a petition is found admissible, the Commission proceeds to establish the facts and issues a report, expressing its opinion on the alleged violation or violations. The case may then be referred by the Commission or the state party or parties concerned to the European Court of Human Rights, which rules on the matter. If no referral is made to the Court, the Committee of Ministers adopts a decision on the basis of the Commission's report. All the states parties to the ECHR have made declarations under articles 25 and 46 recognizing the right of individual petition and the jurisdiction of the European Court of Human Rights.

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31 *X* v. *Sweden* (No. 434/58) (1958/59) 2 Y.B. Eur. Conv. H.R. 354 at 372-373. See also Drzemczewski, *ibid.* at 368 and Plender, *supra*, chapter three, note 48 at 227. It must be emphasized that the ECHR, by virtue of article 60, does not preclude a more favourable regime operating in respect of aliens. Article 60 provides that the rights and freedoms in the ECHR cannot be construed "as limiting or derogating" from those already ensured by the domestic law of states parties or by other international agreements by which states parties are bound. See also Drzemczewski, *ibid.* at 353.

2.2 European Convention on Establishment (ECE)[32]

The broadly defined CoE goal of achieving greater unity among its members was the principal driving force behind the adoption of the ECE.[33] Unlike the ECHR, however, the ECE applies only to nationals of those CoE member states that have ratified it. Its purpose is to facilitate temporary visits and prolonged or permanent residence in states parties.[34] The ECE contains clauses on entry, residence and expulsion as well as lengthy provisions concerning equal treatment between nationals of member states in respect of gainful employment. There are also similar equality provisions dealing with rights in the workplace, participation in economic and professional organizations and education rights, including rights to vocational training.

Implementation of the ECE is supervised by a Standing Committee comprised of one representative from, (and appointed by), each state party to the agreement. The function of the Committee is to draw up proposals "designed to improve the practical implementation of the Convention and, if necessary, to amend or supplement its provisions". The Committee also arranges for the publication of periodic reports on the laws and regulations of states parties in respect of the provisions of the ECE. The opinions or recommendations of the Standing Committee are submitted to the CoE Committee of Ministers.[35]

This supervisory machinery is very limited in comparison to the sophisticated procedures provided for under the ECHR. Any practical value the ECE may have is further reduced on considering that nine of the eleven countries which have ratified it are also members

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32 *European Convention on Establishment*, December 13, 1955; Council of Europe, *European Treaty Series* No. 19; 529 U.N.T.S. 141; entry into force February 23, 1965; ratified by 11 states as of June 1, 1986 (date of ratification in parenthesis): Belgium [12/1/62], Denmark [9/3/61], Germany [23/2/65], Greece [28/11/74], Ireland [1/9/66], Italy [31/10/63], Luxembourg [6/3/69], Netherlands [21/5/69], Norway [10/11/57], Sweden [24/6/71], United Kingdom [14/10/69]. See Appendix D for the text of relevant provisions.

33 Goodwin-Gill, *supra*, note 18 at 227.

34 Articles 1 and 2. See also Lillich, *supra*, chapter one, note 2 at 85, who contends that the ECE functions more as a charter of rights for persons already settled in other countries.

35 Articles 24(1), 24(2) and 24(6) of the ECE respectively.

of the EC, with its far more liberal freedom of movement regime.[36] In spite of its secondary status to the EC regime, the ECE has played a significant role as precedent for many of the EC's provisions, especially those concerned with restrictions on free movement of labour on the grounds of "*ordre public*", national security and public health.[37] The ECE has also served as a catalyst for the development of other CoE instruments, most notably the ESC and the EMW, pertaining to the treatment of nationals from one state party residing and working in another state party.[38]

2.3 European Social Charter (ESC)[39]

The ESC was adopted in accordance with the aim of the CoE to achieve greater unity between member states for the purpose, *inter alia*, of "facilitating their *economic* and *social* progress, in particular by the maintenance and further realization of human rights and fundamental freedoms".[40] With its concern for economic and social rights, including social policy and labour relations, the ESC is the companion instrument to the ECHR.[41] As with the ECE, but unlike the ECHR, the ESC only protects the economic and social rights of nationals of CoE member states that are parties to the agreement. Its inapplicability to migrants who are not nationals of states parties, residing and working within the territory of another state party, must, however, put into question the fundamental nature of the economic and social rights

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36 Goodwin-Gill, *supra*, note 18 at 227. Moreover, the two non-EC states parties, Norway and Sweden, belong to the Nordic Council.

37 Plender, *supra*, note 31 at 238. See also the section on "Residence Rights", *infra*, chapter eight.

38 Cf. Goodwin-Gill, *supra*, note 18 at 227.

39 *European Social Charter*, October 18, 1961; Council of Europe, *European Treaty Series* No. 35; entry into force February 26, 1965; ratified by 20 states as of January 1, 1992 (date or year of ratification in parenthesis): Austria [29/10/69], Belgium [1990], Cyprus [7/3/68], Denmark [3/3/65], Finland [1991], France [9/3/73], Germany [27/1/65], Greece [6/6/84], Iceland [15/1/76], Ireland [7/10/64], Italy [22/10/65], Luxembourg [1991], Malta, Netherlands [22/4/80], Norway [26/10/62], Portugal [1991], Spain [6/5/80], Sweden [17/12/62], Turkey [1989], United Kingdom [11/7/62]. See Appendix D for the text of relevant provisions.

40 Paragraph 1, Preamble. Emphasis added.

41 Lillich, *supra*, note 34 at 88; D. Harris, *The European Social Charter* (Charlottesville, Virginia: University Press of Virginia, 1984) at 8-9; O. Kahn-Freund, "The European Social Charter" in F.G. Jacobs, ed., *European Law and the Individual* (Amsterdam: North-Holland, 1976) 181 at 182.

contained in the instrument:

> One cannot escape the conclusion that the possibility of discrimination specifically contemplated by the Social Charter must lead to serious hesitations as to how far the rights enumerated therein may be considered fundamental, and virtually deprives of all meaning and description of the Charter as being complementary to the Human Rights Convention.[42]

The ESC is divided into two parts. Part I is a list of rights, to be considered as a declaration of aims by states parties (article 21(1)(a)), and Part II translates these rights into precise legal obligations.[43] Ratifying states, however, need not accept all the provisions in Part II, but only five out of seven specified "core" articles and not less than three of the remaining 12 articles or 23 of the remaining 50 paragraphs.[44] The obligations in Part II are themselves divided into two groups: those necessitating immediate action by states parties and those obliging a state party to embark on a course of action with a view to achieving a result.[45]

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42 See M. Evans, "The European Social Charter" in J. Bridge, D. Lasok & R.D. Plender, eds, *Fundamental Rights: A Volume of Essays to Commemorate the 50th Anniversary of the Founding of the Law School in Exeter, 1923-1973* (London: Sweet & Maxwell, 1973) 278 at 284. This observation has been repeated elsewhere:

> The Charter does not however protect the nationals of non-contracting parties at all which seems a curious omission if it purports to set a standard of fundamental social rights which no State should fall below. To exclude a section of those legally resident on the territories of the States parties from the protection of those rights is contrary to the spirit of other major human rights instruments, which protect without discrimination.

See N. Mole, "Freedom of Movement in a Wider Europe: A Comparison of International Instruments" (1991) 1 AEIIRYB 199 at 204. Evans, *ibid.*, provides a possible justification for this approach in the observation that the preparation of the ESC began in 1954 when concern for the social problems of migrant workers was not as acute as at the time of writing (1973) and before the principle of equality of treatment of migrants with nationals began to gain acceptance.

43 Additional rights are to be found in the *Additional Protocol to the European Social Charter*, May 5, 1988; Council of Europe, *European Treaty Series* No. 128; not yet in force as of January 1, 1992; ratified by two states, Finland and Sweden, as of January 1, 1992. The Additional Protocol follows the format of the ESC. See generally L. Betten, "The Protocol to the European Social Charter: More Rights; A Better Impact? (1988) 6 NQHR 9.

44 Article 20(1)(b) and (c). See also Plender, *supra*, note 31 at 244. The seven specified articles are: article 1 (right to work), article 5 (right to organize), article 6 (right to bargain collectively), article 12 (right to social security), article 13 (right to social and medical assistance), article 16 (right of the family to social, legal and economic protection) and article 19 (right of migrant workers and their families to protection and assistance).

45 Kahn-Freund, *supra*, note 41 at 187. Examples of the first kind of obligation are the duty to issue safety and health regulations regarding working conditions (article 3(1)) and equal pay for equal work of equal value between men and women (article 4(3)). Examples of the latter are obligations to *aim* at a high and stable

The most relevant provisions in the ESC to migrant workers are article 18 (the right to engage in [illegible]al occupation in the territory of other contracting parties)[46] and article 19 (the right of migrant workers and their families to protection and assistance). This latter provision constitutes one of the seven specified "core" articles of the ESC.[47]

In chapter three, the contribution of the ILO to the drafting of the standards in the ESC was noted.[48] The ESC's provisions are largely modelled on ILO conventions and recommendations.[49] For example, article 19 was based on ILO Convention No. 97 of 1949.[50] Despite this cooperation between the ILO and the CoE in the drafting of the ESC, a clear distinction should be drawn between the ESC and ILO instruments. Although ESC provisions are less detailed and precise than some of the analogous ILO clauses, the ESC is formulated more in terms of human rights and embodies in a single document many of the provisions dispersed throughout numerous ILO instruments.[51]

The ILO has also made a significant contribution to the ESC's supervisory machinery and continues to play a role in the instrument's implementation. The ESC's supervisory machinery is greatly influenced by the ILO.[52] It is principally based on reports, which, in practice, states submit every two years on the ESC provisions they have accepted.[53] The reports are scrutinized by a Committee of Independent Experts which issues Conclusions. A representative of the International Labour Office participates in a consultative capacity at the

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level of employment (article 2(1)) and to *progressively* reduce working hours (article 12(3)).

46 This right is also framed in terms of a "progressive" obligation. *Ibid.*

47 See also *supra*, note 44. Out of the twenty states that have ratified the ESC, Denmark and Iceland have not accepted article 19 *in toto*. Austria has not accepted paragraphs 4, 7, 8 and 10 of the provision, the Netherlands has not accepted paragraphs 8 and 10 and Norway has rejected paragraph 8 of article 19.

48 *Supra*, chapter three, note 41 and accompanying text. See also Kahn-Freund, *supra*, note 41 at 199.

49 O. Kahn-Freund, "Labour Relations and International Standards - Some Reflections on the European Social Charter" in *Miscellanea W.J. Ganschof van der Meersch*, vol. 1 (Brussels: Emile, 1972) 131 at 132.

50 Plender, *supra*, note 31 at 244.

51 Cf. Harris, *supra*, note 41 at 11; Cf. Kahn-Freund, *supra*, note 41 at 198.

52 Kahn-Freund, *supra*, note 49 at 132.

53 An obligation upon states also exists to report on the ESC provisions which they have not accepted. This obligation, however, depends on a further decision of the Committee of Ministers with respect to the provisions on which reports are to be made. No such decision has yet been taken. Kahn-Freund, *supra*, note 41 at 201. A similar obligation exists under article 19 of the ILO Constitution in respect of unratified conventions and recommendations. See *supra*, chapter three, note 22 and accompanying text.

meetings of this Committee. The Conclusions and the reports are then submitted to a Committee of Government Representatives (formerly called the sub-committee of the Governmental Social Committee), which adds its own Conclusions, and then to the CoE Parliamentary Assembly for its Opinion. Finally, the complete documentation is communicated to the Committee of Ministers which may decide by a two-thirds majority to make recommendations to a state party.[54] No recommendations have been issued thus far.[55]

The supervisory procedure has been criticized largely on the grounds that the governmental element in the process is too influential.[56] The Conclusions of the Committee of Experts are "diluted" somewhat by the "official" views which follow, although in themselves, these Conclusions constitute a valuable source of "case law" for the interpretation of the ESC.[57] This "case law" has significantly expanded the protection afforded migrant workers and their families under the ESC. The ESC also fails to integrate the tripartite ideal successfully implemented in the procedures of the ILO.[58] No more than two representatives of employers and trade unions are permitted to participate as observers "in a consultative capacity" during the deliberations of the Committee of Government Representatives.[59] One commentator has remarked that "this is the marginal, one might say the vestigial, role the tripartite idea is allowed to play in the control mechanism of the Council of Europe".[60] Finally, the ESC further distances itself from its "companion", the ECHR, in that there is no individual right of complaint and no adjudication body, although, admittedly, there is no state reporting procedure

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54 Articles 21-29. See also Harris, *supra*, note 41 at 9; Kahn-Freund, *ibid.* at 202; L. Betten, "European Social Charter" (1988) 6 NQHR 69 at 71.

55 Betten, *ibid.* at 72. Betten notes the absurdity of this process at the stage of the Committee of Ministers. One third of the countries represented in the Committee of Ministers have yet to ratify the ESC, making it very difficult for this group to then judge those CoE member states that have ratified the instrument!

56 See generally Betten, *ibid.* at 71-73 and Betten, *supra*, note 1 at 89.

57 Betten, *supra*, note 54 at 74.

58 Betten, *supra*, note 1 at 89. See also *supra*, chapter three, notes 25-27 and accompanying text.

59 Kahn-Freund, *supra*, note 41 at 201.

60 *Ibid.* at 201-202. Another modest tripartite element in the enforcement procedure is found in article 23 of the ESC, which requires states to provide copies of their reports to both sides of industry for discussion. According to Kahn-Freund, *ibid.* at 201, this process, in practice, was poorly implemented.

under the latter instrument.[61]

Chapters seven and eight show that the provisions in the ESC applicable to migrant workers and their families and the means of implementing them fall considerably short of the standards and enforcement mechanisms found under the EC regime. This conclusion, however, is probably less the result of the weakness of the ESC and more the consequence of the strength and greater integration of the EC.[62] Nonetheless, the ESC remains probably, on its face, the most promising CoE instrument concerned with the protection of the rights of migrant workers and their families.

2.4 European Convention on the Legal Status of Migrant Workers (EMW)[63]

The EMW is the culmination of CoE efforts to produce a specific instrument for the protection of migrant workers and their families. In 1966, a committee of experts was established to draw up a draft convention on migrant workers with the intention of outlining the minimum obligations that CoE member states would accept regarding the legal status of this group. These experts were supported by a committee of observers comprised of observers from a number of international organizations, including the International Labour Office.

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61 See also Lillich, *supra*, note 34 at 88 and Betten, *supra*, note 1 at 88. Some of these concerns have been met by the recent *Protocol amending the European Social Charter*; October 21, 1991; Council of Europe, *European Treaty Series* No. 142; not in force; ratified by two states (Norway and Sweden) as of January 1, 1993. The Protocol remains a long way from coming into force, however, because it requires ratification by *all* the contracting parties to the Charter (article 8).

62 Kahn-Freund, *supra*, note 41 at 195-196 also writes:

> The great actual and even greater potential importance of the European Communities for the development of a European labour law and a European body of social legislation does not stem from the powers of the Communities to make new law. It does stem from the fact of European symbiosis and from the vastly increased incentive by voluntary action to arrive at a harmonisation of labour law and social legislation.

63 *European Convention on the Legal Status of Migrant Workers*, November 24, 1977; Council of Europe, *European Treaty Series* No. 93; entry into force May 1, 1983; ratified by seven states as of January 1, 1992 (date or year of ratification in parenthesis where available): France, Netherlands [1/2/83], Norway [1989], Portugal [15/3/79], Spain [6/5/80], Sweden [5/6/78], Turkey [19/5/81]. See Appendix D for the text of relevant provisions.

International employer and trade union organizations were also consulted.[64]

Despite this diverse input, the contents of the EMW, generally-speaking, are disappointing. The EMW, however, was drafted during a period of great fluctuation with regard to labour migration in Europe, which undoubtedly had an influence on the drafting work. The large number of migrant workers present in Europe before the oil crisis of 1973-74, the energy crisis itself and subsequent unemployment, the existence of regulations concerning freedom of movement within the EC and the adoption of Convention No. 143 of 1975 by the ILO were all significant events and factors affecting the condition of migrant workers and their families at this time.[65]

As with the ECE and the ESC, the EMW operates on the basis of reciprocity and applies only between CoE member states that are parties to the agreement. Consequently, migrant workers from the Mahgreb region, for example, residing and working in a state party, are unable to benefit from the EMW's provisions. The purpose of the EMW, as outlined in the Preamble, is "to ensure that as far as possible they (migrant workers) are treated no less favourably than workers who are nationals of the receiving state in all aspects of living and working conditions" and "to facilitate the social advancement of migrant workers and members of their families".[66] The phrase "in all aspects of living and working conditions" is a reflection of the concern of the EMW for migrant workers as workers, and more generally, as human beings.[67] The Preamble to the EMW also reiterates the CoE's aim to facilitate the "economic and social progress (of member states) while respecting human rights and fundamental freedoms" (paragraph 1). Despite this emphasis on human rights, few provisions in the EMW

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64 H. Golsong, "La convention européenne relative au statut juridique du travailleur migrant" in Société française pour le droit international, ed., *Les travailleurs étrangers et le droit international* (Paris: Éditions A. Pedone, 1978) 226 at 230.

65 *Ibid.* at 231.

66 Preamble, paragraphs 2 and 3 respectively. See also Council of Europe, *Explanatory Report on the European Convention on the Legal Status of Migrant Workers* (Strasbourg: Council of Europe, 1978) [hereinafter *Explanatory Report on the EMW*] at 6, para. 7.

67 Lillich, *supra*, note 34 at 89, observes that the EMW is "the furthest progression of international human rights law with respect to migrant workers" because it "concerns itself with the life of migrant workers *in toto* and not just with respect to the employment relationship". See also Hammond, *supra*, note 10 at 362. It would seem that the UN Convention now goes further in this regard. *Supra*, chapter four.

are phrased in terms of the rights of migrant workers.[68] The provisions are more concerned with inter-state obligations than with the conferment of rights upon individuals applicable in national law.[69] Consequently, the EMW is weaker in terms of the direct protection of the rights of migrant workers and their families than may appear to be the case at first glance. This conclusion is supported by the fact that the EMW is a "framework" instrument which does not purport to regulate in detail all aspects of the legal status of migrant workers, but refers instead to other relevant multilateral and bilateral instruments as well as to national legislation.[70]

The implementing organ of the EMW is the Consultative Committee, comprised of representatives from each state party to the agreement.[71] The function of the Committee is to "examine proposals submitted to it by one of the Contracting Parties with a view to facilitating or improving the application of the Convention, as well as any proposal to amend it" (article 33(3)). The Committee adopts opinions and recommendations by a majority of its members, although unanimous consent is necessary for the adoption of proposals to amend the EMW (article 33(4)). Any opinions, recommendations and proposals of the Consultative Committee are submitted to the CoE Committee of Ministers, which decides upon the action to be taken.[72] The Consultative Committee is also required to draw up a periodic report for the Committee of Ministers containing information regarding the laws and regulations in force in states parties in

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68 These are the right to leave and the right to enter subject to the necessary authorization (article 4(1)), equal rights with nationals regarding the prevention of industrial accidents and occupational diseases (article 20(1)), the right of access to courts and administrative authorities in the receiving state (article 26), the exercise of the right to organize (article 28), and the clause conserving rights acquired under other multilateral and bilateral instruments as well as under national legislation (article 31). See also Plender, *supra*, note 31 at 252, who consequently argues that the title of the EMW is "more ambitious than its content" and that it should be characterized as a treaty of establishment rather than as the basis for a system of regulating migrant labour.

69 Plender, *ibid.*; Golsong, *supra*, note 64 at 249. As far as the question of reservations is concerned, states parties may only make reservations to a maximum of nine articles, but not to the following provisions: article 4 (right of exit and entry), article 8 (work permit), article 9 (residence permit), article 12 (family reunion), article 16 (conditions of work), article 17 (transfer of savings), article 20 (industrial accidents and occupational diseases), article 25 (re-employment) and article 26 (right of access to courts and administrative authorities in the receiving country). See also *Explanatory Report on the EMW*, *supra*, note 66 at 30, para. 107.

70 *Explanatory Report on the EMW*, *ibid.* at 6, para. 8; Golsong, *ibid.* at 232.

71 Article 33(2). Any CoE member state may be represented on the Committee by an observer with the right to speak.

72 Article 33(5). Any revision to the EMW would be effected by means of a Protocol adopted by the Committee of Ministers and opened for signature to CoE member states. *Explanatory Report on the EMW*, *supra*, note 66 at 29, para. 105.

respect of the EMW's provisions (article 33(7)). The *travaux préparatoires* reveal that, in the absence of another body within the CoE capable of undertaking this task, the purpose of the Consultative Committee is to respond to the rapid economic and social developments that may affect migrant workers.[73] Theoretically-speaking, therefore, the Consultative Committee provides for an "evolutionary" and "fluid" element in the EMW enabling appropriate responses to be made to the ever-changing conditions affecting migrant workers and their families.[74] In practice, however, the Consultative Committee remains under the control of the politically-oriented Committee of Ministers.[75] Finally, the Consultative Committee also has a role to play in the implementation of article 12 of the EMW with respect to family reunification, which is considered in the next chapter.

The EMW, therefore, offers more promise than it can ever hope to translate into practice. Given that a mere seven countries have ratified the instrument, including only two major labour-receiving countries (France and the Netherlands), its practical usefulness must be placed in doubt.[76] The EMW has also been ratified by Norway, Sweden, Portugal, Spain, and Turkey. All these countries, with the exception of Turkey, are either members of the EC or the Nordic Council.[77] For the moment, therefore, the practical value of the EMW concerns its application in respect of inter-state relations between Turkey, which is a major supplier of migrant workers in Europe, and the remaining states parties to the EMW.[78]

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73 Golsong, *supra*, note 64 at 248.

74 Cf. Golsong, *ibid.* at 232, 247.

75 Cf. *Explanatory Report on the EMW*, *supra*, note 66 at 29, para. 105.

76 See also Parliamentary Assembly Recommendation 931 of October 8, 1981 on the European Convention on the legal status of migrant workers, deploring the fact that the EMW has been ratified by so few CoE member states and recommending that the Council of Ministers urge the governments of CoE member states to make a special effort to speed up the ratification of the EMW. "Documentation" (1981) Forum - Council of Europe No. 4, 19. The Parliamentary Assembly has called for a wider ratification of the EMW on a number of occasions. See in particular the earlier Recommendation 915 of January 30, 1981 on the situation of migrant workers in host countries and, more recently, Recommendation 1066 of October 7, 1987 on the social protection of migrant workers and their families. See respectively "Documentation" (1981) Forum - Council of Europe No. 1, 20 and Council of Europe, *Information Sheet No. 23 (November 1986 - October 1987)* Appendix XXV, 180.

77 Golsong, *supra*, note 64 at 251 also observes that the EMW and the EC differ from a technical standpoint in that state obligations derived from the former are inter-state, whereas those from the latter are regulated by supranational EC law.

78 Cf. Golsong, *ibid.* To some extent, the EMW is also relevant in respect of inter-state relations

3. The European Community Regime

EC norms relating to free movement of workers are the most advanced provisions concerning the protection of migrant workers and their families. The relevance of these standards outside of the uniquely integrated context of the EC, is questionable, however, beyond the example of the operation of a liberal regime in this area.[79] As more states clamour for accession to the EC, particularly countries from Eastern and Central Europe, these standards are arguably taking on an added significance.[80]

Although the EC's concern with migration has been primarily economic[81] within the context of the free movement of goods and services, EC regulations and policy have increasingly paid attention to the social and human rights' aspects of migration for employment. For example, EC legislation and policy extending to the protection of migrant workers outside of their immediate employment context is evident in areas such as social security, family reunification, the education of migrant workers' children, including the teaching of their culture and language, and political rights. This approach is in line with the EC philosophy that the creation of a single internal market cannot take place without concomitant progress in the social field.[82] An important part of this philosophy is the protection of the social rights of persons residing and working within the EC, which is the aim of the *Charter of the Fundamental Social Rights of Workers*, adopted in December 1989 by all the EC member states with the exception of the United Kingdom.[83]

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between the more established member states of the EC which have ratified the EMW, such as France and the Netherlands, and the newer EC countries, namely Portugal and Spain. Nationals from the latter two countries will only be able to benefit from the EC freedom of movement provisions after January 1, 1993. See *infra*, note 106.

79 See *supra*, Introduction to Case Study, note 2 and accompanying text.

80 Clapham, *supra*, note 8 at 68.

81 Stein & Thomsen, *supra*, Introduction to Case Study, note 2 at 1785.

82 Betten, *supra*, note 1 at 78, 83-84; *Report to the Conference on Migrant Workers from the Mahgreb in the EC*, *supra*, Introduction, note 18 at 13, para. 2.12.

83 *Community Charter of the Fundamental Social Rights of Workers*, adopted by the Heads of State or Government of the Member States of the European Community, Strasbourg, December 9, 1989; reprinted in

The elimination of obstacles to the principle of freedom of movement and its realization for workers within the EC constitute obligations under articles 3(c), 7 and 48 of the *Treaty of Rome*. Free movement of labour was effectively implemented by the end of 1968 by Regulation 1612/68, with the exception of the right to remain which came into being in 1970 with the enactment of Regulation 1251/70.[84] Both of these regulations have been buttressed by additional secondary legislation. Regulation 1612/68, however, is the most significant piece of secondary legislation. Its purpose is to implement the principles of non-discrimination and freedom of movement of EC workers enshrined in articles 7 and 48 of the *Treaty of Rome* respectively.[85] Regulation 1612/68 contains provisions concerning equal treatment between national workers of member states in respect of access to employment, employment and work conditions, social and tax advantages, vocational training, trade union rights, accommodation and education. The Regulation also determines which family members may join the worker in the country of employment and under what conditions. These provisions are analyzed in the next two chapters.

In 1987, the EC adopted the *Single European Act*, the primary objective of which is to realize a single internal market by the end of 1992.[86] The Act has done little to expand the above provisions regarding free movement of workers.[87] Initiatives in this area have largely

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Commission of the European Communities, Directorate-General for Employment, Industrial Relations and Social Affairs, *Social Europe 1/90* (Luxembourg: Office for Official Publications of the European Communities, 1990) 46-50. Paragraph 2 of the Preamble to the Charter asserts that "in the context of the single European market, the same importance must be attached to the social aspects as to the economic aspects and... therefore, they must be developed in a balanced manner". For a comprehensive analysis of the contents of the Charter see B. Bercusson, "The European Community's Charter of Fundamental Social Rights of Workers" (1990) 53 Modern L. Rev. 624.

84 See respectively Council Regulation 1612/68 of October 1968 on Freedom of Movement for Workers, O.J. Sp. Ed. 1968 475 (as amended by Regulation 312/76 of February 9, 1976, O.J. 1976 L39/2) and Commission Regulation 1251/70 of June 29, 1970 on the Right of Workers to Remain in the Territory of a Member State (O.J. Sp. Ed. 1970, 402).

85 Preamble to Regulation 1612/68. See also J.L. Fuster, "Council Regulation 1612/68: A Significant Step in Promoting the Right of Freedom of Movement within the EEC" (1988) 11 Boston College Int'l & Comp. L. Rev. 127 at 127-128.

86 *Single European Act*, 30 O.J. European Commission (No. L 169) 92 (June 29, 1987) (1987) 49 Common Market L. Rev. 741. For a brief description of the most salient aspects of the *Single European Act* see D. Stoelting, "The European Court of Justice and the Scope of Workers' Freedom of Movement in the European Economic Community" (1991) 6 Am. U. J. Int'l L. & Policy 179 at 195-197.

87 Stoelting, *ibid.* at 196-197.

been restricted to policy. The EC Commission has been the author of two principal policy documents on migration, the 1974 *Action Programme in Favour of Migrant Workers and their Families* and the 1985 *Guidelines for a Community Policy on Migration*.[88] These documents also constitute a large part of the EC's concern with regard to the protection of migrant workers and their families from non-EC member states residing and working within the EC. The attention of EC institutions is shifting increasingly to the problems faced by this group, which is not at present protected by EC standards or by the proposed internal market.[89] Moves towards providing workers and members of their families from third countries protection on par with EC nationals are examined below. Migrants from non-EC countries outnumbered EC nationals residing in other member states by eight to five million in 1988. Over half of the non-EC nationals residing and working in the EC came from the Mahgreb region, the territory of former Yugoslavia and Turkey.[90] Non-EC workers are concentrated disproportionately in four EC countries with 87 per cent residing in Germany, France, Belgium and the United Kingdom. In some member states, they account for over 50 per cent of the total foreign workforce.[91] Although migration for employment within the EC is in decline,[92] it is, generally-speaking, a fluid phenomenon predominantly dependent on economic fluctuations.[93] As observed in

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88 *EC Action Programme*, *supra*, Introduction, note 29; *Guidelines for a Community Policy on Migration*, European Communities, EC Commission, Bulletin of the European Communities, Supplement 9/85, Doc. COM (85) 48 final [hereinafter *EC Guidelines*].

89 See also Stoelting, *supra*, note 86 at 194, 196.

90 *SOPEMI 1990*, *supra*, Introduction, note 19 at 25 and 26, Table 10. There are 1,836,761 persons in the EC from the Mahgreb (Algeria, Morocco and Tunisia), 1,937,224 from Turkey and 679,336 from the territory of former Yugoslavia.

91 Note (EEC), "Migrant Workers: A Two-tier Labour Market" (August 1990) Eur. Industr. Rel. Rev. 12 at 12. In France and the Netherlands, 54.2 and 53.5 per cent of foreign workers respectively were non-EC nationals. *SOPEMI 1992*, *supra*, Introduction, note 19 at 142 (Table 19) and 144 (Table 22) [percentages worked out by calculation]. See *supra*, chapter five, Table A. In Germany, there is likely to be a greater proportion of non-EC workers among the foreign workforce because of the large number of Turkish nationals and persons from Yugoslavia and from its former Republics.

92 Plender, *supra*, note 31 at 193. Plender observes, *ibid.* at 215, that free movement of labour within the EC has not resulted in an increase in migration for employment across the borders of member states. On the contrary. In 1959, when freedom of movement for workers was in its infancy, 75 per cent of migrant workers in EC member states originated from other member states. In 1973, however, when the free movement principle was beginning to be implemented to the full, 75 per cent of migrant workers within the EC came from outside of the EC.

93 Cf. Penninx, *supra*, chapter five, note 14 at 956.

chapter five, however, migration for employment to EC countries from non-EC member states is likely to increase if, as expected, the creation of the single internal market results in substantial economic growth and, subsequently, a greater demand for labour.

The system of implementation of EC law is the most extensive and developed of those examined so far. Briefly, EC institutions comprise the Council of Ministers, the European Commission, the European Parliament and the European Court of Justice. The Council of Ministers is composed of representatives from each member state and enacts legislation to ensure the coordination of the economic policies of EC member states. The European Commission, known as the "guardian" of the treaties under the EC regime, is an independent body which oversees an immense bureaucracy and which may propose and enact legislation. The European Parliament, a body consisting of 518 members directly elected to five-year terms, primarily maintains an advisory role and exercises supervision over the Council and the Commission. Finally, the European Court of Justice (ECJ) is the principal institution responsible for the adjudication of disputes and for the clarification and interpretation of EC law.[94] The EC Commission may bring an action before the ECJ under article 169 of the *Treaty of Rome* against any member state that it believes has violated EC law. EC rules are also enforceable in the national courts of all member states and take precedence over domestic law. If the application of EC law is unclear, a national court may refer the question to the ECJ for clarification under article 177 of the *Treaty of Rome*.[95] Any conflict between domestic law and EC law is to be resolved in favour of EC law. On the whole, the ECJ has interpreted the free movement of labour provisions broadly, but it has viewed the permissible limitations on this principle in a very restrictive light.[96] Examples of the operation of this system of implementation are given below in regard to the ECJ's determination of who is a "migrant worker" under EC law and, in chapters seven and eight, with respect to its interpretation of the

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94 See also Stoelting, *supra*, note 86 at 179.

95 Mole, *supra*, note 42 at 208-209.

96 C. Greenwood, "Nationality and the Limits of the Free Movement of Persons in Community Law" (1987) 7 Y.B. of Eur. L. 185 at 185. See also the section on "Residence Rights", *infra*, chapter eight.

specific rights of migrants under EC law.

4. Definition of "Migrant Worker"

4.1 Council of Europe Instruments

From the CoE instruments applicable to migrant workers and their families, only the ESC and the EMW contain specific provisions on migrant workers and only the latter has a comprehensive definition of "migrant worker". A definition may be "implied" from the provisions of the ESC, particularly from article 19, but there is no definition of "migrant worker" in the ECHR or the ECE.

As noted earlier, with the exception of the ECHR, the other CoE conventions only apply to migrant workers who are nationals of other states parties.[97] From the text of article 19 of the ESC, it is clear that illegal nationals from other states parties are excluded. A number of paragraphs in this provision make references to workers "lawfully within" or "lawfully residing within" the territories of states parties. The ESC also specifically obliges contracting parties "to extend the protection and assistance provided for [in article 19] to self-employed migrants in so far as such measures apply" (article 19(10)).[98] This provision only operates in

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97 *Supra*, note 6 and accompanying text. The application of articles 1 and 2 of the ECE, obliging states parties to facilitate temporary entry and prolonged or permanent residence, is specifically restricted to "nationals of the other Parties". Although there is no explicit provision in article 19 of the ESC circumscribing its operation to nationals of states parties, the independent Committee of Experts maintains that this is the case. *Conclusions I* at 81, cited by Harris, *supra*, note 41 at 158; Plender, *supra*, note 31 at 244. This interpretation is consistent with the remainder of the ESC. For example, the "declaratory" parallel provision to article 19, paragraph 19 of Part I, limits the right of migrant workers and their families to "protection and assistance" to those who are "nationals of a Contracting Party". Furthermore, the Appendix to the ESC clearly maintains that articles 1 to 17 are only applicable to foreigners in so far as they are "nationals of other Contracting Parties". See also Harris, *ibid.* Finally, article 1(1) of the EMW defines "migrant worker" for the purpose of the EMW as a "national of a Contracting Party".

98 Compare this paragraph to the provisions of ILO Convention No. 97 of 1949 and Convention No. 143 of 1975 (article 11 in both) which exclude self-employed migrants from the ambit of their protection by defining "migrant worker" as a person who migrates for employment to another country "with a view to being employed *otherwise than on his own account*" (emphasis added). See also *supra*, chapter three, note 102 and accompanying text.

those states parties that have accepted it under the selective ratification procedure of the ESC.[99] The measures that appear to be inapplicable to self-employed migrants are articles 19(4) and 19(5) concerning equal treatment with nationals in respect of employment rights, trade union rights and employment taxes.[100] With regard to refugee migrant workers, the Appendix to the ESC obliges states parties to grant them the most favourable treatment possible.

The EMW, in article 1(1), defines "migrant worker" as "a national of a Contracting Party who has been authorized by another Contracting Party to reside in its territory in order to take up paid employment". The reference to the need for "authorization" in the definition, therefore, excludes migrants from other contracting parties who are in an irregular situation from the ambit of the EMW's protection. Furthermore, the EMW only applies to persons taking up "paid employment" and hence excludes the self-employed as well as those who are not economically active.[101] In addition to the definition of "migrant worker" in article 1(1), the following paragraph (article 1(2)) lists the categories of migrants to which the EMW does not apply. These comprise frontier workers, artists and other entertainers and sports persons engaged for a short period, members of a liberal profession, seamen, those undergoing training, seasonal workers and workers carrying out specific employment in a contracting party on behalf of an undertaking with its registered office outside the territory of that country.[102]

The exclusion of seasonal workers from the application of the EMW has been justified on the grounds that these workers were treated as a separate category from the very beginning

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99 *Supra*, note 44 and accompanying text. Austria and the Netherlands have expressly not accepted article 19(10) of the ESC and article 19 has not been accepted *in toto* by Denmark and Ireland. See also, *supra*, note 47.

100 Plender, *supra*, note 31 at 247. See also Harris, *supra*, note 41 at 188 with regard to article 19(4). Article 19(4) also provides for equal treatment with nationals in respect of accommodation and this provision should be clearly applicable to self-employed migrants. Plender, *ibid.* at 247-248.

101 See also, Plender, *ibid.* at 253, who includes students, tourists and retired persons in this latter category. Foreign students who have completed their studies and are now seeking work in the same country are not covered by the definition, unless they have been authorized to reside in that country in order to take up paid employment. *Explanatory Report on the EMW*, *supra*, note 66 at 8, para. 13.

102 This list resembles the list of excluded categories of migrants in article 11 of ILO Convention No. 143. The only differences are that the EMW provision excludes seasonal workers and that the exclusion with respect to migrants carrying out specific work contracts is drawn more broadly and precisely than its counterpart in article 11(2)(e). See Golsong, *supra*, note 64 at 234 regarding this latter point.

of the drafting process and that it therefore seemed preferable to treat the problems of seasonal migrant workers outside of the framework of the EMW.[103] Article 1(2)(e) of the EMW defines seasonal migrant workers as those "in an activity dependent on the rhythm of the seasons, on the basis of a contract for a specified period or for specified employment". Arguably, therefore, the EMW would be applicable to those migrants who are employed on seasonal contracts, but whose activities constitute *de facto* year-round jobs and are hardly "dependent on the rhythm of the seasons". Workers such as the "*faux saisonniers*" in Switzerland are an example of this latter group and hence should not be excluded from the application of the EMW.[104]

Finally, the definition in article 1 of EMW does not expressly refer to the families of migrant workers, but they are clearly covered by virtue of the numerous references made to them throughout the instrument.[105]

4.2 The "Migrant Worker" under EC Law

The definition of "migrant worker" under EC law is much broader than the one which may be ascertained from CoE instruments, particularly the ESC and the EMW. The intention here is not to undertake a comprehensive analysis of who is a "migrant worker" under EC law, but to provide a few examples of this broader definition. As with the ECE, ESC, and EMW, the EC regime concerning the free movement of workers only applies to nationals of states parties to the *Treaty of Rome*.[106] The EC regime, however, arguably operates on another level

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103 Golsong, *ibid.* at 234. The lack of protection for seasonal migrant workers is recognized by Parliamentary Assembly Recommendation 827 (1978), which invites governments, *inter alia*, to prepare further legal instruments for the protection of seasonal as well as frontier workers as a complement to the EMW. "Documentation" (1978) Forum - Council of Europe Nos. 1-2, 40.

104 See *supra*, chapter five, notes 104 and 105 and accompanying text. A specific argument, however, in relation to the "*faux saisonniers*" in Switzerland is academic, since Switzerland has not ratified the EMW.

105 Article 19 of the ESC also covers migrant workers' families. Indeed, the provision is entitled "The Right of Migrant Workers *and Their Families* to Protection and Assistance" (emphasis added).

106 Full freedom of movement for Portuguese and Spanish nationals will not be implemented until after January 1, 1993 when the transitional arrangements cease to apply. R. Penninx & P. Muus, "No Limits for Migration after 1992? The Lessons of the Past and a Reconnaissance of the Future" (1989) 27 IM 373 at 374.

to CoE conventions, for the concept of "alien" in EC law differs from that found in general international law. EC law strives to break down the barriers of state sovereignty by seeking complete equality between nationals of member states in employment and related matters, whereas CoE instruments can only hope to improve the treatment of migrant workers with respect to nationals and to achieve equality in certain areas.[107]

The workers to which the protection of EC law applies constitute a broad group. The ECJ has stated that the fundamental principle of the free movement of workers requires that the term "worker" in article 48 of the *Treaty of Rome* be interpreted broadly and be given an objective EC definition as opposed to one subjectively determined by member states.[108] The ECJ has held, therefore, that so long as migrants perform services for and under the direction of others for remuneration, freedom of movement applies to them.[109] The worker's activities, however, must be authorized,[110] economic, effective and genuine.[111] Purely marginal and ancillary activities are excluded from the definition.[112] Migrant workers who become unemployed, but who are capable of taking another job,[113] and those who are seeking

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The EC regime also applies to workers' spouses and dependent children under the age of 21, who are *not* nationals of a member state (article 11 of Regulation 1612/68). Nationality is to be determined by the laws of each state party, which can give rise to problems in certain countries. See Goodwin-Gill, *supra*, note 18 at 173-176; Plender, *supra*, note 31 at 198-199.

107 Cf. Stein & Thomsen, *supra*, note 81 at 1777. These authors note that EC law may also be significant in cases where nationals of member states return to their country of origin and want to make use of their education or skills acquired in the country of employment.

108 *Levin* v. *Staatssecretaris van Justitie* (No. 53/81), [1982] E.C.R. 1035, [1982] 2 C.M.L.R. 454; *Lawrie-Blum* v. *Land Baden-Württemberg* (No. 66/85), [1986] E.C.R. 2121; [1987] 3 C.M.L.R. 389; *Bettray* v. *Staatssecretaris van Justitie* (No. 344/87), [1991] 1 C.M.L.R. 459.

109 *Lawrie-Blum*, *ibid.*; *Bettray*, *ibid.*; *Brown* v. *Secretary of State for Scotland* (No. 197/86), [1988] E.C.R. 3205, [1988] 3 C.M.L.R. 403.

110 For example, Stein and Thomsen, *supra*, note 81 at 1778, maintain that activities for the purpose of prostitution would not come within the freedom of movement rubric.

111 *Levin*, *Lawrie-Blum*, and *Bettray*, *supra*, note 108. Effective and genuine activities include part-time employment (*Levin*, *ibid.*) as well as work where a person's income is supplemented by financial assistance from state funds (*Kempf* v. *Staatssecretaris van Justitie* (No. 139/85), [1987] 1 C.M.L.R. 764). In the latter case, a part-time German music teacher who resided in the Netherlands and who gave twelve one-hour lessons a week, "topping up" his income with supplementary benefit, was held to be a "worker" for the purpose of EC law.

112 An example of such work is where persons take up employment solely as a result of their being accepted for admission to university to undertake studies related to the nature of the work. The employment relationship in such a case is merely ancillary to the studies. *Brown*, *supra*, note 109.

113 *Unger* v. *Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* (No. 75/63), [1964] C.M.L.R. 319.

employment are also covered by article 48.[114] Furthermore, self-employed workers are protected by virtue of the right of establishment and freedom to provide services enshrined in the *Treaty of Rome*.[115]

4.3 Migrant Workers from Third Countries in the EC

Migrant workers and their families who originate from countries outside of the EC are often referred to as the EC's "13th Nation", the "cushion of a relatively cheap and flexible workforce during times of labour shortage".[116] As noted earlier, migrants from non-EC countries outnumber EC nationals residing and working in other EC member states by eight to five million. Freedom of movement for workers within the EC does not, however, apply to non-EC nationals. Although article 48 of the *Treaty of Rome* does not explicitly provide that only EC nationals may benefit from the freedom of movement provisions,[117] article 48(2) speaks of the abolition of discrimination based on nationality *between workers of member states* and subsequent EC legislation, such as Regulation 1612/68, clearly confines freedom of movement to these workers.[118] Cognizant, however, of the presence of a large number of

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114 *R* v. *Immigration Appeal Tribunal ex p. Antonissen* (No. 292/89), [1991] 2 C.M.L.R. 373. In this case, a Belgian national was subject to a deportation order on the grounds that he had failed to find employment six months after entering the United Kingdom. The ECJ held that it was reasonable for national law to provide a time limit within which migrants must obtain employment and that six months was a reasonable time limit. Such a time limit, however, cannot be applied if migrants are able to produce evidence that they are continuing to seek employment and that they have a genuine chance of obtaining it.

115 Articles 52-58 and articles 59-66 respectively. Stein and Thomsen, *supra*, note 81 at 1780, observe that the difference between the activity of self-employed workers and that of other workers is that the activity of the former is performed in the interests of the party concerned and on their own responsibility. Freedom of movement does not apply to stateless persons and refugees. EC member states, however, have agreed to treat as favourably as possible recognized refugees who reside in the territory of another member state, if they seek entry for the purpose of employment. See Declaration of Intent of March 25, 1964 (J.O. 1964 1225), cited by P. Oliver, "Non-Community Nationals and the Treaty of Rome" (1985) 5 Y.B. of Eur. L. 57 at 58. See also Stein & Thomsen, *ibid.* at 1778; Plender, *supra*, note 31 at 201.

116 Mole, *supra*, note 42 at 206; "Migrant Workers: A Two-tier Labour Market", *supra*, note 91 at 12.

117 Plender, *supra*, note 31 at 197, speculates that, in this way, the drafters of the *Treaty of Rome* may have wanted to leave open the possibility that the EC might develop a common external policy towards labour from third countries.

118 See *Caisse d'Allocations Familiales* v. *Meade* (No. 238/83), [1984] E.C.R. 263 in which the ECJ explicitly held that article 48 of the *Treaty of Rome* does not apply to non-EC nationals unless they are members of the worker's family.

non-EC migrant workers and their families in member states, an expected increase in the number of these workers and the particular problems these workers face, the EC Commission has endeavoured to develop a common EC policy espousing equality between this group and EC nationals, but without success so far.[119]

In response to the Commission's communication concerning an *Action Programme in Favour of Migrant Workers and their Families* in 1974, the Council of Ministers emphasized the need

> to improve the circumstances of workers who are nationals of third countries and members of their families who are allowed into Member States, by aiming at equality between their living and working conditions, wages and economic rights and those of workers who are nationals of the Member States and members of their families.[120]

The Council also considered it important to "undertake appropriate consultation on migration policies *vis-à-vis* third countries".[121] The Commission renewed its initiatives on behalf of migrants from third countries with the 1985 *Guidelines for a Community Policy on Migration*, which were also communicated to the Council. The Commission emphasized that EC action in this area should aim at equal treatment between non-EC and EC nationals:

> Migrant communities, whether of Community or non-Community origin, face much the same problems in their social and working life. It is a constant factor of the Community approach to these problems that the aim should be equality of treatment in living and working conditions for all migrants, whatever their

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119 See also the recent European Parliament Resolution of June 14, 1990 on migrant workers from third countries in which the European Parliament reiterates the premise that the completion of the single market implies a parallel social policy and notes that arrangements in this respect cannot possibly exclude the eight million non-EC migrants (paragraph A). The Resolution foresees the likelihood of an increase of migration from Central and Eastern Europe and from developing countries, and advocates the social integration of all EC and non-EC workers into the host society on a par with national workers (paragraphs B and C). Council of Europe, *Information Sheet No. 27 (May 1990 - November 6, 1990)* Appendix No. 55, 239.

120 Preamble, paragraph 5 of Council Resolution of February 9, 1976 on an action programme for migrant workers and members of their families. *EC Action Programme, supra*, note 88 at 7-8. See also article 2(c) of the Resolution.

121 Article 5(a) of the Resolution and paragraph 6 of the Preamble. The Council reiterated this proposal in its Resolution of June 27, 1980 on guidelines for a Community labour market policy (O.J. C168, 8/7/80).

origin, and workers who are nationals.[122]

The Commission proposed, as one of the priority actions, the development of consultation aimed primarily at migrants from non-EC countries.[123] In a subsequent Resolution, the Council recognized the desirability of promoting "co-operation and consultation between the Member States and the Commission as regards migration policy, including *vis-à-vis* third countries". The Council also emphasized, however, that EC member states retained their sovereignty in respect of the access, residence and employment of migrant workers from third countries.[124]

In 1985, the EC Commission adopted a binding decision, on the basis of article 118 of the *Treaty of Rome*, setting up a prior communication and consultation procedure on migration policies in relation to non-member countries.[125] The decision required member states to inform the Commission and other member countries, in advance, of all their draft measures and agreements concerning migrant workers from third countries with particular reference to such matters as entry, residence, equal pay and working conditions, and the integration of migrants and their families into the workforce, society and cultural life of the host state. The decision also provided for a consultation procedure, the objective of which was to, *inter alia*, adopt a common EC position on migration from non-EC countries and to ensure that the individual state draft measures and agreements were in conformity with EC policy in this field. Five countries challenged the decision mainly on the grounds that the issue of migration from outside the EC was beyond the scope of article 118 of the *Treaty of Rome*. The ECJ disagreed

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122 *EC Guidelines*, *supra*, note 88 at 5.

123 The consultation was to be particularly concerned with, *inter alia*, the safeguarding of the rights of migrant workers, clandestine migration and the illegal employment of migrant workers, the social and educational insertion of migrants, continuing priority activities to help second-generation immigrants, the provision of information on housing standards and on procedures for obtaining financial support, and the implementation of social security provisions, including the gradual extension to non-EC migrants of the principles governing EC rules relating to EC migrants. *Ibid.* at 16.

124 See respectively Article 3 of Council Resolution of July 16, 1985 on guidelines for a Community policy on migration (O.J. C186, 26/7/85) and paragraph 12 of the Preamble. *EC Guidelines*, *ibid.* at 17-18.

125 O.J. L 217 19/8/85. *EC Guidelines*, *ibid.* at 19. Under article 118 of the *Treaty of Rome*, the Commission is required to promote close cooperation between the member states in the social field.

that the policies of member states relating to non-EC workers fell outside the scope of article 118 because these policies were bound to affect the employment and working conditions of EC nationals, but it considered the part of the decision dealing with cultural integration of migrant workers as exceeding the scope of EC social policy. The ECJ also declared the decision void on the basis that the powers afforded the Commission under article 118 were purely procedural, namely that the Commission may only initiate the consultation procedure and not pre-determine its outcome.[126] Undoubtedly, this judgment has significantly stalled the Commission's efforts to promote the rights of migrant workers from non-EC countries:

> Whilst, therefore, a welcome must be given to the Court's ruling that article 118 EEC does indeed extend to migration policy in relation to non-member countries, and that it bestows a power upon the Commission to adopt binding decisions with a view to the arrangement of consultations, there are other aspects of the judgment which give rise to considerable disappointment. Since the somewhat uncertain start made with the action programme of 1974, it had appeared that the Community, at the highest level, had committed itself to the development of a policy which aimed to provide, at least, a concertation of migration policy in three priority areas - those of employment policy, social security and the integration of migrants into the host society. It had appeared, to judge from the official announcements, that the social advancement of migrants was accepted as necessary for social justice, economic efficiency and to counter racial and ethnic tensions. Against the background of an increasingly uncertain social and economic climate, the promotion of migrants' rights - whatever their country of origin - had come to be regarded as one of the principal social objectives of the Community... The belated attention paid in recent years to the position of migrants from non-member countries has received a major setback with this judgment - and from an unexpected source.[127]

The EC has also entered into association agreements with non-EC countries, notably

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126 *Re the Immigration of Non-Community Workers: Germany and Others* v. *E.C. Commission* (Nos. 281/85, 283-285/85 and 287/85), [1987] E.C.J. 3203, [1988] 1 C.M.L.R. 11. For commentaries on this case see K.R. Simmonds, "Joined Cases 281/85, 283, 284 and 285/85 and 287/85, *Germany and Others* v. *Commission*. Judgment of 9 July 1987, not yet reported" (1988) 25 Common Market L. Rev. 177; Greenwood, *supra*, note 96 at 269; and Stoelting, *supra*, note 86 at 197-198. In his opinion on the case, Advocate General Mancini, *ibid.* at 3223 and 19 respectively, described the attitude of member states towards any measure relating to non-EC immigration as one of "dissension, but above all coldness, distrust and vigorous defence of national sovereignty".

127 Simmonds, *ibid.* at 200.

with Turkey, and more recently, with three Eastern European states.[128] The aim of these agreements in relation to migrant workers is the gradual removal of restrictions on free movement of labour, establishment and services between these countries and the EC.[129] In *Demirel* v. *Stadt Schwäbisch Gmünd*, the ECJ held, however, that a wife of a Turkish national resident in Germany could not invoke the freedom of movement provisions in the EC Association Agreement with Turkey in order to stay in the country with her husband because the Agreement has no direct effect in member states unless a decision is issued by the Council of Association established under the Agreement, and no such decision had been issued at that time.[130]

As these cases show, it is unlikely that the ECJ will make a significant contribution to the protection of migrants from outside of the EC without concomitant political progress in this area. The Association agreements with Turkey and other countries are unlikely to germinate into fully-fledged EC memberships for some time to come.[131]

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128 *Treaty of Association between the EEC and Turkey* (Treaty of Ankara), September 12, 1963, J.O. 3687/1964; *Additional Protocol*, November 23, 1970, O.J. 1972, L 293/1. Recently, the EC entered into association agreements with three former Eastern European socialist countries, namely the Czech and Slovak Federal Republic, Hungary and Poland. J. Havemann (The Los Angeles Times), "Three Nations Become EC Associates" *The [Ottawa] Citizen* (November 23, 1991) 8. These agreements were signed by all the parties involved on December 16, 1991.

129 Stein & Thomsen, *supra*, note 81 at 12.

130 *Demirel* v. *Stadt Schwäbisch Gmünd* (No. 12/86), [1987] E.C.R. 3719, [1989] 1 C.M.L.R. 421. The law of the *Land* in question permitted family reunion only after the spouse had resided legally in the country for eight years and if the marriage had been contracted not less than three years before the application of the partner to join the spouse. Although the husband in this case had acquired a residence permit of unlimited duration, he had only worked in the country for four years. For a commentary on this case see G. Nolte, "Case 12/86 *Demirel* v. *Stadt Schwäbisch Gmünd*, Judgment of 30 September 1987, not yet reported. Freedom of Movement for Workers and EEC-Turkey Association Agreement" (1988) 25 Common Market L. Rev. 403. This case was followed by the English Court of Appeal in *R* v. *Home Secretary ex p. Narin* [1990] 2 C.M.L.R. 233 with respect to a Turkish national who sought to invoke the EC-Turkey Association Agreement and Protocol in order to prevent his deportation from the United Kingdom. For examples where provisions in Association Agreements have had direct effect, see *S.Z. Sevince* v. *Staatsecretaris van Justitie* (No. C-192/89), [1990] E.C.R. 3461, [1992] 2 C.M.L.R. 57 with regard to specified provisions in the EEC-Turkey Association Agreement and *Kziber* v. *Office National De L'Emploi* (No. C-18/90), [1991] E.C.R. 199 concerning a directly applicable social security provision in the EEC-Morocco Cooperation Treaty.

131 With regard to Turkey see M. Evans, "EC Countries not Ready to Embrace Turkey - Muslim Country may have to Wait Years Before Acceptance by European Family" *The [Toronto] Globe and Mail* (July 21, 1992) A7. This article reports that Turkey is unlikely to obtain EC membership until early in the next century. In contrast, member states of the European Free Trade Association (EFTA), namely Austria, Finland, Sweden and Switzerland, are going to be put on the "fast track" towards EC membership and will form an economic partnership with the EC at the beginning of 1993. The recent *EC Treaty on European Union*, adopted by EC member states in February 1992 and expected to come into force at the beginning of 1993, excludes non-EC

Probably the most significant inroad made by the EC with regard to the protection of non-EC nationals residing and working in member states has been the adoption of the Community *Charter of the Fundamental Social Rights of Workers* by eleven EC member states. Paragraph 8 of the Preamble to the Charter declares that it is for

> Member States to guarantee that workers from non-member countries and members of their families who are legally resident in a Member State of the European Community are able to enjoy, as regards their living and working conditions, treatment comparable to that enjoyed by workers who are nationals of the Member State concerned.

The Charter is only a "statement of intent"[132] and imposes no legally binding obligations upon member states. It is, however, a document which has been endorsed by all EC member states with the exception of the United Kingdom. In accordance with the above extract of the Preamble, its provisions relating to "living and working conditions" are all-inclusive embracing "every worker", and therefore apply to workers from third countries.[133]

5. Illegal Migrants

The particularly vulnerable position of illegal migrant workers and their families has already been outlined in preceding chapters. Their irregular status makes them especially subject to exploitation, and, consequently, to a gross violation of their rights. Although the ultimate objective should be the elimination of this exploited class of workers altogether by the implementation of strict enforcement mechanisms and, more importantly, by working towards the abolition of inequality between developed countries and the developing and underdeveloped world, the existence of this group cannot be ignored and measures to ensure its protection must

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nationals from its salient provisions. See *infra*, chapter eight, note 85 and accompanying text.

132 Note (EEC), "Charter on Fundamental Social Rights" (July 1989) Eur. Industr. Rel. Rev. 11 at 11.

133 See also Bercusson, *supra*, note 83 at 627.

be put into place. Indeed, as chapter two pointed out, liberal democratic states are obliged to afford protection to illegal migrants on the basis of their participation in society and their inherent worth as human beings.

Chapter five cited estimates of 2.6 million illegal migrants in Western Europe. In spite of this sizeable number of illegal migrants, CoE and EC standards are woefully deficient in the protection of their rights. It is indisputable that the ECHR protects the basic fundamental rights or "absolute rights" (from which no derogation is permissible) of irregular migrant workers and their families, since it applies to all those resident in the territory of a state party. Other rights, however, provided for in the ECE, ESC and EMW, exclude undocumented workers from their coverage by virtue of the fact that these instruments, with few exceptions, only apply to those "lawfully resident" in or "lawfully within" the territories of states parties.[134] The ECHR also specifically limits the application of some provisions to those "lawfully within" or "lawfully resident" in states parties.[135] The concept of "lawful residence" has been defined by the Committee of Experts, for the purpose of article 19(8) of the ESC, as "the possession [by migrant workers] of all papers legally required by the country of residence, including, if need be, a residence permit and a work permit".[136] This concept, therefore, is to be determined in accordance with national law.

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134 A brief survey of these instruments finds the following rights expressly dependent on legal residence in the country. In the ECE, articles 3 (expulsion), 12 (access to employment), 20 (education), and section V(b) of the Protocol (family reunification definition for the purpose of access to employment), and in the ESC, articles 19(4)-(5) (equality), 19(6) (family reunification), 19(7) (legal proceedings) and 19(8) (expulsion) expressly require lawful residence. The Appendix to the ESC also requires lawful residence and regular employment for the application of articles 1 to 17 of the ESC to foreigners. Article 1 of the EMW defines "migrant worker" as a national of a Contracting Party "who has been *authorized* by another Contracting Party to reside in its territory in order to take up paid employment" (emphasis added). This definition, therefore, expressly excludes illegal migrants from the protection of the EMW. See also *supra*, notes 98 and 101 and accompanying text.

135 See article 2(1) of Protocol No. 4 (the right to freedom of movement within the territory of a state party) and article 1 of Protocol No. 7 (procedural safeguards against the arbitrary expulsion of aliens) respectively.

136 *Conclusions* II at 97, cited in *Case Law on the European Social Charter*, Council of Europe, Social Affairs, at 71 (Council of Europe: Strasbourg, 1982) [hereinafter *ESC Case Law*]. See also Harris, *supra*, note 41 at 169, with reference to article 19(4) of the ESC. A similar interpretation of lawful residence may be offered with respect to the ECE. See Plender, *supra*, note 31 at 236, citing from *Commentary on the European Convention on Establishment adopted by the Standing Committee*, Council of Europe, 1980. Within the meaning of the *European Convention on Social and Medical Assistance*, residence for an alien is lawful "so long as there is in force... a permit or such other permission as is required by the laws and regulations of the country concerned to reside therein" (article 11(a)).

The one provision in the ECHR, which explicitly refers to illegal migrants, concerns their expulsion.[137] Article 5 of the ECHR guarantees the right to liberty and security of the person, but an exception to this guarantee is provided in article 5(1)(f), which permits the arrest and detention of those who have entered the country illegally, or against whom action is being taken with a view to deportation or extradition. The clause stipulates that the deprivation of liberty must be "in accordance with a procedure prescribed by law", which means that there has to be a basis for the proceedings in national legislation.[138] Moreover, the detention is lawful if expulsion proceedings have been commenced and are being seriously pursued. No actual expulsion order, however, need be in force.[139]

Since EC law applies only to nationals of member states, workers who come from non-EC countries, and particularly those with an irregular status, cannot expect any protection under its provisions. EC nationals may possess an "irregular status", but only if they fail to follow the proper formalities with regard to residence permits. They cannot, however, be expelled as a result.[140] Although the EC *Charter of the Fundamental Social Rights of Workers* pertains to *all* workers employed and resident in the EC, it appears that illegal migrant workers are excluded from its coverage by virtue of paragraph 9 of the Preamble to the Charter, which affords comparable treatment with national workers as regards living and working conditions to those non-EC workers and members of their families "legally resident" in EC member states.

Illegal migrant workers clearly lack protection under CoE agreements and the EC

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137 The only CoE provision arguably applicable to illegal migrant workers from other CoE member states, apart from those provisions concerned with residence and expulsion, is article 12(4) of the ESC, which calls for, *inter alia*, equal treatment between nationals of states parties in respect of social security rights in accordance with bilateral and multilateral agreements. See *infra*, chapter seven.

138 See also Swart, *supra*, note 6 at 21.

139 *Caprino* v. *U.K.* (No. 6871/75) (1978), 21 Y.B. Eur. Conv. H.R. 284, 12 Eur. Comm. H.R. D.R. 14, (1981), 22 Eur. Comm. H.R. D.R. 5. These proceedings, however, must be conducted with the "requisite diligence". *Lynas* v. *Switzerland* (No. 7317/75) (1977), 20 Y.B. Eur. Conv. H.R. 413, 6 Eur. Comm. H.R. D.R. 141. There is no precise reference to the permissible duration of confinement in article 5(1)(f) or in the case law with respect to this provision. Clearly though, in accordance with the *Lynas* decision, a period of lengthy detention is not justified.

140 See article 3 of Council Directive 64/221 of February 15, 1964 on the Co-ordination of Special Measures concerning the Movement and Residence of Foreign Nationals, O.J. Sp. Ed. 1963-64, 117. See also *State* v. *Royer* (No. 48/75), [1976] E.C.R. 1495, [1977] 2 C.M.L.R. 585.

regime. Provisions protecting the rights of irregular migrants arising out of past employment and provisions advocating employer sanctions and regularization, which are found in the 1975 ILO instruments and the UN Convention, are noticeably absent from the European standards.[141] CoE and EC institutions have tried to make up for some of these omissions in the area of policy.

CoE Parliamentary Assembly Recommendation 990 (1984) on clandestine migration in Europe commences with the premise that all migrant workers, regardless of status, should enjoy protection of their human rights on the same terms as nationals (paragraphs 5 and 11(c)(i)). It also advocates that CoE member states consider "as a first step, regularization of the situation of migrant workers who have already settled". Regularization, however, is viewed as "only an exceptional and non-renewable arrangement" (paragraph 11(b)). The Recommendation also calls for "severe administrative and penal sanctions for [*inter alia*] employers of clandestine workers..." and the provision of "equal treatment and working conditions for migrant workers" in order to "prevent illicit migration" (article 11(c)(ii)).[142]

The EC Commission's approach to the problem of illegal migration has centred mainly on prevention. In its 1974 *Action Programme*, the Commission emphasized the urgent need for member states to "adopt a common approach to deterrent measures" and to combat illegal immigration by, *inter alia*, imposing "strong legal sanctions against exploiters of immigrant labour".[143] These objectives were reiterated by the Commission in 1985. Attention was also given, however, to "the protection of workers' rights relating to the work they have already carried out" and "the fulfilment of employers' obligations".[144]

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141 See *supra*, chapter three, notes 276-285 and accompanying text and *supra*, chapter four, notes 204-207 and notes 216-219 and accompanying text.

142 Parliamentary Assembly Recommendation 990 (1984) of September 27, 1984 on clandestine migration in Europe. Council of Europe, *Information Sheet No. 16 (April - October 1984)* Appendix XXVII, 132. Under paragraph 11(a) of the Recommendation, CoE member state governments are invited to ratify ILO C143.

143 *EC Action Programme*, *supra*, note 88 at 21.

144 *EC Guidelines*, *supra*, note 88 at 10. The views of the Commission with respect to illegal migrants in the Guidelines are taken from the objectives in a 1976 proposal for a Directive on the harmonization of laws in the Member States to combat illegal migration and illegal employment (O.J. 97, 22/4/78), which was presented to the Council of Ministers in 1976, but never came to fruition. As chapter five indicated, efforts to adopt a common approach towards the prevention of illegal migration have developed outside of the ambit of the EC in

6. Equality and Non-discrimination

6.1 Background

Progress towards equality of migrant workers and their families with nationals of host countries and the elimination of discrimination against migrants is of utmost importance. As stated in chapter three, the extent to which equality is realized in this regard is profoundly connected to the protection of the rights outlined in chapters seven and eight.

Discrimination against migrant workers and their families in Europe manifests itself in many forms.[145] Two distinct seams are distinguishable: "systematic institutionalized discrimination"[146] officially sanctioned by the state and discrimination suffered by migrants at the hands of the general host population.[147] The first type is interwoven into the fabric of the temporary migration system.[148] It is particularly evident in the employment restrictions imposed on migrants in terms of work permits and geographic and occupational mobility, which contribute greatly to their lowly status in the working society.[149] Formal constraints on other rights in the economic, social, cultural and political spheres further marginalize migrants and their families.[150] Poverty, poor housing and inadequate education are some of the more

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the form of the *Schengen Agreement*. See *supra*, chapter five, notes 131-135 and accompanying text.

145 Although much of the literature on this subject concerns the situation in Western Europe, migrants in Eastern Europe have also suffered in a similar fashion. See *supra*, chapter five, notes 49-51 and accompanying text.

146 Gundara, *supra*, chapter five, note 19 at 33.

147 Castles and Kosack, *supra*, chapter five, note 12 at 499, write that since the curtailment of primary migration in the 1970s, the continued inferior position of migrants on the labour market can only be explained in the effect of practices of institutional and informal discrimination against migrant workers.

148 Martin & Miller, *supra*, chapter five, note 1 at 328, 329-330. Martin and Miller write, *ibid.* at 329-330, in assessing the possibility of establishing a temporary worker policy in the United States, that such a policy is unlikely to ensure respect for the human dignity of migrant workers. They contend that temporary worker policy in the context of a democratic society is, by its very nature, discriminatory and stands in opposition to the principle of equal opportunity.

149 See *supra*, chapter five, notes 155-156 and accompanying text. See also Hammond, *supra*, note 10 at 356.

150 Cf. Thomas, "Summing-up and Points of Comparison", *supra*, chapter five, note 23 at 232.

profound consequences of this marginalization process. The discrimination inherent in the migration system itself has been compared to an extension of colonialism ("*le colonialisme chez nous*") in that many migrant workers to Western Europe originate from developing countries: "Indeed, there is not only a similarity but also continuity between the traditional exploitation of labour under colonialism and the insertion of immigrant labour in the workforce of the industrialized countries".[151]

Migrant workers and their families also suffer from general discrimination in the workplace, in the allocation of housing and in other aspects of their daily lives. They are, as explained in chapter two, regarded as a threat to the nation's integrity and homogeneity.[152] They are portrayed in the media and by politicians as the cause of all ills and particularly as the cause of all social and economic problems in the country.[153] The increased visibility of migrants, largely because of the arrival of their families, and their concentration in certain regions of the country and in inner-city areas, leads to competition for employment, housing and social facilities with the national working-class. The resulting insecurity experienced by the latter spawns a racism, which, unfortunately, is encouraged by certain political groupings.[154] The worst manifestations of this racism can be seen in the emergence of Neo-Nazi organizations or extreme right-wing parties,[155] and in the proliferation of racially-motivated attacks.[156] The recent spate of such attacks against foreigners in Germany are a

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151 Stavenhagen, *supra*, chapter five, note 12 at 50. In a similar context, Thomas has observed wryly that "immigration has really been the Third World's aid to developed countries". "Conclusion", *supra*, chapter five, note 28 at 244

152 See also Thomas, "Summing-up and Points of Comparison", *supra*, note 150 at 232.

153 Castles, *supra*, chapter five, note 2 at 776. Such views are consistent with the argument that high levels of unemployment in host countries would be reduced significantly if migrant workers were expelled. This argument, of course, contradicts the evidence that nationals are in fact unwilling to take up the low-paid, insecure jobs presently carried out by migrants. *Report to the Conference on Migrant Workers from the Mahgreb in the EC*, *supra*, note 82 at 6, para. 1.13, citing from D. Maillat, "European Receiving Countries" in OECD, *The Future of Migration* (Paris: OECD, 1987) at 51.

154 Castles & Kosack, *supra*, note 147 at 503-504.

155 Two such parties, the National Front in France and the Republican Party in Germany, have won a significant share of the vote in local and national elections in these countries. *Report to the Conference on Migrant Workers from the Mahgreb in the EC*, *supra*, note 82 at 6, para. 1.13. In France, Le Pen's National Front now holds fifteen per cent support in public opinion polls. P. Koring, "Storm Cloud Builds in Europe" *The [Toronto] Globe and Mail* (November 21, 1991) A1 and A8 at A1.

156 Castles & Kosack, *supra*, note 147 at 503. In 1973, for example, 32 Algerians were murdered in

pertinent example.[157] Racist attacks have also been reported in the so-called "new countries of immigration". An example is this excerpt from a recent newspaper article reporting such attacks in Italy:

> In June (1991), a gang of youths in wealthy Varese stormed through the city's train station beating up North African immigrants, destroying 14 trailers and injuring two people. Earlier, someone burned down an interracial nursery school in Rome. Immigrant dormitories in Bologna and Florence have been the objects of violent attacks. In late August (1991) two Senegalese workers on vacation in Rimini were shot to death in what appears to be a racially motivated incident.[158]

There is undoubtedly a connection between "systematic institutionalized" discrimination and the prejudicial behaviour towards migrants displayed by the general host population. The root cause of both of these veins of discrimination results from host country treatment of migrants in pure economic terms and a fundamental neglect of their other more human needs. As Stephen Castles observed:

> The cause (of the discrimination and racism) is not the employment of migrants in itself, but rather, the attempt to treat migrants purely as economic men and women, and to separate between labour power and other human attributes. Because permanent immigration was not expected, and the states concerned refused to take the necessary steps to provide the housing and social amenities needed for orderly settlement, migration has exacerbated some of the underlying problems of Western European societies. It is easier now to blame the victims than to come to grips with the causes.[159]

Racist and discriminatory attitudes towards migrant workers and their families undermine any equal treatment policies in place and hardly serve the task of their integration

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France in a series of racially-motivated attacks. Castles, *supra*, note 153 at 764. Such attacks are frequently unreported and unredressed due to the insecurity of migrant workers in host countries. *Report to the Conference on Migrant Workers from the Mahgreb in the EC, ibid.*

157 Reuters, "Surge of Attacks in Germany" *The New York Times* (October 14, 1991) A3. See also Koring, *supra*, note 155 at A1.

158 A. Stille, "Bigotry Begins to Fester in Italy" *The [Toronto] Globe and Mail* (November 11, 1991), A1, A10 at A10.

159 Castles, *supra*, note 153 at 776.

into the host society.[160] As chapter three has shown, this integration is more likely to be achieved by the promotion of equality and the elimination of discrimination in practice rather than by its formal prohibition.[161] Such an approach requires a coherent "immigrant policy", including special measures directed specifically at the improvement of the condition of migrant workers and their families.[162] These measures, if the particular situation of migrants so demands, may require the temporary provision of more elaborate rights for migrants than for nationals.[163]

6.2 CoE and EC Standards

It is difficult to speak in terms of true equality between migrant workers and nationals of European countries of employment when the majority of CoE instruments of relevance to migrant workers and their families are unequal from the start, in that they only apply to nationals of other states parties. Furthermore, the principle of equality in these agreements is qualified to a significant degree in those areas that are probably most important to migrant workers and their families, namely access to employment, political rights and residence.[164] For example, the objective of the EMW, spelt out in paragraph 2 of the Preamble, is to ensure that migrant workers are "as far as possible... treated no less favourably than workers who are nationals of the receiving State in all aspects of living and working conditions", and yet

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160 *Growing Employment Problems in Europe*, *supra*, chapter five, note 13 at 88.

161 *Supra*, chapter three, note 116 and accompanying text. The *Conference on Mahgreb Migrant Workers in the EC - Conclusions*, *supra*, chapter five, note 58 at 6, para. 33, proposed the following positive action to combat discrimination against migrants: strict enforcement of laws promoting racial harmony; the highest priority to be accorded by the law enforcement authorities to the prevention of acts of racist violence and to combat racist attitudes within their own structure; disciplinary mechanisms and positive awareness campaigns to eliminate such racism; education at school to emphasize that migrants belong fully to society; and anti-racism campaigns to promote religious freedom.

162 See Hammar's distinction between direct and indirect "immigrant policy" measures. *Supra*, chapter five, note 74.

163 *Growing Employment Problems in Europe*, *supra*, note 160 at 103. Certain measures, particularly in the cultural sphere, should arguably be of a permanent nature in order to remedy a "permanent" inequality innate in the situation. See Cholewinski, *supra*, Introduction, note 74 at 160-161.

164 See also Swart, *supra*, note 6 at 48, 50.

equality in the EMW in the three areas mentioned above is lacking. Moreover, there is no general equality or non-discrimination provision in the main text of the EMW as there is in the ESC and the ECHR,[165] although, as shown below, the ECHR does not have an equality provision in the true sense since it is tied to other rights in the instrument. Free movement of labour within the EC is also confined to nationals of member states, although greater efforts have arguably been made within the EC to extend equality to migrants from non-EC countries. Finally, there are no explicit provisions in CoE Conventions or in EC law requiring states to combat racism and xenophobia towards foreign migrant workers and their families, although both CoE and EC institutions have referred to this subject in the policy area.[166] This does not mean of course that individual European countries are not taking measures to combat racism and xenophobia on the domestic level.[167]

The only CoE instrument to apply to all persons residing within the territories of states parties is the ECHR. The ECHR makes no distinction in principle between aliens and nationals, unless this is specifically provided for in the text.[168] The non-discrimination provision of the ECHR, article 14, is limited because it only applies to the rights and freedoms set forth in the Convention.[169] Although it is uncertain whether article 14 may have an

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165 There are, however, equality provisions in the EMW referring to the following matters: housing (article 31), education and vocational training (article 14), work conditions (article 16), social security (article 18), social and medical assistance (article 19), occupational safety (article 20), inspection of working conditions (article 21), taxation on earnings (article 23), expiry of contract and discharge (article 24), right of access to courts and administrative authorities (article 26), use of employment services, (article 27), the right to organize (article 28) and participation in the affairs of the undertaking (article 29).

166 See in particular Parliamentary Assembly Recommendation 968 (1983) of September 27, 1983 on xenophobic attitudes and movements in member countries with regard to migrant workers, which invites CoE member state governments, *inter alia*, "to enact or strictly apply legislation to prevent or punish discriminatory or xenophobic activities" and to take measures to "promote understanding between the nationals of host countries and foreign workers" (paragraphs 16(iv) and (v)). Council of Europe, *Information Sheet No. 13 (April - October 1983)* Appendix XI, 61. See also the EC Joint Declaration against Racism and Xenophobia of June 11, 1986, signed by the European Parliament, the Commission, the Council of Ministers and member states. This Declaration refers explicitly to third-country workers and their families and contains an undertaking to protect all individuals without discrimination on the grounds of nationality, race or religion. See also the recent European Parliament Resolution of June 14, 1990 on measures to combat racism and xenophobia, criticizing a draft Council resolution of February 14, 1989 on racism and xenophobia (O.J. No. C 69, 20.3.1989, p.43) which does not apply to immigrants from non-EC countries. Council of Europe, *Information Sheet No. 27 (May 1990 - November 6, 1990)* Appendix No. 54, 237.

167 See for example, the *Race Relations Act* (U.K.), 1976, c. 4.

168 For example, see article 16 of the ECHR, *supra*, notes 18-25 and accompanying text.

169 Article 14 reads:

independent function,[170] it certainly cannot be labelled as a general non-discrimination provision in the same vein as article 26 of the ICCPR.[171] What is clear, however, is that there need not be a violation of another provision in the ECHR for article 14 to operate.[172] A government measure in conformity with a particular provision of the ECHR may nonetheless be unlawful when considered in the light of article 14.[173] Although article 14 does not expressly prohibit discrimination on the grounds of nationality, it contains illustrative or open-ended language, which may support such an argument, provided that any discrimination based on nationality is not justified under article 16 or under limitation clauses found in other provisions of the ECHR.

Article 14 of the ECHR does not impose a purely negative obligation upon states parties, but may require that positive action be taken so that the enjoyment of the rights and freedoms in the ECHR are secured without discrimination.[174] Consequently, it appears broader than the principal equality provision in the ESC, namely article 19(4) which obliges states parties to secure for migrant workers

> lawfully within their territories, insofar as such matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment not less favourable than that of their own nationals in respect of the following matters:
>
> (a) remuneration and other employment and working conditions;

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

170 Goodwin-Gill, *supra*, note 18 at 80, observes that in some cases this provision has been given its more restrictive interpretation, whereas in others it has been accorded a much more independent role.

171 *Supra*, chapter one, note 63. Swart, *supra*, note 6 at 53, argues for a general non-discrimination provision to be inserted into the ECHR.

172 *Grandrath* v. *Federal Republic of Germany* (No. 2299/64) (1965), 8 Y.B. Eur. Conv. H.R. 324. This approach was confirmed in the *Belgian Linguistic Case* (1968), Eur. Court H.R. Ser. A, No. 6. See also Goodwin-Gill, *supra*, note 18 at 80, 82.

173 Goodwin-Gill, *ibid.*

174 *Belgian Linguistic Case*, *supra*, note 172. See also Goodwin-Gill, *ibid.* at 81-82.

(b) membership of trade unions and enjoyment of the benefits of collective bargaining;

(c) accommodation.[175]

Article 19(4) of the ESC is closely modelled on article 6(1)(a) of ILO Convention No. 97 of 1949.[176] It suffers, however, from similar weaknesses to those of its predecessor. First, its coverage is limited to matters connected with employment. Equality in other areas of concern to migrant workers and their families, such as education and culture, is not dealt with. Second, the clause only applies to discrimination regulated by laws, regulations or the action of administrative authorities.[177] Private discrimination is not covered *per se*.[178] Therefore, discrimination against migrant workers by landlords, for example, with respect to the acquisition of rental accommodation on the private housing market is not protected by article 19(4) if such discrimination is not prohibited by national law. The third weakness, which stems from the second, is that states are under no obligation to take positive action to promote equality. This conclusion is disturbing given the growing racism towards foreigners in Europe outlined above. It appears, therefore, that states parties to the ESC are not obliged under article 19(4) to deal with discriminatory attitudes towards migrant workers by employers or domestic co-workers in the workplace and to promote racial harmony, unless this duty is specifically provided for in domestic legislation.

In spite of the restrictive wording of article 19(4), the Committee of Independent Experts has maintained that article 19 as a whole should not only ensure equality of treatment between national workers and foreign workers, but also requires the taking of special measures

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175 In addition, equality with nationals in respect of employment taxes, etc., and legal proceedings relating to matters referred to in article 19, is provided in articles 19(5) and 19(7) respectively.

176 Harris, *supra*, note 41 at 169. For the text of article 6(1)(a) see Appendix B.

177 The Committee of Experts, however, has emphasized that "it is not enough for a government to prove that no discrimination exists in law alone, but that it is obliged to prove in addition that no discrimination is practised in fact". *Conclusions III* at 92, cited in *ESC Case Law*, *supra*, note 136 at 158. See also Swart, *supra*, note 6 at 29-30.

178 Harris observes, however, that the Committee of Experts may be moving towards an interpretation of article 19(4) obliging states to counteract private discrimination. *Supra*, note 43 at 169 (footnote 908), citing from *Conclusions VII* at 102 with respect to the Swedish report.

on behalf of the latter group:

> [Article 19] goes beyond merely guaranteeing equality of treatment as between foreign and national workers in the sense that, recognizing that migrants are in fact handicapped, it provides for the institution by the Contracting States of measures which are more favourable and more positive to this category of persons than in regard to the states' own nationals.[179]

This is because equality in law between nationals and migrants does not always ensure equality in practice. An example given by the Committee is where a period of residence is necessary for eligibility for government-subsidized housing.[180] Such a requirement, equally applicable in law to both national workers and migrant workers, is likely to have a discriminatory effect on the latter, especially if they have only recently arrived in the country of employment.

In EC law, the principle of equality of migrant workers from other member states and nationals is enshrined in articles 7 and 48(2) of the *Treaty of Rome*. The former provision constitutes a general prohibition of "any discrimination on grounds of nationality", whereas the latter provides that freedom of movement for workers "shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment". In contrast to article 19(4) of the ESC, the prohibition of discrimination in articles 7 and 48 of the *Treaty of Rome* applies not only to acts of public authorities, but also to rules of any other nature aimed at regulating in a collective manner gainful employment.[181] Equality is to be ensured in practice and all forms of covert action, which lead to the same discriminatory result, are to be outlawed.[182] The principle of non-discrimination is elaborated in Regulation 1612/68. The

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179 *Conclusions I* at 81, cited in *ESC Case Law, supra*, note 136 at 149.

180 *Conclusions V* at 123, cited in *ESC Case Law, ibid.* at 150.

181 *Walrave* v. *Union Cycliste Internationale* (No. 36/74), [1974] E.C.R. 1405; [1975] 1 C.M.L.R. 320. The rules at issue in this case were those concerning the world championship in motor-paced bicycle racing.

182 *Sotgiu* v. *Bundespost* (No. 152/73), [1974] E.C.R. 153 in which the ECJ ruled, *inter alia*, that taking into consideration the fact that workers reside in another EC member state in determining the grant of a family separation allowance to workers may constitute discrimination.

equality clauses in Regulation 1612/68 are similar to those in article 19(4) of the ESC in that they espouse non-discrimination in respect of employment and work conditions, trade union rights and housing,[183] although they are far more detailed and comprehensive than the equivalent provision in the ESC.[184] The principal difference, however, between the equality provisions of the ESC and Regulation 1612/68 is that the latter secures comprehensive equal treatment between migrant workers and nationals in respect of the right of free access to employment, which is examined at the beginning of the next chapter.

7. Conclusion

The stage has been set for the examination of the protection by CoE instruments and EC law of the economic, social, cultural, political and residence rights of migrant workers and their families. This chapter offers two broad conclusions with regard to this protection.

First, CoE Conventions and EC law do not, by any means, protect *all* migrants. The ESC and the EMW, the two CoE instruments containing explicit provisions on migrant workers, apply only to nationals of states parties. The EMW is the sole CoE instrument which contains an express definition of "migrant worker". Even so, it excludes a number of significant categories of migrant workers, notably self-employed, seasonal and undocumented workers. All these categories, for example, are covered by the definition of "migrant worker" in the UN Convention. In contrast, the EC regime offers the broadest definition of "migrant worker" found anywhere, but EC institutions have struggled to adequately protect non-EC nationals who remain "disenfranchised" in respect of the free movement of labour provisions.

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183 Regulation 1612/68, Title II, Employment and Equality of Treatment. Article 2 of the EC *Charter of the Fundamental Social Rights of Workers* proclaims the principle of equal treatment between EC workers in more general terms:

> The right to freedom of movement shall enable any worker to engage in any occupation or profession in the Community in accordance with the principles of equal treatment as regards access to employment, working conditions and social protection in the host country.

184 According to Goodwin-Gill, *supra*, note 18 at 169, provisions concerning themselves with detail are one of the characteristics of an effective freedom of movement regime.

Only the declaratory EC *Charter of the Fundamental Social Rights of Workers* arguably extends limited protection to this group.

The rights of illegal migrants are unprotected by CoE instruments and EC law. None of the CoE Conventions and EC regulations, nor even the EC Charter, apply to them, with the exception of the ECHR which in essence only safeguards their fundamental rights. In contrast to the standards found in ILO instruments and the UN Convention, the protection of illegal migrants in Europe is significantly inferior. The emphasis in Western Europe on the prevention of clandestine immigration, as described in chapter five, appears to have eclipsed the concern to protect the rights of this vulnerable group.

In the light of the lack of adequate protection for those in an irregular situation and for lawful migrant workers and their families, who are neither nationals of states parties to relevant CoE instruments nor nationals of EC member states, equal treatment between migrants and nationals is a relative concept. A uniform approach to the principle of equality and non-discrimination in CoE instruments is absent. Article 19 of the ESC, which espouses equal treatment between migrants and nationals is, on its face, limited as a substantive equality clause, although it has received a generous interpretation by the Committee of Independent Experts. Article 14 of the ECHR is essentially tied to the rights in the instrument and is not a substantive equality clause in the true sense. On the other hand, equal treatment between nationals of EC member states constitutes the keystone to the success of free movement of workers within the EC, but as noted earlier, this treatment is only applicable to approximately two-fifths of the migrant population resident and working in the EC.

CHAPTER SEVEN

ECONOMIC AND SOCIAL RIGHTS

1. Introduction

This chapter is the first of two chapters concerned with the protection of the specific rights of migrant workers and their families by CoE instruments and EC law. It focuses on the protection of economic and social rights. Chapter two argued that neither liberal individualist nor communitarian approaches sanction distinctions between citizens and non-citizens in the employment field and in other fields, such as social security, health and housing. This chapter shows, however, that the protection of the economic and social rights of migrant workers and their families in many states falls far short of the protection accorded to nationals. As far as the regional mechanisms of protection are concerned, EC provisions are strong in this area, whereas CoE instruments are generally weaker, particularly in respect of the right of access to employment and the right to family reunification. These rights are commonly subject to restrictions by countries of employment on the grounds that they jeopardize the socio-economic and physical security of the state.

Finally, the economic and social rights analyzed in this chapter do not include the right to education, which is considered separately in chapter eight. This is because education rights are closely connected with cultural rights, especially insofar as the education of the children of migrants is concerned. It is considered appropriate, therefore, to deal with education and cultural rights together.

2. Employment Rights

2.1 Equal Work and Employment Conditions

Generally-speaking, the question of equal work and employment conditions is uncontroversial. As chapter two indicated, all migrant workers as "workers", through the dignity of their labour and as economic participants in society, are entitled to the same protection as national workers in the workplace and in respect of their conditions of employment. All CoE instruments, with the exception of the ECHR (which does not deal with the matter), and the EC regime proclaim equality between state party or member state nationals in this regard. Differences, however, exist regarding the extent of protection provided. Unfortunately, the migrant workers who suffer most from poor work and employment conditions are those who come from countries outside of Europe and are, therefore, unable to benefit from the provisions discussed below.

The ECE and EMW both affirm equality with regard to work and employment conditions in rather general terms. The ECE refers in article 17(1) to "wages and working conditions in general", whereas the EMW merely refers to "conditions of work" in article 16(1).[1] Article 24 of the EMW, however, extends the principle of equal treatment between migrant workers and nationals to cases when an employment contract expires or is due to expire and to dismissal from employment. The ESC, in article 19(4)(a), speaks of equality in respect of "remuneration and other employment and working conditions". These words have been defined broadly by the Committee of Experts to include promotion, benefits paid to employees for changing jobs or taking up employment for the first time, and access to vocational training.[2] The Committee also maintained that article 19(4) requires equal treatment

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1 Under article 16(2) of the EMW, the principal of equality between migrant workers and nationals cannot be derogated from by individual contract. See also *Explanatory Report on the EMW*, *supra*, chapter six, note 66 at 22, para. 73 and Swart, *supra*, chapter six, note 6 at 30.

2 *Conclusions III* at 92 and 94 and *Conclusions VII* at 103 (regarding access to vocational training), cited in *ESC Case Law*, *supra*, chapter six, note 136 at 159. For a discussion of the separate provisions on

between nationals and migrants in the event of redundancy or dismissal, which is particularly important in times of recession when countries are tempted to dispense with foreign workers in order to protect their nationals.[3] Finally, article 19(5) of the ESC applies the principle of equality between migrants and nationals in employment matters to "employment taxes, dues or contributions payable in respect of employed persons". This provision applies only to taxes on employment.[4]

Similar provisions to those mentioned in CoE instruments exist in article 7 of EC Regulation 1612/68, although they are distinguishable by their detail and subject-matter covered. Article 7(1) guarantees equality between nationals and migrant workers from other member states in respect of "any conditions of employment and work". Emphasis in the provision is placed on remuneration, dismissal and reinstatement or re-employment in the event of unemployment. Moreover, conditions of employment have been taken to include not only statutory or contractual payments, but also benefits paid voluntarily by employers[5] as well as protective measures for certain specific categories of workers, such as disabled persons.[6] By article 7(2) of Regulation 1612/68, EC migrant workers are to enjoy the same "social and tax advantages" as national workers. The concept of "social advantages" has been interpreted broadly by the ECJ with a view to facilitating free movement of labour within the EC. It includes all advantages which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue

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vocational training in articles 9 and 10 of the ESC see the section concerned with the right of migrant workers to vocational training and retraining, *infra*, chapter eight.

3 During the fourth cycle of supervision, the Committee called upon states parties to "take specific action to avoid discrimination to the extent that an increase of the level of unemployment is likely to have a particular impact upon migrant workers". *Conclusions IV* at 119, cited by Harris, *supra*, chapter six, note 41 at 171. In 1978, the Committee of Ministers adopted Resolution (78) 4 on the social repercussions on migrant workers of economic recessions or crises, which deals with the problem of unemployment and its effect on migrant workers. The Resolution proposes the adoption of measures in order to place migrant workers on an equal footing with nationals in the event of redundancy. "Documentation" (1978) Forum - Council of Europe Nos. 1-2, 40.

4 Plender, *supra*, chapter three, note 48 at 246.

5 See the case of *Sotgiu* v *Bundespost*, *supra*, chapter six, note 182.

6 *Michel S.* v. *Fonds national de reclassement social des handicapés* (No. 76/72), [1973] E.C.R. 457.

of the mere fact of their residence on the national territory.[7] Finally, article 7(3) guarantees migrant workers equal access to vocational training with nationals. The right of access to vocational training is considered in chapter eight in the context of the right to education. The EC *Charter of the Fundamental Social Rights of Workers*, in articles 5 to 9, extends equality to *all* workers of the EC in respect of working conditions, particularly those concerned with fair remuneration and annual leave or weekly rest periods.

2.2 Access to Employment

The question of access to employment is of crucial economic and social importance to migrant workers and their families. Chapter five noted, for example, the connection between restrictions on access of foreign workers to employment and their continuing low occupational status in society. Access to employment is also one area where state sovereignty is prevalent and where countries are least inclined to realize equality between alien migrant workers and nationals. Chapter three described the heated debate surrounding the adoption of article 14(a) of ILO Convention No. 143 of 1975, which requires all restrictions on access to employment for migrant workers to be lifted after two years of employment in the host country or after the completion of the first employment contract (if less than two years in duration). Indeed, article 14(a) is one of the principal reasons why the rate of ratification for this ILO instrument has been so low. Restrictions by European countries on the access of foreign workers to the labour market are largely dictated by economic considerations and by the perceived obligation of states to protect their own nationals, and certainly go beyond the requirement imposed by article 14(a) of the 1975 ILO Convention. Indeed, these restrictions are more consistent with the weaker and more discretionary provisions of the UN Convention concerning access to

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7 See *Castelli* v. *O.N.P.T.S.* (No. 261/83), [1984] E.C.R. 3199, [1987] 1 C.M.L.R. 465; *Hoeckx* v. *Centre Public d'Aide Sociale de Kalmthout* and *Scrivner and Cole* v. *Centre Public d'Aide Sociale de Chastre* (Nos. 249/83 and 122/84), [1987] 3 C.M.L.R. 638. For some examples of "social advantages" see the section on "Social Security Rights", *infra*, note 114.

employment.

(a) Background

The migrant-receiving countries in Europe give preference to the hiring of nationals[8] or take the present and expected state of the labour market into account before issuing work permits to foreign workers.[9] Unless they come from countries belonging to free movement regimes, such as the EC and the Nordic Council,[10] migrant workers are only engaged in countries of employment if there is a shortage of qualified personnel on the national labour market, necessitating the employment of skilled foreign labour, or if nationals refuse to take up certain manual jobs, in which case unskilled foreign labour may be called upon.[11]

The employment of migrants is regulated by a system of work and residence permits. The operation of this system is complex. The intention here is to only provide examples, with reference to a number of European countries, of how this system functions to restrict migrants' free choice of employment and, consequently, geographical mobility. In Sweden, France and Germany, work permits have to be obtained by the migrant worker. The rights of migrants in respect of occupational mobility gradually increase the longer they work and reside in the country.[12] Although labour immigration to Sweden is strictly controlled, once foreigners are permitted to take up employment, they are only restricted with respect to occupational activity (namely they are free to change their employer) for one year after which they acquire, in most

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8 Thomas, "Summing-up and Points of Comparison", *supra*, chapter five, note 23 at 218. Castles, *supra*, chapter five, note 46 at 110; R. Kühner "Participation in Economic Life" in *The Legal Position of Aliens*, *supra*, Introduction to Case Study, note 2, 1973 at 1975 with regard to, *inter alia*, the Netherlands and Switzerland.

9 Kühner, *ibid.*, with regard to Austria, Germany and France.

10 Although EC nationals are still required to formally obtain work permits when employed in some member states, nationals of Nordic countries may work in each others' countries without having to obtain a permit. See *infra*, chapter eight and Kühner, *ibid.* at 1974.

11 Thomas, "Summing-up and Points of Comparison", *supra*, note 8 at 218.

12 *Ibid.* Work permits also need to be obtained by the migrant worker in Denmark, Luxembourg and the United Kingdom. Note (EEC), "Employing Non-Community Workers" (May 1983) Eur. Industr. Rel. Rev. 24 at 24.

cases, an unrestricted right to reside and work in Sweden.[13] In France and Germany, this position is far more difficult to attain, and a minimum of four and five years respectively are required before a migrant worker has free choice of employment.[14] In both countries, however, the renewal of work permits, and therefore the continued stay of migrants in the country, is subject to the state of the national labour market and to the broad discretion of the authorities.[15] In Belgium and the Netherlands, employers must acquire the work permit. Restrictions on occupational and geographical mobility are lifted after two and three years respectively.[16]

The access of migrants to employment in the public service of European receiving countries is especially restricted on the basis that "the exercise of certain forms of public authority, typically linked with the status of a civil servant, presupposes a special bond between the office-holder and the authority he or she is supposed to represent".[17] Most states, however, only prohibit access to positions, which are civil service positions in "a strict sense",[18] namely those positions which involve high-level policy-making.

The fact that migrant workers have permission to work in a country does not necessarily mean that their families are entitled to the same rights. In Sweden, Belgium, and

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13 Thomas, *ibid.*; Papademetriou, *supra*, Introduction, note 30 at 356. This liberal regime concerning access to employment for foreigners in Sweden must be considered in the light of the fact that since the early 1970s, immigration of non-Nordic workers has effectively ceased. For example, only 263 work permits were awarded in 1990, mostly to artists, specialists and corporate transferees, which was an increase on the 167 permits issued in 1989. *SOPEMI 1992*, *supra*, Introduction, note 19 at 79.

14 Thomas, *ibid.* at 218-219; Papademetriou, *ibid.* at 353, 359; Kühner, *supra*, note 8 at 1976 with regard to Germany. In Austria, migrants have to wait eight years before restrictions on access to employment are lifted. Kühner, *ibid.*

15 Thomas, *ibid.* at 219, 220. For example, immigrants who have resided in France are not secure from expulsion unless they have resided in the country for 15 years. Thomas, *ibid.* at 219; Papademetriou, *ibid.* at 355.

16 Thomas, *ibid.* at 220. See also Plender, *supra*, note 4 at 18 with regard to the Netherlands and Kühner, *supra*, note 8 at 1974 and 1976. Employers also require authorization to employ foreign workers in Italy and Greece. "Employing Non-Community Workers", *supra*, note 12 at 24. In the United Kingdom, restrictions are lifted after four years residence, although the granting and renewal of work permits are subject to the wide discretion of the Department of Employment before the expiry of this time-period. Plender, *ibid.* at 312, 313.

17 Kühner, *ibid.* at 1979.

18 Kühner, *ibid.* In Germany, however, this category appears to have been drawn too broadly. *Ibid.* at 1984. For example, 1980 figures for Germany indicated that there were no foreign workers in that country's public service. See *supra*, chapter five, note 149.

the Netherlands, there are no such restrictions provided that members of migrants' families obtain a work permit.[19] In France and Germany, on the other hand, the situation is different. In France, the granting of work permits to family members might be dependent on the state of the national labour market, while in Germany, a spouse of a migrant worker must reside in the country for four years before acquiring a work permit.[20] Children of migrants are required to reside in Germany for two years before obtaining a work permit, unless they have completed six months of vocational training.[21]

From the brief analysis above, it is clear that, on the whole, the employment of migrant workers in some of the major labour-receiving countries is essentially shaped by economic considerations. Only Sweden appears to make a firm commitment to ensure that migrant workers and their families enjoy the right to free choice of employment relatively soon after entry into the country, although, as noted above, initial controls on the entry of labour migrants to Sweden are very rigorous.

(b) CoE and EC Standards

European standards concerning the right of access to employment for migrant workers and their families vary significantly. Amongst the CoE instruments, the ECE and the ESC are the most elaborate on this question, although they also contain numerous qualifications. The ECHR does not deal with the matter, nor in effect does the EMW, largely for historical reasons which are outlined below. Within the EC regime, however, free access to employment for migrant workers constitutes the *raison d'être* of the free movement of labour principle. It is the area where differences between the EC regime and CoE instruments with respect to the

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19 Thomas, "Summing-up and Points of Comparison", *supra*, note 8 at 224.

20 Thomas, *ibid.*; Kudat & Sabuncouglu, *supra*, chapter five, note 154 at 14 (endnote 7); Plender, *supra*, note 4 at 315. The waiting period in Germany may be reduced to three years if there is a serious shortage of labour in the sector concerned. Plender, *ibid.*

21 Kudat & Sabuncouglu, *ibid.*; Thomas, *ibid.*

treatment of migrant workers and their families are most striking.

(i) CoE Standards

The principle of equal treatment between state party nationals under the ECE in respect of access to employment is found in article 10. Equal treatment, however, may be restricted for cogent economic and social reasons, which, according to Section I(a)(2) of the Protocol to the ECE, are to be judged by national criteria. This "exceedingly important exception"[22] to the principle of equal treatment in article 10 undermines the very principle itself, since it provides states parties abundant discretion with regard to who may take up employment in the country. Some of the following provisions in the ECE impose further restrictions concerning access to employment. Article 13 allows states parties to reserve public service positions connected with national security or defence for its nationals and article 14 permits restrictions with regard to other prescribed occupations.[23] Article 15 effectively ensures that contracting parties can require nationals from other states to possess the same occupational qualifications as nationals before being permitted to take up employment. Despite these restrictions on access to employment, two provisions attempt to make inroads into state sovereignty. Article 11 prevents the imposition of additional restrictions upon migrant workers after they have taken up employment in the host country and article 12(1) stipulates that any restrictions on access to employment are to be lifted after five years of employment or ten years of residence in that country or if permanent residence has been acquired, although states parties need only comply with one of these conditions.[24]

In summary, the plethora of restrictions on access to employment that the host country

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22 Swart, *supra*, note 1 at 23.

23 These occupations have to be listed at the time of signing the ECE (article 14(1)(a)). Otherwise, they may only be introduced later by states parties because of "imperative reasons of an economic or social character" (article 14(1)(b)).

24 These provisions regarding access to employment are also applicable to the spouse and dependent children of nationals of states parties lawfully residing in another state party (Section V(b) of the Protocol to the ECE).

may impose upon nationals from other states parties make the ECE an ineffective tool for advancing the rights of migrant workers and their families in this important area. According to one commentator, with the advent of the EC regime concerning free movement of workers between member states, article 12 of the ECE remains the only provision of any practical importance.[25]

The provision dealing with access to employment in the ESC is article 18, entitled, "The Right to Engage in a Gainful Occupation in the Territory of Other Contracting Parties":

> With a view to ensuring the effective exercise of the right to engage in a gainful occupation in the territory of any other Contracting Party, Contracting Parties undertake:
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> 1) to apply existing regulations in a spirit of liberality;
>
> 2) to simplify existing formalities and to reduce or abolish chancery dues and other charges payable by foreign workers or their employers;
>
> 3) to liberalise, individually or collectively, regulations governing the employment of foreign workers; and recognize:
>
> 4) the right of their nationals to leave the country to engage in a gainful occupation in the territories of the other Contracting Parties.

Although the wording in article 18 is "somewhat imprecise",[26] this provision has been the subject of much debate during the supervision of state reports, both in the Committee of Independent Experts and the politically-oriented Committee of Government Representatives. Indeed, these bodies have at times taken diametrically opposite views with regard to the interpretation of article 18 of the ESC. The object here is to underline the most salient aspects of this interpretation.

The Appendix to the ESC underlines that article 18 does not concern the question of

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25 Swart, *supra*, note 1 at 25. It was also observed in chapter six that nine of the states that have ratified the ECE are also members of the EC. *Supra*, chapter six, note 36 and accompanying text.

26 *Conclusions III* at 83, cited in *ESC Case Law*, *supra*, note 2 at 139.

entry into the territories of the contracting parties.[27] Furthermore, as with most of the provisions of the ESC, it applies only to migrant workers who are nationals of other states parties and who are residing lawfully in the country of employment. The Committee of Experts has described article 18 as a "dynamic" provision, meaning that states are under an obligation to progressively improve the situation of migrant workers from other contracting parties with regard to access to employment.[28] Although this interpretation is certainly true of articles 18(2) and (3), article 18(1) appears to require the application of "existing regulations in a spirit of liberality" straight away.[29] Article 18(1) is concerned with administrative practice rather than law and merely requires that discretion is exercised by state authorities in the application of regulations, even if these regulations are restrictive in content.[30] Article 18(2) calls for a procedural relaxation of the formalities governing the employment of foreign workers, such as fees required for work permits, whereas article 18(3) is concerned with the relaxation of the substantive rules, such as the grounds upon which work permits are granted or a change in employment is permitted and the restrictions imposed in each case.[31] Consequently, article 18(3) of the ESC may be considered as the most important clause.

The Committee of Experts has asserted that the dynamism inherent in the provision requires states parties to show improvements with every report, but it also recognizes that such improvements may not always be possible in difficult economic times.[32] Although there appears to be no obligation under article 18 to realize complete equality between nationals and migrant workers with respect to access to employment, the Committee of Experts observed that the "letter and spirit of Article 18 mean that the situation of nationals of States bound by the

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27 This has also been stressed on a number of occasions by the Committee of Experts and the Committee of Government Representatives. *Conclusions II* at 60, *Conclusions III* at 83 and Third Report at 8, cited in *ESC Case Law*, *ibid.* at 137, 143 and 140 respectively.

28 *Conclusions II* at 59, cited by Harris, *supra*, note 3 at 148.

29 Harris, *ibid.*

30 *Conclusions III* at 86, cited by Harris, *ibid.*

31 Harris, *ibid.* at 153.

32 *Conclusions II* at 60, cited in *ESC Case Law*, *supra*, note 2 at 138 and by Swart, *supra*, note 1 at 25, and *Conclusions IV* at 108-109, cited by Swart, *ibid.*

Charter should gradually become *as far as possible* like that of nationals".[33] The Committee of Government Representatives, however, considers the dynamism in article 18 to be limited to the extent that the obligations found in this provision occupy the middle ground in a hierarchy of protection, with EC nationals in the most protected position under the EC regime and non-EC nationals as well as those from countries that are not parties to the ESC in the least protected position.[34]

Article 18 has been interpreted by the Committee of Experts in the light of paragraph 18 of the declaratory Part I of the ESC, which provides that the right of nationals of one state party to engage in any gainful occupation in the territory of another on a footing of equality with the nationals of the latter is subject to "restrictions based on cogent economic or social reasons".[35] The Committee recognized that such restrictions may be particularly appropriate in the event of an economic recession, although special care should also be exercised to protect migrant workers at such a time, because they are affected more than others during a downturn in the economy.[36] Disagreement exists between the Committee of Experts and the Committee of Government Representatives as to who decides when there are "cogent economic or social reasons" justifying restrictions on the employment of foreign workers. The latter body considers that only the state authorities may determine this matter best,[37] whereas the former body has questioned the measures taken by a number of states parties.[38] David Harris argues

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33 *Conclusions II* at 60, cited in *ESC Case Law*, *ibid.* at 138. Emphasis added.

34 *Fifth Report* at 15, cited in *ESC Case Law*, *ibid.* at 142; *Eighth Report* at 17, cited in Council of Europe, *Case Law on the European Social Charter: Supplement* (Strasbourg: Council of Europe, 1986) [hereinafter *ESC Case Law - Supplement*] at 46. Indeed, the Committee of Experts later also adopted this view. *Conclusions VIII* at 198, cited in *ESC Case Law - Supplement*, *ibid.*

35 *Conclusions II* at 60, cited in *ESC Case Law*, *ibid.* at 137.

36 *Conclusions IV* at 107, cited in *ESC Case Law*, *ibid.* at 139. Furthermore, any restrictions must not be applied in a discriminatory way favouring one state party's nationals or nationals from a non-state party over those from another state party. However, if the country of employment and the country of which the migrant worker is the national are both members of the EC, the migrant worker is entitled to superior treatment by virtue of that regime. *Conclusions III* at 85, 86, and *Conclusions IV* at 109, 111, cited by Harris, *supra*, note 3 at 149.

37 *Third Report* at 8, cited in *ESC Case Law*, *ibid.* at 141.

38 The Committee of Experts questioned measures taken by Denmark halting the issue of work permits on economic grounds to migrants who were not nationals of EC or Nordic countries. Since these measures only affected nationals of Austria and Cyprus, restrictive provisions applicable to what was effectively a very small group were hard to justify. *Conclusions VI* at 108, cited in *ESC Case Law*, *ibid.* at 145. See also Harris,

that the correct approach should be to allow for a "margin of appreciation" to each state party concerning the imposition of restrictions for cogent economic and social reasons.[39]

The Committee of Experts ruled that a number of common restrictions imposed by states parties on migrant workers with regard to access to employment are invalid under article 18 of the ESC. Examples of such measures are: the limitation of work permits to certain specified jobs, employers and regions, including a prohibition on migrants changing their jobs in the first year of employment;[40] the requirement that a work permit is obtained before entry into the state party;[41] and not permitting applications for a vacancy from aliens if there is a national applicant.[42] Furthermore, restrictions are to be relaxed or abolished the longer a migrant worker is resident in a country.[43] The critical approach taken by the Committee of Experts to these restrictions has been diluted somewhat by the Committee of Government Representatives, which views such restrictions in a more positive light. It contends that restrictions, such as the requirement that a work permit be obtained before entry into a country, actually benefit migrant workers and their families in providing them with social protection by prohibiting employers from illegally hiring migrants without work permits.[44]

There are no provisions in the EMW concerning access to employment. Indeed, some clauses in the EMW imply that state sovereignty remains completely intact in this area. For example, a state party is under a duty in article 8 to issue migrant workers with work permits or to renew them, but only once they have been permitted to enter that country's territory to take

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supra, note 3 at 151.

39 Such as the "margin of appreciation" applied to limitations on rights under ECHR case law. Harris, *ibid.* at 151. Consequently, the supervisory organs should only find against a state party if it is *clear* that the restrictions in question cannot be justified on economic and social grounds. *Ibid.*

40 *Conclusions II*, at 60, *Conclusions III* at 83 and 84-85, cited in *ESC Case Law*, *supra*, note 2 at 137, 139 and 144-145 respectively. The Committee added, however, that economic and social reasons might justify confining migrant workers to specific geographic regions or occupational sectors, but not to a specific employer. *Conclusions II* at 60, *ibid.*

41 *Conclusions III* at 83 and *Conclusions VI* at 114, cited in *ESC Case Law*, *ibid.* at 139 and 147 respectively.

42 *Conclusions V* at 117 and *Conclusions VI* at 110, cited by Harris, *supra*, note 3 at 154.

43 *Conclusions II* at 60, cited by Harris, *ibid.*

44 *Third Report* at 9, cited in *ESC Case Law*, *supra*, note 2 at 141. Similarly, measures restricting migrant workers to a particular sector or employer for a certain period of time are, according to the Committee of Government Representatives, primarily designed to protect workers. *Ibid.*

up employment there.[45] Moreover, article 5 requires migrant workers to possess an employment contract or a definite offer of employment before departure to the receiving country, hence excluding from protection individuals migrating to seek employment.[46] Finally, by articles 25 and 27(2), states parties are under obligations to respectively facilitate the re-employment of migrant workers who lose their jobs for reasons beyond their control, such as redundancy or prolonged illness, and to provide them equal access with nationals to employment services. None of these duties, however, include an obligation to guarantee access to employment for migrant workers on an equal basis with nationals.[47] Clearly, therefore, the EMW stands a long way behind the ESC with respect to the right of access to employment for migrant workers and their families. Without doubt, the historical context of each instrument constitutes one of the reasons for this striking disparity. The ESC was adopted at a time when the influx of migrant workers into Western Europe was not causing as much concern as at the time of the adoption of the EMW in 1978, only a few years after the energy crisis of 1973-74. The willingness to afford migrants freer access to employment on par with nationals was greater when their employment was still in demand than when the emphasis was upon controlling labour migration altogether and upon seeking ways to induce migrant workers to return home.[48]

Despite the contribution of the ESC in article 18 to loosening the knots of state sovereignty in the sensitive area of access to employment for migrant workers and its superiority to the EMW in this regard, it still lags far behind the EC regime. As noted earlier, the objective of free movement of labour in the EC cannot be achieved without completely untying the knots of state sovereignty. The ESC, therefore, has most relevance in relations

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45 See also cf. Oellers-Frahm, *supra*, chapter six, note 30 at 1749.

46 See also Plender, *supra*, note 4 at 254.

47 *Explanatory Report on the EMW*, *supra*, note 1 at 25, para. 90, and at 26, para. 95 respectively.

48 See also Swart, *supra*, note 1 at 28 and Oellers-Frahm, *supra*, note 45 at 1749. Not surprisingly, therefore, the EMW contains an obligation in article 30 requiring contracting parties to assist migrant workers and their families on the occasion of their final return to their country of origin. Moreover, states are given discretion whether to provide financial assistance to migrants upon their return. For examples of measures assisting migrants to return to their countries of origin see *supra*, chapter five, notes 33-34 and accompanying text.

between EC and non-EC countries in this area, although it is disturbing to note that two non-EC countries have not accepted article 18 *in toto* and one other has only accepted it in part.[49]

(ii) EC Standards

Under articles 48(2) and 48(3)(a) of the *Treaty of Rome*, free movement of workers entails "the abolition of any discrimination based on nationality between workers of the Member States as regards employment..." and the right to "accept offers of employment actually made". More detailed provisions concerning access to employment are found in articles 1 to 6 of Regulation 1612/68. The clarity of article 1 stands out in contrast with the provisions and numerous qualifications concerning this subject in the ECE and the rather ambiguous wording of article 18 of the ESC:

> 1. Any national of a Member State, shall, irrespective of the place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State.
> 2. He shall, in particular, have the right to take up available employment in the territory of another Member State *with the same priority* as nationals of that State.[50]

Furthermore, some of the provisions following article 1 have as their objective the abolition of many of the measures which states make use of to protect their nationals with respect to access to employment, including the imposition of quotas on the employment of foreigners "in any undertaking, branch of activity or region" (articles 3 and 4(1) respectively). Equal treatment

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49 Cyprus and Norway have not accepted article 18 *in toto* and Austria has not accepted article 18(3). See also Swart, *ibid.* at 26.

50 Emphasis added. This right is reiterated in article 2 of the EC *Charter of the Fundamental Social Rights of Workers*:

> The right to freedom of movement shall enable any worker to engage in any occupation or profession in the Community in accordance with the principles of equal treatment as regards access to employment, working conditions and social protection in the host country.

between workers of EC member states in respect of assistance in seeking employment is guaranteed by article 5 of the Regulation.[51] EC citizens are also permitted to enter another member country to seek employment without needing to apply for a residence permit.[52] The only restrictions on access to employment for migrant workers from other member states concern employment in the public service,[53] those justified on the grounds of public policy, public security or public health[54] and if linguistic knowledge is required "by reason of the nature of the post to be filled".[55] An EC member state may also, under article 20 of Regulation 1612/68, on informing the Commission that it is undergoing or foresees "disturbances on its labour market which could seriously threaten the standard of living or level of employment in a given region or occupation", set into motion measures discouraging EC workers from applying for employment in a particular region or occupation.

Article 11 of Regulation 1612/68 extends the right of equal access to employment with nationals throughout the territory of the country of employment to the spouse of the worker and to the dependent children under 21, even if they are not nationals of another EC member state.[56] Moreover, the principle of equal access to employment between nationals and migrants from other member states under the EC regime applies not only to free movement of labour, but also to freedom of establishment and to freedom to provide services.[57]

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51 Moreover, articles 13 to 17 of Regulation 1612/68 establish a special procedure between national employment services and the EC Commission on the coordination and clearing of job vacancies and applicants. Article 6 of the EC *Charter of the Fundamental Social Rights* also stipulates that: "Every individual must be able to have access to public placement services free of charge".

52 See the *Antonissen* case, *supra*, chapter six, note 114.

53 Article 48(4) of the *Treaty of Rome*. See also the section on "Political Rights", *infra*, chapter eight.

54 Article 48(3) of the *Treaty of Rome*. See also the section on "Expulsion and Procedural Protection against Expulsion", *infra*, chapter eight.

55 Article 3(1) of Regulation 1612/68. The ECJ has stated that this exception does not *prima facie* apply if knowledge of the language is not needed in performing the work in question. *Groener* v. *Minister for Education* (No. 379/87), [1990] 1 C.M.L.R. 401. In *Groener*, however, the ECJ held that the requirement of knowledge of Irish for the post of commercial art teacher was justified even though English was the normal language of instruction. This was because the requirement was consistent with the legitimate policy of promoting the Irish language.

56 Non-EC family members may take up any employment in the member states open to the worker. *Gül* v. *Regierungspräsident Düsseldorf* (No. 131/85), [1987] 1 C.M.L.R. 501. Furthermore, members of the worker's family may take up employment and reside in a part of the country other than the place of residence of the worker. *Diatta* v. *Land Berlin* (No. 267/83) [1985] E.C.R. 567, [1986] 2 C.M.L.R. 164.

57 See respectively *Reyners* v. *Belgium* (No. 2/74), [1974] 2 C.M.L.R. 305 and *Van Binsbergen* v.

3. Trade Union Rights

3.1 Background

A broad definition of trade union rights, as deduced from chapter three, encompasses the right to form and join trade unions, to enjoy the benefits of collective bargaining, and to participate in trade unions and works councils, namely by voting in trade union elections and by being eligible for trade union office.

From the beginning of postwar guestworker programmes in Western Europe, trade unions insisted that migrant workers were afforded the same work-related rights as national workers in order to protect the wages and working conditions of the latter.[58] On the whole, however, the *entry* of foreign workers was not in their members' interests because the option of migrant labour enabled employers to keep wage increases to a minimum. Nonetheless, it was in the interest of trade unions to organize migrant workers once they were employed in the host country and to articulate their concerns.[59]

Trade unions have usually encouraged migrant workers to join, and in some instances have made membership a requirement before employment migration can take place.[60] By and large, immigrant workers have joined established unions and have not tried to found their own organizations.[61] Although migrant workers may join the trade unions of their choice on an equal basis to that of nationals, union membership among migrants is still proportionately

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Bestuur van de Bedrijfsverniging voor de Metaalnijverheid (No. 33/74), [1974] E.C.R. 1299, [1975] 1 C.M.L.R. 298, holding that the *Treaty of Rome* provisions concerning the right of establishment and the freedom to provide services are directly applicable in national law.

58 Martin & Miller, *supra*, chapter five, note 1 at 326.

59 Cf. Power, *supra*, chapter five, note 3 at 30.

60 Hammar, "Immigrant Policy", *supra*, chapter five, note 45 at 266; Hammar, "Introduction", *supra*, chapter five, note 18 at 287.

61 Hammar, "Immigrant Policy", *ibid.* The following European countries recognize the right of migrant workers to form specific trade unions: Austria, Belgium, Germany, Greece, Luxembourg, the Netherlands, Portugal, and Switzerland. Kühner, *supra*, note 8 at 1978.

lower, or at best comparable, to that among domestic workers.[62] The reasons for any discrepancies in this regard depend to some extent on the industry and enterprise in question and where foreign workers are usually to be found. For example, unionization is generally lower in small and medium-sized undertakings which tend to employ more foreign workers.[63] Short-term migrant workers are also difficult to unionize.[64]

Migrant worker participation in trade unions has increased over the years and, in general, legal obstacles to this participation have been removed.[65] France, however, appears to be an exception. Before migrant workers can hold trade union office in France, they must have been working in the country for at least five years. Moreover, the proportion of foreign workers holding such posts to national workers may not exceed one-third.[66] In general, even without significant legal restrictions, the number of migrant workers in positions of responsibility in trade unions is still "too low".[67]

Migrant participation, including representation, in the works councils of undertakings is impeded by legal and practical considerations. For example, candidates for election to works councils in France must be able, by law, to express themselves in French, whereas in Luxembourg, only workers from other EC countries may vote and be elected to joint works committees.[68] The CoE *Minet Report* also noted the following practical difficulties hindering migrant worker participation in works councils:

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62 Note, "Migrant Workers and Trade Unions" (October 1982) Eur. Industr. Rel. Rev. 20 at 20, citing the report prepared for the Council of Europe by Georges Minet in December 1981 on *Participation by Migrants in Trade Unions, Trade Union Activities and in the Life of Firms*. Figures for 1979 indicated that only fifty per cent of foreign workers were unionized in Belgium in comparison to eighty per cent for all workers. *Ibid.* In Germany, however, more recent information indicates that migrant workers are unionized to approximately the same degree as nationals. *Report to the Conference on Migrant Workers from the Mahgreb in the EC, supra*, Introduction, note 18 at 5, para. 1.10, citing from T. Hammar & Y.G. Lithman, "The Integration of Migrants: Experiences, Concepts and Policies" in OECD, *The Future of Migration* (Paris: OECD, 1987) at 250.

63 "Migrant Workers and Trade Unions", *ibid.* at 20.

64 Papademetriou, *supra*, note 13 at 368.

65 Cf. Martin & Miller, *supra*, note 59 at 326; cf. "Migrant Workers and Trade Unions", *supra*, note 62 at 20-21.

66 "Migrant Workers and Trade Unions", *ibid.* at 20.

67 *Ibid.* at 20; Hammar, "Immigrant Policy", *supra*, note 60 at 287.

68 "Migrant Workers and Trade Unions", *ibid.* at 21. See also Kühner, *supra*, note 8 at 1977 (footnote 36) with regard to Luxembourg. In addition, alien workers cannot stand for election to work councils or work-determination committees in Austria and Denmark. Kühner, *ibid.*

> The system of fixed-term contracts, lack of skills, ignorance or misunderstanding of rights and a general feeling of insecurity that makes people apprehensive of using them, are all reasons for remaining outside the system of representation in the undertaking and the possibilities that it offers.[69]

In addition, migrants' knowledge of the language of the host country is clearly a practical problem. The *Minet Report* proposed that all information concerning elections to works councils be translated into the relevant languages understood by foreign workers.[70]

Collective bargaining agreements which focus on issues such as low wages or job classification may have a beneficial impact on the working conditions of migrants, but the inclusion of more specific demands on behalf of migrant workers would be a step forward in realizing some of their employment rights.[71] An example of such an approach is the position taken by the Dutch CNV union confederation which already bargains on a number of migrant worker-related issues.[72]

The influence that trade unions can exercise over the integration of migrant workers into the host society, including, the promotion of cooperation between foreign and national workers, was noted in chapter three.[73] Indeed, German law empowers works councils to "promote the integration of foreign workers in the establishment and furthering of understanding between themselves and their German colleagues".[74] Examples of specific trade union "integrative" measures are special welfare sections for migrants, the publication of newspapers in their languages, and various activities advocating improvements in the rights of migrant workers, including demands for language instruction during working hours, longer

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69 Cited in "Migrant Workers and Trade Unions", *ibid.* at 21.

70 *Ibid.* In most cases, this is already done. For example, in Germany those responsible for organizing ballots in works council elections must ensure that foreign workers who do not speak German are informed of the methods of nominating candidates, voting, etc. *Ibid.*

71 Cf., *ibid.*

72 For example, leave for Muslim holidays, adjustment of working hours for Muslim Friday afternoon prayers, and the payment of travel expenses to workers visiting families in the home country. *Ibid.*

73 *Supra*, chapter three, notes 161-162 and accompanying text.

74 "Migrant Workers and Trade Unions", *supra*, note 62 at 21.

vacations for migrants visiting families in their home country, and strong public stands against discrimination and racism.[75]

3.2 CoE and EC Standards

By and large, CoE texts protect the right to form and join trade unions and to enjoy the benefits of collective bargaining. Article 11(1) of the ECHR expressly refers to this right within the broader ambit of the right to freedom of peaceful assembly and freedom of association with others, although paragraph 2 of this provision permits restrictions on a number of specified grounds.[76] Article 11 is equally applicable to aliens as well as nationals, but states parties may, by article 16, restrict its operation with respect to aliens, if their activities are judged to be "political". The likelihood of article 16 being applied, especially to the exercise of trade union rights, is very slim. As noted earlier, this provision has not been seriously invoked before the European Commission of Human Rights. Article 19(4)(b) of the ESC guarantees equal treatment between nationals and migrant workers from other states

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75 Power, *supra*, note 58 at 30, referring to some early trade union activities on behalf of migrant workers in Germany and France. Some recent specific "integrative" trade union activities in European countries with regard to the promotion of migrant workers' rights include the following: the publication by the CFDT in France of a guide to the rights of foreigners; the establishment by the CISL in Italy of a support centre for migrant workers in Milan, which defends their trade union rights and provides vocational training and language teaching; campaigns by the DGB in Germany disputing the view that compulsory repatriation of foreigners resolves economic problems and unemployment; and the advancement by the bureau for immigrants of the FNV in the Netherlands of positive discrimination in vocational training programmes and public sector employment and minimum employment quotas for migrant workers, in order to eliminate the disadvantages they face in relation to Dutch nationals. *Report to the Conference on Migrant Workers from the Mahgreb in the EC, supra*, note 62 at 5, para. 1.10. The Report also advocates that trade unions establish separate contact units to help migrants in an irregular situation. Furthermore, they should promote progressive policies regarding migrant workers by, *inter alia*, urging governments to ratify international multilateral agreements concerning the protection of migrants' rights, particularly the ILO Conventions, which few EC countries have ratified, and the recent UN instrument. *Ibid.* at 21-22, para. 3.7 and 3.8 respectively. See also *Conference on Mahgreb Migrant Workers in the EC - Conclusions, supra*, chapter five, note 55 at 9, para. 46 and at 8, para. 45 respectively.

76 Article 11(2) reads:

> No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedom of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, or of the police or of the administration of the State.

parties in respect of "membership of trade unions and enjoyment of the benefits of collective bargaining". These rights are more clearly spelt out in relation to nationals in articles 5 and 6 of the ESC. The EMW is less precise on this question. Article 28 outlines, in general terms, the right of migrant workers "to organize for the protection of their economic and social interests" on the same conditions as nationals.[77] The implication, however, that this provision encompasses the right to join trade unions and to enjoy the benefits of collective bargaining is confirmed by the Explanatory Report to the EMW, which links article 28 to the right to organize, as defined in article 5 of the ESC, and to ILO *Convention No. 87 of 1948 concerning Freedom of Association and Protection of the Right to Organize.*[78]

There is no express provision in CoE instruments recognizing the right of migrant workers to participation in trade unions and works councils, which, as indicated above, is still impeded in some European countries of employment. The ECE does not refer to trade union rights at all, but there is an obligation upon contracting parties in article 18 to permit nationals from another contracting party to participate on an equal basis with nationals as electors in elections held by economic or professional bodies or organizations. It is not clear, however, whether this provision applies to trade unions.[79] Although the question of the participation of migrant workers in trade unions is not mentioned in article 19(4) of the ESC, the Committee of Experts found France in breach of the provision because of the restrictions imposed on the exercise by migrant workers of certain administrative and managerial functions within French trade unions.[80] Finally, the EMW, in article 29, speaks of equality between nationals and migrant workers in respect of participation "in the affairs of the undertaking". States,

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77 Indeed, this is one of the few provisions in the EMW, which is phrased in terms of "rights". See *supra*, chapter six, note 68 and accompanying text.

78 *Explanatory Report on the EMW*, *supra*, note 1 at 27, para. 96. As noted in chapter three, *supra*, note 155 and accompanying text, ILO Convention No. 87 expressly prohibits discrimination on the grounds of nationality in respect of the formation and membership of trade unions (article 2). The *Explanatory Report on the EMW*, *ibid.*, also emphasizes that article 28 cannot be construed as requiring any person to join a trade union.

79 See also Oellers Frahm, *supra*, note 45 at 1750 and Swart, *supra*, note 1 at 43.

80 *Conclusions VI*, cited by Plender, *supra*, note 4 at 246 and Harris, *supra*, note 3 at 171. See also *supra*, note 66 and accompanying text.

however, are only obliged to "facilitate" such participation.[81]

As with employment rights, EC law relating to trade union rights is remarkably lucid in contrast to some of the ambivalent wording found in CoE provisions, especially insofar as participation in trade unions is concerned. Equal treatment between national workers and those from other member states in respect of trade union rights is guaranteed in article 8 of EC Regulation 1612/68. By virtue of this clause, these rights include "membership of trade unions" and, *inter alia*, "the right to vote and to be eligible for the administration or management posts of a trade union" and "the right of eligibility for workers' representative bodies in the undertaking" (works councils).[82] The only exception in article 8 concerns the management of bodies or the holding of an office governed by public law. These positions may be restricted to nationals. This exception is consistent with article 48(4) of the *Treaty of Rome* which excludes the public service domain from the free movement of labour regime. Article 9 of the EC *Charter of the Fundamental Social Rights of Workers* declares that "employers and workers of the European Community shall have the right of association in order to constitute professional organizations or trade unions of their choice for the defence of their economic and social interests". There is no express mention of any right to participate in trade unions.

4. Social Security Rights

4.1 CoE Standards

The CoE has been concerned with drawing up multilateral instruments in respect of social security from its very outset. In 1953, two European Agreements on Social Security and

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81 See also *Explanatory Report on the EMW*, *supra*, note 1 at 27, para. 97, which points out that the provision is based on the premise that equality in respect of participation in the firm's affairs does not yet exist and that the state duty in article 29 merely constitutes an objective to be achieved.

82 Freedom of movement cannot be restricted on the grounds that the worker is involved in trade union activities. *Rutili* v. *Minister of the Interior* (No. 36/75), [1975] E.C.R. 1219, [1976] 1 C.M.L.R. 140.

their Protocols were concluded.[83] The first guaranteed equal treatment between nationals of states parties with regard to certain social security schemes, whereas the second broadened the ambit of this protection.

The 1953 agreements were the starting-point for subsequent CoE agreements in the field of social security.[84] The next two treaties guaranteeing social security rights were the ESC and the *European Code of Social Security*, which were both prepared at the same time. As Harris observes, this presented a problem for the drafters of the ESC. Because it was not practicable to include a detailed text outlining social security rights in an instrument concerned broadly with economic and social rights, the drafters decided to insert a clause dealing with social security in more general terms and leave the specialist instruments to spell out the details.[85] The result was article 12. Articles 12(4)(a) and 12(4)(b) respectively oblige states parties to take steps, by the conclusion of appropriate bilateral and multilateral agreements, or by other means, to ensure equal treatment between their nationals in respect of social security rights (article 12(4)(a)) and to recognize social security contributions in each others' territories in order to ensure their continued validity when persons migrate to another state party (article 12(4)(b)). The Committee of Experts has stated that the first obligation to guarantee equal treatment, when complied with by international action, requires effective and immediate implementation in national law, whereas the second obligation, which may only be effected by

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83 *European Interim Agreement on Social Security Schemes relating to Old Age, Invalidity and Survivors* and *Protocol*, December 11, 1953; Council of Europe, *European Treaty Series* No. 12; entry into force July 1 and October 1, 1954 respectively; ratified by 17 states. *European Interim Agreement on Social Security Schemes other than Schemes for Old Age, Invalidity and Survivors* and *Protocol*, December 11, 1953, Council of Europe, *European Treaty Series* No. 13; entry into force July 1 and October 1, 1954 respectively; ratified by 16 states. In both cases, the Protocols declare the Agreements applicable to refugees within the meaning of the Geneva *Convention relating to the Status of Refugees*, July 28, 1951; 189 U.N.T.S. 137; entry into force April 22, 1954; 106 ratifications as of January 1, 1992.

84 Swart, *supra*, note 1 at 34.

85 Harris, *supra*, note 3 at 110. In this sense, therefore, the role of the ESC to the other more detailed instruments concerned with social security rights is secondary. *Ibid.* Harris also observes, *ibid.* (footnote 588) that the same solution was adopted in respect of article 9 of the ICESCR. A similar philosophy was also followed with regard to the inclusion of social security rights in article 10 of ILO Convention No. 143 of 1975 and article 27 of the UN Convention. See *supra*, chapter three, note 171 and accompanying text and the section on social security rights in chapter four, *supra*.

international agreements, is merely to *endeavour* that migrants retain their rights.[86] The weaker standard applied in the case of the second obligation, however, is not justified by the wording, which requires states parties to "ensure" the standards in *both* paragraphs (a) and (b).[87]

The scope of article 12(4) of the ESC is broader than other provisions in the ESC, for it applies to nationals of all states parties, irrespective of whether they are legally resident or working regularly in the country and of whether these states have accepted article 12(4).[88] In practice, however, it is unlikely that illegal migrant workers would come forward to claim social security rights for fear of being detected by the authorities.

Although the social security benefits covered in article 12 are not listed, it may be assumed that article 12(4) applies to the nine branches of benefits enumerated in ILO *Convention No. 102 of 1952 concerning Minimum Standards of Social Security*. This instrument is referred to in article 12(2) and states parties are required to maintain a social security system on par with that required for the ratification of the latter Convention.[89] ILO Convention No. 102 applies only to contributory benefits, but the Committee of Experts has pointed out that article 12(4) of the ESC also covers non-contributory benefits.[90] The Committee has since observed that the developments in social security systems in Europe are moving in the direction of the elimination of the distinction between social security and social assistance and the traditional connection between social insurance and contribution requirements.[91] Despite the alignment of the Committee's views with these developments, the Appendix to the ESC asserts explicitly that article 12(4) permits states parties to impose

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86 *Conclusions III* at 64, cited in *ESC Case Law*, *supra*, note 2 at 113. See also Harris, *ibid.* at 119.

87 Cf. Harris, *ibid.*

88 Appendix to the ESC. See also Harris, *ibid.* at 118.

89 ILO Convention No. 102 applies to the following nine branches of social security: medical care, sickness benefits, unemployment benefits, old-age benefits, employment injury benefits, family benefits, maternity benefits, disability benefits, and survivors' benefits. Harris, *ibid.* at 111.

90 For example, the Committee ruled that the "social pension" paid to persons over 65 in Italy, who have no other income or whose income does not exceed a certain amount, came within the ambit of social security in article 12(4). Consequently, the refusal of Italian authorities to pay "social pension" to non-Italians was in breach of article 12(4). *Conclusions III* at 65, cited by Harris, *ibid.* at 111, 120.

91 *Conclusions VII* at 74, cited in *ESC Case Law*, *supra*, note 2 at 114.

residence requirements upon nationals from other states parties with respect to the granting of non-contributory benefits.[92]

The *European Code of Social Security* and *Protocol* of 1964 constitute the more detailed texts to which the drafters of the ESC referred.[93] Paragraphs 2 and 4 of the Preamble to the Code declare that the object of the instrument is to encourage CoE member states to further develop their systems of social security and to achieve a higher level of social security standards than those minimum standards in ILO Convention No. 102. The Code spells out a comprehensive set of social security standards relating to nine branches of social security[94] whereas the aim of the Protocol is to improve on these standards. Article 73 of the Code calls for a special social security instrument relating to foreigners and migrants:

> The Contracting Parties shall endeavour to conclude a special instrument governing questions relating to social security for foreigners and migrants, particularly with regard to equality of treatment with their own nationals and to the maintenance of acquired rights and rights in course of acquisition.

Article 2 of the Code permits states parties to opt out of certain of the Code's provisions, but article 73 must be complied with.

The most advanced CoE instruments in force relating to social security are the *European Convention on Social Security* of 1972 and the *Supplementary Agreement* thereto.[95] The

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92 See also Harris, *supra*, note 3 at 121.

93 *European Code of Social Security*, April 16, 1964; Council of Europe, *European Treaty Series* No. 48; entry into force March 17, 1968; ratified by 15 states as of January 1, 1992: Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Sweden, Switzerland, Turkey, United Kingdom. *Protocol to the European Code of Social Security*, April 16, 1964, Council of Europe, *European Treaty Series* No. 48; entry into force March 17, 1968; ratified by 7 states as of January 1, 1992: Belgium, Germany, Luxembourg, Netherlands, Norway, Portugal, Sweden.

94 The branches of social security are the same as those listed in ILO Convention No. 102. *Supra*, note 89.

95 *European Convention on Social Security*, December 14, 1972; Council of Europe, *European Treaty Series* No. 78; entry into force March 1, 1974; ratified by eight states as of January 1, 1992. *Supplementary Agreement for the Application of the European Convention on Social Security*, December 14, 1972; Council of Europe, *European Treaty Series* No. 78; entry into force March 1, 1974; ratified by eight states as of January 1, 1992. The same states have ratified both instruments (date or year of ratification in parenthesis where available): Austria [10/6/75], Belgium, Italy [1990], Luxembourg [13/11/75], Netherlands [8/2/77], Portugal [18/3/83], Spain, Turkey [2/12/76].

Convention is a sequel to the Code. It terminates the two 1953 agreements, although it does not affect ILO instruments nor EC provisions concerning social security. Indeed, the Convention is based on EC social security provisions. Although more ambitious than its predecessors, the instrument recognizes its limits. It is a framework and model Convention and only some of its provisions are directly applicable. The implementation of others depends on the negotiation of agreements between the contracting parties. The Supplementary Agreement was adopted at the same time as the Convention. It regulates relations between social security institutions and the procedures to be followed for the provision of benefits in accordance with the Convention. The Convention and the Supplementary Agreement co-exist, since states ratifying the former are also required to ratify the latter.[96]

The principal of equality between nationals of states parties in respect of social security rights is enshrined in article 8 of the Convention[97] and includes rights acquired under the legislation of other states parties.[98] The instrument applies to persons who are subject, or who were once subject, to the legislation of one or more states parties and who are nationals of contracting parties, as well as to refugees and stateless persons resident in contracting parties and to members of their families and their survivors (article 4(1)(a)).[99] Under article 14 of the Convention, the applicable law in social security matters is, in almost all cases, the law of the country of employment, even if the beneficiaries reside outside of the territory of that country.[100] The Convention, under article 2, applies to eight branches of social security, but expressly excludes social or medical assistance, although it does encompass contributory and

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96 Plender, *supra*, note 4 at 248, 250.

97 Article 8(1) reads:

> Unless otherwise specified in this Convention, persons who are resident in the territory of a Contracting Party and to whom the Convention is applicable shall have the same rights and obligations under the legislation of every Contracting Party as the nationals of such Party.

98 Plender, *supra*, note 4 at 251.

99 Persons covered include the survivors of persons who did not possess the nationality of a state party, but who are nationals of states parties themselves (article 4(1)(b)).

100 See also Plender, *supra*, note 4 at 249.

non-contributory benefits.[101] A state party may, however, impose residence requirements in respect of entitlement to some non-contributory benefits.[102]

The ESC, the Code (and Protocol) and the Convention (and Supplementary Agreement) are the principal CoE instruments concerned with the social security rights of migrant workers and their families.[103] Article 18(1) of the EMW also provides equal treatment between nationals of states parties in respect of social security rights, but the principle of equality is subject to conditions required by national legislation or by international agreements. This very general provision was adopted after the entry into force of all the other social security instruments. Consequently, the reference to other instruments was considered sufficient.[104] Article 18(2) of the EMW requires states parties to preserve acquired social security rights, but the obligation is only to "endeavour" to secure such rights to migrant workers and their families and, once again, only through international agreements.

The ESC, Code and *European Convention on Social Security* complement and reinforce each other in implementing social security rights in Europe. For example, out of the twenty countries that have ratified the ESC, only Sweden and the United Kingdom have not accepted article 12(4) of the instrument. Both Sweden and the United Kingdom, however, have ratified the *European Code of Social Security* and Sweden has also ratified the *Protocol.* Finally, Luxembourg and Portugal are not parties to the ESC, although they have both ratified the other social security instruments.[105]

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101 The applicable branches of social security are: sickness and maternity benefits; invalidity benefits; old-age benefits; survivors' benefits; benefits in respect of occupational injuries and diseases; death grants; unemployment benefits; and family benefits (article 2(1)).

102 Plender, *supra*, note 4 at 249, 250.

103 The *European Code of Social Security* was recently revised, but has not yet entered into force; *European Code of Social Security (Revised)*, November 6, 1990; Council of Europe, *European Treaty Series* No. 139; ratified by one state (Cyprus) as of January 1, 1992.

104 *Explanatory Report on the EMW*, *supra*, note 1 at 22, para. 76. Furthermore, in view of the above, it was not necessary to make article 18 one of those provisions in article 36 to which no reservation can be made. *Ibid.* at 23, para. 77. See also *supra*, chapter six, note 69. The seven states parties to the EMW are also parties to at least one of the principal CoE instruments concerned with social security mentioned above, but only four of them (Netherlands, Portugal, Spain and Turkey) have ratified the *European Convention on Social Security.*

105 Another country which has not ratified the ESC, Switzerland, has, nonetheless, ratified the *European Code of Social Security.*

4.2 EC Standards

The principle of free movement of labour in the EC would be effectively unworkable if workers and their families from other member states were to be placed at a disadvantage to nationals in the social security field.[106] EC provisions are designed to ensure that this does not occur, although they do not create a uniform supranational social security system, but only coordinate individual national social security arrangements. Social security rights are thus made *personal* rather than *territorial*.[107] Article 51 of the *Treaty of Rome* obliges the EC Council of Ministers, on proposals from the Commission, to adopt measures in the social security field to ensure that contributions by EC nationals moving between member states are added together (*principle of aggregation*) and that benefits are to be paid to workers resident anywhere in member states (*principle of exportability*).[108]

The major piece of EC secondary legislation implementing article 51 is Regulation 1408/71.[109] Article 3 of this Regulation enunciates the principle of equal treatment between nationals of member states in respect of social security benefits. With regard to persons and social security schemes covered, Regulation 1408/71 mirrors the *European Convention on Social Security* of 1972. The social security provisions apply to EC workers who are or have been subject to the legislation of one or more member states, self-employed EC workers and to refugees and stateless persons residing within the territory of one of the member states, as well as to their family members and their survivors (articles 2(1) and 2(2)).[110] Under article 69,

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106 Stoelting, *supra*, chapter six, note 86 at 184; Stein & Thomsen, *supra*, Introduction to Case Study, note 2 at 1821; Note (EEC), "Article 51: Migrant Workers' Social Security Rights" (September 1986) Eur. Industr. Rel. Rev. 17 at 17.

107 *Kalsbeek* v. *Bestuur der Sociale Verzekeringsbank* (No. 100/63), [1964] E.C.R. 565. See also "Article 51: Migrant Workers' Social Security Rights", *ibid.* at 18.

108 The terminology is taken from Stein and Thomsen, *supra*, note 106 at 1821.

109 Council Regulation 1408/71 of June 14, 1971 on the Application of Social Security Schemes to Employed Persons, to Self-Employed Persons and to Members of Their Families Moving within the Community (O.J. 1971, 416, J.O. 1971 L149/2). Regulation 1408/71 was amended and updated by Council Regulation 2001/83 of June 2, 1983 (O.J. 1983, L320/6).

110 See also *Fracas* v. *Belgian State* (No. 7/75), [1975] E.C.R. 679, [1975] 2 C.M.L.R. 442, confirming

unemployed persons seeking work in a member state are entitled to receive unemployment benefits for a maximum of three months from the member state in which they were formerly employed, provided that they have registered for at least four weeks with the employment service of that country. The applicable law is usually that of the country of employment (article 13(1)), although no more than one law can apply at a time (article 12(1)). The social security benefits covered by the EC regime, and listed in article 4(1)(a) to (h), are the same eight branches as those specified in article 2 of the *European Convention on Social Security* and include both contributory and non-contributory benefits.[111] The ECJ has maintained that this list is exhaustive.[112] Social and medical assistance are expressly excluded from the application of the Regulation (article 4(4)).

Although this list of social security benefits in Regulation 1408/71 is not as comprehensive as the one found in the *European Code of Social Security*, it has been in practice extended by virtue of article 7(2) of Regulation 1612/68, which espouses equal treatment between EC citizens in respect of, *inter alia*, "social... advantages". This concept has been interpreted broadly by the ECJ. No direct connection between the granting of benefits and employment status need be shown under article 7 so long as granting the benefit facilitates freedom of movement for workers.[113] Although article 4(1) of Regulation 1408/71 specifically excludes "social assistance", "social advantages" in article 7(2) of Regulation 1612/68 have been interpreted by the ECJ to encompass "social assistance type benefits" in respect of both migrant workers and members of their families.[114]

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the applicability of the matters covered by Regulation 1408/71 to members of a worker's family. Regulation 1390/81 of May 12, 1981 (O.J. 1981 L143/1) increases the social protection for self-employed persons.

111 See *supra*, note 101. The ECJ has also held that disability benefits for disabled children constitute social security within the meaning of article 51 of the *Treaty of Rome* as regards the persons covered by Regulation 1408/71. *Fracas* case, *ibid.* and *Inzirillo* v. *Caisse d'Allocations Familiales* (No. 63/76), [1976] E.C.R. 2057, [1978] 3 C.M.L.R. 596.

112 See the joined cases of *Hoeckx* and *Scrivner*, *supra*, note 7.

113 See the cases of *Castelli*, *supra*, note 7 and *Hoeckx* and *Scrivner*, *ibid.*

114 "Social advantages" have been taken to include: minimum income benefits (*Hoeckx* and *Scrivner*, *ibid.*); a non-pension guaranteed income paid to old persons (*Castelli*, *ibid.*); reductions in rail fares for large families (*Fiorini (née Cristini)* v. *S.N.C.F.* (No. 32/75), [1975] E.C.R. 1085, [1976] 1 C.M.L.R. 573); and a discretionary interest-free loan for the birth of a child (*Reina* v. *Landeskreditbank Baden-Württemberg* (No. 65/81), [1982] E.C.R. 33). In contrast with CoE instruments, however, EC member states cannot impose a

Article 10 of the EC *Charter of the Fundamental Social Rights of Workers*, in accordance with the arrangements applying in each country, guarantees to every worker of the EC the right to adequate social protection and, regardless of the worker's status and the size of the undertaking in which he or she is employed, the right to "enjoy an adequate level of social security benefits". The provision also clearly provides for a right to appropriate resources and social assistance to persons who are unemployed and have no means of subsistence.

5. Right to Health

The importance of adequate health care for migrant workers and their families was emphasized in chapter three. In the European context, the EC Commission has identified the problem of the health of migrant workers and their families as follows:

> Medical services, where they are inadequate for the needs of the indigenous population, are even less capable of meeting the particular problems of migrants. Coming from countries of different climate, environment, eating habits and hygiene, the sudden change makes them more vulnerable than the local population to psychological disorders, to certain infectious diseases, parasitical diseases, and industrial accidents.[115]

Equality between nationals and migrants in respect of health matters may only be effectively realized if adequate account is taken of the special problems migrants face in respect of access to the health care system, medical treatment and occupational health and safety.

5.1 Right of Equal Access to Health Care

The most influential CoE instrument with regard to the question of equal access to

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residence condition upon workers from other member states in respect of the payment of a minimum income benefit unless a similar requirement is imposed upon nationals. *Hoeckx* and *Scrivner*, *ibid.*

115 *EC Action Programme*, *supra*, Introduction, note 29 at 19.

health care is the *European Convention on Social and Medical Assistance* (and *Protocol*), adopted in 1953.[116] This treaty completes the social protection accorded to nationals of states parties by the two social security agreements and protocols adopted that same year. Equality between nationals of the host country and nationals of other states parties in respect of social and medical assistance is guaranteed by article 1 of the Convention, provided that the latter are "without sufficient resources" and "lawfully present" in the territory of the state party. The Protocol extends this protection to refugees. Article 6 of the Convention prohibits the expulsion of a state's party's nationals on the sole ground that they are in need of assistance unless certain conditions apply.[117]

The two CoE instruments which expressly provide for equality between nationals and non-nationals in respect of access to health care both refer to the 1953 Convention. The ESC contains a "very general"[118] obligation in article 11 requiring states to prevent the causes of ill-health and disease and to provide health education. The more relevant ESC provision, however, is article 13. Article 13 requires states to ensure that persons without adequate resources are provided with social and medical assistance (article 13(1)) and that they are not subject to political and social discrimination because they receive this assistance (article 13(2)). Article 13(4) requires states to provide social and medical assistance to nationals of other states parties on an equal footing with nationals in accordance with their obligations under the 1953

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116 *European Convention on Social and Medical Assistance* and *Protocol*, December 11, 1953; *European Treaty Series* No. 14; entry into force July 1, 1954; ratified by 17 states (the Protocol has only been ratified by 16 states because Malta has only signed and not ratified the Protocol) as of June 1, 1986 (date of ratification in parenthesis): Belgium [24/7/56], Denmark [30/6/54], France [30/10/57], Germany [24/8/56], Greece [23/6/50], Iceland [4/12/64], Ireland [31/3/54], Italy [1/7/58], Luxembourg [18/11/58], Malta [6/5/69], Netherlands [20/7/55], Norway [9/9/54], Portugal [4/7/78], Spain [21/11/83], Sweden [2/9/55], Turkey [2/12/76], United Kingdom [7/9/54].

117 Article 7(1)(i) to (iii) permits repatriation under the following conditions: (i) if the persons concerned have not resided continuously in the territory of the state party for at least five years (if they entered before attaining the age of 55), or for at least ten years if they entered it after that age; (ii) if they are in a fit state of health to be transported; and if they have no close ties in the territory in which they are resident. A state party that repatriates a national of another state party in accordance with article 7 must bear the cost of repatriation (article 8). The five and ten year residency periods are nonetheless significant limitations on the right of migrants not to be repatriated on the sole ground that they are in need of medical assistance.

118 *Conclusions I* at 59, cited in *ESC Case Law*, *supra*, note 2 at 104. See also Harris, *supra*, note 3 at 105.

Convention. Unlike the 1953 Convention itself, however, no reciprocity is necessary for this provision to operate, so long as the country in which the worker resides and his or her state of origin have both ratified the ESC. Article 13(4), therefore, applies to all nationals of states parties residing lawfully[119] within the territory of another state party regardless of whether their country of origin has ratified the 1953 Convention or accepted article 13(4).[120] The "obligation" in this provision includes repatriation and reservations, both permitted by the 1953 Convention,[121] although states parties to the ESC, which have not ratified the 1953 Convention, are required to accept the obligations of the latter in full under article 13(4).[122] The equivalent provision in the EMW to article 13(4) of the ESC is article 19, which asserts that states parties are to grant social and medical assistance to migrant workers on the same basis as nationals in accordance with the obligations assumed by virtue of other international instruments and, in particular, by virtue of the 1953 Convention.[123]

There are no provisions in EC regulations pertaining to equal treatment between EC workers and their families in respect of access to health care. Indeed, article 4 of Regulation 1408/71 expressly excludes "medical assistance" from the definition of social security. In its 1974 *Action Programme in Favour of Migrant Workers and their Families*, the EC Commission recommended action with a view to "improving the effectiveness of medical

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119 In accordance with the Appendix to the ESC, (as with article 12(4) in respect of social security rights), nationals of states parties need not be working regularly in the country of employment for article 13(4) to apply. Illegal migrant workers, however, are excluded by virtue of the wording in article 13(4), restricting the rights to those residing lawfully in the territory.

120 See respectively Appendix to ESC and *Conclusions VII* at 77-78, cited in *ESC Case Law*, *supra*, note 2 at 123. See also the Committee of Government Representatives, *Eighth Report* at 18, cited in *ESC Case Law - Supplement*, *supra*, note 34 at 41. The only state party to have rejected article 13 *in toto* is Cyprus, which is not a party to the 1953 Convention either. France has not accepted article 13(2) of the ESC.

121 Harris, *supra*, note 3 at 128. The Committee of Experts has observed, however, that the repatriation of a state party national who is in need of social or medical assistance would be incompatible with the ESC. *Conclusions IV* at 91, cited in *ESC Case Law*, *ibid.* at 122. See also Harris, *ibid.* at 129.

122 Harris, *ibid.* at 128.

123 Because of the reference to other instruments, it was considered unnecessary to make this provision one in respect of which a reservation could be made. *Explanatory Report on the EMW*, *supra*, note 1 at 23, para. 79. Similarly, reservations are also permitted to article 18 of the EMW, which guarantees equal treatment between nationals of states parties in respect of social security rights and which also refers to other instruments. See *supra*, note 104 and accompanying text.

examination on recruitment, preventive medicine, [and of] socio-medical services".[124] It is noteworthy that all EC member states are parties to the *European Convention on Social and Medical Assistance* and to the *Protocol*.

5.2 Occupational Health and Safety

The right to healthy and safe working conditions is expressly provided for in both the ESC and EMW. The obligation under article 3 of the ESC is threefold: to issue safety and health regulations, to enforce these regulations by measures of supervision, and to consult workers' and employers' organizations on measures intended to improve industrial safety and health. The Committee of Experts regards article 3 as "establishing a widely recognized principle, stemming directly from the right to personal integrity, one of the fundamental principles of human rights".[125] By virtue of the Appendix to the ESC, this provision applies to all nationals of states parties lawfully resident or working regularly in the territory of the contracting party concerned. Although the Committee of Experts asserts that there is nothing in the provision preventing its application to self-employed workers, this approach is disputed by the Committee of Government Representatives.[126] Furthermore, in view of the importance attached to this right, it is disturbing that the provision does not apply to illegal migrant workers who are most likely to find work in the most dangerous occupations.

Under article 20(1) of the EMW, migrant workers are guaranteed equal rights and protection with nationals in respect of the prevention of industrial accidents and occupational diseases, and industrial hygiene. The importance of this provision is underlined by the fact that no reservation may be made to it. Furthermore, it does not preclude the taking of special

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124 *Supra*, note 115 at 19. In its 1985 *Guidelines*, the EC Commission stated that the particular needs of the migrant population in health matters could be met by "preventive measures, information and, in general, education in health and hygiene". The EC Commission declared its intention "to undertake studies and to develop pilot schemes to examine the possibility of greater cooperation between the institutions and agents involved in the medical welfare of migrants". *Supra*, chapter six, note 88 at 13.

125 *Conclusions I* at 22, cited in *ESC Case Law*, *supra*, note 2 at 21.

126 *Conclusions II* at 182 and *Fourth Report* at 7, cited in *ESC Case Law*, *ibid.* at 22 and 23 respectively.

measures in favour of migrant workers.[127] Special measures for migrant workers in this area are vital, since they are particularly prone to suffering industrial accidents due to their poor education and linguistic difficulties and, as outlined in chapter five, because they continue to occupy the lowest rung of the occupational ladder where the dirtiest and most dangerous jobs are to be found. In chapter three, the observation was also made that additional instruction in occupational health and safety to migrant workers during employment training and the posting up of warning signs and symbols in their language might contribute greatly to the prevention of such accidents.

In 1974, the EC Commission proposed action with respect to the training of migrant workers in prevention of industrial accidents and illnesses.[128] The only direct EC provision relating to occupational health and safety is found in the recent *Charter of the Fundamental Social Rights of Workers*, which declares in article 19 that *all* workers in the EC must enjoy satisfactory health and safety conditions in their working environment. Measures in this area are to take particular account of "the need for the training, information, consultation and balanced participation of workers as regards the risks incurred and the steps taken to eliminate or reduce them".

6. Right to Housing

6.1 Background

During the initial phases of international labour migration in Europe, migrant workers came as single men and women and were housed in temporary and provisional accommodation.[129] This housing, generally provided by employers in accordance with

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127 *Explanatory Report on the EMW*, *supra*, note 1 at 23, para. 80.

128 *EC Action Programme*, *supra*, note 115 at 19.

129 Hammar, "Immigrant Policy", *supra*, note 60 at 268. This accommodation was usually comprised of hostels specially aimed at single workers. Castles & Kosack, *supra*, chapter five, note 12 at 494.

bilateral agreements, was far from adequate, although it was nonetheless better than independently secured accommodation, which was frequently excessively expensive and substandard.[130] The phenomenon of uncontrolled migration, especially in France, coupled with severe housing shortages, also led to migrants living in appalling conditions in shanty-towns around large towns and cities in the late 1960s.[131] The living conditions in the notorious French "bidonvilles", which thankfully no longer exist, are well documented.[132] This does not mean, however, that "bidonvilles" have disappeared elsewhere. As this passage from a recent newspaper article indicates, migration to Italy has sparked its own problems in this regard:

> [In October 1991], the northern Italian city of Milan dismantled what had come to be called "the village of shame," a squalid illegal encampment where about 700 North African immigrants were living in trailers without plumbing and electricity.
>
> The only problem was that the city offered no alternative housing to most of the immigrants. So, within a few days, many of the homeless had taken over an abandoned factory a few blocks from the dismantled camp.[133]

In the more established European labour-receiving countries, however, the increase in family reunification compelled migrants increasingly to seek accommodation on the general housing market. This shift to the regular private and public housing market did not alleviate the poor conditions experienced by migrants. Immigrant workers and their families face exploitation in the private housing market by unscrupulous and discriminating landlords and find themselves at the bottom of waiting-lists for accommodation in the public sector.[134] This situation is partly

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130 Papademetriou, *supra*, note 13 at 348.

131 Castles, *supra*, chapter five, note 2 at 764.

132 See generally "Bidonville--A French Word for Hell" in Castles, *Migrant Workers and the Transformation of Western Societies*, *supra*, chapter five, note 46, 5.

133 Stille, *supra*, chapter six, note 158 at A1.

134 Cf. Hammar, "Immigrant Policy", *supra*, note 60 at 268. In this regard, the *Conference on Mahgreb Migrant Workers in the EC - Conclusions*, *supra*, note 75 at 5, para. 25, proposed, *inter alia*, that migrant workers should be guaranteed the same rights as nationals enjoy in relation to access to subsidized housing and personalized housing assistance.

due to the chronic shortage of quality housing in countries of employment. Principally, however, it is the result of the legal, economic and social status of migrant workers and their families in society. The connection between restrictions on migrants' occupational mobility and their low occupational status has already been noted.[135] Low occupational status has also resulted in the geographic concentration of some migrants in certain urban areas and subsequently in the poorest housing in overcrowded inner-city neighbourhoods.[136] The poor housing situation of migrants is exacerbated by the legal restrictions on their political participation in society which prevent them from drawing attention to their plight.[137]

Inadequate accommodation also creates a breeding ground for poor educational performance among the children of migrants. The fact that migrant workers are concentrated in certain regions of the host country in disproportionate numbers to the local population, particularly in the inner cities, leads to a disproportionate enrolment of their children in the local schools. The resulting tension created in these schools is hardly conducive to a positive educational environment for migrant children.[138] The concentration of migrants in the poor housing areas of the host country may, paradoxically, have some positive side-effects in terms of cultural, psychological and physical security. In spite of the difficulties connected with life in these conditions, the formation and existence of migrant communities in such areas assist in the preservation of culture and language.[139] Furthermore, these communities constitute a

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135 *Supra*, chapter five, notes 155-156 and accompanying text.

136 Martin and Miller, *supra*, note 59 at 325 (footnote 34), observed in 1980 that 50 per cent of the migrant workers in Germany are concentrated on less than four per cent of the territory, whereas in France, 34 per cent of the total foreign population lives in the Paris region alone. In Switzerland, the canton of Zurich accounts for one-fifth of the Swiss foreign population. See also Castles & Kosack, *supra*, note 129 at 494. More recently, a Dutch government study revealed that foreigners and ethnic minorities are over-represented in the four largest cities in the Netherlands. For example, aliens constitute 15.5 per cent of all the inhabitants of Amsterdam. *SOPEMI 1992*, *supra*, note 13 at 71 (Table II.15).

137 Castles & Kosack, *ibid.*

138 In some countries, for example, this situation has impeded normal instruction in schools leading to protests from the parents of native children. Hammar, "Immigrant Policy", *supra*, note 60 at 269.

139 Hammar, *ibid.*, writes:

> Immigrants' housing conditions, in particular the concentration of certain nationalities in the same residential area, is of utmost importance for the planning of immigrant policy. It has gradually become obvious that the geographical dispersion of immigrants adversely affects, among other things, the possibilities for communities to arrange language instruction and the

refuge or haven from the damaging effects of racial discrimination, xenophobia and isolation experienced by migrants outside.[140]

Special efforts to improve the housing conditions of migrant workers and their families in Europe have been few and far between. The "bidonvilles" in France were vacated and their occupants offered alternative accommodation. In Norway, active measures have been undertaken to provide housing for migrants.[141] Tomas Hammar notes that host countries have preferred to treat migrants under the auspices of general housing policy and have been reluctant to recognize their special difficulties and needs.[142] Express recognition of these difficulties and needs leading to the improvement in the housing conditions of this disadvantaged group would undoubtedly serve its integration into the host society.[143]

6.2 CoE and EC Standards

(a) Public and Private Rental Accommodation

Article 19(4)(c) of the ESC articulates the principle of equal treatment between nationals

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education of immigrant children, as well as opportunities to form organizations that can promote these cultural activities.

140 Castles & Kosack, *supra*, note 129 at 494.

141 Hammar, *supra*, "Immigrant Policy", note 60 at 269; *ILO General Survey 1980, supra*, chapter three, note 49 at 121, para. 429. The Norwegian measures include the provision of grants to local authorities for housing immigrants and the establishment of a government-financed society to acquire and make available housing for immigrants. *ILO General Survey 1980, ibid.* Although the recent influx of East Germans and ethnic Germans into the former Federal Republic of Germany (*supra*, chapter five, note 55 and accompanying text) is not strictly-speaking categorized as international migration for employment in the true sense, it is nonetheless interesting to observe that the German Government committed itself in November 1989 to spending DM 8,000 million on housing construction over the next four years in order to alleviate the country's serious housing shortage. "East Germans and Ethnic Germans on the Labour Market", *supra*, chapter five, note 55 at 12.

142 Hammar, "Immigrant Policy", *ibid.* In other words, these countries have been reluctant to apply a "direct" immigrant policy in this area. See also *supra*, chapter five, note 74.

143 *SOPEMI 1990, supra*, Introduction, note 19 at 35. The *Report to the Conference on Migrant Workers from the Mahgreb in the EC, supra*, note 62 at 21, para. 3.9, also urges the taking of "active" policies on behalf of migrant workers to promote their equal access to housing. The Report proposes the issuance of housing benefits to migrants to prevent the emergence of ghettos and discusses the urgent need for renovation and "infrastructural improvement" policies in poor urban areas. *Ibid.* See also *Conference on Mahgreb Migrant Workers in the EC - Conclusions, supra*, note 75 at 6, para. 28.

and migrant workers from other states parties in respect of "accommodation". The obligation to secure equal treatment in respect of accommodation has been given considerable attention by the Committee of Experts and has been interpreted broadly. For example, the United Kingdom was deemed to be discriminating against migrants from ESC states parties residing and working in Northern Ireland because access to public housing there was restricted to United Kingdom nationals, EC nationals and those employed in key posts.[144] This restriction was eventually dispensed with by the United Kingdom.[145] Article 19(4)(c) has also been interpreted as prohibiting discrimination with regard to government housing grants in the event of a change of occupation by migrants and measures dictating where migrants are to live in the country of employment.[146]

As discussed in the previous chapter, article 19(4), on its face, only prohibits discrimination arising out of national laws, regulations and the action of administrative authorities. It would appear, therefore, that the provision imposes no obligation upon states parties to enforce equal treatment between nationals and migrant workers in practice. The Committee of Experts, however, is moving towards such an interpretation in spite of this negative wording. Although Harris concludes that article 19(4) is a negative obligation, which cannot induce state action to prevent discrimination in the private housing market and to assist migrant workers in obtaining accommodation,[147] this conclusion is questionable in the light of the Committee's statements regarding the need to ensure *de facto* equality between migrant workers and nationals.[148] The Committee's approach is supported further in view of its opinion that a special programme of assistance to encourage the construction of accommodation

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144 *Conclusions VI* at 122, cited by Plender, *supra*, note 4 at 246 and Harris, *supra*, note 3 at 171.

145 Harris, *ibid.* at 172, notes that the Committee of Experts consequently reversed their ruling in *Conclusions VII* after the change in British policy.

146 Swart, *supra*, note 1 at 36, citing from *Conclusions III* at 92-93 regarding the first point and Harris, *ibid.*, citing from *Conclusions VI* at 21, referring to the exclusion of migrant workers from areas of high immigrant population in the former Federal Republic of Germany.

147 For example, by requiring employers to find housing for foreign employees. Harris, *ibid.* at 173.

148 See also Swart, *supra*, note 1 at 36, who asserts categorically that *de facto* equality is, in fact, the obligation in article 19(4). See also *supra*, chapter six, note 177.

specifically for the benefit of migrant workers and their families was fully consistent with article 19(4)(c).[149]

The provision in the EMW concerned with migrant workers' housing is article 13. Article 13(1) espouses the principal of equality between nationals and migrant workers in respect of access to housing and rents, although, as with article 19(4) of the ESC, equality only applies to the extent access to housing and rents is covered by "domestic laws and regulations". It is clear, from article 13(3), however, that if these laws and regulations apply to the private rental sector, states parties are under an obligation to protect migrant workers against "exploitation in respect of rents". Article 13(4) is an interesting provision obliging contracting parties to ensure "by the means available to the competent national authorities, that the housing of the migrant worker shall be suitable". The CoE explanatory document on the EMW maintains that "suitable" accommodation is to be assessed in accordance with national housing standards. Furthermore, the undertaking in paragraph 13(4) is general in scope and applies to all types of accommodation, including communal accommodation.[150] It is not clear, however, whether this provision endorses an obligation upon states to take positive action to assist migrant workers and their families to obtain "suitable" accommodation.[151]

EC law is succinct on the question of the provision of adequate housing for EC migrant workers and their families. Article 9(1) of EC Regulation 1612/68 maintains that such workers are to "enjoy all the rights and benefits accorded to national workers in matters of housing", whereas article 9(2) is concerned with ensuring equality in respect of the allocation of public housing. EC workers have the same right as nationals to place their names on lists for this

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149 *Conclusions II* at 67, cited in *ESC Case Law*, *supra*, note 2. See also the Committee's statement regarding the conformity of article 19 with special measures for migrant workers generally. *Supra*, chapter six, note 179 and accompanying text.

150 *Explanatory Report on the EMW*, *supra*, note 1 at 21, para. 67. As noted earlier, single migrant workers in Europe are most likely to end up in communal accommodation, although all types of migrants, workers and their families, are found in slum shanty-towns, or "bidonvilles", which cannot be described as anything but "communal". Nowhere in Western Europe, however, should such accommodation objectively be considered "suitable" in accordance with national housing standards.

151 Swart, *supra*, note 1 at 10, thinks that, in contrast to article 19(4)(c) of the ESC, article 13(4) of the EMW does not endorse such an obligation.

kind of accommodation. More importantly, the families of migrant workers, if still resident in the country of origin, are deemed to be resident in the country of employment for the purpose of this provision, but only if nationals benefit from a similar presumption. This clause, therefore, deters member states from giving priority to their nationals with regard to the allocation of public accommodation on the basis that they are in greater need of this housing because their families are with them. Article 7 of the EC *Charter of the Fundamental Social Rights of Workers* proclaims that "the completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community". The provision outlines what such a process is to involve, but there is no reference to the need for improvement in the *housing* conditions of these workers. In its *Guidelines for a Community Policy on Migration* in 1985, the EC Commission urged that information be disseminated to migrants through the social services regarding the possibility of gaining access to financing available for the construction of dwellings or the upgrading of old and insanitary accommodation.[152]

(b) Acquisition of Private Property

Although there is no unrestricted right of aliens to acquire private property within CoE member states,[153] two CoE instruments impliedly touch on this question, whereas one deals with it directly.

Article 1 of the first Protocol to the ECHR is concerned with property rights and asserts that "every natural or legal person is entitled to the peaceful enjoyment of his possessions". The provision, therefore, does not explicitly protect the *acquisition* of property, although it clearly applies to both nationals and aliens. Nevertheless, this right to peacefully enjoy one's

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152 *Supra*, note 124 at 14. The Commission also advocated the promotion of experimental schemes for the housing of migrant workers and schemes for the renewal of urban neighbourhoods, which often include a large number of migrants.

153 Oellers-Frahm, *supra*, note 45 at 1752.

property is subject to restrictions: "No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law".[154] Commentators agree, however, that specific measures limiting the rights of alien migrant workers to hold property in the country of employment under article 1, would also have to be justified under article 14 of the ECHR, which prohibits discrimination on the ground of, *inter alia*, "property" in respect of rights and freedoms set forth in the ECHR.[155]

The broad interpretation given to article 19(4)(c) of the ESC by the Committee of Experts extends the principal of equality between nationals and migrant workers to the acquisition of private property. The Committee has stated on a number of occasions that the allocation of loans to nationals to purchase property, but not to foreign migrant workers, is contrary to article 19(4)(c).[156] Article 19(4)(c), however, does not protect the acquisition of property by migrant workers for a purpose other than accommodation.[157]

The ECE is the only CoE instrument which explicitly provides for equal treatment between host contracting party nationals and those from other states parties in respect of "the possession and exercise of private rights... relating to property" (article 4). Indeed, it would be unusual for this treaty, the main purpose of which is to facilitate temporary and permanent residence in the countries agreeing to it, to avoid clearly stating this principle. Nevertheless, the effect of this statement is greatly reduced by subsequent provisions, which permit the host state to reserve the acquisition of property to nationals or to restrict, *inter alia*, its acquisition by aliens for reasons of national security or defence (article 5).[158]

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154 Under the second paragraph of this provision, however, states parties have further discretion in controlling the use of property in accordance, *inter alia*, with the "general interest". See also Swart, *supra*, note 1 at 40.

155 Oellers-Frahm, *supra*, note 45 at 1752; Swart, *ibid.*

156 *Conclusions I* at 215 (regarding the requirement in the former Federal Republic of Germany that foreign workers had to reside in the country for two years in order to be eligible for grants for the construction of family housing) and *Conclusions III* at 92, cited in *ESC Case Law*, *supra*, note 2 at 160, by Harris, *supra*, note 3 at 172 and by Swart, *ibid.* at 36.

157 Harris, *ibid.* Accommodation purchased for business purposes, therefore, does not come within the ambit of article 19(4)(c).

158 Article 6 permits states parties to retain restrictions already in existence at the time the ECE was

Although CoE provisions are generally sympathetic to the right of migrant workers to acquire private property in the country of employment, in contrast to ILO instruments and the UN Convention which do not provide for this right, they still lag behind EC law on this subject. Article 222 of the *Treaty of Rome* maintains that the Treaty "shall in no way prejudice the rules in Member States governing the system of property ownership", but it is clear that the principle of freedom of movement would be fettered considerably if EC nationals were unable to liberally acquire property in member states.[159] In the recent case of *Re Ownership of Landed Property: EC Commission* v. *Greece*, the ECJ ruled upon the validity of Greek legislation prohibiting non-Greeks from acquiring or dealing in rights in land in the border regions of the country. The ECJ held that access to housing and ownership of property is the corollary of freedom of movement for workers and that the Greek legislation constituted discrimination on the grounds of nationality under article 48 of the *Treaty of Rome*. Furthermore, it also hindered the right of establishment under article 52. The right to establish oneself and to pursue an occupation in an EC member state necessarily implies the right to acquire, use or dispose of immovable property in that country.[160] Restrictions, such as the one referred to above, also infringe article 9(1) of Regulation 1612/68, which extends equality between EC workers in respect of matters of accommodation to "ownership of... housing".

7. Right to Family Reunification

Chapter two maintained that the communitarian conception of the individual, which recognizes his or her closest attachments, including those of family, as integral constituents of individual identity, justifies the right of migrant workers to be reunited with their families, especially if the separation has been a lengthy one. Moreover, the right of migrant workers to

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concluded. Further restrictions may only be added after the ECE enters into force for imperative economic and social reasons.

159 See also Stein & Thomsen, *supra*, note 106 at 1819-1820.

160 *Re Ownership of Landed Property: EC Commission* v. *Greece* (No. 305/87), [1991] 1 C.M.L.R. 611.

reunite with their families is essential not only to their own well-being and to the welfare of their families, but also, as argued in chapter three, because the realization of this right contributes to social stability in both receiving and sending countries.[161]

7.1 Background

The right to family reunification is recognized, in practice, in all major labour-receiving European countries, although it is by no means applied in a uniform manner.[162] Generally-speaking, the definition of "family" for the purposes of family reunification is confined to the spouse and minor children.[163] Furthermore, conditions on family reunification exist in all countries. In most countries, migrant workers are required to work and reside in the country of employment for a certain period of time (usually one year)[164] and possess adequate accommodation before their families are permitted to join them.[165] Further conditions on the entry of families include requirements that migrant workers possess sufficient resources to maintain their families and that the latter be in good health.[166] The strictness of these

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161 The *Report to the Conference Report on Migrant Workers from the Mahgreb in the EC, supra*, note 62 at 23, para. 3.16, asserted that, in addition to being a basic human right, the right to family reunification "enhances the sense of security of migrant workers and so is a factor for greater stability in society as a whole".

162 The right is recognized in different forms in the legislation of all EC states with the exception of Ireland and Luxembourg, although these two countries conform to this principle in practice. *Ibid.*

163 "Post-World War II European Labour Migration: An Introduction to the Issues", Rogers, *supra*, chapter five, note 25 at 17. In Austria, Germany, France, Ireland and Switzerland, parents may also join their children but often only in cases of need or personal hardship. S. Thomsen, "The Legal Position of the Spouse and Family Members" in *The Legal Position of Aliens, supra*, Introduction to Case Study, note 2, 1947 at 1949. In Sweden, family reunion applies to co-habitants. *SOPEMI 1992, supra*, note 13 at 78.

164 *ILO General Survey 1980, supra*, note 141 at 121, para. 426 with regard to France, Germany, and the Netherlands. See also Thomsen, *ibid.* at 1951. In Luxembourg and Switzerland, the waiting-period for family reunification is also one year. Thomsen, *ibid.* In some German *Länder*, however, three years are required. J.A. Frowein, "Concluding Report to the Heidelberg Colloquium on the Legal Position of Aliens in National and International Law" in *The Legal Position of Aliens, ibid.*, 2081 at 2084. In Sweden, residence permits are granted to the spouses, co-habitants and unmarried children under 20 of persons already domiciled in Sweden. The condition is that permits must be obtained before entry into the country. *SOPEMI 1992, ibid.*

165 Adequate housing is a pre-requisite for family reunification in Austria, France, the Netherlands, Norway, Switzerland, Germany, Luxembourg, and the United Kingdom. *ILO General Survey 1980, ibid.* and Thomsen, *ibid.* In Denmark, migrant workers are also obliged to provide appropriate accommodation for their relatives. Singer, *supra*, chapter five, note 23 at 28.

166 For the financial support of family members requirement see *ILO General Survey 1980, ibid.* with regard to France and the United Kingdom (concerning the United Kingdom see also Plender, *supra*, note 4 at 312) and Thomsen, *ibid.* with regard to the above countries and Germany, the Netherlands and Norway. For the

conditions largely depends on the liberality of a host country's policy towards family reunification.[167] If both receiving and sending countries, however, are parties to a bilateral labour agreement or belong to a free trade and labour regime, such as the EC, then conditions on family reunification, as demonstrated below, are usually more relaxed.

7.2 CoE and EC Standards

Both the ESC and the EMW, the two instruments containing provisions dealing directly with the protection of migrant workers, recognize the right to family reunification, although in considerably qualified terms. A tentative right to family reunification may also be ascertained from the case law of the ECHR, which is particularly important given that the ECHR applies to *all* migrant workers residing in the territory of a state party. The EC regime, however, is the most liberal and lucid in this area and guarantees the greatest protection for certain family members who wish to accompany migrant workers to, or join them in, the country of employment.

(a) CoE Standards

There is no explicit clause in the ECHR concerned with the right to family reunion. The understanding, however, as noted earlier, is that states parties have, by ratifying the ECHR, impliedly agreed to limit their sovereignty, including their previously unfettered control over the entry and exit of aliens. In the case of family reunification, the guarantee in article 8(1) of

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health requirement see *ILO General Survey 1980*, *ibid.*, with regard to Austria and France. Another "condition", although this does not directly affect the entry of a migrant worker's family to the country of employment, but may nonetheless considerably influence whether the family does enter, involves restrictions on access to the labour market for dependents. See *supra*, notes 19-21 and accompanying text for specific details of such restrictions. See also generally Penninx, *supra*, chapter five, note 14 at 968.

167 According to Penninx, *ibid.* at 962, restrictive policies are applied in Austria, Switzerland, France (since 1974) and Germany, whereas Norway, Sweden, Denmark and Belgium tend to follow more liberal policies.

the ECHR that "everyone has the right to respect for his private and family life..." has led to the recognition that

> in certain circumstances, refusals to give certain persons access to, or allow them to take up residence in, a particular country, might result in the separation of such persons from the close members of their family which could raise serious problems under article 8 of the Convention.[168]

The same argument may be raised with respect to the potential expulsion of a family member from the country in question. The case law of the European Court and Commission of Human Rights is somewhat nebulous on this question, but it appears that a number of prerequisites have to be met before a refusal of family reunification may seriously be considered to be a breach of article 8(1): first, the relationship between the family members has to be sufficiently close and effective;[169] second, family life must be "existing";[170] and third, it must not be feasible for the family reunion to take place elsewhere.[171] These prerequisites

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168 *X* v. *Denmark* (No. 1855/63) (1965), 8 Y.B. Eur. Conv. H.R. 200 at 204. In this case, the applicant, a German national who had been born and had lived in Denmark for almost all his life, was refused entry into the country in 1945 after carrying out military service for the German army. From 1957, he regularly received permission to visit his family, consisting of his German parents and Danish relatives, for periods up to three months. His application for a permanent residence permit was rejected by the Danish authorities with no reasons given. The applicant alleged a violation of article 8(1). The Commission found that the applicant had failed to establish that his "private and family life" had been infringed on the following grounds: that he had now lived for more than 20 years in Germany; that he was permitted to visit his relatives regularly; and that the closest members of his family, namely his parents, also possessed German nationality.

169 For example, relationships between parents and dependent children, especially young children, as well as relationships between spouses. See *Abdulaziz, Cabales and Balkandali* v. *U.K.* (Nos. 9214/80, 9473/81 and 9474/81) (1982), 29 Eur. Comm. H.R. D.R. 176, *Alam and Khan* v. *U.K.* (No. 2991/66) (1976), 10 Y.B. Eur. Conv. H.R. 478 and Application No. 7031/75 (1977), Eur. Comm. H.R. [unpublished], cited in Council of Europe, *Digest of Strasbourg Case-Law relating to the European Convention on Human Rights*, vol. III (articles 7-12) (Köln: Heymanns Verlag, 1984) [hereinafter *Digest of ECHR Case Law III*] at 137. See also Drzemczewski, *supra*, chapter six, note 16 at 368. As far as "effective" relationships are concerned see *Singh* v. *U.K.* (No. 2992/66) (1976), 10 Y.B. Eur. Conv. H.R. 478, in which the Commission ruled that because the applicant son had lived apart from his widowed father for a long time, their relationship did not constitute "effective" family life for the purposes of article 8(1).

170 See *X and Y* v. *U.K.* (No. 7229/75) (1977), 12 Eur. Comm. H.R. D.R. 32, concerning the reunion of an uncle with an "adopted" nephew.

171 Contrast the following applications: (No. 3522/68) (1986) Eur. Comm. [unpublished] and (No. 6357/73) (1974), 1 Eur. Comm. H.R. D.R. 77, cited in *Digest of ECHR Case Law III*, *supra*, note 169 at 128-129, 130-131 and 134-135. In the former case, the applicant sought to remain with his wife in Belgium. Both were German citizens, however, and had been resident in Belgium for little over a year. The Commission ruled that there was nothing to prevent the applicant's wife and family from joining the applicant in Germany. In the latter case, the applicant, a Syrian national, had lived with his German wife and two children in Germany for ten

were all satisfied in the recent case before the European Court of Human Rights, *Moustaquim* v. *Belgium*.[172] This case concerned a 25 year old second-generation migrant of Moroccan nationality, who had been deported at the age of 21 as a result of convictions for a number of criminal offenses, mostly against property. The seriousness of the offenses would not have been sufficient to deport a EC national in the same circumstances. The Court found a violation of the right to respect for family life. The young Moroccan had lived in Belgium since the age of two. Furthermore, all the members of his closest family (parents, brothers and sisters) resided in Belgium with one of his brothers having acquired Belgian nationality. He spoke no Arabic and retained few links with his country of origin.

Because the ECHR does not expressly provide for the right of families to be reunited, there is nothing in the case law evaluating the conditions that states usually place on this right; for example, that migrant workers first reside in the country of employment for a specified period, possess adequate accommodation and sufficient resources, and that their family members be in good health. Article 8(2) of the ECHR, however, cites a lengthy list of justifiable limitations on the right to family life. Arguably, restrictions such as those "necessary in a democratic society in the interests of... public safety or the economic well-being of the country, [or] for the protection of health..." would permit some of the above conditions imposed by states on family reunification. Article 8(2) has been resorted to infrequently on account of the fact that the European Commission of Human Rights has only occasionally found that state measures preventing the reunion of families have violated article 8(1).[173]

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years. The Commission held that the applicant's extradition to Syria could lead to a lasting separation from his family and that there were valid reasons for his wife and children not following the applicant to Syria.

172 *Moustaquim* v. *Belgium* (1991), Eur. Ct. H.R. Ser. A, No. 193. See also *Berrehab* v. *Netherlands* (1988), Eur. Ct. H.R. Ser. A, No. 138.

173 Swart, *supra*, note 1 at 12. See *X* v. *Belgium* (No. 312/57) (1958-1959), 2 Y.B. Eur. Conv. H.R. 352, in which the Commission rejected the application of a man with Belgian and Italian nationality claiming a violation of article 8(1). The applicant had been expelled by Belgian authorities to Italy after being convicted for collaborating with the German army during World War Two. The Commission held that although the expulsion resulted in his separation from his wife and child in Belgium, it was justified under article 8(2) as being in the "public interest". See also Plender, *supra*, note 4 at 233. In Application No. 8971/80 (1981), Eur. Comm. H.R. [unpublished], cited in *Digest of ECHR Case Law III*, *supra*, note 169 at 151-152, the

The right to marry and to found a family is protected by article 12 of the ECHR. Neither the Commission nor the Court, however, have found that this right has been infringed because an applicant has had to leave or has been refused entry into a country. In most cases, the couple are able to marry and live together elsewhere.[174] It is arguable, however, that both articles 8(1) and 12 read together, may be interpreted as imposing an obligation to admit a fiancé into the country of residence of the partner if marriage and life together outside of that country are deemed impossible.[175]

In practice, therefore, the right to family reunification under the ECHR is, at most, tentative, and largely dependent on a number of factual circumstances.[176] Nevertheless, the ECHR is the only human rights instrument in Europe which applies to the great majority of migrant workers on the continent. Moreover, the recognition of the family as "the fundamental unit of society" in other instruments, as indicated in chapter one, together with the general wording of article 8, constitute principled deterrents and discourage states from placing unduly onerous burdens on the right to family reunion.[177]

There is no right to family reunification in the ECE. This is an anomaly given that one of the purposes of the ECE is to facilitate prolonged or permanent residence in a country for nationals from other states parties. Family is defined for the purpose of access to employment as the "husband or wife and dependent children of nationals of any Contracting Party lawfully residing in the territory of another Party *who have been authorized to accompany or rejoin them*".[178] This indicates, in the absence of express provisions to the contrary, that the question of family reunification is at the sole discretion of the receiving country. The only

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Commission ruled that the expulsion of the applicant, a deserter from the Indian Air Force, and thereby separating him from his wife and child, was justified as "necessary in a democratic society... for the prevention of... crime", within the meaning of article 8(2).

174 For example, see (No. 7175/75) (1976), 6 Eur. Comm. H.R. D.R. 138, cited in *Digest of ECHR Case Law III*, *ibid.* at 582, in which the Commission ruled, *inter alia*, that the applicant's right to marry had not been restricted because he had been refused a residence permit by the German authorities preventing him from marrying in that country.

175 Cf. Plender, *supra*, note 4 at 235.

176 Cf. Swart, *supra*, note 1 at 11.

177 Cf. Golsong, *supra*, chapter six, note 64 at 236.

178 Section V(b) of the Protocol to the ECE. Emphasis added.

possible limitation upon this discretion is article III(b) of the Protocol to the ECE, which stipulates that family ties are to be taken into account on the expulsion of a state party national from the territory of another state party.

As stated at the beginning of this discussion, both the ESC and the EMW contain express provisions on family reunification. Article 19(6) of the ESC places states under an obligation "to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory".[179] This duty is only to "facilitate" and constitutes a watered-down version of a draft text of the ESC which used much stronger language and spoke of family reunification in terms of an explicit right.[180] Nonetheless, the Committee of Independent Experts has interpreted article 19(6) broadly in addition to evaluating strictly the validity of the restrictions which states often impose on the reunion of migrant workers with their families. The purpose of this provision is to create the conditions which make family reunification possible. This provision is also to be interpreted in the light of article 16 of the ESC which recognizes the obligation of states to ensure the social, legal and economic protection of the family, regarded as the "fundamental unit of society".[181] The duty in article 16 extends, *inter alia*, to the "provision of family housing".[182] As described earlier, most receiving countries require migrant workers to obtain suitable housing before family reunification may take place, and the provision of such accommodation, especially in many Western European countries, where it is scarce, is a considerable obstacle to the realization of this right. In recognition of these difficulties, the Committee of Experts has interpreted the

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179 By virtue of article 19(10), this obligation also covers the families of self-employed migrant workers.

180 The draft version of article 19(6) required states to grant migrant workers "the *right* to be accompanied or joined by their families" and "to facilitate", without qualification, "the reunion of their families". Harris, *supra*, note 3 at 174. Emphasis added.

181 *Conclusions VIII* at 211-212, cited in *ESC Case Law - Supplement*, *supra*, note 34 at 50.

182 Article 16 reads in full:

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

duty to "facilitate" in article 19(6) as implying a *positive* obligation to assist migrant workers and their families in finding suitable public or private housing.[183] Clearly, this call for special measures in favour of migrant workers and their families in the area of housing is an extension of the principle of equal treatment between migrants and nationals in respect of accommodation in article 19(4) of the ESC.[184]

The wording of article 19(6) appears to restrict family reunion to the family of a worker "permitted to establish himself in the territory" of a state party. This clause is to be contrasted with other paragraphs in article 19 which afford rights to migrant workers "lawfully within" the territories of states parties.[185] Although the Committee of Experts has not stated that article 19(6) is narrower than these other provisions, the drafting history suggests that it is more limited.[186] The Committee of Government Representatives stated that this wording must exclude certain categories of migrant workers, such as seasonal workers, from the operation of the clause.[187] This restriction on the reunion of families with short-term workers finds further support in the acknowledgement by the Committee of Experts that states parties may require migrant workers to reside a certain period of time in their territory before their families are permitted to join them, provided that this period is not too excessive.[188] The condition that migrant workers possess sufficient financial resources to maintain their families constitutes another justifiable restriction on family reunification so long as it does not require migrant

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183 *Conclusions I* at 85, *Conclusions II* at 69, *Conclusions III* at 94, 96, *Conclusions IV* at 124, 126, *Conclusions V* at 136-137, and *Conclusions VII* at 105, cited in *ESC Case Law*, *supra*, note 2 at 163-167. This interpretation has been endorsed by the Parliamentary Assembly. *Parliamentary Assembly Report*, (Mrs Morf) Doc. 5374 at 15, cited in *ESC Case Law - Supplement*, *supra*, note 34 at 51. Positive state action is not required, however, if housing market conditions are favourable. *Conclusions III* at 94, cited in *ESC Case Law*, *ibid.* at 164.

184 Harris, *supra*, note 3 at 179.

185 See also Plender, *supra*, note 4 at 247.

186 Harris, *supra*, note 3 at 175.

187 *Eighth Report* at 18-19, cited in *ESC Case Law - Supplement*, *supra*, note 34 at 51. On this interpretation, a policy such as that practised in Switzerland (which has not ratified the ESC) of not permitting seasonal workers to bring their families is not contrary to article 19(6). See *supra*, chapter five, note 103.

188 *Conclusions VI* at 125, cited by Harris, *supra*, note 3 at 125. See also Swart, *supra*, note 1 at 10 and Oellers-Frahm, *supra*, note 45 at 1737. A lengthy waiting-period risks infringing article 19(6). For example, the Committee of Experts has stated that a waiting period of three years is too excessive. Conclusions II at 69, cited in *ESC Case Law*, *supra*, note 2 at 163.

workers to attain a higher standard of living than national workers.[189] The exclusion of family members with serious diseases may also be justified,[190] but this does not mean, however, that a state can prohibit the entry of sick or disabled children requiring special treatment, to join a family of limited means.[191]

Article 12 of the EMW is entitled "family reunion" and was influenced by the ESC, but the article 12 provisions, according to one commentator, remain "in their entirety some way behind the latter".[192] Although the importance of article 12 is underlined by the fact that no reservations can be made in respect of its provisions,[193] the principle of family reunion is subject to so many escape clauses that its efficacy must seriously be questioned.[194] Before family reunion may occur, article 12(1) requires migrant workers to possess family housing "considered as normal for national workers in the region where the migrant worker is employed". There is no obligation upon states parties, however, as there appears to be under article 19(6) of the ESC, to provide special assistance to migrant workers in obtaining this accommodation.[195] Furthermore, the families of migrant workers can only enter the country under the same conditions as originally applied to these workers and the provision also permits a discretionary waiting-period of not more than twelve months. In addition to these three conditions on family reunion, a state party may impose a further condition requiring migrant workers to possess "steady resources" sufficient to meet the needs of their families. This condition, however, may only take effect one month after a declaration has been addressed to

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189 Mole, *supra*, note 172 at 204. It is arguable that the lower standard of living of migrant workers in general constitutes discrimination *per se*, because their markedly lower wages prevent them from obtaining sufficient financial resources in order to bring their families. I am grateful to Professor Bill Black for drawing my attention to this argument.

190 *Conclusions III* at 95, cited in *ESC Case Law*, *supra*, note 2 at 164-165. See also Plender, *supra*, note 4 at 247 and Harris, *supra*, note 3 at 177, who also notes that the Committee of Experts impliedly justified the latter restriction on the basis of article 31 of the ESC which permits states parties to limit the exercise of ESC rights for the protection of, *inter alia*, "public health".

191 *Conclusions I* at 85, cited in *ESC Case Law*, *ibid.* at 163. Provided that the intention of the migrant worker in seeking employment in the country is not to take advantage of the benefits of the health service solely for this purpose. *Conclusions II* at 69 and *Conclusions III* at 97, cited in *ESC Case Law*, *ibid.* at 165-166.

192 Oellers-Frahm, *supra*, note 45 at 1737. See also Swart, *supra*, note 1 at 19.

193 *Explanatory Report on the EMW*, *supra*, note 1 at 18, para. 53.

194 Cf. Hammond, *supra*, chapter six, note 10 at 362.

195 See also Oellers-Frahm, *supra*, note 45 at 1737 and Swart, *supra*, note 1 at 10.

this effect to the CoE Secretary-General (article 12(2)). Migrant workers living off unemployment benefit or public assistance benefits are deemed not to possess "steady resources".[196]

The most significant "escape" clause, however, is article 12(3), which enables states parties to derogate temporarily from the obligation of family reunification for certain parts of its territory. The CoE Explanatory Report on the EMW observes that this derogation provision was added to the draft in the final stages of negotiation in order to take account of the special situation in a number of countries, particularly as regards receiving capacity; for example, in cases where states parties can no longer cope with the influx of migrant workers' families into certain regions in respect of the provision of housing, education and health care.[197] This clause is subject to a number of in-built safeguards, based upon those provided for in article 15 of the ECHR concerning derogation in time of war and public emergency, to ensure that this power is not abused.[198] The derogation may only be applied temporarily, although no specific time-limit is expressly provided,[199] and cannot be employed with respect to the whole territory of the country. Furthermore, the Secretary-General must be informed of the intention to derogate by a declaration stating "the special reasons justifying the derogation with regard to receiving capacity".[200] A further safeguard is provided by article 33(6) of the EMW, by which any state party may request a meeting of the Consultative Committee whenever article 12(3) is invoked.[201]

The differences between the ESC and the EMW in respect of acceptable restrictions on

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196 *Explanatory Report on the EMW, supra*, note 1 at 19, para. 59. This is because article 12(1) refers to migrant workers "lawfully employed" in the territory of a state party. *Ibid.*

197 *Ibid.* at 19, paras. 60-61.

198 *Ibid.* at 19, para. 60.

199 Plender, *supra*, note 4 at 255.

200 Special reasons must be given for derogations from the family reunion obligation for *each* part of the state's territory. *Explanatory Report on the EMW, supra*, note 1 at 19, para. 62. The possibility of derogation from *any* obligation in the event of war or public emergency threatening the life of the nation is provided to states parties by article 30 of the ESC.

201 See also, *ibid.* at 20, para. 64. Golsong, *supra*, note 177 at 244, observes that this right of initiative available to each state party might lead to genuine multilateral negotiation with respect to the application of article 12 of the EMW.

the right to family reunification may largely be explained by the time-gap between the two instruments. The EMW was completed after the "turning-point" in labour migration in 1973-74. As pointed out in chapter five, in this depressed economic situation, migrant workers in Western European countries preferred to bring in their families, rather than risk return to their countries of origin.[202] Concerned that these arrivals would lead to an over-concentration of the foreign population in certain regions resulting in problems of social integration as well as in overburdened social, health and education services, a number of states negotiating the EMW sought to place constraints on the right to family reunion. The result was the "compromise" reached in article 12.[203]

(b) EC Standards

In contrast to the right of family reunification under CoE instruments and the numerous qualifications imposed upon it, EC provisions on this subject are relatively straightforward. The principle of freedom of movement for workers within the EC would be meaningless if these workers could not be accompanied by their families or if their families were unable to join them in the country of employment:[204]

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202 *Supra*, chapter five, notes 26 and 27 and accompanying text.

203 Golsong, *supra*, note 177 at 242. On June 8, 1978, the Committee of Ministers adopted Resolution (78) 33 on the reunion of families of migrant workers in Council of Europe Member States, which goes beyond the family reunification provisions of article 12. Council of Europe, *Collection of Recommendations and Declarations of the Committee of Ministers concerning Human Rights 1949-1987* (Strasbourg: Council of Europe, 1989) 62. The resolution places the following limitations on conditions governing the admission of migrant workers' families: the waiting-period should be reduced to a minimum and should not exceed twelve months; housing quality requirements should be limited to those regarded as normal by national standards; family reunion conditions concerning the employment of migrant workers may only relate to the capacity to provide for the needs of the family from stable and adequate resources, excluding unemployment benefit; and if a medical examination is required for members of a migrant worker's family, its sole purpose must be the detection of illnesses representing a danger to public health or "*ordre public*" (paragraph B.1.b.). Moreover, the resolution also calls for equality of access between migrant workers and nationals to low-cost accommodation (paragraph B.2). It is noteworthy that the representatives of the United Kingdom, Germany and Austria reserved the right not to comply with these provisions.

204 Stein & Thomsen, *supra*, note 106 at 1801.

> The traditional view of the migrant worker is that of an economic factor of production allowed into the host country, generally for a limited period of time and unaccompanied by his family, to meet particular labour demands. However, the European Community... has departed from this pattern. It has set up a common labour market where workers can move freely, taking up employment and residence in any member state on the same conditions as nationals of that state. Far from treating the worker as a temporary immigrant, Community law envisages him as being fully integrated into the social and economic life of the society in which he has chosen to settle.
>
> One of the most important rights accorded to workers is the right to bring their families to settle in the host member state.[205]

Article 10(1) of EC Regulation 1612/68 provides expressly that defined family members have "the *right* to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State".[206] The only condition on this right, with the exception of the definition of "family" itself (considered below), is that the worker must have available for the family housing "considered as normal for national workers" in the region of employment. This provision "must not give rise to discrimination between national workers and workers from the other Member States" (article 10(3)).[207]

Article 10(3) of EC Regulation 1612/68 was the object of a recent action brought by the EC Commission against Germany under article 169 of the *Treaty of Rome*. In accordance with article 10(3), German law allowed EC workers to bring their families to join them if they had appropriate family housing. Residence permits were only granted, however, if the housing remained suitable and were liable to be withdrawn if the level of accommodation fell below the appropriate standards. The ECJ ruled that article 10(3) only applies at the time of the arrival of family members and not later, when housing conditions may deteriorate below an acceptable standard, for example, either because of birth or because children attain the age of majority. German law, therefore, discriminated against EC migrant families in relation to those of

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205 Note (EEC), "Migrant Workers' Families: Legal Rights" (December 1987) Eur. Industr. Rel. Rev. 18 at 18.

206 Emphasis added.

207 In the case of public housing waiting lists, the principle of non-discrimination is satisfied by article 9(2) of Regulation 1612/68. See also *supra*, note 152 and accompanying text.

nationals.[208]

The right to family reunion in article 10(1) does not require that the members of the family live together. Indeed, they may both pursue occupations in different parts of the same country.[209] The liberal EC rules on family reunion lead to an anomaly, however, whereby EC nationals employed in another member state are able to benefit from these rules, whereas national workers may be subject to stricter national legislation.[210] EC regulations on the right to family reunion are not elaborated upon in the *Charter of the Fundamental Social Rights of Workers*, which merely notes that the right of Community workers to freedom of movement shall also imply "harmonisation of conditions of residence in all Member States, particularly those concerning family reunification".

7.3 Definition of Family

For the purpose of European human rights standards concerned with the right of family reunion for migrant workers, "family", with one exception, effectively includes the spouse and minor dependent children. This general definition has been expanded, in some cases to a considerable extent, in the interpretation of CoE and EC standards by the ESC Committee of Independent Experts and the ECJ respectively. In one sense, however, the various definitions of "family" found in these standards are nothing more than further restrictions on the right to family reunification simply because they are perceived as necessary by the country of

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208 *Re Housing of Migrant Workers: EC Commission* v. *Germany* (No. 249/86), [1989] E.C.R. 1263, [1990] 3 C.M.L.R. 540. Moreover, the German Government's action was not justified under article 48(2) of the *Treaty of Rome* on the grounds of public policy. See the section on "Residence Rights", *infra*, chapter eight. The ECJ also held that the provisions in Regulation 1612/68 relating to equal treatment for the family of migrant workers had to be interpreted in the light of the right to respect for family life in article 8 of the ECHR.

209 *Diatta* v. *Land Berlin*, *supra*, note 56. This case also provides for the rule that a married couple are still regarded as "family" for the purposes of article 10 even if they are living apart, provided that their marriage has not been formally dissolved.

210 *Morson and Jhanjan* v. *Netherlands* (No. 35-36/82), [1982] E.C.R. 3723, [1983] 2 C.M.L.R. 221. This case concerned two Surinam mothers who wished to remain with their children in the Netherlands, but who were threatened with expulsion. The children were employed in the Netherlands, but had never worked in another EC member state. The ECJ held that the EC provisions on free movement of workers are inapplicable to workers who have always lived and worked in their *own* country.

employment and leave migrant workers with no room to determine for themselves who constitutes "family".

The ESC and the EMW each offer different definitions of "family" for the purpose of family reunion. The ESC defines the family of a foreign worker, for the purpose of article 19(6), to mean "at least his wife and dependent children under the age of 21 years" (Appendix to the ESC). The EMW confines the state obligation regarding family reunification, in article 12(1), to the spouse and unmarried minor dependent children. The ESC definition does leave the door open for a broader group of persons to be included in "family" by virtue of the words "at least". For example, this definition would probably include dependent disabled children over the age of 21.[211] The ESC Committee of Government Representatives observed that "dependence" does not merely mean economic dependence, but encompasses "all situations in which there is *de facto* or legal dependence under the relevant laws", including psychological and moral dependence.[212] Unfortunately, the definition does not apply to the husbands of female migrant workers. This overt discrimination is rectified in the EMW which applies to spouses of both sexes. Nonetheless, it is high time that the ESC definition is expanded to include male spouses in spite of the text clearly indicating the contrary.[213] The definition of "dependent children" in article 12(1) of the EMW is narrower than that in the ESC. Under the ESC, all dependent children under the age of 21 are included. Under the EMW, however, these children must not be married. Furthermore, the EMW definition only applies to "minor" children with no specified age-limit, which is to be determined by the law of the host country.[214] Consequently, dependent children below the age of 21 may be excluded under the

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211 See Harris, *supra*, note 3 at 174 and footnote 938, citing from the drafting process in the Committee of Ministers (Doc. CM (61) 95 rev. 3).

212 *Eighth Report* at 18-19, cited in *ESC Case Law - Supplement*, *supra*, note 34 at 51. This definition of the concept of dependent persons is wider than that proposed by the Committee of Experts as being that "of persons who depend, for their existence, on their family, in particular because of economic reasons or, as the case may be, for such reasons as continuation of education without remuneration or for reasons of health". *Conclusions VIII* at 211-212, cited in *ESC Case Law - Supplement*, *ibid.* at 50.

213 See also Swart, *supra*, note 1 at 9. Moreover, such a move would not encounter much opposition. The Committee of Experts stated, however, that the notion of "dependency" includes the children of female migrant workers. *Conclusions IV* at 124, cited in *ESC Case Law*, *supra*, note 2 at 166.

214 See also Oellers-Frahm, *supra*, note 45 at 1737 and Golsong, *supra*, note 177 at 243.

EMW if the law of the state party where the migrant worker is employed stipulates that the age of majority commences earlier.

Both definitions of "family" in the ESC and the EMW are narrower than the corresponding definitions in article 13(2) of ILO Convention No. 143 of 1975, articles 4 and 44(2) of the UN Convention,[215] and article 10(1) of EC Regulation 1612/68. The latter offers a more detailed and comprehensive definition of family. Migrant workers from other EC member states may be accompanied to or joined in the country of employment by their spouse and children under the age of 21, or by children over 21 if the latter are still dependent on the worker. The ECJ has held that unmarried partners of EC workers, who have lived with them in a stable relationship, are *not* covered by the word "spouse" which only applies to marriage partners.[216] Article 10(1) also includes dependent relatives in the ascending line of the worker and his or her spouse, namely their parents and grandparents. As far as other relatives are concerned, article 10(2) obliges member states to facilitate their admission if they are dependent on the worker or living under his or her roof.[217] Although the right in article 10(1) may be enforced directly in the national courts of each member state, it is questionable whether the obligation "to facilitate" in article 10(2) has the same effect.[218] In all cases, proof of the relationship or dependency may be required by the authorities of the receiving member

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215 Under ILO C143, the definition of the "family" for the purpose of family reunification is extended to *all* dependent children and parents (article 13(2)). See *supra*, chapter three, notes 195-196 and accompanying text. See also Plender, *supra*, note 4 at 254. Under the UN Convention, the definition of the "family" for the purpose of family reunion includes "minor dependent unmarried children" as well as "spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage" (article 44(2)). See *supra*, chapter four, notes 127-128 and accompanying text.

216 *The State (Netherlands)* v. *Reed* (No. 59/85), [1987] 2 C.M.L.R. 448. This case concerned an English woman who wished to stay in the Netherlands with her English male partner, an EC migrant worker with a residence permit. Although article 10(1) did not apply to her, she was permitted to stay with her partner on the basis that "cohabitation" constituted a "social advantage" enjoyed by Dutch nationals under Dutch law. See also Plender, *ibid.* at 201 and Stein & Thomsen, *supra*, note 106 at 1802 In this respect, therefore, article 10(1) of Regulation 1612/68 is narrower than article 44(2) of the UN Convention. *Ibid.*

217 This does not mean, however, that the members of the workers' family *must* live permanently under the same roof as the worker so long as the accommodation which the worker makes available is considered as "normal" for the purpose of accommodating family members. *Diatta* v. *Land Berlin*, *supra*, note 56.

218 Plender, *supra*, note 4 at 201, argues that the test on the direct effect of EC provisions in national courts, as laid down in *Van Duyn* v. *Home Office* (No. 41/74), [1974] E.C.R. 1337, [1975] 1 C.M.L.R. 1, may not apply to article 10(2). See also Oliver, *supra*, chapter six, note 115 at 63, citing from T.C. Hartley, *EEC Immigration Law* (Amsterdam: North Holland, 1978) at 132, expressing the view that article 10(2) has no binding legal effect.

country.[219]

Because there is no explicit right to family reunification in the ECHR, there is no definition of "family" for this purpose either.[220] But for the purpose of the right to respect for family life in article 8 of the ECHR, the concept of "family" is defined broadly. In addition to the spouse and unmarried dependent children, the family has been taken to include ties between near relatives such as grandparents and grandchildren,[221] ties between parents and illegitimate children,[222] and co-habitees in a stable relationship.[223] More distant family relationships, such as those between uncle and nephew and aunt and niece, are less likely to fall within the ambit of the concept of "family life" under article 8.[224] Homosexual partners have been expressly excluded from the scope of "family life" by the European Commission of Human Rights, although they are covered by the concept of "private life" in Article 8.[225] In each case, however, the degrees of relationship and dependency are factors determining whether "family life" has been established for the purpose of article 8. Consequently, the ECHR arguably offers the broadest definition of family for the purpose of the right to family reunion, although in

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219 Article 4(1) of Directive 68/360 of October 15, 1968 on the Abolition of Restrictions on Movement and Residence within the Community (O.J. Sp. Ed. 1968, 485).

220 Neither is a right to family reunion recognized in the ECE, but section V(b) of the Protocol does contain a definition of the "family" for the purpose of access to employment as the "husband or wife and dependent children". See also *supra*, note 178 and accompanying text.

221 See the *Marckx* v. *Belgium* (1979), Eur. Court H.R. Ser. A, No. 31 at 21, para.45 in which the Court held that: ""[F]amily life", within the meaning of Article 8, includes at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life".

222 See *Marckx*, *ibid.* at 14-15, para.31 regarding the relationship between mother and illegitimate child as constituting "family" (cited in *Digest of ECHR Case Law III*, *ibid.* at 96). See also *X and Y* v. *Switzerland* (Nos. 7289/75 and 7349/76) (1977), 9 Eur. Comm. H.R. D.R. 57, holding that the relationship between illegitimate children and their father is included in the concept of family life.

223 *X and Y* v. *Switzerland*, *ibid.* Polygamous relationships may also constitute "family life", but according to Plender, *supra*, note 4 at 230, a polygamous wife and her husband should only be regarded as spouses if they habitually and normally cohabit and form part of a familial unit.

224 *X* v. *Federal Republic of Germany* (No. 3110/67) (1968), Y.B. Eur. Conv. H.R. 494 and *X* v. *U.K.* (No. 8353/78) (1979), Eur. Comm. H.R. [unpublished], cited in *Digest of ECHR Case Law III*, *supra*, note 169 at 85-86 and 90-91 respectively. See also Drzemczewski, *supra*, note 169 at 369 (endnote 84). Relationships between cousins fall into a similar category as well as relationships between engaged couples. See respectively Application Nos. 7768/77 (1977), Eur. Comm. H.R. [unpublished] and 8823/79 (1980), Eur. Comm. H.R. [unpublished], cited in *Digest of ECHR Case Law III*, *ibid.* at 88 and 92.

225 *X and Y* v. *U.K.* (No. 9369/81) (1983), 32 Eur. Comm. H.R. D.R. 220; Application 12513/86 v. *United Kingdom* (1989) 11 E.H.R.R. 49.

practice, as mentioned earlier, this right under the ECHR is itself a tentative one.

8. Conclusion

The protection of migrant workers and their families in respect of rights to equal work and employment conditions, social security, health care and housing is given extensive consideration by CoE instruments and EC law, with the exception of health rights which are not covered by EC provisions. With regard to trade union rights, CoE instruments are clearly weaker insofar as the right to participation in trade unions is concerned.

The most important economic and social rights for migrant workers and their families are, arguably, the right of access to employment and the right to family reunification and these rights are heavily qualified under CoE instruments. The provisions in the ECE regarding access to employment and article 12 of the EMW on family reunion constitute exemplars of such restrictions.

The right of free access to employment and the right to family reunification, however, are integral to the successful operation of the EC free movement of workers regime. It is hardly surprising, therefore, that the protection offered migrants who are nationals of EC member states with respect to these rights is far stronger. They are *rights* in the true sense of the word. The discretion granted to states parties under CoE instruments to impose substantial conditions on these rights is consistent with their concern to protect the socio-economic and physical security of the polity. CoE instruments, therefore, effectively defer to state sovereignty in these crucial areas.

CHAPTER EIGHT

RIGHTS TO EDUCATION, CULTURE, POLITICAL PARTICIPATION AND RESIDENCE

1. Introduction

The final chapter in the European Case Study is concerned with the protection of the rights of migrants to education, culture, political participation and residence, including safeguards against unfair expulsion, by CoE instruments and EC law. As noted in the introduction to the previous chapter on economic and social rights, the right to education has been included in this chapter because of its importance to the protection of the cultural identity of the children of migrants. This does not mean, however, that education is not understood in its broader sense. Hence the right of equal access to vocational training and retraining of migrants of all age groups with nationals is also discussed.

Rights to culture, political participation and residence in a liberal democratic state are at the very root of statehood and are integral to the way the national community defines itself. An inward-looking national community perceives the right of migrants to maintain and develop their cultures and languages as a threat to its cultural homogeneity, and the granting of political and residence rights as undermining its very *raison d'être*. Nonetheless, chapter two argued that migrant workers may lay claim to all these rights. They may claim cultural rights on the basis of the communitarian conception of the individual which recognizes the person's close attachment to his or her ethnic or cultural group and they may claim progressive political and residence rights on the basis of their economic and social participation in society. Not surprisingly, the protection of these rights is very limited under CoE instruments. On the other hand, the right of residence and the right to remain under EC law are at the core of the free movement rubric which is soon set to also embrace political participation at the local level. Some of the national provisions concerning the protection of rights to culture and political

participation are more advanced, however, and these are referred to where appropriate.

2. Right to Education

2.1 Vocational Training and Retraining

The preceding chapters have underlined the importance of equal treatment between migrant workers and national workers in respect of access to vocational training and retraining. Special adult educational and adult skills training programmes for migrant workers are necessary to end labour force segmentation, particularly in view of the fact that migrant workers often enter the country of employment with linguistic problems and a poor initial education.[1] Although this right serves to promote the integration of migrants as full members of the receiving society, it has its obvious limitations given the restrictions, as noted in the previous chapter, imposed upon their access to employment. Chapter five also emphasized the particular importance of this right for second- or third-generation migrants in assisting their economic advancement and in contributing to a reduction in their unemployment.

(a) CoE Standards

The ESC and EMW contain the most relevant CoE standards in this area.[2] There is no express reference in the text of the ESC to any state obligation to ensure equal treatment between migrant workers and nationals in respect of access to vocational training or retraining.

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1 *Report to the Conference on Migrant Workers from the Mahgreb in the EC, supra*, Introduction, note 18 at 20, para. 3.6. See also *Conference on Mahgreb Migrant Workers in the EC - Conclusions, supra*, chapter five, note 58 at 6, para. 30. The provisions regarding language instruction in Sweden are particularly illuminating. Since 1972, every residence permit holder has the right to participate in Swedish language courses financed by the state. Furthermore, migrant workers are permitted 240 hours of language instruction during working hours and without loss of pay, the expense being absorbed by the employer. Papademetriou, *supra*, Introduction, note 30 at 357.

2 Article 20 of the ECE also ensures equality of access for nationals of school age of any state party lawfully residing in any other state party, to institutions for, *inter alia*, "technical and vocational training".

This general principle, however, has been recognized by the Committee of Independent Experts in its interpretation of various ESC provisions. For example, the Committee has interpreted article 19(4), which guarantees equal treatment between migrant workers and nationals in respect of, *inter alia*, "employment and working conditions" as applying to vocational training. The exclusion of migrant workers from access to such training is, therefore, incompatible with article 19(4).[3] Moreover, this provision has also been interpreted by the Committee as containing an obligation to provide language training for migrant workers,[4] an important component of employment training as a whole given that, as noted above, migrants tend not to know, on their arrival, the language of the country of employment in addition to being poorly educated in the first place. Furthermore, both article 9, dealing with the right to vocational guidance, and article 10 of the ESC, outlining in detail the right to vocational training, operate, according to the Committee, so as to prohibit discrimination against migrant workers. Vocational guidance is to be available free of charge and the Committee of Experts has expressed interest in its extension to the children of foreign workers.[5]

Article 10 of the ESC is a comprehensive provision imposing obligations upon states parties to provide or promote, *inter alia*, the following: the technical and vocational training of all persons (and to grant facilities for access to higher technical and university education) (article 10(1)); a system of apprenticeship for training young persons in employment (article 10(2)); and training and re-training facilities for adult workers (article 10(3)). The Committee of Experts has observed, with reference to the whole of this provision, that special efforts should be made on behalf of unemployed migrant workers, who are more likely to be seriously affected by economic difficulties, to ensure that they enjoy equal treatment with nationals in

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3 *Conclusions VII* at 103, cited in *ESC Case Law*, *supra*, chapter six, note 136 at 159. See also *Conclusions III* at 92, cited by Plender, *supra*, chapter three, note 48 at 246 and Harris, *supra*, chapter six, note 41 at 170.

4 *Conclusions IV* at 120, 122, cited by Harris, *ibid.* and Swart, *supra*, chapter six, note 6 at 31.

5 *Conclusions IV* at 69, cited in *ESC Case Law*, *supra*, note 3 at 94.

respect of vocational training and retraining.[6] The obligation to grant migrant workers the right to vocational training cannot be contingent upon whether such training constitutes an advantage or a disadvantage to the economy of the receiving country.[7] Moreover, *de jure* or *de facto* restrictions on access to vocational training for migrant workers, such as those requiring a prescribed period of employment or residence or those preventing foreign workers from applying for financial aid to fund this training, are incompatible with article 10 of the ESC.[8] Indeed, the Committee of Experts has stated that the provision of financial assistance is indispensable to the effective exercise of the right to vocational training in article 10.[9]

In contrast to the ESC, the EMW, in article 14(1), *expressly* recognizes the principle of equal treatment between migrant workers and their families and nationals in respect of, *inter alia*, vocational training and retraining. The reference to retraining should be read in conjunction with article 25(2) of the EMW obliging states parties to promote measures to ensure, as far as possible, the vocational retraining and occupational rehabilitation of those migrant workers who have lost their jobs for reasons beyond their control (Article 25(1)). This provision does not apply to the families of such workers.[10] Furthermore, the words "as far as possible" indicate that the intention in article 25(2) is not to ensure the full equality of nationals and migrant workers in this regard.[11] To promote access to vocational training, article 14(2) imposes an explicit obligation upon receiving countries to facilitate the teaching of its language or languages to migrant workers and members of their families. Article 14(3) provides that the granting of scholarships for the purpose of, *inter alia*, vocational training, including linguistic

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6 *Conclusions IV* at xv, cited in *ESC Case Law*, *ibid.* at 96.

7 *Conclusions VII* at 60 with respect to article 10(1), cited in *ESC Case Law*, *ibid.* at 98.

8 For example, the Committee of Experts asserted, with regard to article 10(3), that measures which only permitted access to financially-assisted vocational training after six years of employment potentially discriminated against foreign workers. *Conclusions V* at 84-85, cited in *ESC Case Law*, *ibid.* at 101. Similarly, a condition that prevented young migrants from the benefit of vocational training before their parents had completed three years of residence and employment in the host country was incompatible with article 10(2). *Conclusions VI* at 71, cited in *ESC Case Law*, *ibid.* at 100.

9 *Conclusions VIII* at 136, cited in *ESC Case Law - Supplement*, supra, chapter seven, note 34 at 34.

10 *Explanatory Report on the EMW*, *supra*, chapter six, note 66 at 21, para. 69.

11 Cf. Swart, *supra*, note 4 at 37.

instruction, is to be left to the *discretion* of each state party. This clause, therefore, appears to be more restrictive than the interpretation given to article 10 of the ESC by the Committee of Experts prohibiting discrimination between national and foreign workers in respect of the provision of financial assistance for vocational training.[12] The provisions concerning the question of vocational training and retraining for migrant workers and their families in the EMW, however, in accordance with the difficult economic period during which the instrument was drafted, are to be geared as far as possible to the needs of migrant workers with a view to their return to their state of origin, rather than to their integration into the country of employment.[13]

Equal access for migrant workers to vocational training and retraining with nationals has also been the object of Committee of Ministers recommendations and resolutions. Recommendation (84) 9 on second-generation migrants urges CoE member states to "consider the appropriateness of providing pre-vocational training - whenever possible in the languages of the countries of origin" to second-generation migrants, which would enable these migrants to receive suitable vocational training (paragraph c).[14] Resolution (76) 11 on equal treatment for national and migrant workers with regard to vocational guidance, training and retraining notes the importance of teaching the host country's language to migrants so that they may take full advantage of the possibilities open to them in respect of vocational training (paragraph 2(i)). With regard to assistance for vocational training, the Resolution also recommends that migrant workers should be given such "leave of absence, grants and allowances for training as are provided for national workers" (paragraph 2(iv)).[15]

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12 Article 20 of the ECE also leaves the grant of scholarships to the discretion of each state party.

13 Article 14(5). See also *Explanatory Report on the EMW, supra*, note 10 at 21, para. 69.

14 Recommendation (84) 9 of March 20, 1984 of the Committee of Ministers to the Member States on second-generation migrants. Council of Europe, *Information Sheet No. 14 (November 1983 - March 1984)* Appendix X, 63. Liechtenstein, Switzerland, the United Kingdom, Austria, Germany and Norway reserved the right not to comply with the whole or certain parts of the Resolution.

15 Committee of Ministers Resolution (76) 11 of March 10, 1976 on equal treatment for national and migrant workers with regard to vocational guidance, training and retraining. *Collection of Recommendations, Resolutions and Declarations of the Committee of Ministers concerning Human Rights, supra*, chapter seven, note 203, 56.

(b) EC Standards

Article 7(3) of EC Regulation 1612/68 guarantees the right of equal access to "training in vocational schools and retraining centres" for nationals from EC member states working in other member states. Furthermore, article 12 of the Regulation ensures equality of admission between the children of workers employed in member states and nationals to, *inter alia*, "apprenticeship and vocational training courses". Vocational training has been defined broadly by the ECJ to include "any form of instruction which prepares for a qualification for a trade, profession or employment or which provides the necessary training and skills".[16] The ECJ has also held that the right of equal access to vocational training of migrants with nationals also includes equal access to financial assistance. The requirement that migrants from other EC member states, but not nationals, pay tuition fees for such training, is contrary to article 7(3) and article 12 of Regulation 1612/68.[17] Articles 7(3) and 12 of Regulation 1612/68 are mirrored to some extent in article 15 and articles 20 to 23 of the EC *Charter of the Fundamental Social Rights of Workers*. Article 15 proclaims the principle that "every worker of the European Community must be able to have access to vocational training and to benefit therefrom throughout his working life" and prohibits discrimination based on nationality in respect of access to such training. The provision lays accent, in the light of technical developments, upon the need to establish continuing retraining systems to enable workers to improve their skills or to acquire new skills. The Charter's specific concern for the welfare of

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16 *Brown* v. *Secretary of State for Scotland*, *supra*, chapter six, note 109. See also *Gravier* v. *City of Liege* (No. 293/83), [1985] 3 C.M.L.R. 1. These conditions are fulfilled by university education with the exception of certain special courses, which are intended for persons wishing to improve their general knowledge, rather than to prepare themselves for an occupation. University education, however, only constitutes "vocational training" within article 12, since the ECJ has held that "vocational schools" in article 7(3) have a narrower meaning and refer solely to establishments providing instruction in between periods of employment, for example, during apprenticeship. Brown, *ibid.*

17 *Forcheri* v. *Belgium* (No. 152/82), [1983] E.C.R. 2323, [1984] 1 C.M.L.R. 334. The case concerned an Italian wife of an Italian EC official employed in Brussels, who was required to pay tuition fees for a further education course. Belgian nationals were exempt from paying these fees. See also the cases of *Gravier* and *Brown*, *ibid.*

young people is brought out in articles 20 to 23 on the protection of children and adolescents. Articles 20 and 21 call for appropriate adjustments to labour regulations in order to cater for the particular development and vocational training needs of young workers. More specifically, article 23 requires that:

> [F]ollowing the end of compulsory education, young people must be entitled to receive initial vocational training of a sufficient duration to enable them to adapt to the requirements of their future working life; for young workers, such training should take place during working hours.[18]

2.2 Education of Migrant Children

(a) Background

Between 1988 and 1990, migrant children represented approximately one tenth of the total primary education enrolment in Belgium (1988), France (1989) and Sweden (1990), at 11.3, 10.3 and 11.7 per cent respectively. In Germany and Switzerland, foreign children amount respectively to 14.1 and 17.8 per cent of the total primary education enrolment. Enrolment in secondary education is lower, with only Belgium and Switzerland revealing figures comparable to primary education enrolment, at 10.2 and 16.3 per cent respectively. In France and Germany, migrant children represent 7.1 per cent of the total secondary education enrolment. Foreigners are also over-represented, in comparison with nationals, in "special education" and in short-cycle secondary and vocational education which does not normally lead to higher education.[19] When considering the above figures, it must be remembered that not all

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18 An earlier draft of this provision in the Charter was phrased in more precise and stronger language. The initial vocational training was to last a specific duration of two years and the draft provision required categorically, by using the word "shall" instead of "should" in the final phrase, that this training take place during working hours.

19 *SOPEMI 1992*, *supra*, Introduction, note 19 at 39 (Table I.6) and at 38. The proportion of foreigners to nationals enroled in "special education" in countries of employment ranged from 14.7 per cent in Belgium, 17.3 per cent in Germany and 19.2 per cent in France, to 37.6 per cent in Switzerland. *Ibid.* In France and Germany, there are more children enroled in primary than in secondary education. Because of the scale of family

migrant children of school-age may be in education, for example; the children of illegal migrants or those who work to supplement the family income.[20]

The migration process and the strains of European inner-city life have detrimental consequences with respect to the education of these children.[21] Their educational difficulties need to be counteracted by special measures[22] to ensure that they are not disadvantaged educationally with respect to their future training, employment or entry into higher education. Otherwise, they are in danger of remaining in the same socio-occupational strata as their parents.[23] Some of the special measures taken in European countries have included additional language instruction, preparatory and adaptation classes and assistance with homework.[24] Another special measure involves the teaching to these children of their language and culture of origin. This question is considered separately in the section on "Cultural Rights" below.

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immigration and the higher birthrate among foreign women in many host countries, the average foreign schoolchild is younger than the native-born child. *SOPEMI 1990, supra*, Introduction, note 19 at 35.

20 In 1970, for instance, the German authorities found 97,800 children working illegally in the country in contravention of the compulsory schooling regulations. Power, *supra*, chapter five, note 3 at 19. All the laws of the major European countries embrace the principle of compulsory education, which encompasses foreign children. M. Herdegen, "Political Rights and Other Aspects of Resident Status" in *The Legal Position of Aliens, supra*, Introduction to Case Study, note 2, 2003 at 2013.

21 The migration process results in language difficulties, cultural differences, family problems as a result of separation and the new environment, and lack of clear perspectives due to insecure legal status. The strains of inner-city life include poor housing conditions and a lack of play facilities. Castles & Kosack, *supra*, chapter five, note 12 at 500. See also *supra*, chapter seven, note 138 and accompanying text with regard to the connection between inadequate housing and poor educational performance.

22 See also *supra*, chapter three, note 242 and accompanying text regarding the need for special educational measures for the children of migrant workers.

23 Castles & Kosack, *supra*, note 21 at 501-502. The *Report to the Conference on Migrant Workers from the Mahgreb in the EC, supra*, note 1 at 6, para. 1.12, citing from EC Group of Experts, *Politiques d'Immigration et Intégration Sociale des Immigrés dans la Communauté Européenne* (European Commission, 1990) at 21-23, observes that poor education, together with poor social services in run-down areas of towns where migrants tend to live, contribute to a "vicious circle", whereby children from the area are badly educated and therefore unable to take up better employment than the low-status occupations possessed by their parents.

24 Hammar, "Immigrant Policy", *supra*, chapter five, note 45 at 270, referring to some of the special measures taken in Switzerland. See also *ILO General Survey 1980, supra*, chapter three, note 49 at 105, para. 395, referring to the special arrangements in France, Germany, the Netherlands, Sweden and Switzerland for teaching the language of the host country to children of migrant workers. This is usually carried out within the framework of general schooling, through intensive courses or special adaptation classes designed to enable the children to participate in the normal school curriculum as soon as possible. See also Note (EEC), "Focus on Migrant Workers" (April 1984) Eur. Industr. Rel. Rev. 19 at 20 concerning the special measures in this regard in Germany and the United Kingdom. Other special measures may include supplementing the content of some general courses, such as geography and history, with information more relevant to non-European children in order to encourage their continued interest and also to promote the understanding of European children. *Report to the Conference Report on Migrant Workers from the Mahgreb in the EC, ibid.* at 21, para. 3.9. See also *Conference on Mahgreb Migrant Workers in the EC - Conclusions, supra*, note 1 at 6, para. 29.

Stephen Castles and Godula Kosack have observed that the special conditions required for ensuring that migrant children enjoy the same educational opportunities as nationals have rarely been available in Europe. One reason for this state of affairs has been the lack of clear and consistent host country policies in the field of education, partly as a consequence of the difficulties many of these countries have encountered in coming to terms with the reality of the permanent settlement within their borders of immigrant worker groups as *de facto* ethnic minorities.[25]

(b) CoE and EC Standards

Although the ECHR is concerned with civil and political rights, article 2 of the first Protocol to the ECHR[26] espouses the right to education in very general terms:

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

This provision clearly applies to both nationals and aliens equally.[27] No children of migrants residing and working in a CoE member country which has ratified this Protocol should, therefore, be denied their right to receive an education, even if their parents are illegal residents.[28] As noted above, some European countries recognize that the fundamental right to education must be tailored to the specific needs of migrant children in order to facilitate their integration into society and to ensure that they are not placed at an educational disadvantage to the children of nationals. Mere equal treatment between the children of migrants and those of

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25 Castles & Kosack, *supra*, note 21 at 500, 501.

26 This Protocol has been ratified by 22 states as of March 18, 1992. See *supra*, chapter six, note 20.

27 See also Swart, *supra*, note 4 at 38.

28 Chapter five observed, however, that the likelihood of such children enroling in schools is slim because their parents risk discovery of their illegal status as a result. *Supra*, chapter five, note 118.

nationals in respect of access to schooling in the country of employment is insufficient.

CoE standards relating to the education, as defined above, of these children are sparse. ESC provisions hardly mention this subject at all. In article 10(1), states parties are under a duty to "grant facilities for access to higher technical and university education, based solely on individual aptitude" in addition to the obligation to "provide or promote... the technical and vocational training of all persons". Furthermore, the Committee of Independent Experts has interpreted the state duty in article 19(2) to adopt appropriate measures to facilitate, *inter alia*, the reception of migrant workers and their families as including the need "to ensure appropriate educational reception" of their children.[29] Arguably, "educational reception" means the provision of "special" facilities for these children to ease their adaptation to the educational system of the receiving country. It is clear, however, from the Committee's interpretation of "reception" that such measures are to be temporary only.[30]

Article 20 of the ECE provides for equal treatment between nationals of school age from any state party legally residing in another state party and nationals of the host country in respect of, *inter alia*, admission to state primary and secondary educational institutions. The EMW goes further in article 14. Equality between nationals and migrant workers is guaranteed, *inter alia*, in respect of general education and access to higher education "according to the general regulations governing admission to respective institutions in the receiving state" (article 14(1)). Under both provisions, the granting of scholarships is to be left to the discretion of each state party, which is in line with the approach taken to this question in other international instruments. Article 14(3) of the EMW, however, attempts to temper the harshness of this rule with respect to the children of foreign workers by specifying that states parties should make "special efforts" to aim for equal treatment between the children of nationals and migrant workers with regard to the granting of scholarships. In addition to this

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29 *Conclusions IV* at 117, cited in *ESC Case Law*, *supra*, note 3 at 155. See also Harris, *supra*, note 3 at 159.

30 The Committee stated in *Conclusions IV* at 115, cited in *ESC Case Law*, *ibid.* at 154, that: ""Reception" must be provided at the time of arrival and the period immediately following, that is to say during the weeks in which immigrant workers and their families find themselves in a particularly difficult position".

concession, the EMW also contains a special provision in article 14(2) requiring the receiving state to facilitate the teaching of its language or languages to migrant children in order to promote their access to, *inter alia*, general schools.

Article 12 of EC Regulation 1612/68 guarantees equal treatment between the children of migrant workers from EC member states and the children of nationals in respect of, *inter alia*, "general education courses". Moreover, the provision imposes a positive duty upon member states to "encourage all efforts to enable... [migrant workers'] children to attend these courses under the best possible conditions". Consequently, the ECJ has held that equality extends not only to access to education, but also to the entitlement of advantages which facilitate participation in education, in particular to scholarships and grants.[31] Article 12 also covers assistance to those children with special educational needs, such as disabled children.[32] Finally, it entitles children to continue their education in the member state, even if their parents return to the country of origin.[33]

The need to adapt the education rights of the children of migrant workers is called for in Directive 77/486,[34] which is applicable to all children of migrant workers from EC member states in compulsory school attendance (article 1). The Directive calls for special measures with an emphasis on teaching the language of the host country. Article 2 entitles such children to free tuition in order to "facilitate initial reception", which is to include, in particular, "the teaching -- adapted to the specific needs of such children -- of the official language or one of the official languages of the host State".[35] The justification for this clause, provided in the

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31 *Casagrande* v. *Landeshauptstadt Munich* (No. 9/74), [1974] E.C.R. 773, [1974] 2 C.M.L.R. 423; *Alaimo* v. *Prefect of the Rhône* (No. 69/74), [1975] E.C.R. 109, 1 C.M.L.R. 262. In both cases, measures restricting the eligibility for educational grants to nationals were held to constitute an infringement of the equality principle in article 12 of Regulation 1612/68. In *Echternach* v. *Minister van Onderwijs en Wetenschappen* (Nos. 389-390/87), [1990] 2 C.M.L.R. 305, the ECJ stated that equal treatment in respect of the provision of financial assistance for education covered not only the financing of study fees, but also ancillary assistance, such as maintenance and other costs.

32 See the case of *Michel S.*, *supra*, chapter seven, note 6.

33 Especially if these children, on return to their country of origin, are unable to obtain recognition of diplomas acquired in the host country. See the case of *Echternach*, *supra*, note 31.

34 Council Directive 77/486 of July 25, 1977 on the Education of the Children of Migrant Workers, O.J. 1977, L199/32. This Directive came into force in July 1981.

35 Article 2 also obliges member states to "take the measures necessary for the training and further

second paragraph of the Preamble to the Directive, is "to permit the integration of such children into the educational environment and the school system of the host State".

The application of EC Directive 77/486 is limited to the children of EC nationals, but the Commission and European Parliament have both argued for broadening the Directive's ambit to encompass the children of workers from third countries. In collecting information for its report on the implementation of the Directive, the Commission asked member states about the existence of measures for the education of these children.[36] The European Parliament has also called for the extension of the provisions of the Directive

> to the children of *all* ethnic minority groups whose language or culture differs from that of the indigenous community amongst whom they reside... this should be done irrespective of whether these ethnic minority residents have citizenship of the country in which they are living and even if they are permanently settled.[37]

3. Cultural Rights

3.1 Background

The *raison d'être* of the maintenance and promotion of the culture and language of migrant workers and their families is to support this vulnerable minority group as a distinct entity in the country of employment. A crucial component of this process is the teaching of the culture and language of migrants to their children, which also constitutes one of the special measures required to fully satisfy their right to education. Two secondary objectives are to assist the reintegration of migrant workers, and particularly of their children, if they decide to

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training of the teachers who are to provide this tuition".

36 *Commission Report to the Council on the Implementation of Directive 77/486*, Doc. COM(84) 54 final, cited in "Focus on Migrant Workers", *supra*, note 24 at 20.

37 Paragraph 6 of European Parliament Resolution of April 16, 1985 on the implementation of Directive 77/486/EEC on the education of the children of migrant workers. Council of Europe, *Information Sheet No. 17 (November 1984 - March 1984)* Appendix XXXIV, 152. Emphasis added.

return to their country of origin, and to facilitate their integration into the host society. European countries which possess policies in this area either place accent on one of these secondary objectives, or attempt to pursue both simultaneously, instead of viewing the cultural rights of migrant workers and their families as ends in themselves.[38]

Germany, for example, has adopted a "dual strategy" of integrating foreign children into German society, while at the same time preparing them for repatriation. This approach involves the establishment of preparatory classes to provide instruction in the German language and to prepare children for entry into mainstream German education as well as "mother tongue classes" designed to maintain knowledge of the language and culture of the country of origin.[39] The "dual strategy" has been criticized on the grounds that it cannot achieve either of its contradictory aims and ends up as "education for bilingual illiteracy".[40]

The "dual strategy" approach should be contrasted with an approach where the mother tongue and culture are taught to children with a view to strengthening their self-esteem and supporting the whole minority group and not merely with the aim of preparing the return of these children to the country of origin nor as a step towards their integration into the host society. Such an approach has been taken in the Netherlands and in Sweden, and to some extent, in France.[41] In the Swedish case, it falls under the auspices of one of the cornerstones of that country's immigration policy, namely freedom of choice. This principle aims to ensure

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38 Steps in the right direction were taken by the Conference of Local and Regional Authorities of Europe in Resolution 129 (1982), which stressed the need "to protect and develop the culture in which the immigrant child is rooted, in particular by providing education in his native tongue" (paragraph 5) and requests local authorities in CoE member states "to ensure that teaching aids in the mother tongue of migrant children are geared towards the actual situation of migrant families (paragraph 18)". Conference of Local and Regional Authorities of Europe, 17th Session, October 19-21, 1982, Resolution 129 (1982) on the education of migrant workers' children, Council of Europe, *Information Sheet No. 12 (October 1982 - March 1983)* Appendix XI., 126.

39 Castles & Kosack, *supra*, note 21 at 501. Because educational policy in many countries is the responsibility of local or regional authorities, the strategy regarding mother tongue teaching may differ depending on the educational district concerned. Hammar, "Immigrant Policy", *supra*, note 24 at 270, observes, with reference to this question in Germany, that educational policy in Berlin has emphasized the need to integrate immigrant children into German society, while in Bavaria the schools have considered it their duty to prepare these children for their eventual return to their countries of origin.

40 Castles & Kosack, *ibid.*, citing from U. Akpinar, A. López-Blasco & J. Vink, *Pädagogische Arbeit mit ausländischen Kindern und Jugendlichen* (Munich: Juventa Verlag, 1977) at 45.

41 Hammar, "Immigrant Policy", *supra*, note 24 at 270.

to migrants a genuine choice between retaining and developing their own cultural identity and assuming a Swedish cultural identity.[42] In the sphere of education, this principle translates itself into a policy of "active bilingualism".[43] The above approach to the teaching of the mother tongue and culture to migrant children reflects a commitment to a policy of cultural pluralism and a rejection of assimilation.[44] For immigrant languages to thrive in the second- and third-migrant generations, this policy, however, requires substantial investment.[45]

3.2 CoE and EC Standards

The only CoE instrument dealing with the question of mother tongue or cultural instruction is the EMW. Article 15, entitled "Teaching of the migrant worker's mother tongue" reads:

> The Contracting Parties concerned shall take action by common accord to arrange, as far as practicable, for the migrant worker's children, special courses for the teaching of the migrant worker's mother tongue, to facilitate, *inter alia*, their return to their State of origin.

One commentator has labelled article 15 as "one of the most significant advances contained in the Convention".[46] This may be true considering that international human rights standards

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42 Papademetriou, *supra*, note 1 at 358. The policy assumes that a large number of immigrants will probably settle permanently and, therefore, directs initiatives towards assisting such groups to retain their linguistic and cultural identity with public support, if they so desire. *Ibid.* at 357-358.

43 Papademetriou, *ibid.* at 358; Hammar, "Immigrant Policy", *supra*, note 24 at 270. Hammar observes that this policy has been taken further in Sweden than anywhere else, since immigrant children are not only taught to speak their mother tongue, but it is also used as a language of instruction for other subjects. Instruction in Swedish remains nevertheless the most important subject. *Ibid.* It is essential that immigrants learn the language of the host country, for this is the only way to achieve integration, particularly on the labour market. Hammar, "Towards Convergence", *supra*, chapter five, note 80 at 301.

44 In countries of permanent immigration, the original belief was that immigrants would be easily assimilated into the host country culture. Such an approach, however, was not as straightforward as had at first been anticipated, nor was it particularly advantageous. Hammar, "Towards Convergence", *ibid.* at 301.

45 Hammar, *ibid.* at 301.

46 Lillich, *supra*, chapter one, note 2 at 91.

have only, in rare instances, expressly dealt with the cultural rights of minority groups.[47] Nonetheless, article 15 seems to emulate the same confused sense of direction (explained above) taken by some European states to this question. This short clause is riddled with qualifications. First, agreement has to be reached between sending and receiving countries before any action may be taken in this area. Unilateral initiatives are not called for. Second, instruction of other subjects in the language is not required. Third, the provision is limited to the teaching of the mother tongue of migrant workers and does not contain any specific reference to the teaching of culture. Finally, the purpose of this special education is to facilitate return to the country of origin.[48] Indeed, article 15 was originally to follow article 30, which is concerned with return home, although in the end, the drafters decided to place the clause after article 14, and particularly after article 14(5) which also refers to return migration in the context of ensuring that vocational and retraining schemes cater as far as possible for the needs of migrant workers with a view to their return to their country of origin.[49]

There are no explicit provisions in CoE instruments relevant to the protection of migrant workers and their families which are concerned with the promotion of their general cultural activities. Neither are there any measures obliging governments to allocate funds out of grants for the arts, such as theatre and music, in order to reflect the cultures of migrants. Article 10(3) of the EMW, however, contains the state obligation to ensure that migrant workers' freedom of worship is respected and to "facilitate such worship within the limit of available means". This implies the provision of positive assistance to migrants and their families, for example, in their quest for appropriate premises in which to worship, although any assistance can be constrained by financial considerations. In this respect, therefore, the obligation goes further than article 9

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47 See generally Cholewinski, *supra*, chapter one, note 74. See, however, articles 45(3) and 45(4) of the UN Convention, which are a considerable improvement on article 15 of the EMW. *Supra*, chapter four, notes 155-160 and accompanying text.

48 See cf. Lillich, *supra*, note 46 at 92. Admittedly, the words "*inter alia*" may include other purposes. Nevertheless, the express emphasis here on "return" is decisive in any interpretation of article 15. See also Cholewinski, "The Racial Discrimination Convention and the Protection of Cultural and Linguistic Ethnic Minorities" *supra*, chapter one, note 107 at 211 (endnote 167).

49 *Explanatory Report on the EMW*, *supra*, note 10 at 21-22, paras. 71-72.

of the ECHR, which guarantees to everyone the "right to freedom of thought, conscience and religion",[50] without specifying the provision of positive assistance to promote or facilitate this right.

The scarcity of CoE standards regarding the promotion of the cultural rights of migrants does not mean that efforts in this regard are not being undertaken at the national level. The case of Sweden is an exemplar of positive initiatives in this area. The Swedish Government, through the National Cultural Council, co-ordinates. promotes and subsidizes cultural activities among migrants, while promoting cultural cooperation with countries of origin.[51] This role may also be played by the trade unions of the host country in defending migrant workers' interests, particularly when employment matters conflict with their religious obligations.[52]

As with CoE standards, EC initiatives in this area are also incomplete and generally unsatisfactory. Article 3 of EC Directive 77/486 reads:

> Member States shall, in accordance with their national circumstances and legal systems, and in cooperation with States of origin, take appropriate measures to promote, in accordance with normal education, teaching of the mother tongue and culture of the country of origin for the children... [of migrant workers from other member states].

In contrast with article 15 of the EMW, which is limited to language education, this provision extends instruction to the teaching of the "culture of the country of origin". But vestiges of article 15 qualifications remain. Appropriate measures in this field depend on "cooperation" with the countries of origin. Moreover, the third paragraph of the Preamble to the Directive reveals the purpose of article 3. Measures to promote the teaching of the mother tongue and culture to the children of migrant workers are to take place "with a view principally to

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50 Golsong, *supra*, chapter six, note 64 at 237-238.

51 Papademetriou, *supra*, note 1 at 358. The Council organizes literary production and allocates funds for the purchase of literature in minority languages for migrants. It also supports the ethnic press and minority theatrical activities and encourages and promotes foreign films, music and folklore. *Ibid.* at 358-359.

52 See *supra*, chapter seven, note 72 and accompanying text regarding the Dutch CNV union confederation's collective bargaining activities on behalf of migrant workers.

facilitating their possible reintegration into the Member State of origin". In 1985, the EC Commission Report on the implementation of this Directive found the overall situation in member states to be unsatisfactory.[53] Although the Commission has called for the extension of the Directive's provisions to the children of non-EC workers, it is questionable whether this is possible in respect of the teaching of the language and culture of the country of origin, especially as the implementation of article 3 requires "cooperation" between member states.[54] There seems to be little scope for the direct application of this Directive by the ECJ with the result that progress depends on the EC Commission encouraging member states to take positive measures, particularly with respect to the teaching of languages, a course of action arguably central to the realization of greater European unity.[55]

4. Political Rights

4.1 Background

The participation of foreign workers and their families in the political life of European countries of employment is, with few exceptions, limited. Although immigrant workers may, in theory, engage in political activities, these activities are restricted, or looked upon disapprovingly, by a number of countries.[56] The same can be said for the right of migrants to establish associations to advance their concerns and demands. In France, the right of association was restricted until 1981 and foreigners had to obtain prior permission from the

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53 "Focus on Migrant Workers", *supra*, note 24 at 21. For example the report found that in the United Kingdom "integrated tuition in the language and culture of origin is offered to only 2.2 per cent of pupils whose first language is not English". *Ibid.*

54 Oliver, *supra*, chapter six, note 115 at 73. The Directive, however, clearly applies to children who are non-EC nationals, but whose parents possess the nationality of an EC member state.

55 Stein & Thomsen, *supra*, Introduction to Case Study, note 2 at 1826.

56 Thomas, "Summing-up and Points of Comparison", *supra*, chapter five, note 23 at 234. This is the case in France, Germany and Belgium. In the Netherlands, only activities considered to be prejudicial to national security are prohibited. Sweden has the most liberal policy permitting the political activities of foreigners, which is discussed in greater detail below with regard to migrant associations and electoral rights. *Ibid.* at 234-235.

Ministry of the Interior and were also required to observe a certain moderation in political affairs (*obligation de réserve*).[57] In Germany, foreign residents have been able to form their own associations since 1964. In 1967, they were also permitted to become members of political parties, but they cannot participate in the nomination of candidates for a general election. Furthermore, the majority of the members of any political party in Germany must be German citizens.[58] In spite of legal restrictions, however, it would appear that, in practice, a more liberal attitude towards the political activities of aliens is taken in these countries.[59] The right of foreigners to association is most clearly recognized in Sweden, where foreign organizations have flourished, largely because of support from the state.[60] The approach in Sweden recognizes that migrant associations have a valuable role to play in integrating migrants into the host society, preserving their cultural identity and, if need be, facilitating their reintegration into the country of origin. Eric-Jean Thomas writes:

> The Swedish experience shows that foreigners' associations, far from presenting a threat to public order... have an extremely important role to play in the process of integrating immigrants into the host society. In particular they can enable them to maintain a link with the society of their country of origin and help them to preserve their cultural identity to some extent. These aspects of immigration policy are very important because the conditions that must be created in order to facilitate the life of immigrants during their stay in the host country are also prerequisites for their reintegration into the society of their country of origin.[61]

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57 Hammar, *supra*, chapter two, note 31 at 131. See also Thomas, *ibid.* at 235 and Herdegen, *supra*, note 20 at 2006. In Switzerland, aliens are under a duty of political restraint, especially with respect to criticism of domestic institutions and authorities. Hammar, "The Policymaking Process", *supra*, chapter five, note 23 at 288; Herdegen, *ibid.*

58 Hammar, *ibid.* at 132. The right to association for foreigners is recognized fully in Belgium and the Netherlands, although in the former country, immigrant organizations are generally cultural in nature, whereas in the Netherlands they are more politically active. Thomas, *ibid.* There are also no specific restrictions in the following European countries: Denmark, Norway and the United Kingdom. Herdegen, *ibid.*

59 Frowein, *supra*, chapter seven, note 164 at 2087.

60 Thomas, "Summing-up and Points of Comparison", *supra*, note 56 at 235-236. In Sweden, in the early 1980s, there were about one thousand foreigners' associations and 120 nationwide ones. Many of these receive financial support from the state and from the individual municipalities without being required to sacrifice their independence. *Ibid.*

61 *Ibid.* at 236.

Sweden has also made great strides with regard to the electoral participation of migrants. Migrants who have legally resided in Sweden for a minimum of three years have the right to vote and to run for office in municipal elections. These rights were accorded to migrants for the first time in the municipal elections of September 1976 with considerable success, since 60 per cent of the 220,000 immigrants eligible to vote, exercised their right to do so.[62] This bold step in the direction of granting foreigners electoral rights has been followed in other European countries. In 1985, the legislature in the Netherlands implemented a constitutional clause which extends to aliens the right to vote in local elections after five years of legal residence.[63] Indeed, this is the first country with a high percentage of foreigners to have introduced for them the right to vote in local elections.[64] Migrants are also permitted to participate in local elections in Denmark and Norway after three years of legal residence.[65] Foreigners do not have the right to vote in France and Germany, although in 1989, the *Länder* of Hamburg and Schleswig-Holstein decided to give foreign residents voting rights in municipal elections.[66] The approach being taken in these European countries is consistent with the argument in chapter two that rights to political participation should be extended to migrants

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62 Thomas, *ibid.* at 235; Hammar, "The Policymaking Process", *supra*, note 57 at 288; Papademetriou, *supra*, note 1 at 359, citing from J. Widgren, "The Status of Immigrant Workers in Sweden" in *Immigrant Workers in Europe*, *supra*, chapter five, note 23, 186 and from the *SOPEMI* Reports of 1977 and 1978. Thomas, *ibid.*, observes that after these elections many political parties and trade unions in Sweden advocated the extension of the right to vote for foreigners to the national level. The Swedish parliament, however, preferred to ease restrictions on the acquisition of citizenship so that migrants could obtain access to political life at the national level by making an outright commitment to Swedish society.

63 See "*Staatsblad*" No. 478/85; Herdegen, *supra*, note 20 at 2009 and footnote 58; Hammar, *supra*, note 57 at 150.

64 Frowein, *supra*, note 59 at 2088.

65 Frowein, *ibid.*; Hammar, *supra*, note 57 at 150; Singer, *supra*, chapter five, note 23 at 25, regarding Denmark. There are some other instances where nationals of one country can exercise electoral rights in another. In the United Kingdom, for example, Commonwealth citizens, British protected persons or citizens of the Irish Republic can vote in and stand for elections to Parliament. In Ireland, resident EC nationals may vote in elections for the European Parliament, all foreign residents may vote in local elections and since 1984, United Kingdom citizens are permitted to vote in elections for Parliament. Herdegen, *supra*, note 20 at 2009; Hammar, *ibid.* at 151. Finally, in Switzerland, foreigners have had the right to vote in the canton of Neuchâtel since 1849 and in the canton of Jura since 1980. Frowein, *ibid.* at 2089; Hammar, *ibid.* at 150. In Finland and Iceland, the right to vote in local elections is also extended to foreigners, but only to other Nordic nationals. Hammar, *ibid.* at 152.

66 Hammar, *ibid.* at 171. In Schleswig-Holstein, the right to vote is granted to foreigners after five years of residence and only to citizens of countries who give the same rights to German citizens. In Hamburg, all foreign citizens may vote in local elections after eight years of residence. *Ibid.*

as a "natural outgrowth" of their economic and social participation in society.

With the exception of the provision of limited voting rights at the local level, migrants in Europe, on the whole, remain disenfranchised, which has meant that national political parties have generally ignored their interests, apart from perhaps those parties that have traditionally represented the working-class electorate.[67] The assumption has always been that citizenship should be obtained first before electoral rights are granted.[68] In practice, however, citizenship is difficult to obtain in some countries. Furthermore, many migrants who have the opportunity to acquire the nationality of the host country do not usually apply for it merely to obtain full political rights.[69]

The political non-participation of migrants and their families in Europe is an alarming development. Tomas Hammar argues that political democracy does not fully function when more than ten million men and women in Europe are deprived of their voting rights.[70] Some European countries have tried to lessen the negative effect of non-participation by migrants in the political life of their societies with the creation, mainly on the municipal level, of immigrant advisory or consultative councils, composed of migrant representatives who are chosen by their peers. The aim of these bodies is to participate in the making of official decisions concerning migrants' interests.[71] Such bodies were set up in Germany, the Netherlands and

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67 Cf. Hammar, "The Policymaking Process", *supra*, note 57 at 280.

68 Hammar, "Towards Convergence", *supra*, note 43 at 299-300; Herdegen, *supra*, note 20 at 2008.

69 Hammar, *ibid.* For specific details of the difficulties involved in obtaining citizenship see the section on "Residence Rights" below. Three reasons for the reluctance to apply for naturalization may be advanced: (i) migrants truly believe that they will one day return to their home country (Hammar, "Immigration Regulation and Aliens Control", *supra*, chapter five, note 75 at 255, Rogers, "Post-World War II European Labour Migration: An Introduction to the Issues", *supra*, chapter five, note 25 at 24, and Martin & Miller, *supra*, chapter five, note 1 at 323); (ii) they plan to stay permanently but prefer to retain their own national identity (Hammar, *ibid.* and Rogers, *ibid.*) or; (iii) they perceive the host country as a hostile environment (Martin & Miller, *ibid.*).

70 Hammar, "Towards Convergence", *ibid.* at 299. It is argued that the election of migrants can contribute greatly to a perception among them that they are a welcome part of the host society and provide them with a channel through which they are able to express their grievances. *Report to the Conference on Migrant Workers from the Mahgreb in the EC*, *supra*, note 1 at 22, para. 312.

71 For a description of these bodies see: Thomas, "Summing-up and Points of Comparison", *supra*, note 56 at 236-237; Martin & Miller, *supra*, note 69 at 327; Hammar, "The Policymaking Process", *supra*, note 57 at 289; Power, *supra*, note 20 at 31.

Belgium, but have met with little success.[72] A number of reasons may be advanced to explain these failures. First, these migrant councils are usually established on the initiative of the authorities of the host country and not on the initiative of the migrants themselves.[73] Second, they have no power to take any decisions and merely exercise an advisory function.[74] Finally, and most importantly, the *raison d'être* of these bodies is to act as a substitute for genuine political participation. As a result, these unique "representative" structures created especially to give a "voice" to migrants in host countries have been rejected by the migrants themselves, because, in essence, they have served to separate foreign workers and their families from the political reality in these countries:

> It is a mistake to construct programmes for satisfying unimportant needs or creating artificial needs: what is important is to treat people as much as possible like one's own nationals. This alignment of status with that of nationals should, moreover, to be effective, be carried out as a united policy.[75]

4.2 CoE and EC Standards

The political rights of migrant workers and their families are conspicuous by their absence in CoE and EC standards. Indeed, the few provisions referring to such questions as general political activity, electoral participation and public service employment are aimed at restricting rather than promoting the access of migrants to these spheres.

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72 Thomas, *ibid.* at 236.

73 *Ibid.*

74 *Ibid.* at 237; Power, *supra*, note 20 at 31; Martin & Miller, *supra*, note 69 at 327.

75 Thomas, *supra*, chapter five, note 42 at 47. See also Thomas, "Summing-up and Points of Comparison", *ibid.* In this respect, according to Thomas, *ibid.*, the Swedish approach is proceeding in the right direction.

(a) General Political Activity

Article 16 of the ECHR enables states parties to effectively disregard the rights to freedom of expression and association and to non-discrimination when imposing restrictions on the political activity of aliens. As stated in chapter six, however, this activity can also be restricted on the basis of limitations built into the provisions concerned with these rights. Furthermore, article 16 has not been invoked by states parties to the ECHR and many states do not, in any case, restrict the general political activity of aliens in practice. In the light of these arguments, the need to retain article 16 in the ECHR is highly questionable.[76]

EC standards do not contain any right to general political activity for migrant workers from other member states. The predominantly economic accent of the EC regime and the limitation of the non-discrimination provision to the employment field are further indicators that civil and political rights fall outside the scope of the EC.[77] Nonetheless, the ECJ has ruled that participation in political as well as in trade union activity cannot affect freedom of movement within the EC or within individual member states.[78] Arguably, however, there is nothing to prevent the imposition of restrictions on the political activity *per se* of EC nationals employed in member countries, so long as their right to freedom of movement is not infringed.[79]

(b) Electoral Rights

The right to electoral participation guaranteed by article 3 of the Protocol to the ECHR obliges states parties "to hold free elections at reasonable intervals by secret ballot that will

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76 See also *supra*, chapter six, notes 22-25 and accompanying text. Indeed, Parliamentary Assembly Resolution 799 of January 25, 1977 on the political rights and position of aliens recommended the repeal of article 16. Oellers-Frahm, *supra*, chapter six, note 30 at 1745.

77 Cf. Stein and Thomsen, *supra*, note 55 at 1810 regarding the latter point.

78 See the *Rutili* case, *supra*, chapter seven, note 82.

79 Stein & Thomsen, *supra*, note 55 at 1810, citing from Hailbronner, *Ausländerrecht, Ein Handbuch* (1984), marginal note 851, and from Ress, "Free Movement of Persons, Services and Capital" in Commission of the European Communities, *Thirty Years of Community Law* (Luxembourg: Office for Official Publications of the European Communities, 1983) 285 at 302.

ensure the free expression of the opinion of the people in the choice of the legislature". It is not stated expressly whether this right may be exercised by *everyone* resident in the country. Because article 16, however, permits restrictions on the political activity of aliens in connection with certain specified rights in the ECHR, it would be an anomaly if "political activity" did not include, for this purpose, participation by vote in article 3 of the Protocol. In accordance with this view, it is justifiable for states parties to the ECHR to confine electoral participation to citizens.

In spite of the lack of CoE standards on the subject of political participation for foreigners, the Parliamentary Assembly has committed itself, on a number of occasions, to supporting a right to vote for aliens in the country of residence at the municipal level. For example, Resolution 712 (1973) calls for the right to vote and to stand for office to be accorded to foreign workers after five years residence in the country, so long as they have resided in the local district in question for the preceding three years.[80] This proposal partly reflects the actual state of affairs in Sweden and Denmark, described earlier, where migrants may exercise the right to vote at the municipal level after three years residence in the country. The resolution also advocates the establishment of local immigrant advisory councils, elected by immigrants on the basis of the proportional representation of nationalities.[81]

Presently, migrant workers who are EC nationals have no right to vote or to stand for political office under EC law. EC institutions have advocated that this right be recognized at the local level by member states, although they do not possess the "necessary powers" under the *Treaty of Rome* to implement this objective.[82] In 1974, the EC Commission set itself the

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80 Resolution 712 of September 26, 1973 on the integration of migrant workers with the society of the host country. Oellers-Frahm, *supra*, note 76 at 1745. See also Parliamentary Assembly Resolution 799 of September 8, 1977, which calls upon all CoE member states to accord foreigners resident in their territories the right to vote at the local level (Oellers-Frahm, *ibid.*) and Parliamentary Assembly Recommendation 903 of September 30, 1980 on the right of aliens to vote and stand for local authority elections. "Documentation" (1980) Forum - Council of Europe No. 4, 17.

81 Oellers-Frahm, *ibid.* at 1746. Oellers-Frahm observes, *ibid.*, that this recommendation is repeated in other CoE resolutions, notably Parliamentary Resolution 799, *ibid.* As noted above, however, the effectiveness of such bodies is questionable because they are only perceived as a substitute for genuine political participation. *Supra*, note 75 and accompanying text.

82 Paragraph E of European Parliament Resolution of June 7, 1983 on the right of citizens of a Member

objective of realizing the right of migrants residing in a member state other than their own to full participation in local elections, but without defining a residence requirement. This aim was considered consistent with the spirit of the free movement principle and the political objectives of the EC with regard to European Union. The Commission reiterated this view in 1985 by maintaining that granting EC nationals resident in other member states the right to vote and to stand for office would constitute "a decisive element... [in the process of] the social and political integration of migrants".[83] In October 1986, the Commission produced a comprehensive report for the European Parliament on *Voting Rights in Local Elections for Community Nationals*, which was also transmitted for information to the Council. In this report, the Commission restated the principle of full participation in local elections for EC nationals residing in other member states. As for a residence requirement, the Commission considered that, in the case of the right to vote, a waiting-period corresponding to the term of office of a municipal council was reasonable. It proposed, however, that this period be doubled in the case of the right to stand for election.[84]

The right of EC nationals to political participation in other EC member states is soon to become a reality. On February 7, 1992, EC member states adopted the *Treaty on European Union* which amends the *Treaty of Rome*. This instrument contains a separate chapter on "Union Citizenship" which not only accords full freedom of movement to EC nationals within the EC, but also grants them the right to vote and to stand as candidates in local elections and elections to the European Parliament in the member state in which they reside, under the same conditions as nationals of that state. Non-EC nationals are excluded from this chapter of the Treaty and from the exercise of these rights. The *Treaty on European Union* is expected to

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State residing in a Member State other than their own to stand for and vote in local elections. Council of Europe, *Information Sheet No. 13 (April - October 1983)* Appendix XXXVIII, 119.

83 *EC Guidelines*, *supra*, chapter six, note 88 at 9, para. 19.

84 See respectively *EC Action Programme*, *supra*, Introduction, note 29 at 20-21 and *Voting Rights in Local Elections for Community Nationals*, European Communities, Commission, Report from the Commission to the European Parliament transmitted for information to the Council in October 1986, Doc. COM(86) 487 final, Bulletin of the European Communities Supplement 7/86.

come into force during 1993.[85]

(c) Employment in the Public Service

Generally-speaking, employment in the public service in European labour-receiving countries is restricted to nationals.[86] The question that requires a definitive answer, however, is what constitutes "public service" for the purpose of such restrictions. Only EC law attempts to place significant constraints on the normally broad state discretion in this area.[87]

The ECE is the sole CoE instrument which expressly deals with this issue.[88] Article 13 of the ECE stipulates:

> Any Contracting Party may reserve for its own nationals the exercise of public functions or of occupations connected with national security or defence, or make the exercise of these occupations by aliens subject to special conditions.

It is clear from this provision that only public functions or occupations "connected with national security or defence" can be reserved for nationals. The reserved category of employment is therefore defined by an objective reference to the actual function performed,

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85 Note, Human Rights News, EC, "Maastricht Summit 9 and 10 December: Adoption of the Treaty on Political Union" (1992) 10 NQHR 75 at 75-76.

86 See *supra*, chapter seven, notes 17-18 and accompanying text.

87 Similar efforts to place such constraints have been taken by the ILO Committee of Experts with respect to the interpretation of article 14(c) of Convention No. 143 of 1975, which permits states parties to "restrict access to limited categories of employment or functions where this is necessary in the interests of the state". *Supra*, chapter three, notes 252-253 and accompanying text. Article 52(2)(a) of the UN Convention permits a country of employment "to restrict access to limited categories of employment, functions, services or activities where this is necessary in the interests of this state and provided for by national legislation". *Supra*, chapter four, note 168 and accompanying text.

88 Article 18 of the ESC, which grants to nationals of states parties the right to engage in a gainful occupation in the territory of other contracting parties, does not refer to any limitations regarding public service employment. See also Swart, *supra*, note 4 at 43-44. The Committee of Experts does not seem to have addressed the question of public service employment under this provision. It has stated, however, with respect to article 19(4), that measures preventing the access of migrant workers to public service employment for security reasons may be justified under article 31 of the ESC. *Conclusions VIII* at 208, cited in *ESC Case Law - Supplement*, *supra*, note 9 at 49.

rather than by reference to the legal description given to the position by the state concerned.[89] The Third Periodical Report of the Standing Committee on the ECE observes that all states parties have resorted to this provision in restricting the access of nationals of other states parties to employment in the public service.[90]

The right of free access to employment of EC workers within the EC does not, by virtue of article 48(4) of the *Treaty of Rome*, encompass "employment in the public service". This derogation from the principle of freedom of movement has been interpreted restrictively by the ECJ, because the principle itself must take precedence over the "legitimate interest" of member states to reserve public service posts for their own nationals.[91] This restrictive interpretation has concerned the notion of "employment in the public service" which is not defined in the text. From EC case law, it is clear that "public service" is a fixed notion in all member states, defined by reference to the actual function performed and not by reference to the legal status of the employment post.[92] According to the ECJ, the public service positions that may be reserved for nationals are those which involve

> direct or indirect participation in the exercise of powers conferred by public law and in the discharge of functions whose purpose is to safeguard the general interests of the State or of other public authorities and which therefore require a special relationship of allegiance to the State on the part of the persons occupying them and a reciprocity of rights and duties which form the foundation of the bond of nationality.[93]

What is crucial in this approach to defining "public service" for the purpose of the derogation in article 48(4) is whether the person in employment possesses the capacity to exercise public law

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89 Cf. Plender, *supra*, note 3 at 238.

90 Oellers-Frahm, *supra*, note 76 at 1751; Swart, *supra*, note 4 at 24.

91 *Re Public Employees (No. 1): EC Commission* v. *Belgium* (No. 149/79), [1980] E.C.R. 3881, [1981] 2 C.M.L.R. 413. See Stoelting, *supra*, chapter six, note 86 at 193-194 for a brief commentary on this case.

92 Advocate-General Mayras in *Sotgiu* v. *Bundespost*, *supra*, chapter six, note 182. See also Plender, *supra*, note 3 at 210 and Stein & Thomsen, *supra*, note 55 at 1818.

93 *Lawrie-Blum* v. *Land Baden-Württemberg*, *supra*, chapter six, note 108 at 390.

power or the responsibility for safeguarding state interests.[94] Such power and responsibility is not exercised by railroad workers and nurses employed in public hospitals, nor by trainee teachers and university foreign-language assistants.[95] If EC nationals are already employed in the public service of another member state, however, article 48(4) cannot be used to deny them the protection of EC law with regard to, for example, remuneration and other working conditions,[96] although these workers may still be prevented from aspiring to posts connected with the exercise of public law powers.[97]

The right of establishment and the freedom to provide services are subject to similar restrictions in that they are inapplicable to "activities... connected, even occasionally, with the exercise of official authority".[98] These provisions, also lacking a definition in the text, have been interpreted restrictively by the ECJ, which has held, for example, that this exemption in article 55(1) of the *Treaty of Rome* in respect of the right of establishment is limited to activities which in themselves involve a direct and specific connection with the exercise of official authority.[99] Although the ECJ did not elaborate upon this "connection", it did hold, on the facts of the case under consideration, that legal assistance and representation given by lawyers or *avocats* are not activities linked directly and specifically with the exercise of official authority.[100]

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94 Plender, *supra*, note 3 at 210. Plender also observes, *ibid.* at 238, that the difficulties with the interpretation of article 48(4) would be reduced if it were read in its historical context with reference to article 13 of the ECE, which links the notion of public service to "national security or defence". See *supra*, note 89 and accompanying text.

95 See respectively *Commission* v. *Belgium*, *supra*, note 91, *Re French Nurses: EC Commission* v. *France* (No. 307/84), [1987] 3 C.M.L.R. 555, *Lawrie-Blum* v. *Land Baden-Wurttemberg*, *supra*, note 93, and *Allué and Coonan* v. *Università degli Studi di Venezia* (No. 33/88), [1991] 1 C.M.L.R. 283.

96 *Sotgiu* v. *Bundespost*, *supra*, note 92; *Echternach* case, *supra*, note 31; *Allué and Coonan*, *ibid.*

97 *Commission* v. *Belgium*, *supra*, note 91.

98 Article 55(1) of the *Treaty of Rome*, which is extended to the freedom to provide services by article 66.

99 See *Reyners* v. *Belgium*, *supra*, chapter seven, note 57.

100 *Reyners*, *ibid.* Article 55(1), therefore, applies to "activities" only and not to occupations or professions as a whole.

5. Residence Rights

5.1 Background

For those migrants who came to Europe and were accepted as permanent immigrants, particularly those who emigrated from former colonies, many of the questions below do not concern them. The assumption was that they would settle indefinitely in the country of employment and residence.[101] For those "temporary" migrants, however, whose employment and residence in a country depends on a permit system, their legal situation as regards regular residence, permanent residence and naturalization is subject to numerous obstacles.

As outlined in chapter seven, it can take between one and five years in the major European migrant-receiving countries before restrictions on migrant workers' free access to employment are lifted.[102] Given that the practice today is to align residence permits with work permits, it may take a similar period of time before restrictions on the duration of residence are removed. Generally-speaking, work permits are aligned with residence permits in the following countries: Sweden, France, the Netherlands[103] and the United Kingdom.[104] In Sweden, therefore, a migrant worker can stay in the country after just one year's residence.[105] The most notable exceptions are Germany and Switzerland. In both countries, a minimum period of eight and ten years residence respectively is required before permanent residence status can be obtained.[106] If migrant workers become unemployed in the meantime, their

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101 *Supra*, chapter five, notes 14-15 and accompanying text.

102 *Supra*, chapter seven, notes 12-16 and accompanying text.

103 Thomas, "Summing-up and Points of Comparison", *supra*, note 56 at 221.

104 Plender, *supra*, note 3 at 312.

105 Papademetriou, *supra*, note 1 at 356. See also chapter seven, note 13 and accompanying text. The Executive Committee of the European Trade Union Confederation approved, on December 14-15, 1989, a Resolution on the Entry, Residence and Free Movement of Immigrant Workers in a (European) Community Country proposing, *inter alia*, that legal migrant workers "who have been residing in a Member State for 18 months be granted the right to a 5-year residence permit, and those who have been residing for at least 5 years in a Member State be granted the right to permanent residence (paragraph 7)." See *Report to the Conference on Migrant Workers from the Mahgreb in the EC, supra*, note 1 at 22, para. 312, and Annex II. See also *Conference on Mahgreb Migrant Workers in the EC - Conclusions, supra*, note 1, at 4-5, para. 21.

106 Thomas, "Summing-up and Points of Comparison", *supra*, note 56 at 221-222 and Papademetriou,

residence status in these countries is placed in jeopardy.

Removal of restrictions on the duration of a migrant's residence in the country of employment is not the same, of course, as naturalization and the acquisition of citizenship. In most countries, at least five years legal residence is required before applications may be lodged for naturalization. This is the case in Sweden, France, the United Kingdom and the Netherlands.[107] The requirements for naturalization in Germany and Switzerland, however, are extremely rigid. In Germany, at least ten years of permanent residence are required before migrants may apply for naturalization.[108] Knowledge of the German language and German society is also necessary as well as good behaviour and satisfactory means of support, and the cost of naturalization is high, about 75 per cent of an average monthly salary. Moreover, this process is by no means automatic and the decision whether or not to grant citizenship to the applicant is at the discretion of the German authorities.[109] In Switzerland, the process is even more complex, with the result that citizenship is exceedingly difficult to obtain. Naturalization may be applied for in the commune in which the applicant resides after twelve years of residence. The process lasts two years and is completed when the candidate proves, on taking an examination, that he or she is "sufficiently assimilated". The award of citizenship is subject to the payment of an extremely high fee and to ratification by the communal parliaments.[110]

Given the restrictions on the acquisition of citizenship in the aforementioned European countries, it is not surprising that the naturalization rates in many of these countries are particularly low.[111] Undoubtedly, these difficulties are also another factor in dissuading

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ibid. at 353 respectively.

107 Hammar, "Immigration Regulation and Aliens Control", *supra*, note 69 at 255. In Luxembourg, an application for naturalization may be submitted after four years residence. *SOPEMI 1990*, *supra*, note 19 at 55.

108 H. Esser & H. Korte, "Federal Republic of Germany" in *European Immigration Policy*, *supra*, chapter five, note 5, 165 at 178. Martin & Miller, *supra*, note 69 at 323 (footnote 24); Hammar, *supra*, note 57 at 87. Since 1991, adult migrants may now apply for naturalization after fifteen years of continuous residence in the country. See *infra*, note 113.

109 Hammar, *ibid.*; Martin & Miller, *ibid.*

110 H.-J. Hoffmann-Nowotny, "Switzerland" in *European Immigration Policy*, *supra*, note 108, 206 at 222. Naturalization is further delayed if the foreigner has resided in several cantons and communes, since time spent in one cannot be transferred to another. *Ibid.*

111 For example, see *SOPEMI 1990*, *supra*, note 19 at 50 regarding Germany.

migrants from applying for citizenship once they are eligible to do so.[112]

As noted in chapter two, the problem with naturalization in a number of European countries of employment is that citizenship is not obtained on the moment of birth in the territory. Hence, many second- and third-generation migrants, born in host countries, are not citizens of these countries, but instead retain the citizenship of the country of origin of their parents. This is the case, for example, in Germany, where children of immigrants born in Germany do not become German citizens. The rules in France and Belgium are less severe. Persons born in France, whose parents are foreign citizens, acquire French citizenship at the age of majority if they have been residents of France during the previous five years. In Belgium, third-generation migrants under eighteen are granted Belgian citizenship automatically, while those over eighteen may claim Belgian nationality by filing a simple statement. Second-generation migrants born in Belgium and aged under twelve can obtain Belgian citizenship at the request of their parents. In the United Kingdom, however, citizenship is acquired by the children of foreign parents at birth, but only if the parents were legal residents at the time or became so thereafter.[113]

5.2 CoE and EC Standards

Both CoE and EC standards tie the right of residence to the employment of migrant workers in the host country. Since free access to employment for EC nationals in any member state is a right and an integral aspect of the freedom of movement principle, the right of residence in EC member countries becomes a formality once employment is found. EC

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112 For other factors deterring migrants from applying for the nationality of the host country see *supra*, note 69 and accompanying text.

113 Hammar, *supra*, note 57 at 75, 109, regarding Germany, France and the United Kingdom; *SOPEMI 1992*, *supra*, note 19 at 36 regarding Belgium and the new legislation of June 1991. The German rules on naturalization have been liberalized somewhat by the recent *Foreigners Act*, which came into force on January 1, 1991. This legislation introduces a simplified naturalization procedure for young migrants aged between 16 and 23 who have resided continuously in Germany for at least eight years, and for adults who have lived in Germany for more than fifteen years. Anyone wishing, however, to acquire German citizenship must relinquish his or her former nationality. *SOPEMI 1992*, *ibid.*

standards are also more protective when migrant workers lose their employment. There are no CoE or EC provisions imposing a state duty to facilitate naturalization for migrant workers and their families. This is not surprising given that the CoE has adopted a Convention discouraging the acquisition of dual citizenship and that the thrust of EC principles are aimed at reducing the relevance of nationality within a specific region rather than at promoting its acquisition. A right to stay indefinitely in a member state, however, is recognized under the EC regime. Finally, migrant workers as aliens remain subject to expulsion or deportation from the country of employment. Although both CoE and EC standards limit the grounds on which such expulsion may be exercised and provide procedural protection enabling migrants to challenge unfair expulsion decisions, EC law is more developed and detailed in this regard.

(a) The Right of Residence

There is no express right of residence under the ECE and the ESC.[114] Article 2 of the ECE imposes a duty upon state parties to facilitate prolonged or permanent residence, but this obligation is subject to the economic and social conditions persisting in the country which are to be judged by national criteria.[115] Both instruments, however, contain provisions on access to employment for migrants, which although limited, necessarily imply a right of residence. The EMW provides specifically that residence permits are to be aligned with work permits (article 9(1)). Residence permits are to be issued for a period equal to the validity of work permits, and if the latter are of indefinite duration, then residence permits are to be issued for at least one year (article 9(2)). This express right of residence, therefore, is inextricably bound up with the right to pursue an occupation, which is subject wholly to the discretion of the

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114 The ECHR and Protocols also contain no right of residence. Nor may such a right be implied from other rights such as the right to education. Nevertheless, it is arguable that a right of residence would ensue in the rare case when family life is unjustifiably infringed under article 8 as a result of measures restricting family reunification. See also cf. Swart, *supra*, note 4 at 11, 16 and the section on the "Right to Family Reunification", *supra*, chapter seven.

115 Section I(a)(2) of the Protocol to the ECE. Swart, *ibid.* at 7, maintains that it is difficult to speak of a right of residence under such conditions.

country of employment.

Neither the ECE nor the ESC contain an express reference to the renewal of residence permits, although once again a duty to extend residence must be viewed as existing so long as migrant workers retain the right to pursue an occupation in the host country under a valid work permit.[116] This is clear in the EMW where, as described above, residence permits are aligned with work permits. Article 9(2) also expressly stipulates that the residence permit is to be *renewed* for the duration of the work permit or for at least one year if such a work permit is valid indefinitely.

The EMW is the only CoE instrument which provides a limited right of residence for migrant workers after the termination of their employment. Under article 9(4), migrant workers have the right to remain in the host country for at least five months, but only if they are temporarily unable to work because of illness or accident or are involuntarily unemployed. The five month period is to allow workers to recuperate or to find alternative employment in accordance with article 25 of the EMW, which deals with re-employment.[117] A state party, however, is not obliged to permit migrant workers to remain for a period exceeding the period of payment of the unemployment allowance or more than five months if unemployment benefit is payable beyond this period.[118] Article 9(4) has been criticized on a number of grounds: it does not permit migrant workers to stay longer than five months even if they continue to receive unemployment benefit; it does not apply in respect of workers who have become *permanently* incapacitated; and finally, it does not apply in the event of a refusal to renew a

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116 See also Oellers-Frahm, *supra*, note 76 at 1738-1739.

117 See respectively Oellers-Frahm, *ibid.* at 1739 and *Explanatory Report on the EMW*, *supra*, note 10 at 16, para. 42.

118 This provision resembles somewhat article 8(1) of ILO Convention No. 143 of 1975 and paragraphs 30 to 34 of the accompanying Recommendation (No. 151), which provide that legally resident migrant workers should not be deemed to be in an irregular situation simply on account of loss of employment and that states are under a duty to give migrants sufficient time to find alternative employment at least for a period corresponding to that during which they may be entitled to unemployment benefit. *Supra*, chapter three, note 255 and accompanying text. See also article 49(2) of the UN Convention which applies similar wording in respect of migrant workers who have free choice of employment in the host country. Migrant workers who do not have free choice of employment, however, may only seek re-employment or alternative employment on termination of their present employment "during the remaining period of their authorization to work" (article 51). See *supra*, chapter four, notes 170-173 and accompanying text.

residence permit.[119]

The right of EC workers and their families to stay in a member state for the purpose of employment is recognized in article 48(3)(c) of the *Treaty of Rome*. The formal aspects of this right are found in EC Directive 68/360. EC nationals need only produce a valid passport or identity card in order to gain entry into another EC member state.[120] Once in the country, article 4(1) of this Directive obliges member states to grant the right of residence to EC workers and to issue a residence permit on the production of a travel document, a confirmation or certificate of employment and a proof of relationship in the case of entry of workers' family members (article 4(3)).[121] This permit is valid throughout the territory of the member state for a period of at least five years and is automatically renewable (article 6(1)). Renewal is a formality, but no renewal is possible if the worker voluntarily gives up work or is permanently incapacitated. In such a case, however, the right to remain may apply (see below).[122] The permit cannot be withdrawn if a worker has become temporarily incapacitated as a result of illness or accident or involuntarily unemployed, although its duration, on the first renewal, may be shortened if the worker has been involuntarily unemployed for more than twelve months (article 7).

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119 Swart, *supra*, note 4 at 15.

120 *Re Belgian Passport Controls: EC Commission* v. *Belgium* (No. 321/87), [1990] C.M.L.R. 492. The expiry of an identity card or passport used by the EC national to enter a member state does not justify expulsion from that territory (article 3(3) of Directive 64/221).

121 Although legal sanctions may legitimately be imposed by member states for failure to comply with these formalities, they must not be so disproportionate as to become an obstacle to freedom of movement. *State* v. *Royer*, *supra*, chapter six, note 140; *Republic* v. *Sagulo* (No. 8/77), [1977] E.C.R. 1495, [1977] 2 C.M.L.R. 585; *R* v. *Pieck* (No. 157/79), [1979] E.C.R. 2171, [1980] 3 C.M.L.R. 220. Consequently, deportation for failure to comply with these formalities is prohibited. Royer, *ibid.* Article 8(1) of Directive 68/360 stipulates that a residence permit need not be issued to those employed in a member state for less than three months and to frontier and seasonal workers, although in each case a state may require these workers to report their presence in its territory (article 8(2)). Measures requiring EC nationals to register with the police within three days of entry and imposing criminal penalties for non-compliance are not reasonable. See the case of *Messner* (No. C-265/88), [1991] C.M.L.R. 545. Furthermore, as noted in chapter six, EC nationals seeking employment may also reside in a member state for up to six months. See the case of *Antonissen*, *supra*, chapter six, note 114.

122 See also Stein & Thomsen, *supra*, note 55 at 1797.

(b) Right to Remain and to Naturalization

Migrant workers and their families residing in the country of employment have no right under CoE instruments to an unlimited period of residence or to naturalization and citizenship.[123] The only provision which comes close to providing such a right is the duty imposed upon state parties in article 2 of the ECE to facilitate prolonged or permanent residence, although as discussed above, this obligation is qualified to such an extent that its usefulness is questionable. Any rights of residence that may be implied from the ESC and the EMW are strictly connected with migrant workers remaining in employment, with the narrow exception provided in article 9(4) of the EMW. In contrast, the resolutions and recommendations of CoE institutions in this area are quite far-reaching. For example, Parliamentary Assembly Resolution 769 of 1975 on the legal status of aliens boldly advocates a basic freedom of choice of CoE nationals to reside in any CoE member state, including an unrestricted right of residence after a stay of over three years in the country.[124] A more recent Parliamentary Assembly Recommendation encompasses non-CoE nationals and invites member states to "recognize the right of migrants, *irrespective of their country of origin or nationality*, to reside permanently on their territories when they have resided there for at least five years".[125] Other recommendations propose that member states facilitate the naturalization of migrant workers as well as migrant women and second-generation migrants.[126]

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123 See also Oellers-Frahm, *supra*, note 76 at 1734. The latter right, of course, would favourably alter the condition of migrant workers and their families in the host country, since so many of the rights that matter to them are tied to nationality. Cf. Swart, *supra*, note 4 at 60.

124 Parliamentary Assembly Resolution 769 of October 3, 1975 on the legal status of aliens. Oellers-Frahm, *ibid.* at 1733.

125 Parliamentary Assembly Recommendation 1082 (1988) of June 30, 1988 on the right of permanent residence for migrant workers and their families. Council of Europe, *Information Sheet No. 23 (May - October 1988)* Appendix XXI, 118. Emphasis added.

126 See respectively: Parliamentary Assembly Recommendation 915 (1981) of January 13, 1981 on the situation of migrant workers in host countries, *supra*, chapter six, note 76; Parliamentary Assembly Recommendation 956 (1982) of November 9, 1982 on migrant women, Council of Europe, *Information Sheet No. 12 (October 1982 - March 1983)* Appendix XIV, 72, paragraph 9(iii); and Committee of Ministers Recommendation (84) 9 of March 9, 1984 on second-generation migrants, *supra*, note 14. With regard to second-generation migrants, CoE member states are called upon to enable these migrants acquire the citizenship of the host country or to resume their original nationality (paragraph III(b)).

The lack of resolve by the CoE in this area may be traced to the *Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality*, adopted by the CoE in 1963.[127] The purpose of the Convention is to reduce the number of dual citizens in CoE member states and thereby the inconveniences which result.[128] The Convention has been ratified by only eleven states[129] and mainly by countries of employment in which dual citizenship is discouraged. For example, in Germany, the Netherlands and Scandinavian countries, the renunciation of previous citizenship is a general requirement for naturalization. This rule is applied to citizens of all states in spite of the fact that the Convention only requires dual nationality to be discouraged in respect of citizens from other states parties. Indeed, France applies the Convention in this manner, with the result that citizens from non-states parties find it easier to acquire French citizenship without having to renounce their own nationality.[130] It is noteworthy that the traditional Southern European countries of emigration, such as Portugal and Turkey, have not ratified the Convention, since it is in the interests of these countries to ensure that their citizens abroad retain their former citizenship even when they become citizens of another country.[131]

Although the number of dual citizens in Europe has increased considerably, Hammar

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127 *Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality*, May 6, 1963, Council of Europe, *European Treaty Series* No. 43; entry into force March 28, 1968; ratified by 12 states as of 1989 (date of ratification in parenthesis where available): Austria, Denmark, France [26/1/65], Germany [17/11/69], Ireland, Italy [27/2/68], Luxembourg [11/10/71], Netherlands, Norway [26/11/69], Spain, Sweden [5/3/69], United Kingdom [7/7/71]. The United Kingdom, Ireland and Spain have made declarations that they will only apply the Convention's second chapter dealing with military obligations in cases of multiple nationality (article 7(1)). See also Hammar, *supra*, note 113 at 112.

128 *Ibid.* at 107. Paragraph 2 of the Preamble to the Convention reads:

> *Considering* that cases of multiple nationality are liable to cause difficulties and that joint action to reduce as far as possible the number of cases of multiple nationality, as between member States, corresponds to the aims of the Council of Europe.

Inconveniences may follow from situations where it is not clear which country's legislation should be applied or in which country military service should be completed, or even which citizenship a person should be considered to hold at a certain time. Hammar, *ibid.*

129 *Supra*, note 127.

130 Hammar, *supra*, note 57 at 113.

131 Cf. Hammar, *ibid.* at 112. Although Italy has ratified the Convention, it is noteworthy that one of the main provisions of a 1990 Italian draft law is that Italians who acquire another nationality will nonetheless be able to retain their Italian citizenship. *SOPEMI 1992*, *supra*, note 19 at 68.

maintains that the Convention "has probably partly served its purpose... for... without the Convention the number would probably have been greater".[132] Attitudes, however, towards the concept of dual citizenship are changing. The Convention was adopted in 1963 when labour migration to Western Europe was beginning to spiral. Since then, large permanent foreign populations have formed in the major countries of employment. In the light of this increase in foreign populations, proposals have been made to revise the 1963 Convention, but without concrete results to date. Nonetheless, the Nordic countries, especially Sweden and Finland, are taking unilateral steps to accept dual citizenship to a greater extent than before.[133]

Hammar notes that members of the younger foreign generation in countries, such as Germany, France and Switzerland, are growing up with dual identities and adds that "from a psychological point of view, dual citizenship could for them be a fair expression of their dual national identity".[134] In this climate of increasing cultural pluralism in Europe, it seems only reasonable that the CoE should move towards facilitating rather than restricting the acquisition of dual citizenship.

Likewise, EC law does not contain any provisions on speeding up naturalization. The emphasis is on the creation of a distinct kind of European "citizenship", rather than on the acquisition of the nationality of individual member states.[135] EC law, however, permits migrant workers to remain indefinitely in the country of employment on retirement or because of an incapacity to work. Such a right constitutes an integral part of the freedom of movement principle.[136] Article 2(1)(a) of EC Regulation 1251/70 grants EC workers the right to remain in a member state after three years of continuous residence and if they have been employed

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132 *Ibid.* at 107.

133 *Ibid.* at 119, 124

134 *Ibid.* at 108.

135 Stein & Thomsen, *supra*, note 55 at 1800-1801. See also *supra*, note 85 and accompanying text referring to the *Treaty on European Union* which contains a chapter on "Union Citizenship".

136 Stein & Thomsen, *ibid.* at 1794. A right of permanent residence to self-employed workers who establish themselves in a host member state is granted by article 4(1) of Council Directive 73/148 of May 21, 1973 on the Abolition of Restrictions on Movement and Residence within the Community for Nationals of Member States with regard to Establishment and Services, O.J. 1973, L172/14.

there for at least twelve months before the termination of employment.[137] Article 3(1) extends the right to remain to workers' families if this right has been acquired by the worker. The right, moreover, is not extinguished on the worker's death.[138] Those with the right to remain under EC law receive, in the same way as those with a right of residence, a five year residence permit, which is automatically renewable (article 6(1)). Finally, article 7 of Regulation 1251/70 underlines that the right to equal treatment in Regulation 1612/68 also applies to workers with the right to remain. Workers possessing the right to remain, however, are still some way from acquiring *de facto* citizenship status. For example, they may, as noted below, be subject to expulsion from the country of residence on certain specified grounds.

(c) Expulsion and Procedural Protection against Expulsion

Expulsion is a serious threat to any rights of residence which migrants may acquire. This section provides a summary of some of the most salient CoE and EC provisions in this area, particularly those relating to the protection of migrant workers and their families against expulsion on economic grounds, for example in the event of their unemployment and their reliance on social security or assistance benefits.

States that are parties to CoE instruments or that are members of the EC cannot expel aliens and migrant workers at will, but may only do so in accordance with certain criteria. Article 1(1) of *Protocol No. 7* to the ECHR, applicable to all lawfully resident aliens whether or not they are nationals of other states parties, provides a number of procedural safeguards in

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137 Shorter periods of residence apply to those workers who have become permanently incapacitated because of an industrial accident or an occupational disease (article 2(1)(b)). Frontier workers also have the right to remain after three years of continuous residence and employment (article 2(1)(c)). The right to remain must be exercised within two years of it accruing to the person (article 5(1)).

138 If the worker dies before acquiring the right to remain, members of his family may remain regardless, but only if one of the following conditions is satisfied: the worker resided continuously in the member state for at least two years before his or her death, the death was caused by an industrial accident or disease, or the surviving spouse is a national of the country of residence or had forfeited that nationality by marriage to the worker (article 3(2)).

the event of their expulsion.[139] Article 4 of *Protocol No. 4* to the ECHR contains a blanket prohibition against the collective expulsion of aliens.[140] Arguably, other rights' guarantees in the ECHR may also be utilized by aliens to challenge a decision of expulsion from the territory of a state party.[141] The other relevant CoE instruments limit the expulsion of aliens and migrant workers to a number of specified grounds. The principle grounds of expulsion common to these agreements are national security, public morality and various derivatives of public policy.[142] The ECE, ESC and EMW also provide aliens and migrant workers procedural protection against expulsion, and particularly, in articles 3(2), 19(8) and 9(5) respectively, a right of appeal to a court, independent authority or person. In the case of the ESC, this right has been read into article 19(8) by the Committee of Independent Experts.[143] No express provision is made, however, in these clauses for preventing the expulsion of

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139 These safeguards enable aliens to submit reasons against their expulsion, to have their case reviewed and to be represented for the above purposes before the competent authority. States parties may by-pass these safeguards if expulsion is necessary in the interests of public order or for reasons of national security (article 1(2) of the Protocol). Oellers-Frahm, *supra*, note 76 at 1744, also observes, citing from the CoE *Explanatory Report to Protocol No. 7*, that the effect of these safeguards is not to suspend expulsion until the final conclusion of the domestic procedure in question. So far, *Protocol No. 7* to the ECHR has only been ratified by twelve states. See *supra*, chapter six, note 26.

140 *Supra*, chapter six, note 28 and accompanying text. In *Becker* v. *Denmark*, a petition under article 4 complaining against a proposal of the Danish authorities to expel 199 Vietnamese children, who had been placed temporarily in a Danish hostel, was considered inadmissible by the European Commission of Human Rights because each case was to be judged on its own merit. *Becker* v. *Denmark* (No. 7011/75) (1976), 19 Y.B. Eur. Conv. H.R., (1975) 4 Eur. Comm. H.R. D.R. 215.

141 For example, the right not to be subjected to torture, or to inhuman or degrading treatment or punishment (article 3). This argument was successful in *Soering* v. *United Kingdom* (1989), Eur. Court H.R. Ser. A, No. 161. Other guarantees include: the right to a fair hearing in the determination of civil rights and obligations (article 6); the right to respect for family life (article 8); and the right to an effective remedy (article 13). See also Swart, *supra*, note 4 at 16-20 and Drzemczewski, *supra*, chapter six, note 16 at 361-365, for a more detailed discussion of the application of these provisions to the expulsion of aliens.

142 The grounds of expulsion for each instrument are as follows: national security, public order, or morality (article 3(1) ECE); national security, public interest or morality (article 19(8) ESC); and national security, public policy or morals (article 9(5)(a) EMW) and public health (article 9(5)(b) EMW). Expulsion on grounds of public health under the EMW is only permissible if migrant workers refuse to comply with public health measures specifically issued to them. The EMW also permits expulsion if a condition essential to the validity of the residence permit has not been fulfilled (article 9(5)(c)). In connection with "public interest" under article 19(8) of the ESC, the Committee of Experts has made it clear that a state party cannot justify expulsion on the ground of public health unless medical treatment has been unreasonably refused. *Conclusions V* at 138, cited in *ESC Case Law*, *supra*, note 3 at 173.

143 *Conclusions IV* at 129, *Conclusions V* at 138, *Conclusions VI* at 128, and *Conclusions VII* at 109, cited in *ESC Case Law*, *ibid.* at 172-174. Both Harris, *supra*, note 3 at 185-186 and Swart, *supra*, note 4 at 19, have questioned the Committee's forward interpretation of article 19(8).

migrant workers pending the appeal.[144]

The above provisions concerning the expulsion and the procedural protection of aliens and migrant workers are, on the whole, silent as to the question of expulsion on economic grounds.[145] As noted earlier, only the EMW obliges states parties to permit migrant workers to remain in the country in the event of involuntary unemployment, but only for a limited period of time and only if they are still collecting unemployment benefit. The Committee of Experts under the ESC has also interpreted article 19(8) as prohibiting the expulsion of migrant workers solely on the basis that they are of limited means.[146] An important CoE agreement in this area is the *European Convention on Social and Medical Assistance*, discussed in the previous chapter, which expressly prohibits the expulsion of lawfully resident aliens on the sole ground that they are in need of assistance, but only if they have been resident in a state party for a considerable period of time.[147]

Under article 48(3) of the *Treaty of Rome*, the right to freedom of movement for workers may be limited on grounds of "public policy, public security or public health". In accordance with the practice of the ECJ, this exception to the freedom of movement principle is to be interpreted strictly.[148] EC Directive 64/221 specifies when these grounds may be invoked by member states and elaborates somewhat on their content. Article 2(1) stipulates

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144 Swart, *ibid.* also makes this observation in respect of article 9(5) of the EMW. With regard to article 19(8) of the ESC, the Committee of Government Representatives acknowledges that:

> in the case of a threat to national security, the public interest or morality, an expulsion order could be immediately enforceable. It must, however, always be possible for the expelled migrant worker to lodge an appeal from abroad and, if successful, to return to the host country.

Eighth Report at 19, cited in *ESC Case Law*, *ibid.* at 52.

145 See also Swart, *ibid.* at 15.

146 *Conclusions V* at 139, cited in *ESC Case Law*, *supra*, note 3 at 173. This approach should be contrasted with the earlier view of the Committee that article 19(8) does not preclude a situation where the loss of employment by migrant workers leads to a loss of residence. *Conclusions II* at 198, cited in *ESC Case Law*, ibid. at 171 and by Harris, *supra*, note 3 at 186. Such an eventuality is specifically prohibited in ILO C143 by article 8(1). *Supra*, chapter three, notes 255-256 and accompanying text.

147 *Supra*, chapter seven, note 117 and accompanying text.

148 *Van Duyn*, *supra*, chapter seven, note 218. *Bonsignore* v. *Oberstadtdirektor Cologne* (No. 67/74), [1975] E.C.R. 297, [1975] 1 C.M.L.R. 472; *Rutili*, *supra*, note 78.

that the Directive applies to all measures based on these grounds in respect of entry, renewal of residence permits, or expulsion.[149] Article 3(1) maintains that measures taken on grounds of public policy or public security must be based solely on the personal conduct of the individual concerned. Such conduct must constitute a genuine and serious threat affecting one of the fundamental interests of society.[150] Article 4(1) of Directive 64/221 refers to a list of diseases in the Annex permitting expulsion on public health grounds.[151] Member states are given a "margin of appreciation" in the application of measures invoking these grounds, although it is not clear from EC case law whether the offensive conduct in question must be illegal in domestic law.[152] With regard to the question of expulsion for economic reasons, Article 2(2) of Directive 64/221 stipulates that the grounds are not to be invoked to "service economic ends". EC law concerning the issue of residence permits appears to adequately protect migrant workers and their families in the event of unemployment. However, those EC nationals who have become unemployed and are not entitled to a renewal of residence permit or the right to remain, may be particularly vulnerable to expulsion.

A broad right to legal protection against the refusal of entry, renewal of residence permit, and expulsion is guaranteed to EC nationals by Directive 64/221.[153] This protection is in the form of a "double safeguard". First, the persons concerned are entitled to be notified of the grounds on which measures restricting their freedom of movement are based (articles 6 and

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149 Measures include individual administrative decisions applying general legislation. *Rutili, ibid.* The application of this Directive is extended to those EC nationals who possess the right to remain in Council Directive 72/194 of May 18, 1972, O.J. Sp. Ed. 1972, 474.

150 *Van Duyn, supra,* note 148; *Rutili, ibid.* Deportation must relate only to the conduct of the individual concerned and must not be used in a "preventive" manner to deter others. *Bonsignore, supra,* note 148. Previous criminal convictions do not in themselves constitute grounds for expulsion on the basis of public policy or on the basis of public security. Article 3(2) of Directive 64/221. See also *R* v. *Bouchereau* (No. 30/77), [1977] E.C.R. 1999, [1977] 2 C.M.L.R. 800.

151 If the prescribed disease, however, is contracted after the grant of the first work permit, expulsion cannot take place (article 4(2)).

152 In *Van Duyn, supra,* note 148, the ECJ held that a member state may expel an individual for conduct, which though undesirable, need not be tainted with illegality. In *Adoui and Cornuaille* (Nos. 115/81 and 118/81), [1982] E.C.R. 1655, the ECJ contradicted its earlier position. Plender, *supra,* note 3 at 207, contends that the latter case, arguing against expulsion in such an instance, appears to represent the law.

153 Directive 64/221 requires member states to reach speedy decisions, (to take no longer than six months), whether to grant or to refuse a residence permit, and to allow workers to remain in the territory until such a decision is taken (article 5(1)).

7) unless interests of state security dictate otherwise (article 6). These reasons must be precise and comprehensive in order to enable the persons concerned to prepare an effective defence. Second, an effective right of appeal must be made available (articles 8 and 9).[154] Member states, however, do not have to postpone expulsion until the end of the appeal process provided that the persons concerned are permitted to exercise their rights in full during the procedure.[155]

6. Conclusion

In line with general international human rights instruments and with the ILO and UN instruments concerned specifically with the protection of the rights of migrant workers and their families, the right to education is guaranteed by CoE and EC standards, particularly as it pertains to the education of migrant children. In contrast with other instruments, however, EC provisions extend this right to equal treatment between migrants and nationals in respect of the provision of financial assistance for education, including grants and scholarships.

As observed in the introduction to this chapter, however, rights to culture, political participation and residence are at the core of the liberal-democratic debate within the nation-state and their full enjoyment is limited to nationals. The weak CoE standards merely reflect the restrictive approaches taken in individual countries to these rights which are severely circumscribed in states of employment, with few exceptions such as the position in Sweden. CoE instruments contain no rights for migrants to political participation, in spite of the fact that a number of countries of employment grant foreigners the right to vote at the municipal level. Neither are there are any rights to permanent residence nor to naturalization. Cultural rights are also very limited as witnessed by article 15 of the EMW and its numerous qualifications.

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154 See the case of *Rutili*, *supra*, note 148. Article 9(1) provides for an independent review of the decision if no right of appeal is available to a court of law or if that right is restricted.

155 *Pecastaing* v. *The Belgian State* (No. 98/79), [1980] E.C.R. 691, [1980] 3 C.M.L.R. 685.

The superiority of EC provisions over CoE standards with respect to equal treatment between migrants and nationals and the protection of the economic and social rights of migrant workers and their families was evident in the discussion of these rights in chapters six and seven respectively. In the areas of culture and political participation, there were fewer significant differences until recently. The right of migrant children to retain and develop the culture and language of the country of origin of their parents is subject to similar conditions to those found in article 15 of the EMW. With regard to political participation, however, after years of discussion on the policy level, the EC has recently moved in the direction of granting EC nationals the right to vote and to stand for political office in local elections in the member state of residence. Finally, EC provisions are silent on the question of naturalization, although those EC nationals who reside and work in other member states, by and large possess secure rights of residence and may remain there after the cessation of economic activity.

CONCLUSION

TOWARDS INCLUSION OR EXCLUSION?

> "[A]s regards the alien, we must remember that compacts have a particular sanctity; indeed, offences by alien against alien, we may say, compared with sins against fellow-citizens, more directly draw down the vengeance of God. For the alien, being without friends or kinsmen, has the greater claim on pity, human and divine... What anxious care, then, should a man of any foresight take to come to the end of life's journey guiltless of offence towards aliens!.. Plato, *The Laws* (London: Dent, 1966) at para. 729.

1. Background

The plethora of international standards concerned with the protection of migrant workers and their families examined in this thesis may give the impression that international human rights law has given sufficient attention to the plight of this vulnerable group.

On a global scale, general international human rights instruments, such as the International Bill of Rights and the ICERD, and regional treaties in Europe, America and Africa have generally taken the human being as their starting-point regardless of citizenship status or nationality. Migrant workers and their families have also been the object of specific attention in the ILO since the Organization's inception in 1919. Most ILO standards concerning the protection of people in their working environment are applicable to migrant workers. In addition, specific instruments were adopted for their protection by the International Labour Conference in 1949 and 1975. Since the early 1970s, migrant workers and their families have also been the focus of UN concern which recently generated a lengthy and complex instrument dedicated to their complete protection.

In Europe, additional standards to those found in the *European Convention on Human Rights* were adopted under the auspices of the Council of Europe in order to protect migrant workers and their families. In contrast with the universal thrust of the standards mentioned above, these norms are characterized by their exclusivity, namely they are not applicable to all

alien migrants residing in a state party which has ratified the instrument in question, but only to nationals of other states parties. Similarly, the EC regime on the free movement of workers is an exclusive "club" and operates only to protect those who come to work in one member country from another member country. The EC system, as examined in the Case Study of the regional protection of migrants in Europe, offers the best arrangement. It is the *crème de la crème* of protection.

Chapter two argued for a redefinition of the national community. By including and protecting all those who participate in its economy and society and not just citizen-members, chapter two maintained that a liberal-democratic community would not only sensitize itself to the interdependence of today's world and the international developments taking place which no national community can morally ignore, but would also more closely conform to its individualist and communitarian precepts. The liberal-democratic polity, however, is faced with a dilemma. In order to preserve itself, it must to some extent exclude newcomers, but the ideals and values on which it is based are universal in application. This dilemma may partly be resolved by according equal treatment with citizen-members to all those who have been invited to participate in the economic, social and cultural life of society, including those uninvited guests who have also participated in and contributed to the community for a considerable length of time.

Chapter two also observed that the bastion of the nation-state order in our world today, the principle of state sovereignty, is being whittled away by the international system for the protection of the rights of all human beings. This system is based on the creed that the dignity of human beings is the concern of the whole international community and not merely the concern of the sovereign nation-state. Consequently, migrant workers and their families, who find themselves at the mercy of national governments, employers and the general citizenry, are not supposed to be without protection in a country of employment. They have universal and international norms to rely on in times of exploitation and the trampling of their human rights.

The creed of the international system for the protection of human rights is a worthy

one, but is it viable? Nation-states, no matter how tyrannical or authoritarian, still tend to sign international human rights agreements. After all, no country likes to be perceived as acknowledging openly the oppression of its own members. But what about aliens, migrant workers and their families? Can the nation-state order protect the rights of this group? The international system for the protection of human rights maintains that it does, or more accurately, that it should.

Below, international instruments already examined in the preceding chapters are applied in a general manner, and from a different perspective, to the hypothetical situation of a particularly vulnerable group of migrant workers and their families residing in one or more of the major European countries of employment. The objective of this examination is to consider how adequately these instruments interact in protecting this class of migrants, bearing in mind that this group is excluded from most of the European standards analyzed in the Case Study.

A similar examination could also be conducted in respect of any group of migrants in the world, such as Colombian workers in Venezuela, which is one of the few major countries of employment that has ratified ILO Convention No. 143 of 1975, and the five million or so migrant workers in the Arab Gulf states. It must be emphasized, however, that the only major international human rights instrument ratified by any of the six GCC (Gulf Cooperation Council) states is the ICERD,[1] and none have ratified the ILO Conventions relating specifically to the protection of migrant workers and their families.

2. The Hypothetical Situation

2.1 The Migrant Group

Consider a group of migrant workers and their families residing in Western Europe from a developing country, such as from one of the countries of the Mahgreb region of North

1 The ICERD has been ratified by Bahrain, Kuwait, Qatar and the United Arab Emirates.

Africa (Algeria, Morocco and Tunisia), or from one of the new democracies in Central and Eastern Europe, such as the Czech and Slovak Federal Republic, Hungary and Poland. Leaving aside any possible protection they may be entitled to under the national law of the country of employment and under bilateral agreements signed between sending and receiving states,[2] what further protection may they expect under international human rights law? Consider also the undocumented migrants working and residing in Western Europe. What kind of recourse do these groups of migrants have to the protection of the international human rights law examined in this thesis?

2.2 Universal Human Rights Instruments

As far as universal human rights instruments are concerned, all of these migrants may claim protection under the ICCPR, the ICESCR and the ICERD, which all the European countries of employment have ratified. As individuals, however, they may not be able to enforce these rights because not all of the countries in question have ratified the Optional Protocol to the ICCPR, nor made a declaration under article 14 of ICERD accepting the individual right of petition.[3] The only "countries of employment" which have accepted this right under both instruments are Denmark, Norway, Sweden, France, Italy and the Netherlands, and only the latter four countries have a substantial number of foreigners living within their borders. In contrast, neither Belgium, Germany nor the United Kingdom have accepted the right of individual petition under the ICCPR and the ICERD.[4]

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2 For example, chapter five noted recent bilateral agreements between a number of Western European countries and the newly democratic states of Central and Eastern Europe, in particular seasonal labour agreements. *Supra*, chapter five, notes 57 and 101 and accompanying text.

3 *Supra*, chapter one, notes 133-134 and accompanying text.

4 As of January 1, 1992, the European countries which have ratified the Optional Protocol to the ICCPR are as follows: Austria, the Czech and Slovak Federal Republic, Denmark, Estonia, Finland, France, Hungary, Iceland, Ireland, Italy, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Russia, Spain, San Marino, Sweden and Ukraine. Denmark, France, Hungary, Iceland, Italy, the Netherlands, Norway, Russia and Sweden have all made declarations under article 14 of the ICERD, allowing for the right of individual petition.

2.3 Universal Human Rights Instruments Specifically Relating to Migrants

With regard to specific universal standards concerned with the protection of migrant workers and their families, only ILO instruments are relevant for the time being. The UN Convention is not in force and, as explained in chapter four, it is unlikely that it will come into force in the very near future. The ILO standards are therefore critical. ILO Convention No. 143 of 1975 has only been ratified by fifteen countries, including seven European countries, namely Cyprus, Italy, Norway, Portugal, San Marino, Sweden and Yugoslavia. Italy and Portugal, predominantly countries of emigration in the past, are very relevant to the hypothetical situation discussed. Both have recently experienced an influx of migrants from developing countries, including a considerable flow of North Africans to Italy. Many of these immigrant workers are undocumented.[5] Because Part I of this Convention applies to all migrants, including those in an irregular situation, its importance to the migrant group under consideration is apparent. The list of European migrant-receiving countries that have ratified ILO Convention No. 97 of 1949 is lengthier. Belgium, France, Germany, Italy, the Netherlands, Portugal, Spain and the United Kingdom are all parties to this agreement. Convention No. 97, however, does not apply to illegal migrants.

2.4 Regional Human Rights Instruments

With regard to regional human rights instruments in Europe, only the ECHR applies to migrants from the Mahgreb region, other developing countries, and from the newly democratic states of Central and Eastern Europe, some of which have already ratified the ECHR. The ECHR has been ratified by 24 Council of Europe member states as of March 18, 1992. All the states parties to the ECHR have also made declarations accepting the right of individual petition

5 See generally *supra*, chapter five, notes 64-68 and accompanying text.

and the jurisdiction of the European Court of Human Rights. The other Council of Europe agreements, such as the ECE, ESC and the EMW, are inapplicable to this particular group of migrant workers and their families because they only protect nationals from other states parties residing and employed in another state party. Furthermore, as Council of Europe instruments, they are not open, for example, to ratification by countries from the Mahgreb, although they can now be ratified by the new Eastern European Council of Europe member states. To date, however, none of these countries have ratified the ECE, the ESC or the EMW. Finally, EC provisions are not applicable to the migrants in question, with the exception of the declaratory Community *Charter of the Fundamental Social Rights of Workers* which by and large applies to all legally resident workers in the member states of the EC.

2.5 Definition and Rights

Given this rubric of international instruments, what kind of rights' safeguards may this particular group of migrant workers and their families expect? Before answering this question, it must be emphasized that even if these migrant workers are fortunate enough to find themselves in a country which has ratified one or both ILO Conventions concerning migrant workers, the safeguards contained therein might not apply to them because they might fall outside of the definitions of "migrant worker" in these instruments.[6] For example, if they are self-employed workers, students or trainees engaging in employment, or so-called "project-tied" workers, namely workers who have entered a country to work on a specific job and who are required to leave once this job is completed, they cannot claim protection under these Conventions.[7] The definitions in these agreements exclude illegal migrants, although this group is protected to some extent under Part I of Convention No. 143.

The fundamental rights of migrants from which no derogation is permissible, such as

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6 Article 11 in both Conventions No. 97 and 143.

7 *Supra*, chapter three, notes 103-106 and accompanying text. Seasonal migrant workers are *not* excluded by either of the definitions. *Supra*, chapter three, note 107 and accompanying text.

their right to life and their right not to be subjected to torture, are guaranteed by the universal human rights instruments of general application. These rights are also referred to in article 1 of ILO Convention No. 143 of 1975 and in the ECHR, and are listed fully in the UN Convention. The international protection of the economic, social, cultural, political and residence rights, including protection against unfair expulsion, of migrant workers and their families from the Mahgreb countries and beyond and from Eastern Europe is less well-defined. The ILO Conventions, in line with the Organization's mandate, are mainly concerned with economic and social rights as they relate to labour and less so with other rights, although references to culture, education and residence are made in the ILO instruments specifically concerned with the protection of migrants. The ECHR and its Protocols have only very limited application; positively, by espousing a general right to education and providing procedural safeguards against the arbitrary expulsion of legally resident migrants and the collective expulsion of *all* aliens,[8] and negatively, by potentially excluding migrants from all political activity in the country of employment.[9]

In terms of a right to general equal treatment with nationals, laws, regulations and administrative action which discriminate against migrant workers in respect of employment, social security, accommodation and membership of trade unions and the enjoyment of the benefits of collective bargaining are prohibited under Convention No. 97 of 1949.[10] Consequently, discrimination in the private sector, such as the renting of private accommodation, which is not regulated by national laws, regulations or by the action of administrative authorities, is not covered. The application of equality under ILO Convention No. 143 of 1975 is much broader, with the result that states parties are under a duty to declare and pursue a national policy which promotes equal treatment between lawful migrant workers and their families and nationals in respect of the aforementioned matters as well as additional

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8 See respectively article 2 of Protocol No. 1 to the ECHR, article 4 of Protocol No. 4 and article 1 of Protocol No. 7.

9 Article 16 of the ECHR.

10 Articles 6(1)(a) and (b).

matters. Non-discrimination is also a principle found in article 14 of the ECHR, but this is not a substantive equality clause in the true sense because it only applies to the rights contained in the ECHR, which are mainly civil and political rights.

The right of this particular group of migrants to equal work and employment conditions is guaranteed by the ICESCR,[11] and in more detail by numerous ILO standards and the ILO instruments specifically concerned with the protection of migrant workers. The right to equal conditions of work and employment is of particular importance to migrant workers from the Mahgreb and from Eastern Europe and to those in an irregular situation, because they constitute the lowest level of labour in Europe and are most likely to be found in the dirtiest and most menial jobs.[12]

The right to form and join trade unions is guaranteed to all workers by the ICESCR, the ICCPR and the ECHR. ILO standards also guarantee the rights of all workers, irrespective of nationality, to establish and to join trade unions.[13] The right to participate in trade unions is less pronounced. Although "trade union rights" under ILO Convention No. 143 of 1975 encompass this right,[14] it is not specified in the ECHR.

In line with article 9 of the ICESCR, which provides for the right of "everyone" to social security, both ILO Conventions relating to migrant workers and their families guarantee equal treatment between migrants and nationals in respect of social security rights.[15] Social security is defined in ILO Convention No. 97. Its contours may also be drawn from more specific ILO standards dealing with this question, such as *Convention No. 102 of 1952 concerning Minimum Standards of Social Security*. As of January 1, 1992, however, Convention No. 102 had not been ratified by any of the Mahgreb countries, and only by one of

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11 Article 7.

12 For example, it was observed in chapter five that most Mahgreb workers in France are manual or unskilled workers and that many migrants from Eastern Europe are engaged, either under bilateral agreements or illegally, in agricultural seasonal labour in Western European countries, notably in Germany. Chapter five, *supra*, notes 150 and 101 and accompanying text.

13 See especially article 2 of ILO *Convention No. 87 of 1948 concerning Freedom of Association and Protection of the Right to Organize*.

14 *Supra*, chapter three, note 157 and accompanying text.

15 Article 6(1)(b) of Convention No. 97 and article 10 of Convention No. 143.

the Central and Eastern European countries, namely the Czech and Slovak Federal Republic. This ILO social security instrument, like those which follow it, only operates on the basis of reciprocity. Conventions Nos. 97 and 143, however, guarantee these rights to all migrants legally resident in the territory of any state party which has ratified one or both of these instruments. The social security rights of illegal migrants are less well-defined, although Part I of ILO Convention No. 143 guarantees, on an equal basis with regular migrant workers, their rights arising out of past employment as regards, *inter alia*, social security and other benefits.[16]

Article 12 of the ICESCR recognizes the "right of everyone to the enjoyment of the highest attainable standard of physical and mental health". Although Convention No. 97 does not refer to medical care, subsequent ILO Conventions on social security have defined "social security" to include medical care.[17] As far as health and safety at work is concerned, ILO standards specifically relating to migrant workers are only to be found in a Recommendation.[18]

The right of this group of disadvantaged migrants to equality with nationals in respect of accommodation is set out in ILO Convention No. 97 of 1949.[19] Although Convention No. 143 of 1975 does not specify "housing" in its equality clause, by which states are required to promote equal treatment in practice between migrants and nationals, the accompanying recommendation maintains that migrants should enjoy effective equal opportunity and treatment with nationals in respect of, *inter alia*, "conditions of life, including housing... ". Consequently, a state policy to ensure equal treatment between migrants and nationals in respect of access to accommodation on the private housing market is advocated. The accompanying recommendation also proposes, that states, with a view to facilitating family reunion, should take the needs of migrant workers and their families into account in their housing construction and housing assistance policies.[20]

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16 Article 9(1).

17 *Supra*, chapter three, note 209 and accompanying text.

18 Paragraphs 21-22 of Recommendation No. 151 of 1975.

19 Article 6(1)(a)(iii).

20 See respectively paragraphs 2(i) and 16 of Recommendation No. 151. See also article 5 of Recommendation No. 115 of 1961 concerning Workers' Housing. *Supra*, chapter three, note 221 and

The right to education, irrespective of nationality and legal status, is guaranteed to "everyone" in the ICESCR and the ECHR. Education falls outside of the competence of the ILO, which is primarily concerned with labour-related rights, although as shown in chapter three, the education of migrant children is a question not entirely ignored by ILO standards, especially in the context of their cultural education and integration into society.[21] If this group of migrants, however, seeks financial assistance or scholarship funding for their children, which is especially relevant to higher education, they are unlikely to have much success, unless national regulations are sympathetic in this area. Among all the standards concerned with education examined in this thesis, only EC provisions, as interpreted by the ECJ, ensure equality between member state nationals in respect of equal access to educational assistance, including access to grants and scholarships,[22] and these provisions would not apply to the group under consideration.

Because of its interrelationship with labour matters, the education of workers is a focus of ILO attention. The right of migrant workers to equal treatment with nationals in respect of access to vocational training, is guaranteed by both ILO instruments.[23] In addition, ILO Recommendation No. 151 proposes that migrant workers also be given language instruction within working hours,[24] a crucial component of their integration into the working life of the host country. The ILO Committee of Independent Experts on the Application of Conventions and Recommendations has recognized, however, that the right of equal access to vocational training may be difficult to satisfy in the case of seasonal or short-term migrants.[25]

Rights to free choice of employment, family reunification, culture, political participation and residence, including the right to remain, naturalization and protection from unfair expulsion, are grouped together below because the protection migrants from the Mahgreb and

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accompanying text.

21 *Supra*, chapter three, notes 234-235 and accompanying text.

22 *Supra*, chapter eight, note 32 and accompanying text.

23 Article 6(1)(a)(i) of Convention No. 97 and article 10 of Convention No. 143.

24 Paragraph 7(1)(b).

25 *Supra*, chapter three, note 240 and accompanying text.

from Eastern Europe might expect to receive with respect to these rights is minimal. Indeed, these areas are at the core of the socio-economic, cultural and physical security concerns, considered in chapter two, which states have in respect of the presence of alien migrant workers and their families within their territories.

Article 14(a) of Convention No. 143 is the most enlightened provision in international human rights law regarding the right of migrant workers to free choice of employment. Only the provisions of the EC free movement of workers regime are stronger. Under article 14(a), migrant workers from the Mahgreb who are legally resident in countries that have ratified this ILO instrument, such as Italy or Portugal, are entitled to free choice of employment after two years of work and residence, or sooner if they have completed their first work contract that is under two years in duration. Article 14(a) thus curtails state sovereignty in a significant economic area and is the principal reason why so few states have ratified this Convention.[26]

Proclamations that the family is "the natural and fundamental group unit of society" and hence is entitled to the fullest protection by the state abound in international human rights law.[27] The reality of ensuring this protection in respect of alien families through family reunification, however, is different as many states view increasing family reunion less from a humanitarian perspective and more from the perspective of a threat to their physical sovereignty. The rights of migrant workers from the Mahgreb and Eastern Europe to reunion with their families are limited. ILO Convention No. 97 only touches upon this question from the standpoint of permanent migration, whereas states parties to ILO Convention No. 143 are given the discretion to "facilitate" the reunion of migrant workers with their spouses, dependent children and parents.[28] Moreover, the migrant worker should also be in possession of appropriate accommodation for his or her family, which meets the standards normally applicable to nationals.[29] Preventing family reunion, however, may constitute an infringement

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26 *Supra*, chapter three, notes 149-151 and accompanying text.
27 *Supra*, chapter one, notes 130-131 and accompanying text.
28 Article 13.
29 Paragraph 13(2) of Recommendation No. 151.

of the right to "family life" under article 8(1) of the ECHR. Recent cases decided by the European Court of Human Rights indicate that a foreigner, who is "rooted" in a country of employment on account of strong family ties, cannot be expelled from that country for reasons which are insufficient to expel other groups of foreigners, for example nationals from EC member states.[30] Indeed, migrants from the Mahgreb and Eastern Europe are not necessarily in a less protected position with regard to family reunification than other nationals, particularly those whose countries have ratified the ESC and the EMW but which do not belong to the EC, since the right to family reunion is qualified considerably under both of these instruments, in particular under the EMW.[31] Only EC provisions speak of a *right* to family reunification in the true sense, subject only to the condition that the migrant worker possesses accommodation for his or her family which is considered normal for national workers in that region of employment.[32]

The right of migrants to maintain their culture and language is also limited under the instruments which apply to this group of migrants under consideration. Indeed, only Convention No. 143 of 1975 refers to this question by obliging states parties to assist and encourage migrant workers and their families to preserve their cultural identity, including the possibility of providing mother-tongue education to migrant children.[33]

Migrant workers and their families possess no right to political participation in the country of employment in international human rights law. Indeed, any political activity in the host country, if connected with the right to freedom of expression and to freedom of assembly or association, is subject to restrictions under article 16 of the ECHR. Electoral participation is limited to nationals in the ICCPR[34] and in other regional human rights instruments. The instrument which comes closest to referring to such a right for non-nationals is the recent UN

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30 *Moustaquim* v. *Belgium*, *supra*, chapter seven, note 172 and accompanying text.

31 Article 19(6) of the ESC and article 12 of the EMW. See also the discussion in *supra*, chapter seven, notes 179-203 and accompanying text.

32 Article 10 of EC Regulation 1612/68.

33 Article 12(f).

34 Article 25.

Convention which obliges states to facilitate the "consultation or participation of migrant workers and their families in decisions concerning the life and administration of local communities",[35] but without specifically proposing that migrants are to be granted voting rights in local elections. Not even EC nationals residing and working in other EC member states presently have a right under EC law to political participation in the country of employment, although they will acquire this right when the *Treaty on European Union* comes into force. This is one of the areas where national law has developed more rapidly than international norms. For example, if migrants from the Mahgreb or Eastern Europe have legally resided in certain countries, such as the Netherlands for five years, or in Sweden, Norway or Denmark for three years, they acquire the right to vote at the municipal level. The access of migrants workers to the public service in the country of employment is limited in all instruments concerned with migrant workers, including ILO Convention No. 143.[36]

In most migrant-receiving countries in Europe, residence permits are aligned with work permits. If migrant workers lose their jobs, their residence status is jeopardized as a result, unless they have acquired more stable residence status, such as permanent residence. ILO Convention No. 143 stipulates that migrant workers who have been legally employed are not to be considered as in an irregular situation on account of loss of employment.[37] Hence unemployed migrant workers should be permitted to stay in the host country in order to find alternative employment, at least for a period corresponding to that during which they may be entitled to unemployment benefit.[38] There is no right to stay or to acquire naturalization under ILO instruments or under the ECHR. Indeed, no such right exists anywhere else in international human rights law. Only EC provisions allow for a right to remain after the completion of a certain period of employment and residence in the country of employment.[39]

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35 Article 42(2).
36 Article 14(c).
37 Article 8(1).
38 Paragraph 31 of Recommendation No. 151.
39 EC Regulation 1251/70.

As far as protection against unfair expulsion is concerned, the group of migrants under consideration can be expelled at will provided that a state follows the correct legal procedures.[40]

Illegal migrant workers and their families are in the least protected situation. As with legal migrants, they may claim protection of their basic or fundamental rights under universal and regional human rights instruments. Even these instruments, however, make specific exceptions which limit rights to lawful residence. For example, illegal migrants have no right to freedom of movement within a state,[41] nor any right to procedural protection against expulsion,[42] and their liberty can be denied under the ECHR with a view to expulsion or deportation.[43] Only the universal instruments specifically relating to migrant workers and their families, namely the UN Convention and ILO Convention No. 143, provide any comprehensive protection to undocumented migrants. The basic thrust of these instruments is to prevent clandestine migration and the abusive conditions which it gives rise to, although both also list some basic rights to which this vulnerable group is entitled over and above the basic civil and political guarantees in the universal and regional human rights treaties of general application.

The UN Convention is not yet in force, but it confirms the universality of basic human rights principles in the UDHR, the ICCPR and the ICESCR, namely that they encompass all human beings regardless of citizenship or legal status. Under Part III of the UN Convention, the minimum rights of illegal migrant workers and their families to equal employment and work conditions, membership of trade unions, social security, emergency health care, education and culture are guaranteed.

Part I of ILO Convention No. 143 is devoted to the problem of illegal migration. As

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40 Article 13 of the ICCPR and article 1 of Protocol No. 7 to the ECHR. Under both provisions, however, the "correct procedure" includes the right of aliens to have their cases reviewed by the competent authorities.

41 See article 12(1) of the ICCPR and article 2(1) of Protocol No. 4 to the ECHR.

42 The UN Convention, however, grants illegal migrant workers and members of their families limited procedural protection against expulsion (article 22).

43 Article 5(1)(f).

noted earlier, this instrument is most relevant to the hypothetical situation under consideration. Illegal migrant workers from the Mahgreb region or from Eastern European countries are protected in respect of their rights arising out of past employment. Their employers, therefore, cannot refuse them wages or infringe their rights to social security or other benefits on the grounds that their employment is illegal.[44] Furthermore, as part of its policy to prevent clandestine migration, this instrument obliges states to impose sanctions on employers for hiring illegal labour, but no punishments are to be imposed on the illegal migrants themselves.[45] This view is confirmed by the stipulation that migrants are not liable for the costs of their expulsion, namely the administrative and judicial costs.[46] Furthermore, Convention No. 143 is supportive of national programmes aimed at the regularization of the situation of migrant workers and their families.[47] It is noteworthy that Italy, which has ratified ILO Convention No. 143, implemented substantial regularization programmes in 1986 and 1990.[48] As discussed in chapter four, however, illegal migrants are unlikely to come forward to claim any of the rights to which they are entitled because of fear of detection by the authorities and, ultimately, expulsion.

3. Hierarchy of Protection

This brief overview illustrates the limited application of existing international human rights instruments to Europe's most vulnerable group of migrants. The UN Convention requires twenty ratifications in order to come into force, unlike most ILO Conventions which only require two ratifications.[49] If the same rules applied to ILO Convention No. 143, adopted

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44 Article 9(1). See also *supra*, note 16 and accompanying text and *supra*, chapter three, notes 280-284 and accompanying text.

45 Article 6(1). See also *supra*, chapter three, notes 278-279 and accompanying text.

46 Article 9(3). See also *supra*, chapter three, note 279.

47 Article 9(4) of Convention No. 143 and paragraph 8(1) of Recommendation No. 151.

48 Portugal, another party to Convention No. 143, was also considering the implementation of such programmes. See *supra*, chapter five, note 68 and accompanying text.

49 *Supra*, chapter three, note 43.

back in 1975, it would still not be in force today! For the time being, therefore, this latter instrument is the most relevant to the group of migrants considered above, but it effectively applies only to four countries in Europe: Italy and Portugal which have only recently experienced an influx of migrant workers, and Norway and Sweden which, in recent years, have closed their doors to labour immigration. The ECHR applies to all migrant workers and their families residing within the jurisdiction of the 24 states which have ratified it and is endowed with superior enforcement machinery, but as is evident from the above discussion, this instrument has only a very narrow application to the particular group of migrants under consideration. As with general international human rights instruments, it protects their fundamental rights. It also confers some protection with respect to their rights to education and family reunion. Finally, the ECHR also provides legal migrants with procedural safeguards against arbitrary expulsion. However, the companion instrument to the ECHR, namely the ESC which is concerned with the protection of economic and social rights, only applies to nationals of other states parties on the basis of reciprocity.

Indeed, it is disputable whether the protection accorded to nationals of states parties, such as those from Turkey, by the ECE, the ESC and the EMW is any stronger than that afforded migrants from the Mahgreb or from Eastern Europe by the ECHR and the ILO instruments combined. It must be emphasized that not all Council of Europe member states have ratified these instruments. Switzerland is an example in point. Out of all the instruments referred to above, this country has only ratified, as of January 1, 1992, the ECHR and a number of its Protocols as well as ILO *Convention No. 87 of 1948 concerning Freedom of Association and Protection of the Right to Organize.* Nor is Switzerland a member of the EC. Therefore, in theory, the rights of the large number of migrants residing and working in Switzerland, regardless of their country of origin, depend upon the protection conferred by national law or under provisions of bilateral labour migration agreements.

Council of Europe Conventions elaborate on many of the rights accorded to migrant workers and their families in other international instruments, such as ILO Conventions Nos. 97

and 143, but some of these rights, especially those concerned with areas at the core of the socio-economic and physical security concerns of sovereign states, are qualified considerably, for example the right of access to employment in the ECE and the right to family reunion in the EMW. Moreover, the supervision and enforcement machinery in these instruments is, generally-speaking, weak in comparison to that of the ECHR and to the tripartite composition of ILO supervisory procedures. Only the ESC has advanced the rights of migrant workers and their families, and this has largely been through the "case law" of the Committee of Independent Experts which has given a broad interpretation to the provisions that are concerned with the protection of migrants. Finally, neither the ESC, the EMW nor the ECE apply to illegal migrant workers, even if they originate from another Council of Europe state which has ratified one of these instruments.

The situation of one group of migrant workers and their families in Europe, namely those from regions outside of Europe and from the Central and Eastern parts of the continent, is in stark contrast to that experienced by the "privileged" migrants who belong to the EC "club" of states. The very *raison d'être* of a system designed by a group of states with the objective of removing the obstacles to the realization of free movement of labour among its members, demands that many of the rights commonly denied, or significantly restricted in respect of migrants, be granted in full. Hence the EC regime affords nationals of member states, with few limitations, rights to free choice of employment, social security, family reunification, and a right to remain in the country of employment after having worked and resided there for a defined period of time. With regard to enforcement, EC law is superior to the other instruments described because many of its provisions are *directly* applicable in the national courts of member states. In the context of such a system, the principle of state sovereignty, as described in chapter two of the thesis, loses much of its significance. Even so, some rights considered central to the definition of the national community, such as the right to political participation in the country of employment, for the time being at least remain beyond the reach of EC nationals.

4. From National Exclusion Towards Regional Exclusion?

The importance of the EC regime as an example of the quintessential system of protection of the rights of migrant workers and their families should not be underestimated. As observed in the Introduction to the Case Study of the regional protection of migrants in Europe, the EC free movement of labour system operates for the time being within the confined context of an integrated group of states with similar political, economic, social and cultural origins. Nonetheless, more and more states are clamouring for accession to this unified Europe. It is not inconceivable that, by the beginning of the 21st century, free movement of labour will be a reality among twenty or more states in Europe and not just among the present twelve in the EC and the five countries belonging to the Nordic Council, especially if free trade agreements among the members states of the European Free Trade Association (EFTA) and the EC come to fruition. Free trade between EFTA and the EC foresees the progressive introduction of freedom of movement between member states.[50]

The phenomenon of free movement of labour is not confined to Europe. The development of economic regionalization in other parts of the world is also bound to lead to the promotion of free movement of labour within these regions. Free trading zones have been set up or are being considered in North America, South America, South-East Asia, Central Asia, Central and Eastern Europe and, as noted in the introductory chapter, in certain parts of the African continent.[51]

The liberal dilemma, noted earlier and described fully in chapter two, between

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50 *SOPEMI 1992*, *supra*, Introduction, note 19 at 14.

51 See respectively the North American Free Trade Agreement (NAFTA) between the United States, Canada and Mexico, the Andean Pact (Bolivia, Colombia, Ecuador, Peru and Venezuela) established in 1991, and proposed agreements in South America (Brazil, Argentina, Paraguay and Uruguay), and South-East Asia (ASEAN countries, comprising Brunei, Indonesia, Malaysia, the Philippines, Singapore and Thailand, which plan to progressively establish a free trade area (AFTA) within 15 years from January 28, 1992). Plans to set up free trade agreements have also been undertaken in Central Asia (at the instigation of Turkey and Iran) and in Central and Eastern Europe (the Czech and Slovak Federal Republic, Hungary and Poland). *SOPEMI 1992*, *ibid.* at 15. For similar initiatives in Africa see *supra*, Introduction, note 134 and accompanying text.

excluding aliens or non-members from the benefits enjoyed by citizen-members and granting the former rights on the basis of their participation in and contribution to society has been transferred from the domain of the nation-state to the realm of regional economic pacts among countries. Chapter six described the dilemma faced by the EC whether to accord protection to non-EC nationals on the same basis as that accorded to nationals from EC member states.

As the hypothetical situation described above indicates, the gulf between these two sets of migrants is considerable. This gulf is a profound aberration in the continent which can best provide for the fulfilment of the rights discussed in this thesis. The powerful unifying forces at play in the European arena that aim to integrate national economic and political systems must not lose sight of the human factor. For it is the people and workers of Europe, regardless of their nationality or social status, who contribute to its development. The contribution of present and future migrant workers to the Europe of tomorrow must not entail the same toil, hardship and inequality that characterized the contribution of their predecessors. Such an outcome is simply unacceptable on a continent which only so recently celebrated the triumph of human rights over oppression.

The international human rights instruments examined in this thesis are attempting to bridge the divide between, on the one hand, a system such as that of the EC which enables those employed in countries other than their own to benefit from protection comparable to that afforded nationals, and on the other hand, the intransigent and exclusionary walls of state sovereignty. These efforts must continue for the sake of migrant workers and their families who rightly seek national and international recognition as individuals with equal moral worth and as fully integrated social beings and not merely as economic men and women.

The thought of Plato, cited at the beginning of these concluding remarks, leads us to the conviction that our treatment of the alien or the stranger among us, whether in the form of the immigrant labourer or otherwise, is a measure of our humanity. If we succeed in adequately protecting migrant workers and their families, we shall also be advancing and serving the rights and interests of all who live and work within our system of nation-states, including

paradoxically the rights and interests of those we aspire to protect most, namely citizen-members.

APPENDIX A

DECLARATION ON THE HUMAN RIGHTS OF INDIVIDUALS WHO ARE NOT NATIONALS OF THE COUNTRY IN WHICH THEY LIVE

[UN General Assembly Res. 40/144, December 13, 1985]

The General Assembly,

Considering that the Charter of the United Nations encourages universal respect for and observance of the human rights and fundamental freedoms of all human beings, without distinction as to race, sex, language or religion,

Considering that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth in that Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Considering that the Universal Declaration of Human Rights proclaims further that everyone has the right to recognition everywhere as a person before the law, that all are equal before the law and entitled without any discrimination to equal protection of the law, and that all are entitled to equal protection against any discrimination in violation of that Declaration and against any incitement to such discrimination,

Being aware that the States parties to the International Covenants on Human Rights undertake to guarantee that the rights enunciated in these Covenants will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Conscious that, with improving communications and the development of peaceful and friendly relations among countries, individuals increasingly live in countries of which they are not nationals,

Reaffirming the purposes and principles of the Charter of the United Nations,

Recognizing that the protection of human rights and fundamental freedoms provided for in international instruments should also be ensured for individuals who are not nationals of the country in which they live,

Proclaims this Declaration:

Article 1

For the purposes of this Declaration, the term "alien" shall apply, with due regard to qualifications made in subsequent articles, to any individual who is not a national of the State in which he or she is present.

Article 2

1. Nothing in this Declaration shall be interpreted as legitimizing the illegal entry into and presence in a State of any alien, nor shall any provision be interpreted as restricting the right of any State to promulgate laws and regulations concerning the entry of aliens and the terms and conditions of their stay or to establish differences between nationals and aliens. However, such laws and regulations shall not be incompatible with the international legal obligations of that State, including those in the field of human rights.

2. This Declaration shall not prejudice the enjoyment of the rights accorded by domestic law and of the rights which under international law a State is obliged to accord to aliens, even where this Declaration does not recognize such rights or recognizes them to a lesser extent.

Article 3

Every State shall make public its national legislation or regulations affecting aliens.

Article 4

Aliens shall observe the laws of the State in which they reside or are present and regard with respect the customs and traditions of the people of that State.

Article 5

1. Aliens shall enjoy, in accordance with domestic law and subject to the relevant international obligations of the State in which they are present, in particular the following rights:

(a) The right to life and security of person; no alien shall be subjected to arbitrary arrest or detention; no alien shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law;

(b) The right to protection against arbitrary or unlawful interference with privacy, family, home or correspondence;

(c) The right to be equal before the courts, tribunals and all other organs and authorities administering justice and, when necessary, to free assistance of an interpreter in criminal proceedings and, when prescribed by law, other proceedings;

(d) The right to choose a spouse, to marry, to found a family;

(e) The right to freedom of thought, opinion, conscience and religion; the right to manifest their religion or beliefs, subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others;

(f) The right to retain their own language, culture and tradition;

(g) The right to transfer abroad earnings, savings or other personal monetary assets, subject to domestic currency regulations.

2. Subject to such restrictions as are prescribed by law and which are necessary in a democratic society to protect national security, public safety, public order, public health or morals or the rights and freedoms of others, and which are consistent with the other rights recognized in the relevant international instruments and those set forth in this Declaration, aliens shall enjoy the following rights:

(a) The right to leave the country;

(b) The right to freedom of expression;

(c) The right to peaceful assembly;

(d) The right to own property alone as well as in association with others, subject to domestic law.

3. Subject to the provisions referred to in paragraph 2, aliens lawfully in the territory of a State shall enjoy the right to liberty of movement and freedom to choose their residence within the borders of the State.

4. Subject to national legislation and due authorization, the spouse and minor or dependent children of an alien lawfully residing in the territory of a State shall be admitted to accompany, join and stay with the alien.

Article 6

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

Article 7

An alien lawfully in the territory of a State may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall except where compelling reasons of national security otherwise require, be allowed to submit the reasons why he or she should not be expelled and to have the case reviewed by, and be represented for the purpose before, the competent authority, or a person or persons specially designated by the competent authority. Individual or collective expulsion of such aliens on grounds of race, colour, religion, culture, descent or national or ethnic origin is prohibited.

Article 8

1. Aliens lawfully residing in the territory of a State shall also enjoy, in accordance with the national laws, the following rights, subject to their obligations under article 4:

(a) The right to safe and healthy working conditions, to fair wages and equal remuneration for work of equal value without distinction of any kind, in particular, women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(b) The right to join trade unions and other organizations or associations of their choice and to participate in their activities. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary, in a democratic society, in the interests of national security or public order or for the protection of the rights and freedoms of others;

(c) The right to health protection, medical care, social security, education, rest and leisure, provided that they fulfil the requirements under the relevant regulations for the participation and that undue strain is not placed on the resources of the State.

2. With a view to protecting the rights of aliens carrying on lawful paid activities in the country in which they are present, such rights may be specified by the Governments concerned in multilateral or bilateral conventions.

Article 9

No alien shall be arbitrarily deprived of his or her lawfully acquired assets.

Article 10

Any alien shall be free at any time to communicate with the consulate or diplomatic mission of the State of which he or she is a national or, in the absence thereof, with the consulate or diplomatic mission of any other State entrusted with the protection of the interests of the State of which he or she is a national in the State where he or she resides.

APPENDIX B[1]

ILO INSTRUMENTS OF 1949 AND 1975 SPECIFICALLY RELATING TO MIGRANT WORKERS

[Selected Provisions]

CONVENTION No. 97 OF 1949 CONCERNING MIGRATION FOR EMPLOYMENT (REVISED)

[Preamble omitted]

Article 1

Each Member of the International Labour Organisation for which this Convention is in force undertakes to make available on request to the International Labour Office and to other Members

(a) information on national policies, laws and regulations relating to emigration and immigration;

(b) information on special provisions concerning migration for employment and the conditions of work and livelihood of migrants for employment;

(c) information concerning general agreements and special arrangements on these questions concluded by the Member.

Article 2

Each Member for which this Convention is in force undertakes to maintain, or satisfy itself that there is maintained, an adequate and free service to assist migrants for employment, and in particular to provide them with accurate information.

Article 3

1. Each Member for which this Convention is in force undertakes that it will, so far as national laws and regulations permit, take all appropriate steps against misleading propaganda relating to emigration and immigration.

2. For this purpose, it will where appropriate act in co-operation with other Members concerned.

Article 4

Measures shall be taken as appropriate by each Member, within its jurisdiction, to facilitate the departure, journey and reception of migrants for employment.

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1 The texts of the following ILO Conventions and Recommendations are reproduced from ILO, *International Labour Conventions and Recommendations 1919-1981* (Geneva: International Labour Office, 1982) at 785-810, 821-833.

Article 5

Each Member for which this Convention is in force undertakes to maintain within its jurisdiction, appropriate medical services responsible for

(a) ascertaining where necessary, both at the time of departure and on arrival, that migrants for employment and members of their families authorised to accompany or join them are in reasonable health;

(b) ensuring that migrants for employment and members of their family enjoy adequate medical attention and good hygienic conditions at the time of departure, during the journey and on arrival in the territory of destination.

Article 6

1. Each Member for which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that to which it applies to its own nationals in respect of the following matters:

(a) in so far as such matters are regulated by law or regulations, or are subject to the control of administrative authorities

(i) remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age for employment, apprenticeship and training, women's work and the work of young persons;

(ii) membership of trade unions and enjoyment of the benefits of collective bargaining;

iii) accommodation;

(b) social security (that is to say, legal provision in respect of employment injury, maternity, sickness, invalidity, old age, death, unemployment and family responsibilities, and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:

(i) there may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;

(ii) national laws or regulations of immigration countries may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension;

(c) employment taxes, dues or contributions payable in respect of the person employed; and

(d) legal proceedings relating to the matters referred to in this Convention.

2. In the case of a federal State the provisions of this Article shall apply in so far as the matters dealt with are regulated by federal law or regulations or are subject to the control of federal administrative authorities. The extent to which and manner in which these provisions shall be applied in respect of matters regulated by the law or regulations of the constituent States, provinces or cantons, or subject to the control of the administrative authorities thereof, shall be determined by each Member. The Member shall indicate in its annual report upon the application of the Convention the extent to which the matters dealt with in this Article are regulated by federal law or regulations or are subject to the control of federal administrative authorities. In respect of matters which are regulated by the law or regulations of the constituent States, provinces or cantons,

or are subject to the control of the administrative authorities thereof, the Member shall take the steps provided for in paragraph 7 (b) of article 19 of the Constitution of the International Labour Organisation.

Article 7

1. Each Member for which this Convention is in force undertakes that its employment service and other services connected with migration will co-operate in appropriate cases with the corresponding services of other Members.

2. Each Member for which this Convention is in force undertakes to ensure that the services rendered by its public employment service to migrants for employment are rendered free.

Article 8

1. 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 be returned to their territory of origin or 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 case exceed five years from the date of admission of such migrants.

Article 9

Each Member for which this Convention is in force undertakes to permit, taking into account the limits allowed by national laws and regulations concerning export and import of currency, the transfer of such part of the earnings and savings of the migrant for employment as the migrant may desire.

Article 10

In cases where the number of migrants going from the territory of one Member to that of another is sufficiently large, the competent authorities of the territories concerned shall, whenever necessary or desirable, enter into agreements for the purposes of regulating matters of common concern arising in connection with the application of the provisions of this Convention.

Article 11

1. For the purpose of this Convention the term "migrant for employment" means a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment.

2. This Convention does not apply to

(a) frontier workers;

(b) short-term entry of members of the liberal profession and artistes; and

(c) seamen.

Articles 12 and 13

[Ratifications and entry into force: standard final provision]

Article 14

1. Each Member ratifying this Convention may, by a declaration appended to its ratification, exclude from its ratification any or all of the Annexes to the Convention.

2. Subject to the terms of any such declaration, the provisions of the Annexes shall have the same effect as the provisions of the Convention.

3. Any Member which makes such a declaration may subsequently by a new declaration notify the Director-General that it accepts any or all of the Annexes mentioned in the declaration; as from the date of the registration of such notification by the Director-General the provisions of the Annexes shall be applicable to the Member in question.

4. While a declaration made under paragraph 1 of this Article remains in force in respect of any Annex, the Member may declare its willingness to accept that Annex as having the force of a Recommendation.

Articles 15 and 16

[Declarations of application to non-metropolitan territories]

Article 17

[Paragraphs 1 and 2: standard final provisions on denunciation]

3. At any time at which this Convention is subject to denunciation in accordance with the provisions of the preceding paragraphs any Member which does not so denounce it may communicate to the Director-General a declaration denouncing separately any Annex to the Convention which is in force for that Member.

4. The denunciation of this Convention or of any or all of the Annexes shall not affect the rights granted thereunder to a migrant or to members of his family if he immigrated while the Convention or the relevant Annex was in force in respect of the territory where the question of the continued validity of these rights arises.

Articles 18-21

[Notification, registration and examination of revision: standard final provisions]

Article 22

1. The International Labour Conference may, at any session at which the matter is included in its agenda, adopt by a two-thirds majority a revised text of any one or more of the Annexes to this Convention.

2. Each Member for which this Convention is in force shall, within the period of one year, or, in exceptional circumstances, of eighteen months, from the closing of the session of the Conference, submit any such revised text to the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.

3. Any such revised text shall become effective for each Member for which this Convention is in force on communication by that Member to the Director-General of the International Labour Office of a declaration notifying its acceptance of the revised text.

4. As from the date of the adoption of the revised text of the Annex by the Conference, only the revised text shall be open to acceptance by Members.

Article 23

[Authoritative texts: standard final provisions]

ANNEX 1

RECRUITMENT, PLACING AND CONDITIONS OF LABOUR OF MIGRANTS FOR EMPLOYMENT RECRUITED OTHERWISE THAN UNDER GOVERNMENT-SPONSORED ARRANGEMENTS FOR GROUP TRANSFER

Article 1

This Annex applies to migrants for employment who are recruited otherwise than under Government-sponsored arrangements for group transfer.

Article 2

For the purpose of this Annex

(a) the term "recruitment" means

(i) the engagement of a person in one territory on behalf of an employer in another territory, or

(ii) the giving of an undertaking to a person in one territory to provide him with employment in another territory,

together with the making of any arrangements in connection with the operations mentioned in (i) and (ii) including the seeking for and selection of emigrants and the preparation for the departure of the emigrants;

(b) the term "introduction" means any operations for ensuring or facilitating the arrival in or admission to a territory of persons who have been recruited within the meaning of paragraph (a) of this Article; and

(c) the term "placing" means any operations for the purpose of ensuring or facilitating the employment of persons who have been introduced within the meaning of paragraph (b) of this Article.

Article 3

1. Each Member for which this Annex is in force, the laws and regulations of which permit the operations of recruitment, introduction and placing as defined in Article 2, shall regulate such of the said operations as are permitted by its laws and regulations in accordance with the provisions of this Article.

2. Subject to the provisions of the following paragraph, the right to engage in the operations of recruitment,introduction and placing shall be restricted to

(a) public employment offices or other public bodies of the territory in which the operations take place;

(b) public bodies of a territory other than that in which the operations take place;

(c) any body established in accordance with the terms of an international instrument.

3. In so far as national laws and regulations or a bilateral arrangement permit, the operations of recruitment, introduction and placing may be undertaken by

(a) the prospective employer or a person in his service acting on his behalf, subject, if necessary in the interest of the migrant, to the approval and supervision of the competent authority;

(b) a private agency, if given prior authorisation so to do by the competent authority of the territory where the said operations are to take place, in such cases and under such conditions as may be prescribed by

(i) the laws and regulations of that territory, or

(ii) agreement between the competent authority of the territory of emigration or any body established in accordance with the terms of an international instrument and the competent authority of the territory of immigration.

4. The competent authority of the territory where the operations take place shall supervise the activities of bodies and persons to whom authorisations have been issued in pursuance of paragraph 3 (b), other than any body established in accordance with the terms of an international instrument, the position of which shall continue to be governed by the terms of the said instrument by any agreement made between the body and the competent authority concerned.

5. Nothing in this Article shall be deemed to permit the acceptance of a migrant for employment for admission to the territory of any Member by any person or body other than the competent authority of the territory of immigration.

Article 4

Each Member for which this Annex is in force undertakes to ensure that the services rendered by its public employment service in connection with the recruitment, introduction or placing of migrants for employment are rendered free.

Article 5

1. Each Member for which this Annex is in force which maintains a system of supervision of contracts of employment between an employer, or a person acting on his behalf, and a migrant for employment undertakes to require

(a) that a copy of the contract of employment shall be delivered to the migrant before departure or, if the Governments concerned so agree, in a reception centre on arrival in the territory of immigration;

(b) that the contract shall contain provisions indicating the conditions of work and particularly the remuneration offered to the migrant;

(c) that the migrant shall receive in writing before departure, by a document which relates either to him individually or to a group of migrants of which he is a member, information concerning the general conditions of life and work applicable to him in the territory of immigration.

2. Where a copy of the contract is to be delivered to the migrant on arrival in the territory of immigration, he shall be informed in writing before departure, by a document which relates either to him individually or to a group of migrants of which he is a member, of the occupational category for which he is engaged and the other conditions of work, in particular the minimum wage which is guaranteed to him.

3. The competent authority shall ensure that the provisions of the preceding paragraphs are enforced and that appropriate penalties are applied in respect of violations thereof.

Article 6

The measures taken under Article 4 of the Convention shall, as appropriate, include

(a) the simplification of administrative formalities;

(b) the provision of interpretation services;

(c) any necessary assistance during an initial period in the settlement of the migrants and members of their families authorised to accompany or join them; and

(d) the safeguarding of the welfare, during the journey and in particular on board ship, of migrants and members of their families authorised to accompany or join them.

Article 7

1. In cases where the number of migrants for employment going from the territory of one Member to that of another is sufficiently large, the competent authorities of the territories concerned shall, whenever necessary or desirable, enter into agreements for the purpose of regulating matters of common concern arising in connection with the application of the provisions of this Annex.

2. Where the members maintain a system of supervision over contracts of employment, such agreements shall indicate the methods by which the contractual obligations of the employers shall be enforced.

Article 8

Any person who promotes clandestine or illegal immigration shall be subject to appropriate penalties.

ANNEX II

RECRUITMENT, PLACING AND CONDITIONS OF LABOUR OF MIGRANTS FOR EMPLOYMENT RECRUITED UNDER GOVERNMENT-SPONSORED ARRANGEMENTS FOR GROUP TRANSFER

Article 1

This Annex applies to migrants for employment who are recruited under Government-sponsored arrangements for group transfer.

Article 2

For the purpose of this Annex

(a) the term "recruitment" means

(i) the engagement of a person in one territory on behalf of an employer in another territory under a Government-sponsored arrangement for group transfer, or

(ii) the giving of an undertaking to a person in one territory to provide him with employment in another territory under a Government-sponsored arrangement for group transfer,

together with the making of any arrangements in connection with the operations mentioned in (i) and (ii) including the seeking for and selection of emigrants and the preparation for the departure of the emigrants;

(b) the term "introduction" means any operations for ensuring or facilitating the arrival in or admission to a territory of persons who have been recruited under a Government-sponsored arrangement for group transfer within the meaning of subparagraph (a) of this paragraph; and

(c) the term "placing" means any operations for the purpose of ensuring or facilitating the employment of persons who have been introduced under a Government-sponsored arrangement for group transfer within the meaning of subparagraph (b) of this paragraph.

Article 3

1. Each Member for which this Annex is in force, the laws and regulations of which permit the operations of recruitment, introduction and placing as defined in Article 2, shall regulate such of the said operations as are permitted by its laws and regulations in accordance with the provisions of this Article.

2. Subject to the provisions of the following paragraph, the right to engage in the operations of recruitment, introduction and placing shall be restricted to

(a) public employment offices or other public bodies of the territory in which the operations take place;

(b) public bodies of a territory other than that in which the operations take place which are authorised to operate in that territory by agreement between the Governments concerned;

(c) any body established in accordance with the terms of an international instrument.

3. In so far as national laws and regulations or a bilateral arrangement permit, and subject, if necessary in the interest of the migrant, to the approval and supervision of the competent authority, the operations of recruitment, introduction and placing may be undertaken by

(a) the prospective employer or a person in his service acting on his behalf,

(b) private agencies.

4. The right to engage in the operations of recruitment, introduction and placing shall be subject to the prior authorisation of the competent authority of the territory where the said operations are to take place in such cases and under such conditions as may be prescribed by

(i) the laws and regulations of that territory, or

(ii) agreement between the competent authority of the territory of emigration or any body established in accordance with the terms of an international instrument and the competent authority of the territory of immigration.

5. The competent authority of the territory where the operations take place shall, in accordance with any agreements made between the competent authorities concerned, supervise the activities of bodies and persons to whom authorizations have been issued in pursuance of the preceding paragraph, other than any body

established in accordance with the terms of an international instrument, the position of which shall continue to be governed by the terms of the said instrument or by any agreement made between the body and the competent authority concerned.

6. Before authorising the introduction of migrants for employment the competent authority of the territory of immigration shall ascertain whether there is not a sufficient number of persons already available capable of doing the work in question.

7. Nothing in this Article shall be deemed to permit the acceptance of a migrant for employment for admission to the territory of any Member by any person or body other than the competent authority of the territory of immigration.

Article 4

1. Each Member for which this Annex is in force undertakes to ensure that the services rendered by its public employment service in connection with the recruitment, introduction or placing of migrants for employment are rendered free.

2. The administrative costs of recruitment, introduction and placing shall not be borne by the migrants.

Article 5

In the case of collective transport of migrants from one country to another necessitating passage in transit through a third country, the competent authority of the territory of transit shall take measures for expediting the passage, to avoid delays and administrative difficulties.

Article 6

1. Each Member for which this Annex is in force which maintains a system of supervision of contracts of employment between an employer, or a person acting on his behalf, and a migrant for employment undertakes to require

(a) that a copy of the contract of employment shall be delivered to the migrant before departure or, if the Governments concerned so agree, in a reception centre on arrival in the territory of immigration;

(b) that the contract shall contain provisions indicating the conditions of work and particularly the remuneration offered to the migrant;

(c) that the migrant shall receive in writing before departure, by a document which relates either to him individually or to a group of migrants of which he is a member, information concerning the general conditions of life and work applicable to him in the territory of immigration.

2. Where a copy of the contract is to be delivered to the migrant on arrival in the territory of immigration, he shall be informed in writing before departure, by a document which relates either to him individually or to a group of migrants of which he is a member, of the occupational category for which he is engaged and the other conditions of work, in particular the minimum wage which is guaranteed to him.

3. The competent authority shall ensure that the provisions of the preceding paragraphs are enforced and that appropriate penalties are applied in respect of violations thereof.

Article 7

The measures taken under Article 4 of the Convention shall, as appropriate, include

(a) the simplification of administrative formalities;

(b) the provision of interpretation services;

(c) any necessary assistance during an initial period in the settlement of the migrants and members of their families authorised to accompany or join them; and

(d) the safeguarding of the welfare, during the journey and in particular on board ship, of migrants and members of their families authorised to accompany or join them.

(e) permission for the liquidation and transfer of property of migrants for employment admitted on a permanent basis.

Article 8

Appropriate measures shall be taken by the competent authority to assist migrants for employment, during an initial period, in regard to matters concerning their conditions of employment; where appropriate, such measures may be taken in co-operation with approved voluntary organisations.

Article 9

If a migrant for employment introduced into the territory of a Member in accordance with the provisions of Article 3 of this Annex fails, for a reason for which he is not responsible, to secure the employment for which he has been recruited or other suitable employment, the cost of his return and that of the members of his family who have been authorised to accompany or join him, including administrative fees, transport and maintenance charges to the final destination, and charges for the transport of household belongings, shall not fall upon the migrant.

Article 10

If the competent authority of the territory of immigration considers that the employment for which a migrant for employment was recruited under Article 3 of this Annex has been found to be unsuitable, it shall take appropriate measures to assist him in finding suitable employment which does not prejudice national workers and shall take such steps as will ensure his maintenance pending placing in such employment, or his return to the area of recruitment if the migrant is willing or agreed to such return at the time of his recruitment, or his resettlement elsewhere.

Article 11

If a migrant for employment who is a refugee or a displaced person and who has entered a territory of immigration in accordance with Article 3 of this Annex becomes redundant in any employment in that territory, the competent authority of that territory shall use its best endeavours to enable him to obtain suitable employment which does not prejudice national workers, and shall take such steps as will ensure his maintenance pending placing in suitable employment or his resettlement elsewhere.

Article 12

1. The competent authorities of the territories concerned shall enter into agreements for the purpose of regulating matters of common concern arising in connection with the application of the provisions of this Annex.

2. Where the Members maintain a system of supervision over contracts of employment, such agreements shall indicate the methods by which the contractual obligations of the employer shall be enforced.

3. Such agreements shall provide, where appropriate, for co-operation between the competent authority of the territory of emigration or a body established in accordance with the terms of an international instrument and the competent authority of the territory of immigration, in respect of the assistance to be given to migrants concerning their conditions of employment in virtue of the provisions of Article 8.

Article 13

Any person who promotes clandestine or illegal immigration shall be subject to appropriate penalties.

ANNEX III

IMPORTATION OF THE PERSONAL EFFECTS, TOOLS AND EQUIPMENT OF MIGRANTS FOR EMPLOYMENT

Article 1

1. Personal effects belonging to recruited migrants for employment and members of their families who have been authorised to accompany or join them shall be exempt from customs duties on arrival in the territory of immigration.

2. Portable hand-tools and portable equipment of the kind normally owned by workers for the carrying out of their particular trades belonging to recruited migrants for employment and members of their families who have been authorised to accompany or join them shall be exempt from customs duties on arrival in the territory of immigration if such tools and equipment can be shown at the time of importation to be in their actual ownership or possession, to have been in their possession and use for an appreciable time, and to be intended to be used by them in the course of their occupation.

Article 2

1. Personal effects belonging to migrants for employment and members of their families who have been authorised to accompany or join them shall be exempt from customs duties on the return of the said persons to their country of origin if such persons have retained the nationality of that country at the time of their return there.

2. Portable hand-tools and portable equipment of the kind normally owned by workers for the carrying out of their particular trades belonging to migrants for employment and members of their families who have been authorised to accompany or join them shall be exempt from customs duties on return of the said persons to their country of origin if such persons have retained the nationality of that country at the time of their return there and if such tools and equipment can be shown at the time of importation to be in their actual ownership and possession and use for an appreciable time, and to be intended to be used by them in the course of their occupation.

RECOMMENDATION No. 86 OF 1949
CONCERNING MIGRATION FOR EMPLOYMENT (REVISED)

[Preamble omitted]

I

1. For the purpose of this Recommendation

(a) the term "migrant for employment" means a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment;

(b) the term "recruitment" means

(i) the engagement of a person in one territory on behalf on an employer in another territory, or

(ii) the giving of an undertaking to a person in one territory to provide him with employment in another territory,

together with the making of any arrangements in connection with the operations mentioned in (i) and (ii) including the seeking for and selection of emigrants and the preparation for departure of the emigrants;

(c) the term "introduction" means any operations for ensuring or facilitating the arrival in or admission to a territory of persons who have been recruited within the meaning of subparagraph (b);

(d) the term "placing" means any operations for the purpose of ensuring or facilitating the employment of persons who have been introduced within the meaning of subparagraph (c).

2. For the purpose of this Recommendation, references to the Government or competent authority of a territory of emigration should be interpreted as referring, in the case of migrants who are refugees or displaced persons, to any body established in accordance with the terms of an international instrument which may be responsible for the protection of refugees and displaced persons who do not benefit from the protection of any Government.

3. This Recommendation does not apply to

(a) frontier workers;

(b) short-term entry of members of the liberal profession and artistes; and

(c) seamen.

II

4. (1) It should be the general policy of Members to develop and utilise all possibilities of employment and for this purpose to facilitate the international distribution of manpower and in particular the movement of manpower from countries which have a surplus of manpower to those countries that have a deficiency.

(2) The measures taken by each Member should have due regard to the manpower situation in the country and the Government should consult the appropriate organisations of employers and workers on all general questions concerning migration for employment.

5. (1) The free service provided in each country to assist migrants and their families and in particular to provide them with accurate information should be conducted

(a) by public authorities; or

(b) by one or more voluntary organisations not conducted with a view to profit, approved for the purpose by the public authorities, and subject to the supervision of the said authorities; or

(c) partly by the public authorities and partly by one or more voluntary organisations fulfilling the conditions stated in subparagraph (b) of this Paragraph.

(2) The service should advise migrants and their families, in their languages or dialects or at least in a language which they can understand, on matters relating to emigration, immigration, employment and living conditions, including health conditions in the place of destination, return to the country of origin or of emigration, and generally speaking any other question which may be of interest to them in their capacity as migrants.

(3) The service should provide facilities for migrants and their families with regard to the fulfilment of administrative formalities and other steps to be taken in connection with the return of the migrants to the country of origin or of emigration, should the case arise.

(4) With a view to facilitating the adaptation of migrants, preparatory courses should, where necessary, be organised to inform the migrants of the general conditions and the methods of work prevailing in the country of immigration, and to instruct them in the language of that country. The countries of emigration and immigration should mutually agree to organise such courses.

6. On request information should be made available by Members to the International Labour Office and to other Members concerning their emigration laws and regulations, including administrative provisions relating to restrictions on emigration and facilities granted to emigrants, and appropriate details concerning the categories of persons wishing to emigrate.

7. On request information should be made available by Members to the International Labour Office and to other Members concerning their immigration laws and regulations, including administrative provisions, entry permits where needed, number and occupational qualifications of immigrants desired, laws and regulations affecting admission of migrants to employment, and any special facilities granted to migrants and measures to facilitate their adaptation to the economic and social organisation of the country of immigration.

8. There should, as far as possible, be a reasonable interval between the publication and coming into force of any measure altering the conditions under which emigration or immigration or the employment of migrants is permitted in order that these conditions may be notified in good time to persons who are preparing to emigrate.

9. Provision should be made for adequate publicity to be given at appropriate stages to the principal measures referred to in the preceding Paragraph, such publicity to be in the languages most commonly known to the migrants.

10. Migration should be facilitated by such measures as may be appropriate

(a) to ensure that migrants for employment are provided in case of necessity with adequate accommodation, food and clothing on arrival in the country of immigration;

(b) to ensure, where necessary, vocational training so as to enable the migrants for employment to acquire the qualifications required in the country of immigration;

(c) to permit, taking into account the limits allowed by national laws and regulations concerning export and import of currency, the transfer of such part of the earnings and savings of migrants for employment as the migrants may desire;

(d) to arrange, in the case of permanent migration, for the transfer, where desired, to the country of immigration, of the capital of migrants for employment, within the limits allowed by national laws and regulations concerning export and import of currency;

(e) to provide access to schools for migrants and members of their families.

11. Migrants and the members of their families should be assisted in obtaining access to recreation and welfare facilities, and steps should be taken where necessary to ensure that special facilities are made available during the initial period of settlement in the country of immigration.

12. In the case of migrants under Government-sponsored arrangements for group transfer, medical assistance should be extended to such migrants in the same manner as provided for nationals.

IV

13. (1) Where necessary in the interest of the migrant, Members should require that any intermediary who undertakes the recruitment, introduction or placing of any migrants for employment on behalf of an employer must obtain a written warrant from the employer, or some other document proving that he is acting on the employer's behalf.

(2) This document should be drawn up in, or translated into, the official language of the country of emigration and should set forth all necessary particulars concerning the employer, concerning the nature and scope of the recruitment, introduction or placing which the intermediary is to undertake, and concerning the employment offered, including the remuneration.

14. (1) The technical selection of migrants for employment should be carried out in such a way as to restrict migration as little as possible while ensuring that the migrants are qualified to perform the required work.

(2) Responsibility for such selection should be entrusted

(a) to official bodies; or

(b) where appropriate, to private bodies of the territory of immigrants duly authorised and, where necessary in the interest of the migrant, supervised by the competent authority of the territory of emigration.

(3) The right to engage in selection should be subject to the prior authorisation of the competent authority of the territory where the said operation takes place, in such cases under such conditions as may be prescribed by the laws and regulations of that territory of emigration and the Government of the territory of immigration.

(4) As far as possible, intending migrants for employment should, before their departure from the territory of emigration, be examined for purposes of occupational and medical selection by a representative of the competent authority of the territory of immigration.

(5) If recruitment takes place on a sufficiently large scale there should be arrangements for close liaison and consultation between the competent authorities of the territories of emigration and immigration concerned.

(6) The operations referred to in the preceding subparagraphs of this Paragraph should be carried out as near as possible to the place where the intending migrant is recruited.

15. (1) Provision should be made by agreement for authorisation to be granted for a migrant for employment introduced on a permanent basis to be accompanied or joined by the members of his family.

(2) The movement of the members of the family of such a migrant authorised to accompany or join him should be specially facilitated by both the country of emigration and the country of immigration.

(3) For the purposes of this Paragraph, the members of the family of a migrant for employment should include his wife and minor children; favourable consideration should be given to requests for the inclusion of other members of the family dependent upon the migrant.

V

16. (1) Migrants for employment authorised to reside in a territory and the members of their families authorised to accompany or join them should as far as possible be admitted to employment in the same conditions as nationals.

(2) In countries in which the employment of migrants is subject to restrictions, these restrictions should as far as possible

(a) cease to be applied to migrants who have regularly resided in the country for a period, the length of which should not, as a rule, exceed five years; and

(b) cease to be applied to the wife and children of an age to work who have been authorised to accompany or join the migrant, at the same time as they cease to be applied to the migrant.

17. In countries where the number of migrants for employment is sufficiently large, the conditions of employment of such workers should be specially supervised, such supervision being undertaken according to circumstances either by a special inspection service or by labour inspectors or other officials specialising in this work.

VI

18. (1) When a migrant for employment has been regularly admitted to the territory of a Member, the said Member should, as far as possible, refrain from removing such person, or the members of his family from its territory on account of his lack of means, or the state of the employment market, unless an agreement to this effect has been concluded between the competent authorities of the emigration and immigration territories concerned.

(2) Any such agreement should provide

(a) the length of time the said migrant has been in the territory of immigration shall be taken into account and that in principle no migrant shall be removed who has been there for more than five years;

(b) that the migrant must have exhausted his rights to unemployment insurance benefit;

(c) that the migrant must have been given reasonable notice so as to give him time, more particularly to dispose of his property;

(d) that suitable arrangements shall have been made for his transport and that of the members of his family;

(e) that the necessary arrangements shall have been made to ensure that he and the members of his family are treated in a humane manner; and

(f) that the costs of the return of the migrant and the members of his family and of the transport of their household belongings to their final destination shall not fall on him.

19. Appropriate steps should be taken by the authorities of the territories concerned to consult the employers' and workers' organisations concerning the operations of recruitment, introduction and placing of migrants for employment.

VII

20. When migrants for employment or members of their families who have retained the nationality of the state of origin return there, that country should admit such persons to the benefit of any measures in force for the granting of poor relief and unemployment relief, and for promoting the re-employment of the unemployed, by exempting them from the obligation to comply with any condition as to previous residence or employment in the country or place.

VIII

21. (1) Members should in appropriate cases supplement the Migration for Employment Convention (Revised), 1949, and the preceding Paragraphs of the present Recommendation by bilateral agreements, which should specify the methods of applying the principles set forth in the Convention and in the Recommendation.

(2) In concluding such agreements, Members should take into account the provisions of the Model Agreement annexed to the present Recommendation in framing appropriate clauses for the organisation of migration for employment of migrants, including refugees and displaced persons.

ANNEX

MODEL AGREEMENT ON TEMPORARY AND PERMANENT MIGRATION FOR EMPLOYMENT, INCLUDING MIGRATION OF REFUGEES AND DISPLACED PERSONS

[Selected Provisions][2]

Article 17. Equality of Treatment

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:

(a) in so far as such matters are regulated by laws or regulations or are subject to the control of administrative authorities,

(i) remuneration, including family allowances where these form part of remuneration, hours of work, weekly rest days, overtime arrangements, holidays with pay and other regulations concerning employment, including limitations on home work, minimum age provisions, women's work, and the work of young persons;

(ii) membership of trade unions and enjoyment of the benefits of collective bargaining;

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2 The phrases and passages in italics refer primarily to permanent migration; those enclosed within square brackets refer solely to the migration of refugees and displaced persons.

iii) admission to schools, to apprenticeship and to courses or schools for vocational or technical training, provided that this does not prejudice nationals of the country of immigration;

(iv) recreation and welfare measures;

(b) employment taxes, dues or contributions payable in respect of the persons employed;

(c) hygiene, safety and medical assistance;

(d) legal proceedings relating to matters referred to in this Agreement.

Article 20. Housing Conditions

The competent authority of the territory of immigration shall ensure that migrants *and the members of their families* have hygienic and suitable housing, in so far as the necessary housing is available.

CONVENTION No. 143 OF 1975 CONCERNING MIGRATIONS IN ABUSIVE CONDITIONS AND THE PROMOTION OF EQUALITY OF OPPORTUNITY AND TREATMENT OF MIGRANT WORKERS

The General Conference of the International Labour Organisation,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its Sixtieth Session on 4 June 1975, and

Considering that the Preamble of the Constitution of the International Labour Organisation assigns to it the task of protecting "the interests of workers when employed in countries other than their own", and

Considering that the Declaration of Philadelphia reaffirms, among the principles on which the Organisation is based, that "labour is not a commodity", and that "poverty anywhere constitutes a danger to prosperity everywhere", and recognises the solemn obligation of the ILO to further programmes which will achieve in particular full employment through "the transfer of labour, including for employment...",

Considering the ILO World Employment Programme and the Employment Policy Convention and Recommendation, 1964, and emphasizing the need to avoid the excessive and uncontrolled or unassisted increase of migratory movements because of their negative social and human consequences, and

Considering that in order to overcome underdevelopment and structural and chronic unemployment, the governments of many countries increasingly stress the desirability of encouraging the transfer of capital and technology rather than the transfer of workers in accordance with the needs and requests of these countries in the reciprocal interest of the countries of origin and the countries of employment, and

Considering the right of everyone to leave any country, including his own and to enter his own country, as set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, and

Recalling the provisions contained in the Migration for Employment Convention and Recommendation (Revised), 1949, in the Protection of Migrant Workers (Underdeveloped Countries) Recommendation, 1955, in the Employment Policy Convention and Recommendation, 1964, in the Employment Service Convention and Recommendation, 1948, and in the Fee-Charging Employment Agencies Convention (Revised), 1949, which deal with such matters as the regulation of the recruitment, introduction and placing of migrant workers, the provision of accurate information relating to migration, the minimum conditions to be enjoyed by migrants in

transit and on arrival, the adoption of an active employment policy and international collaboration in these matters, and

Considering that the migration of workers due to conditions in labour markets should take place under the responsibility of official agencies for employment or in accordance with the relevant bilateral or multilateral agreements, in particular those permitting free circulation of workers, and

Considering that evidence of the existence of illicit and clandestine trafficking in labour calls for further standards specifically aimed at eliminating these abuses, and

Recalling the provisions of the Migration for Employment Convention (Revised), 1949, which require ratifying Members to apply to immigrants lawfully within their territory treatment not less favourable than that which they apply to their nationals in respect of a variety of matters which it enumerates, in so far as these are regulated by laws or regulations or subject to the control of administrative authorities, and

Recalling that the definition of the term "discrimination" in the Discrimination (Employment and Occupation) Convention, 1958, does not mandatorily include distinctions on the basis of nationality, and

Considering that further standards, covering also social security, are desirable in order to promote equality of opportunity and treatment of migrant workers and, with regard to matters regulated by laws or regulations or subject to the control of administrative authorities, ensure treatment at least equal to that of nationals, and

Noting that, for the full success of action regarding the very varied problems of migrant workers, it is essential that there be close co-operation with the United Nations and of other specialised agencies, and

Noting that, in the framing of the following standards, account has been taken of the work of the United Nations and other specialised agencies and that, with a view to avoiding duplication and to ensuring appropriate co-ordination, there will be continuing co-operation in promoting and securing the application of the standards, and

Having decided upon the adoption of the certain proposals with regard to migrant workers, which is the fifth item of the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention supplementing the Migration for Employment Convention (Revised), 1949, and the Discrimination (Employment and Occupation) Convention, 1958,

Adopts this twenty-fourth day of June of the year one thousand nine hundred and seventy-five the following Convention, which may be cited as the Migrant Workers (Supplementary Provisions) Convention, 1975:

PART 1. MIGRATIONS IN ABUSIVE CONDITIONS

Article 1

Each Member for which this Convention is in force undertakes to respect the basic human rights of all migrant workers.

Article 2

1. Each Member for which this Convention is in force shall systematically seek to determine whether there are illegally employed migrant workers on its territory and whether there depart from, pass through or arrive in its territory any movements of migrants for employment in which the migrants are subjected during their journey, on arrival or during their period of residence and employment to conditions contravening relevant international multilateral or bilateral instruments or agreements, or national laws or regulations.

2. The representative organisations of employers and workers shall be fully consulted and enabled to furnish any information in their possession on this subject.

Article 3

Each Member shall adopt all necessary and appropriate measures, both within its jurisdiction and in collaboration with other Members

(a) to suppress clandestine movements of migrants for employment and illegal employment of migrants, and

(b) against the organisers of illicit or clandestine movements of migrants for employment departing from, passing through or arriving in its territory, and against those who employ workers who have immigrated in illegal conditions,

in order to prevent and to eliminate the abuses referred to in Article 2 of this Convention.

Article 4

In particular, Members shall take such measures as are necessary, at the national and the international level, for systematic contact and exchange of information on the subject with other States, in consultation with representative organisations of employers and workers.

Article 5

One of the purposes of the measures taken under Articles 3 and 4 of this Convention shall be that the authors of manpower trafficking can be prosecuted whatever the country from which they exercise their activities.

Article 6

1. Provision shall be made under national laws and regulations for the effective detection of the illegal employment of migrant workers and for the definition and the application of administrative, civil and penal sanctions, which include imprisonment in their range, in respect of the illegal employment of migrant workers, in respect of the organisation of movements of migrants for employment defined as involving the abuses referred to in Article 2 of this Convention, and in respect of knowing assistance to such movements, whether for profit or otherwise.

2. Where an employer is prosecuted by virtue of the provision made in pursuance of this Article, he shall have the right to furnish proof of his good faith.

Article 7

The representative organisations of employers and workers shall be consulted in regard to the laws and regulations and other measures provided for in this Convention and designed to prevent and eliminate the abuses referred to above, and the possibility of their taking initiatives for this purpose shall be recognised.

Article 8

1. On condition that he has resided legally in the territory for the purpose of employment, the migrant worker shall not be regarded as in an illegal or irregular situation by the mere fact of the loss of his employment, which shall not in itself imply the withdrawal of his authorisation of residence or, as the case may be, work permit.

2. Accordingly, he shall enjoy equality of treatment with nationals in respect in particular of guarantees of security of employment, the provision of alternative employment, relief work and retraining.

Article 9

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

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

3. In case of expulsion of the worker or his family, the cost shall not be borne by them.

4. Nothing in this Convention shall prevent Members from giving persons who are illegally residing or working within the country the right to stay and to take up legal employment.

PART II. EQUALITY OF OPPORTUNITY AND TREATMENT

Article 10

Each Member for which the Convention is in force undertakes to declare and pursue a national policy to promote and 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 individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory.

Article 11

1. For the purpose of this Part of this Convention, the term "migrant worker" means a person who migrates or who has migrated from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant worker.

2. This Part of this Convention does not apply to

(a) frontier workers;

(b) artistes and members of the liberal professions who have entered the country on a short-term basis;

(c) seamen;

(d) persons coming specifically for purposes of training or education;

(e) employees of organisations or undertakings operating within the territory of a country who have been admitted temporarily to that country at the request of their employer to undertake specific duties or assignments, for a limited and defined period of time, and who are required to leave that country on the completion of their duties or assignments.

Article 12

Each Member shall, by methods appropriate to national conditions and practice

(a) seek the co-operation of employers' and workers' organisations and other appropriate bodies in promoting the acceptance and observance of the policy provided for in Article 10 of this Convention;

(b) enact such legislation and promote such educational programmes as may be calculated to secure the acceptance and observance of this policy;

(c) take measures, encourage educational programmes and develop other activities aimed at acquainting migrant workers as fully as possible with the policy, with their rights and obligations and with activities designed to give effective assistance to migrant workers in the exercise of their rights and for their protection;

(d) repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy;

(e) 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;

(f) 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;

(g) guarantee equality of treatment, with regard to working conditions, for all migrant workers who perform the same activity whatever might be the particular conditions of their employment.

Article 13

1. A Member may take all necessary measures to which fall within its competence and collaborate with other Members to facilitate the reunification of the families of all migrant workers legally residing in its territory.

2. The members of the family of the migrant worker to which this Article applies are the spouse and dependent children, father and mother.

Article 14

A Member may

(a) 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 within 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;

(b) after appropriate consultation with the representative organisations of employers and workers, make regulations concerning recognition of occupational qualifications acquired outside its territory, including certificates and diplomas;

(c) restrict access to limited categories of employment or functions where this is necessary in the interests of the State.

PART III FINAL PROVISIONS

Article 15

This Convention does not prevent Members from concluding multilateral or bilateral agreements with a view to resolving problems arising from its application.

Article 16

1. Any Member which ratifies this Convention may, by a declaration appended to its ratification, exclude either Part I or Part II from its acceptance of the Convention.

2. Any Member which has made such a declaration may at any time cancel that declaration by a subsequent declaration.

3. Every Member for which a declaration made under paragraph 1 of this Article is in force shall indicate in its reports upon the application of this Convention the position of its law and practice in regard to the provisions of the Part excluded from its acceptance, the extent to which effect has been given, or is proposed to be given, to the said provision and the reasons for which it has not yet included them in its acceptance of the Convention.

Articles 17-24

[Standard final provisions]

RECOMMENDATION No. 151 OF 1975 CONCERNING MIGRANT WORKERS

[Preamble - Selected Provisions]

The General Conference of the International Labour Organisation,...

Considering that the Preamble of the Constitution of the International Labour Organisation assigns to it the task of protecting "the interests of workers when employed in countries other than their own", and...

Considering that further standards are desirable as regards equality of opportunity and treatment, social policy in regard to migrants and employment and residence...

1. Members should apply the provision of this Recommendation within the framework of a coherent policy on international migration for employment. That policy should be based upon the economic and social needs of both countries of origin and countries of employment; it should take account not only of short-term manpower needs and resources but also of the long-term social and economic consequences of migration for migrants as well as for the communities concerned.

I. EQUALITY OF OPPORTUNITY AND TREATMENT

2. Migrant Workers and members of their families lawfully within the territory of a Member should enjoy effective equality of opportunity and treatment with nationals of the Member concerned in respect of

(a) access to vocational guidance and placement services;

(b) access to vocational training and employment of their own choice on the basis of individual suitability for such training or employment, account being taken of qualifications acquired outside the territory of and in the country of employment;

(c) advancement in accordance with their individual character, experience, ability and diligence;

(d) security of employment, the provision of alternative employment, relief work and retraining;

(e) remuneration for work of equal value;

(f) conditions of work, including hours of work, rest periods, annual holidays with pay, occupational safety and occupational health measures, as well as social security measures and welfare facilities and benefits provided in connection with employment;

(g) membership of trade unions, exercise of trade union rights and eligibility for office in trade unions and in labour-management relations bodies, including bodies representing workers in undertakings;

(h) rights of full membership in any form of co-operative;

(i) conditions of life, including housing and the benefits of social services and educational and health facilities.

3. Each Member should ensure the application of the principles set forth in Paragraph 2 of this Recommendation in all activities under the control of a public authority and promote its observance in all other activities by methods appropriate to national conditions and practice.

4. Appropriate measures should be taken, with the collaboration of employers' and workers' organisations and other bodies concerned, with a view to

(a) fostering public understanding and acceptance of the above-mentioned principles;

(b) examining complaints that these principles are not being observed and securing the correction, by conciliation of other appropriate means, of any practices regarded as in conflict therewith.

5. Each Member should ensure that national laws and regulations concerning residence in its territory are so applied that the lawful exercise of rights enjoyed in pursuance of these principles cannot be the reason for non-renewal of a residence permit or for expulsion and is not inhibited by the threat of such measures.

6. A Member may

(a) 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 within 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;

(b) after appropriate consultation with the representative organisations of employers and workers, make regulations concerning recognition of occupational qualifications acquired outside its territory, including certificates and diplomas;

(c) restrict access to limited categories of employment or functions where this is necessary in the interests of the State.

7. (1) In order to enable migrant workers and their families to take full advantage of their rights and opportunities in employment and occupation, such measures as may be necessary should be taken, in consultation with the representative organisations of employers and workers

(a) to inform them, as far as possible in their mother tongue or, if that is not possible, in a language with which they are familiar, of their rights under national law and practice as regards the matters dealt with in Paragraph 2 of this Recommendation;

(b) to advance their knowledge of the language or languages of the country of employment, as far as possible during paid time;

(c) generally, to promote their adaptation in the society of the country of employment and 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.

(2) Where agreements concerning the collective recruitment of workers have been concluded between Members, they should jointly take the necessary measures before the migrants' departure from their country of origin to introduce them to the language of the country of employment and also to its economic, social and cultural environment.

8. (1) Without prejudice to measures designed to ensure that migrant workers and their families enter national territory and are admitted to employment in conformity with the relevant laws and regulations, a decision should be taken as soon as possible in cases in which these laws and regulations have not be respected so that the migrant worker should know whether his position can be regularised or not.

(2) Migrant workers whose position has been regularised should benefit from all rights which, in accordance with Paragraph 2 of this Recommendation, are provided for migrant workers lawfully within the territory of a Member.

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

(4) In case of dispute about the rights referred to in the preceding subparagraphs, the worker should have the possibility of presenting his case to a competent body, either himself or through a representative.

(5) In case of expulsion of the worker or his family, the cost should not be borne by them.

II. SOCIAL POLICY

9. Each Member should, 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 nationals while taking account, without adversely affecting the principle of equality of opportunity and treatment, of such special needs that they may have until they are adapted to the society of the country of employment.

10. With a view to making the policy as responsive as possible to the real needs of migrant workers and their families, it should be based, in particular, on an examination not only of the conditions in the territory of the Member but also of those in the countries of origin of the migrants.

11. The policy should take account of the need to spread the social cost of migration as widely and equitably as possible over the entire collectivity of the country of employment, and in particular over those who profit most from the work of migrants.

12. The policy should be periodically reviewed and evaluated and where necessary revised.

A. Reunification of Families

13. (1) All possible measures should be taken both by countries of employment and by countries of origin to facilitate the reunification of families of migrant workers as rapidly as possible. These measures should include, as necessary, national laws or regulations and bilateral and multilateral arrangements.

(2) A prerequisite for the reunification of families should be that the worker has, for his family, appropriate accommodation which meets the standards normally applicable to nationals of the country of employment.

14. Representatives of all concerned, and in particular of employers and workers, should be consulted on the measures to be adopted to facilitate the reunification of families and their co-operation sought in giving effect thereto.

15. For the purpose of the provisions of this Recommendation relating to the reunification of families, the family of the migrant worker should include the spouse and dependent children, father and mother.

16. With a view to facilitating the reunification of families as quickly as possible in accordance with Paragraph 13 of this Recommendation, each Member should take full account of the needs of migrant workers and their families in particular in its policy regarding the construction of family housing, assistance in obtaining this housing and the development of appropriate reception services.

17. Where a migrant worker who has been employed for at least one year in a country of employment cannot be joined by his family in that country, he should be entitled

(a) to visit the country of residence of his family during the paid annual holiday to which he is entitled under the national law and practice of the country of employment without losing during the absence from that country any acquired rights or rights in course of acquisition and, particularly, without having his employment terminated or his right to residence in the country of employment withdrawn during that period; or

(b) to be visited by his family for a period corresponding at least to the annual holiday with pay to which he is entitled.

18. Consideration should be given to the possibility of giving the migrant worker financial assistance towards the cost of travel envisaged in the preceding Paragraph or a reduction in the normal cost of transport, for instance by the arrangement of group travel.

19. Without prejudice to more favourable provisions which may be applicable to them, persons admitted in pursuance of international arrangements for free movement of labour should have the benefit of the measures provided for in Paragraphs 13 to 18 of this Recommendation.

B. Protection of the Health of Migrant Workers

20. All appropriate measures should be taken to prevent any special health risks to which migrant workers may be exposed.

21. (1) Every effort should be made to ensure that migrant workers receive training and instruction in occupational safety and occupational hygiene in connection with their practical training or other work preparation, and, as far as possible, as part thereof.

(2) In addition, a migrant worker should, during paid working hours and immediately after beginning his employment, be provided with sufficient information in his mother tongue or, if that is not possible, in a language with which he is familiar, on the essential elements of laws and regulations and on provisions of collective agreements concerning the protection of workers and the prevention of accidents as well as on safety regulations and procedures particular to the nature of the work.

22. (1) Employers should take all possible measures so that migrant workers may fully understand instructions, warnings, symbols and other signs relating to safety and health hazards at work.

(2) Where, on account of the migrant workers' lack of familiarity with processes, language difficulties or other reasons, the training of instruction given to other workers is inadequate for them, special measures which ensure their full understanding should be taken.

(3) Members should have laws or regulations applying the principles set out in this Paragraph and provide that where employers or other persons or organisations having responsibility in this regard fail to observe such laws or regulations, administrative, civil and penal sanctions might be imposed.

C. Social Services

23. In accordance with the provisions of Paragraph 2 of this Recommendation, migrant workers and their families should benefit from the activities of social services and have access thereto under the same conditions as nationals of the country of employment.

24. In addition, social services should be provided which perform, in particular, the following functions in relation to migrant workers and their families

(a) giving migrant workers and their families every assistance in adapting to the economic, social and cultural environment of the country of employment;

(b) helping migrant workers and their families to obtain information and advice from appropriate bodies, for instance by providing interpretation and translation services; to comply with administrative and other formalities, and to make full use of services and facilities provided in such fields as education, vocational training and language training, health services and social security, housing, transport and recreation: Provided that migrant workers and their families should as far as possible have the right to communicate with public authorities in the country of employment in their own language or in a language with which they are familiar, particularly in the context of legal assistance and court proceedings;

(c) assisting authorities and bodies with responsibilities relating to the conditions of life and work of migrant workers and their families in identifying their needs and in adapting thereto;

(d) giving the competent authorities information and, as appropriate, advice regarding the formulation, implementation and evaluation of social policy with respect to migrant workers.

(e) providing information for fellow workers and foremen and supervisors about the situation and the problems of migrant workers.

25. (1) The social services referred to in Paragraph 24 of the Recommendation may be provided, as appropriate to national conditions and practice, by public authorities, by approved non-profit-making organisations or bodies, or by a combination of both. The public authorities should have the over-all responsibility of ensuring that these social services are at the disposal of migrant workers and their families.

(2) Full use should be made of services which are or can be provided by authorities, organisations and bodies serving the nationals of the country of employment, including employers' and workers' organisations.

26. Each Member should take such measures as may be necessary to ensure that sufficient resources and adequately trained staff are available for the social services referred to in Paragraph 24 of this Recommendation.

27. Each Member should promote co-operation and co-ordination between different social services on its territory and, as appropriate, between these services and corresponding services in other countries, without, however, this co-operation and co-ordination relieving the States of their responsibilities in this field.

28. Each Member should organise and encourage the organisation, at the national, regional or local level, or as appropriate in a branch of economic activity employing substantial numbers of migrant workers, of periodic meetings for the exchange of information and experience. Consideration should also be given to the exchange of information and experience with other countries of employment as well as with the countries of origin of migrant workers.

29. Representatives of all concerned and in particular of employers and workers should be consulted on the organisation of the social services in question and their co-operation sought in achieving the purposes aimed at.

III. EMPLOYMENT AND RESIDENCE

30. In pursuance of the provision of Paragraph 18 of the Migration for Employment Recommendation (Revised), 1949, that Members should, as far as possible, refrain from removing from their territory, on account of lack of means or the state of the employment market, a migrant worker regularly admitted thereto, the loss by such migrant worker of his employment should not in itself imply the withdrawal of his authorisation of residence.

31. A migrant who has lost his employment should be allowed sufficient time to find alternative employment, at least for a period corresponding to that during which he may be entitled to unemployment benefit; the authorisation of residence should be extended accordingly.

32. (1) A migrant worker who has lodged an appeal against the termination of his employment, under such procedures, as may be available, should be allowed sufficient time to obtain a final decision thereon.

(2) If it is established that the termination of employment was not justified, the migrant worker should be entitled, on the same terms as national workers, to reinstatement, to compensation for loss of wages or of other payment which results from unjustified termination, or to access to a new job with a right to indemnification. If he is not reinstated, he should be allowed sufficient time to find alternative employment.

33. A migrant worker who is the object of an expulsion order should have a right of appeal before an administrative or judicial instance, according to conditions laid down in national laws or regulations. This appeal should stay the execution of the expulsion order, subject to the duly substantiated requirements of national security or public order. The migrant worker should have the same right to legal assistance as national workers and have the possibility of being assisted by an interpreter.

34. (1) A migrant worker who leaves the country of employment should be entitled, irrespective of the legality of his stay therein

(a) to any outstanding remuneration for work performed, including severance payments normally due;

(b) to benefits which may be due in respect of any employment injury suffered;

(c) in accordance with national practice

(i) to compensation in lieu of any holiday entitlement acquired but not used;

(ii) to reimbursement of any social security contributions which have not given and will not give rise to rights under national laws or regulations or international arrangements: Provided that where social security contributions do not permit entitlement to benefits, every effort should be made with a view to the conclusion of bilateral or multilateral agreements to protect the rights of migrants.

(2) Where any claim covered in subparagraph (1) of this Paragraph is in dispute, the worker should be able to have his interests represented before the competent body and enjoy equal treatment with national workers as regards legal assistance.

APPENDIX C

INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES

[Selected Provisions]

PREAMBLE

The States Parties to the present Convention,

Taking into account the principles embodied in the basic instruments of the United Nations concerning human rights, in particular the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child,

Taking into account also the principles and standards set forth in the relevant instruments elaborated within the framework of the International Labour Organization, especially the Conventions concerning Migration for Employment (No. 97) and Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (No. 143), the Recommendations concerning Migration for Employment (No. 86) and Migrant Workers (No. 151), and the Conventions concerning Forced Labour (No. 29) and the Abolition of Forced Labour (No. 105),

Reaffirming the importance of the principles of contained in the Convention against Discrimination in Education of the United Nations Educational, Scientific and Cultural Organization,

Recalling the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Declaration of the Fourth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, the Code of Conduct for Law Enforcement Officials and the Slavery Conventions,

Recalling also that one of the objectives of the International Labour Organization, as stated in its Constitution, is the protection of the interest of workers when employed in countries other than their own, as well as the expertise and experience of the said Organisation in matters related to migrant workers and members of their families,

Recognizing the importance of the work carried out in connection with migrant workers and members of their families in various organs of the United Nations system, in particular in the Commission on Human Rights and the Commission for Social Development, and in the Food and Agriculture Organization of the United Nations, the United Nations Educational, Scientific and Cultural Organization and the World Health Organization and in other international organizations,

Recognizing also the progress made by certain States on a regional or bilateral basis towards the protection of the rights of migrant workers and members of their families as well as the importance and usefulness of bilateral agreements in this field,

Realizing the importance and extent of the migration phenomenon, which involves millions of people and affects a large number of States in the international community,

Aware of the impact of the flows of migrant workers on States and people concerned, and desiring to establish norms which may contribute to harmonize the attitudes of States through the acceptance of basic principles concerning the treatment of migrant workers and members of their families,

Considering the situation of vulnerability in which migrant workers and their families frequently find themselves owing, among other things, to their absence from the State of origin and to the difficulties they may encounter arising from their presence in the State of employment,

Convinced that the rights of migrant workers and members of their families have not been sufficiently recognized and therefore require appropriate international protection,

Taking into account the fact that migration is often the cause of serious problems for the members of the families of migrant workers as well as for the workers themselves, in particular because of the scattering of the family,

Bearing in mind that the human problems involved in migration are even more serious in the case of irregular migration and convinced therefore that appropriate action should be encouraged in order to prevent and eliminate clandestine movements and trafficking in migrant workers, while at the same time assuring the protection of their fundamental human rights,

Considering that workers who are non-documented or in an irregular situation are frequently employed under less favourable conditions of work than other workers and that certain employers find this an inducement to seek such labour in order to reap the benefits of unfair competition,

Considering also that recourse to the employment of migrant workers who are in an irregular situation will be discouraged if the fundamental human rights of all migrant workers are more widely recognized and, moreover, that granting certain additional rights to migrant workers and members of their families in a regular situation will encourage all migrants and employers to respect and comply with the laws and procedures established by the States concerned,

Convinced therefore of the need to bring about the international protection of the rights of all migrant workers and members of their families, reaffirming and establishing basic norms in a comprehensive convention which could be applied universally,

Have agreed on the following articles:

PART I

Scope and definitions

Article 1

1. 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, marital status, birth or other status.

2. The present Convention shall apply during the entire migration process of migrant workers and members of their families, which comprises preparation for migration, departure, transit and the entire period of stay and remunerated activity in the State of employment as well as return to the State of origin or the State of habitual residence.

Article 2

For the purposes of the present Convention:

1. The term "migrant worker" refers to a person who is to be engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.

2. (a) The term "frontier worker" refers to a migrant worker who retains his or her habitual residence in a neighbouring State to which he or she normally returns every day or at least once a week;

(b) The term "seasonal worker" refers to a migrant worker whose work by its character is dependent on seasonal conditions and is performed only during part of the year;

(c) The term "seafarer", which includes a fisherman, refers to a migrant worker employed a board a vessel registered in a State of which he or she is not a national;

(d) The term "worker on an offshore installation" refers to a migrant worker employed on an offshore installation that is under the jurisdiction of a State of which he or she is not a national;

(e) The term "itinerant worker" refers to a migrant worker who, having his or her habitual residence in one State, has to travel to another State or States for shorter periods, owing to the nature of his or her occupation;

(f) The term "project-tied worker" refers to a migrant worker admitted to a State of employment for a defined period to work solely on a specific project being carried out in that State by his or her employer;

(g) The term "specified-employment worker" refers to a migrant worker:

(i) Who has been sent by his or her employer for a restricted and defined period of time to a State of employment to undertake a specific assignment or duty; or

(ii) Who engages for a restricted and defined period of time in work that requires professional, commercial, technical or other highly specialized skill; or

iii) Who, upon the request of his or her employer in the State of employment, engages for a restricted and defined period of time in work whose nature is transitory or brief;

(h) The term "self-employed worker" refers to a migrant worker who is engaged in a remunerated activity otherwise than under a contract of employment and who earns his or her living through this activity normally working alone or together with members of his or her family, and to any other migrant worker recognized as self-employed by applicable legislation of the State of employment or bilateral or multilateral agreements.

Article 3

The present Convention shall not apply to:

(a) Persons sent or employed by international organizations and agencies or persons sent or employed by a State outside its territory to perform official functions, whose admission and status are regulated by general international law or by specific international agreements or conventions;

(b) Persons sent or employed by a State or on its behalf outside its territory who participate in development programmes and other co-operation programmes, whose admission and status are regulated by agreement with the State of employment and who, in accordance with that agreement, are not considered migrant workers;

(c) Persons taking up residence in a State different from their State of origin as investors;

(d) Refugees and stateless persons, unless such application is provided for in the relevant national legislation of, or international instruments in force for, the State Party concerned;

(e) Students and trainees;

(f) Seafarers and workers on an offshore installation who have not been admitted to take up residence and engage in a remunerated activity in the State of employment.

Article 4

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.

Article 5

For the purposes of the present Convention, migrant workers and members of their families:

(a) Are considered as documented or in a regular situation if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a Party;

(b) Are considered as non-documented or in an irregular situation if they do not comply with the conditions provided for in subparagraph (a) of this article.

Article 6

For the purposes of the present Convention:

(a) The term "State of origin" means the State of which the person concerned is a national;

(b) The term "State of employment" means a State where the migrant worker is to be engaged, is engaged or has been engaged in a remunerated activity, as the case may be;

(c) The term "State of transit" means any State through which the person concerned passes on any journey to the State of employment or from the State of employment to the State of origin or the State of habitual residence.

PART II

Non-discrimination with respect to rights

Article 7

States Parties undertake, in accordance with the 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 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.

PART III

Human rights of all migrant workers and members of their families

Article 8

[right to leave/enter State of origin]

Article 9

[right to life]

Article 10

[right not to be subjected to torture, etc.]

Article 11

[right not to be subjected to slavery or forced labour]

Article 12

[right to freedom of thought, conscience and religion]

4. States parties to the present Convention undertake to have respect for the liberty of parents, at least one of whom is a migrant worker, and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 13

[Right to freedom of expression]

Article 14

No migrant worker or member of his or her family shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home, correspondence or other communications, or to unlawful attacks on his or her honour and reputation. Each migrant worker and member of his or her family shall have the right to the protection of the law against such interference or attacks.

Article 15

No migrant worker or member of his or her family shall be arbitrarily deprived of property, whether owned individually or in association with others. Where, under the legislation in force in the State of employment, the assets of a migrant worker or a member of his or her family are expropriated in whole or in part, the person concerned shall have the right to fair and adequate compensation.

Article 16

[right to liberty and security of person]

Article 17

[right to be treated with humanity if deprived of liberty]

Article 18

[right to equality with nationals before the courts]

Article 19

[right not to be convicted of any criminal offence which is not a criminal offence under national or international law]

Article 20

1. No migrant worker or member of his or her family shall be imprisoned merely on the ground of failure to fulfil a contractual obligation.

2. No migrant worker or member of his or her family shall be deprived of his or her authorization of residence or work permit or 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.

Article 21

[protection against destruction/confiscation of migrants' documents]

Article 22

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.

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

3. The decision shall be communicated to them in a language they understand. Upon their request where not otherwise mandatory, the decision shall be communicated to them in writing and, save in exceptional circumstances on account of national security, the reasons for the decision likewise stated. The persons concerned shall be informed of these rights before or at the latest at the time the decision is rendered.

4. 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.

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.

6. In case of expulsion, the person concerned shall have a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her and any pending liabilities.

7. Without prejudice to the execution of a decision of expulsion, a migrant worker or a member of his or her family who is subject to such a decision may seek entry into a State other than his or her State of origin.

8. In case of expulsion of a migrant worker or a member of his or her family the costs of expulsion shall not be borne by him or her. The person concerned may be required to pay his or her own travel costs.

9. Expulsion from the State of employment shall not in itself prejudice any rights of a migrant worker or a member of his or her family acquired in accordance with the law of that State, including the right to receive wages and other entitlements due to him or her.

Article 23

[Right to protection of consular authorities]

Article 24

[Right to recognition as person before the law]

Article 25

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

(a) Other conditions of work, that is to say overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and any other conditions of work which, according to national law and practice, are covered by this term;

(b) Other terms of employment, that is to say minimum wage of employment, restriction on home work and any other matters which, according to national law and practice, are considered a term of employment.

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.

Article 26

1. States Parties recognize the right of migrant workers and members of their families:

(a) To take part in meetings and activities of trade unions and of any other associations established in accordance with law, with a view to protecting their economic, social, cultural and other interests, subject only to the rules of the organization concerned;

(b) To join freely any trade union and any such association as aforesaid, subject only to the rules of the organization concerned;

(c) To seek the aid and assistance of any trade union and of any association as aforesaid.

2. No restrictions may be placed on the exercise of these rights other than those that are prescribed by law and which are necessary in a democratic society in the interests of national security, public order (*ordre public*) or the protection of the rights and freedoms of others.

Article 27

1. With respect to social security, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they 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 who are in similar circumstances.

Article 28

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

Article 29

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

Article 30

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

Article 31

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.

Article 32

Upon the termination of their stay in the State of employment, migrant workers and members of their families shall have the right to transfer their earnings and savings and, in accordance with the applicable legislation of the States concerned, their personal effects and belongings.

Article 33

1. Migrant workers and members of their families shall have the right to be informed by the State of origin, the State of employment or the State of transit as the case may be concerning:

(a) Their rights arising out of the present Convention;

(b) The conditions of admission, their rights and obligations and the law and practice of the State concerned and such other matters as will enable them to comply with administrative or other formalities in that State.

2. States Parties shall take all measures they deem appropriate to disseminate the said information or to ensure that it is provided by employers, trade unions or other appropriate bodies or institutions. As appropriate, they shall co-operate with other States concerned.

3. Such adequate information shall be provided upon request to migrant workers and members of their families, free of charge, and, as far as possible, in a language they are able to understand.

Article 34

Nothing in this Part of the present Convention shall have the direct effect of relieving migrant workers and the members of their families from either the obligation to comply with the laws and regulations of any State of transit and the State of employment or the obligation to respect the cultural identity of the inhabitants of such States.

Article 35

Nothing in this Part of the present Convention shall be interpreted as implying the regularization of the situation of migrant workers and 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 migrants in Part VI.

PART IV

Other rights of migrant workers and members of their families who are documented or in a regular situation

Article 36

Migrant workers and members of their families who are documented or in a regular situation in the State of employment shall enjoy the rights set forth in this Part of the present Convention in addition to those set forth in Part III.

Article 37

Before their departure, or at the latest at the time of their admission to the State of employment, migrant workers and members of their families shall have the right to be fully informed by the State of origin or the State of employment, as appropriate, of all conditions applicable to their admission and particularly those concerning their stay and the remunerated activities in which they may engage as well as of the requirements they must satisfy in the State of employment and the authority to which they must address themselves for any modifications of those conditions.

Article 38

1. States of employment shall make every effort to authorize migrant workers and members of their families to be temporarily absent without effect upon their authorization to stay or to work, as the case may be. In doing so, States of employment shall take into account the special needs and obligations of migrant workers and members of their families, in particular in their States of origin.

2. Migrant workers and members of their families shall have the right to be fully informed of the term on which such temporary absences are authorized.

Article 39

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.

Article 40

1. Migrant workers and members of their families shall have the right to form associations and trade unions in the State of employment for the promotion and protection of their economic, social, cultural and other interests.

2. No restrictions may be placed on the exercise of this right other than those that are prescribed by law and are necessary in a democratic society in the interests of national security, public order (*ordre public*) or the protection of the rights and freedoms of others.

Article 41

1. Migrant workers and members of their families shall have the right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State, in accordance with its legislation.

2. The States concerned shall, as appropriate and in accordance with their legislation, facilitate the exercise of these rights.

Article 42

1. States Parties shall consider the establishment of procedures or institutions through which account may be taken, both in States of origin and in States of employment, of special needs, aspirations and obligations of migrant workers and members of their families and shall envisage, as appropriate, the possibility for migrant workers and members of their families to have their freely chosen representatives in those institutions.

2. States of employment shall facilitate, in accordance with their national legislation, the consultation or participation of migrant workers and members of their families in decisions concerning the life and administration of local communities.

3. Migrant workers may enjoy political rights in the State of employment if that State, in the exercise of its sovereignty, grants them such rights.

Article 43

1. Migrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to:

(a) Access to educational institutions and services subject to the admission requirements and other regulations of the institutions and services concerned;

(b) Access to vocational guidance and placement services;

(c) Access to vocational training and retraining facilities and institutions;

(d) Access to housing, including social housing schemes, and protection against exploitation in respect of rents;

(e) Access to social and health services, provided that the requirements for participation in the respective schemes are met;

(f) Access to co-operatives and self-managed enterprises without implying a change of their migration status and subject to the rules and regulations of the bodies concerned;

(g) Access to and participation in cultural life.

2. 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 stay, as authorized by the State of employment, meet the appropriate requirements.

3. States of employment shall not prevent an employer of migrant workers from establishing housing or social or cultural facilities for them. Subject to article 70 of the present Convention, a State of employment may make the establishment of such facilities subject to the requirements generally applied in that State concerning their installation.

Article 44

1. States Parties, recognizing that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, shall take appropriate measures to ensure the protection of the unity of the families of migrant workers.

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 as their minor dependent unmarried children.

3. States of employment, on humanitarian grounds, shall favourably consider granting equal treatment, as set forth in paragraph 2 of this article, to other family members of migrant workers.

Article 45

1. Members of the family of migrant workers shall, in the State of employment, enjoy equality of treatment with nationals of that State in relation to:

(a) Access to educational institutions and services, subject to the admission requirements and other regulations of the institutions and services concerned;

(b) Access to vocational guidance and training institutions and services, provided that requirements for participation are met;

(c) Access to social and health services, provided that requirements for participation in the respective schemes are met;

(d) Access to and participation in cultural life.

2. 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.

3. 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.

4. States of employment may provide special schemes of education in the mother tongue of children of migrant workers, if necessary in collaboration with the States of origin.

Article 46

[exemption from custom duties]

Article 47

[right to transfer earnings and savings]

Article 48

[exemption from double taxation]

Article 49

1. Where separate authorizations to reside and to engage in employment are required by national legislation, the States of employment shall issue to migrant workers authorization of residence for at least the same period of time as their authorization to engage in remunerated activity.

2. Migrant workers who in the State of employment are allowed to freely 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 the termination of their remunerated activity prior to the expiration of their work permits or similar authorizations.

3. In order to allow migrant workers referred to in paragraph 2 of this article sufficient time to find alternative remunerated activities, the authorization of residence shall not be withdrawn at least for a period corresponding to that during which they may be entitled to unemployment benefits.

Article 50

1. In the case of death of a migrant worker or dissolution of marriage, the State of employment shall favourably consider granting family members of that migrant worker residing in that State on the basis of family reunion an authorization to stay; the State of employment shall take into account the length of time they have already resided in that State.

2. Members of the family to whom such authorization is not granted shall be allowed before departure a reasonable period of time in order to enable them to settle their affairs in the State of employment.

3. The provisions of paragraph 1 and 2 of this article may not be interpreted as adversely affecting any right to stay and work otherwise granted to such family members by the legislation of the State of employment or by bilateral and multilateral treaties applicable to the State.

Article 51

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 the 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.

Article 52

1. Migrant workers in the State of employment shall have the right freely to choose their remunerated activity, subject to the following restrictions or conditions.

2. For any migrant worker a State of employment may:

(a) Restrict access to limited categories of employment, functions, services or activities where this is necessary in the interests of this State and provided for by national legislation;

(b) Restrict free choice of remunerated activity in accordance with its legislation concerning recognition of occupational qualifications acquired outside its territory. However, States Parties concerned shall endeavour to provide for recognition of such qualifications.

3. For migrant workers whose permission to work is limited in time, a State of employment may also:

(a) Make the right freely to choose their remunerated activities subject to the condition that the migrant worker 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 two years;

(b) Limit access by a migrant worker 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.

4. States of employment shall prescribe the conditions under which a migrant worker who has been admitted to take up employment may be authorized to engage in work on his or her own account and vice versa. Account shall be taken of the period during which the worker has already been lawfully in the State of employment.

Article 53

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 favourable 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.

Article 54

1. Without prejudice to the terms of their authorization of residence or their permission to work and the rights provided for in articles 25 and 27 of the present Convention, migrant workers shall enjoy equality of treatment with nationals of the State of employment in respect of:

(a) Protection against dismissal;

(b) Unemployment benefits;

(c) Access to public works schemes intended to combat unemployment;

(d) Access to alternative employment in the event of loss of work or termination of other remunerated activity subject to article 52 of the present Convention.

2. If a migrant worker claims that the terms of his or her work contract have been violated by his or her employer, he or she shall have the right to address his or her case to the competent authorities of the State of employment, on terms provided for in article 18, paragraph 1, of the present Convention.

Article 55

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.

Article 56

1. Migrant workers and members of their families referred to in this Part of the present Convention may not be expelled from of State of employment, except for reasons defined in the national legislation of that State, and subject to the safeguards established in Part III.

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.

PART V

Provisions applicable to particular categories of migrant workers and members of their families

Article 57

The particular categories of migrant workers and members of their families specified in this Part of the present Convention who are documented or in a regular situation shall enjoy the rights set forth in Part III and, except as modified below, the rights set forth in Part IV.

Article 58

1. Frontier workers, as defined in article 2, paragraph 2(a), of the present Convention, shall be entitled to the rights provided for in Part IV that can be applied to them by reason of their presence and work in the territory of the State of employment, taking into account that they do not have their habitual residence in that State.

2. States of employment shall consider favourably granting frontier workers the right freely to choose their remunerated activity after a specified period of time. The granting of that right shall not affect their status as frontier workers.

Article 59

1. Seasonal workers, as defined in article 2, paragraph 2(b) of the present Convention, shall be entitled to the rights provided for in Part IV that can be applied to them by reason of their presence and work in the territory of the State of employment and that are compatible with their status in that State as seasonal workers, taking into account that they are present in that State for only part of the year.

2. The State of employment shall, subject to paragraph 1 of this article, consider granting seasonal workers who have been employed in its territory for a significant period of time the possibility of taking up other remunerated activities and giving them priority over other workers who seek admission to that State, subject to applicable bilateral and multilateral agreements.

Article 60

Itinerant workers, as defined in article 2, paragraph 2(e), of the present Convention, shall be entitled to the rights provided for in Part IV that can be granted to them by reason of their presence and work in the territory of the State of employment and that are compatible with their status as itinerant workers in that State.

Article 61

1. Project-tied workers, as defined in article 2, paragraph 2(f), of the present Convention, and members of their families shall be entitled to the rights provided for in Part IV, except the provisions of article 43, paragraphs 1(b) and (c) and article 43, paragraph 1(d), as it pertains to social housing schemes, article 45(b), and articles 52 to 55.

2. If a project-tied worker claims that the terms of his or her work contract have been violated by his or her employer, he or she shall have the right to address his or her case to the competent authorities of the State which has jurisdiction over that employer, on terms provided for in article 18, paragraph 1, of the present Convention.

3. Subject to bilateral agreements in force for them, the States Parties concerned shall endeavour to enable project-tied workers to remain adequately protected by the social security systems of their States of origin or habitual residence during their engagement in the project. States Parties concerned shall take appropriate measures with the aim of avoiding any denial of rights or duplication of payments in this respect.

4. Without prejudice to the provisions of article 47 of the present Convention and to relevant bilateral or multilateral agreements, States Parties concerned shall permit payment of the earning of project-tied workers in their State of origin or habitual residence.

Article 62

1. Specified-employment workers as defined in article 2, paragraph 2(g), of the present Convention shall be entitled to the rights provided for in Part IV, except the provisions of article 43, paragraphs 1(b) and (c) and article 43, paragraph 1(d), as it pertains to social housing schemes; article 52; and article 54, paragraph 1(d).

2. Members of the family of specified-employment workers shall be entitled to the rights relating to family members of migrant workers in Part IV of the present Convention, except the provisions of article 53.

Article 63

1. Self-employed workers, as defined in article 2, paragraph 2(h), of the present Convention, shall be entitled to the rights provided for in Part IV with the exception of those rights which are exclusively applicable to workers having a contract of employment.

2. Without prejudice to articles 52 and 79 of the present Convention, the termination of the economic activity of the self-employed workers shall not in itself imply the withdrawal of the authorization for them or for the members of their families to stay or to engage in a remunerated activity in the State of employment except where the authorization of residence is expressly dependent upon the specific remunerated activity for which they were admitted.

PART VI

Promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families

Article 64

1. Without prejudice to article 79 of the present Convention, the States Parties concerned shall as appropriate consult and co-operate with a view to promoting sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families.

2. In this respect due regard shall be paid not only to labour needs and resources, but also to the social, economic and cultural and other needs of migrant workers and members of their families involved, as well as to the consequences of such migration for the communities concerned.

Article 65

1. States parties shall maintain appropriate services to deal with questions concerning international migration of workers and members of their families. Their functions shall include, *inter alia*:

(a) The formulation and implementation of policies regarding such migration;

(b) An exchange of information, consultation and co-operation with the competent authorities of other States Parties involved in such migration;

(c) The provision of appropriate information, particularly to employers, workers and their organizations on policies, laws and regulations relating to migration and employment on agreements concluded with other States concerning migration and on other relevant matters;

(d) The provision of information and appropriate assistance to migrant workers and members of their families regarding requisite authorizations and formalities and arrangements for departure, travel, stay, remunerated activities, exit and return, as well as on conditions of work and life in the State of employment and on customs, currency, tax and other relevant laws and regulations.

2. States parties shall facilitate as appropriate the provision of adequate consular and other services that are necessary to meet the social, cultural and other needs of migrant workers and members of their families.

Article 66

1. Subject to paragraph 2 of this article, the right to undertake operations with a view to the recruitment of workers for employment in another State shall be restricted to:

(a) Public services or bodies of the State in which such operations take place;

(b) Public services or bodies of the State of employment on the basis of agreement between the States concerned;

(c) A body established by virtue of a bilateral or multilateral agreement.

2. Subject to any authorization, approval and supervision by the public authorities of the States Parties concerned as may be established pursuant to the legislation and practice of those States, agencies, prospective employers or persons acting on their behalf may also be permitted to undertake the said operations.

Article 67

1. States Parties concerned shall co-operate as appropriate in the adoption of measures regarding the orderly return of migrant workers and members of their families to the State of origin when they decide to return or their authorization of residence or employment expires or when they are in the State of employment in an irregular situation.

2. Concerning migrant workers and members of their families in a regular situation, States Parties concerned shall co-operate as appropriate, on terms agreed upon by those States, with a view to promoting adequate economic conditions for their resettlement and to facilitating their durable social and cultural reintegration in the State of origin.

Article 68

1. States Parties, including States of transit, shall collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation. The measures to be taken to this end within the jurisdiction of each State concerned shall include:

(a) Appropriate measures against the dissemination of misleading information relating to emigration and immigration;

(b) Measures to detect and eradicate illegal or clandestine movements of migrant workers and members of their families and to impose effective sanctions on persons, groups or entities which organize, operate or assist in organizing or operating such movements;

(c) Measures to impose effective sanctions on persons, groups or entities which use violence, threats or intimidation against migrant workers or members of their family in an irregular situation.

2. States of employment shall take all adequate and effective measures to eliminate employment in their territory of migrant workers in an irregular situation, including, whenever appropriate, sanctions on employers of such workers. The rights of migrant workers *vis-à-vis* their employer arising from employment shall not be impaired by these measures.

Article 69

1. States Parties shall, when there are migrant workers and members of their families within their territory in an irregular situation, take appropriate measures to ensure that such a situation does not persist.

2. Whenever States Parties concerned consider the possibility of regularizing the situation of such persons in accordance with applicable national legislation and bilateral or multilateral agreements, appropriate account shall be taken of the circumstances of their entry, the duration of their stay in the States of employment and other relevant considerations, in particular those relating to their family situation.

Article 70

States Parties shall take measures not less favourable than those applied to nationals to ensure that working and living conditions of migrant workers and members of their families in a regular situation are in keeping with the standards of fitness, safety, health and principles of human dignity.

Article 71

1. States Parties shall facilitate, whenever necessary, the repatriation to the State of origin of the bodies of the deceased migrant workers or members of their families.

2 As regards compensation matters relating to the death of a migrant worker or a member of his or her family, States Parties shall, as appropriate, provide assistance to the persons concerned with a view to the prompt settlement of such matters. Settlement of these matters shall be carried out on the basis of applicable national law in accordance with the provisions of the present Convention and any relevant bilateral or multilateral agreements.

PART VII

Application of the Convention

Article 72

1. (a) For the purpose of reviewing the application of the present Convention, there shall be established a Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (hereinafter referred to as "the Committee");

(b) The Committee shall consist, at the time of entry into force of the present Convention, of ten and, after the entry into force of the Convention for the forty-first State Party, of fourteen experts of high moral standing, impartiality and recognized competence in the field covered by the present Convention.

2. (a) Members of the Committee shall be elected by secret ballot by the States Parties from a list of persons nominated by the States Parties, due consideration being given to equitable geographical distribution, including both States of origin and States of employment, and to the representation of the principal legal systems. Each State Party may nominate one person from among its own nationals.

(b) Members shall be elected and serve in their personal capacity.

3. The initial election shall be held no later than six months after the date of entry into force of the present Convention and subsequent elections every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to all States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the State Parties that have nominated them, and shall submit it to the States Parties not later than one month before the date of the corresponding election, together with the curricula vitae of the persons thus nominated.

4. Elections of members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at the United Nations Headquarters. At that meeting, for which two-thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of votes of the States Parties present and voting.

5. (a) The members of the Committee shall serve for a term of four years. However, the terms of five of the members elected in the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting of States Parties;

(b) The election of the four additional members of the Committee shall be held in accordance with the provisions of paragraphs 2, 3 and 4 of this article, following the entry into force of the present Convention for the forty-first State Party. The term of two of the additional members elected on this occasion shall expire at the end of two years; the names of these members shall be chosen by lot by the Chairman of the meeting of States Parties;

(c) The members of the Committee shall be eligible for re-election if renominated.

6. If a member of the Committee dies or resigns or declares that for any cause he or she can no longer perform the duties of the Committee, the State Party that nominated the expert shall appoint another expert from among its own nationals for the remaining part of the term. The new appointment is subject to the approval of the Committee.

7. The Secretary-general of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee.

8. The members of the Committee shall receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide.

9. The members of the Committee shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

Article 73

1. States Parties undertake to submit to the Secretary-General of the United Nations for consideration by the Committee a report on the legislative, judicial, administrative and other measures they have taken to give effect to the provisions of the Convention:

(a) Within one year after the entry into force of the Convention for the State party concerned;

(b) Thereafter every five years and whenever the Committee so requests.

2. Reports made under this article shall also indicate factors and difficulties, if any, affecting the implementation of the present Convention and shall include information on the characteristics of migration flows in which the State Party concerned is involved.

3. The Committee shall decide any further guidelines applicable to the content of the reports.

4. States Parties shall make their reports widely available to the public in their own countries.

Article 74

1. The Committee shall examine the reports submitted by each State Party and shall transmit such comments as it may consider appropriate to the State Party concerned. This State Party may submit to the Committee observations on any comment made by the Committee in accordance with this article. The Committee may also request supplementary information from States Parties when considering these reports.

2. The Secretary-General of the United Nations shall, in due time before the opening of each regular session of the Committee, transmit to the Director-General of the International Labour Office copies of the reports submitted by States Parties concerned and information relevant to the consideration of these reports in order to enable the Office to assist the Committee with the expertise the Office may provide regarding those matters dealt with by the Convention that fall within the sphere of competence of the International Labour Organization. The Committee shall consider in its deliberations such comments and materials as the Office may provide.

3. The Secretary-General of the United Nations may also, after consultation with the Committee, transmit to other specialized agencies as well as to intergovernmental organizations, copies of such parts of these reports as may fall within their competence.

4. The Committee may invite the specialized agencies and organs of the United Nations, as well as intergovernmental organizations and other concerned bodies to submit, for consideration by the Committee, written information on such matters dealt with in the Convention as fall within the scope of their activities.

5. The International Labour Office shall be invited by the Committee to appoint representatives to participate, in a consultative capacity, in the meetings of the Committee.

6. The Committee may invite representatives of other specialized agencies and organs of the United Nations, as well as of intergovernmental organizations, to be present and heard in its meetings whenever matters falling within their field of competence are considered.

7. The Committee shall present an annual report to the General Assembly of the United Nations on the implementation of the present Convention, containing its own considerations and recommendations based, in particular, on the examination of the reports and any observations presented by the States Parties.

8. The Secretary-General of the United Nations shall transmit the annual reports of the Committee to the States Parties to the present Convention, the Economic and Social Council, the Commission on Human Rights of the United Nations, the Director-General of the International Labour Office and other relevant organizations.

Article 75

1. The Committee shall adopt its own rules of procedure.

2. The Committee shall elect its officers for a term of two years.

3. The Committee shall normally meet annually.

4. The meetings of the Committee shall normally be held at United Nations Headquarters.

Article 76

1. A State Party to the present Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Convention. Communications under this article may be received and considered only if submitted by a State Party that has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

(a) If a State Party to the present Convention considers that another State Party is not fulfilling its obligations under the present Convention, it may, by written communication, bring the matter to the attention of that State Party. The State Party may also inform the Committee of the matter. Within three months after the receipt of the communication the receiving State shall afford the State that sent the communication an explanation, or any other statement in writing clarifying the matter which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;

(b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter to the Committee, by notice given to the Committee and to the other State;

(c) The Committee shall deal with a matter referred to it only after it has ascertained that all available domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where, in the view of the Committee, the application of the remedies is unreasonably prolonged;

(d) Subject to the provisions of subparagraph (c) of this paragraph, the Committee shall make available its good offices to the States Parties concerned with a view to a friendly solution of the matter on the basis of the respect for the obligations set forth in the present Convention;

(e) The Committee shall hold closed meetings when examining under this article;

(f) In any matter referred to it in accordance with subparagraph (b) of this paragraph, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;

(g) The States Parties concerned, referred to in subparagraph (b) of this paragraph, shall have the right to be represented when the matter is being considered by the Committee and to make submissions orally and/or in writing;

(h) The Committee shall, within twelve months after the date of receipt of notice under subparagraph (b) of this paragraph, submit a report:

(i) If a solution within the terms of subparagraph (d) of this paragraph is not reached, the Committee shall confine its report to a brief statement of the facts and of the solution reached;

(ii) If a solution within the terms of subparagraph (d) is not reached, the Committee shall, in its report, set forth the relevant facts concerning the issue between the states parties concerned. The written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. The Committee may also communicate only to the States Parties concerned any views that it may consider relevant to the issue between them.

In every matter, the report shall be communicated to the States Parties concerned.

2. The provisions of this article shall come into force when ten States Parties to the present Convention have made a declaration under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter that is the subject of a communication already transmitted under this article; no further communication by any State Party shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 77

1. A State Party to the present Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim that their individual rights as established by the present Convention have been violated by that State Party. No communication shall be received by the Committee if it concerns a State Party that has not made such a declaration.

2. The Committee shall consider inadmissible any communication under this article which is anonymous or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the present Convention.

3. The Committee shall not consider any communications from an individual under this article unless it has ascertained that:

(a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement; and

(b) The individual has exhausted all available domestic remedies; this shall not be the rule where, in the view of the Committee, the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to that individual.

4. Subject to the provisions of paragraph 2 of this article, the Committee shall bring any communications submitted to it under this article to the attention of the State Party to the present Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

5. The Committee shall consider communications received under this article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned.

6. The Committee shall hold closed meetings when examining communications under this article.

7. The Committee shall forward its views to the State Party concerned and to the individual.

8. The provisions of this article shall come into force when ten States Parties to the present Convention have made declarations under paragraph 1 of this article. Such declarations shall be deposited by the States Parties with the Secretary-General of the United Nations who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter that is the subject of a communication already transmitted under this article; no further communication by or on behalf of an individual shall be received under this article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 78

The provision of article 76 of the present Convention shall be applied without prejudice to any procedures for settling disputes or complaints in the field covered by the present Convention laid down in the constituent instruments of, or in conventions adopted by, the United Nations and its specialized agencies and shall not prevent the States Parties from having recourse to any procedures for settling a dispute in accordance with international agreements in force between them.

PART VIII

General Provisions

Article 79

Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing the 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 limitation set forth in the present Convention.

Article 80

Nothing in the present Convention shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Convention.

Article 81

1. Nothing in the present Convention shall affect more favourable rights or freedoms granted to migrant workers and members of their families by virtue of:

(a) The law or practice of a State Party; or

(b) Any bilateral or multilateral treaty in force for the State Party concerned.

2. Nothing in the present Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act that would impair any of the rights and freedoms set forth in the present Convention.

Article 82

The rights of migrant workers and members of their families provided for in the present Convention may not be renounced. it shall not be permissible to exert any form of pressure upon migrant workers and members of their families with a view to their relinquishing or foregoing any of the said rights. It shall not be possible to derogate by contract from rights recognized in the present Convention. States parties shall take appropriate measures to ensure that these principles are respected.

Article 83

Each State Party to the present Convention undertakes:

(a) To ensure that any person whose rights or freedoms are herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons

acting in an official capacity;

(b) To ensure that any persons seeking such a remedy shall have his or her claim reviewed and decided by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 84

Each State Party undertakes to adopt the legislative and other measures that are necessary to implement the provisions of the present Convention.

PART IX

Final Provisions

Article 85

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

Article 86

1. The present Convention shall be open for signature by all States. It is subject to ratification.

2. The present Convention shall be open to accession by any State.

3. Instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations.

Article 87

1. The present Convention shall enter into force on the first day of the month following a period of three months after the date of the deposit of the twentieth instrument of ratification or accession.

2. For each State ratifying or acceding to the present Convention after its entry into force, the Convention shall enter into force on the first day of the month following a period of three months after the date of the deposit of its own instrument of ratification or accession.

Article 88

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 form its application.

Article 89

[Denunciation]

Article 90

1. After five years from the entry into force of the Convention a request for the revision of the Convention may be made at any time by any State Party by means of notification in writing addressed to the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that within four months from the date of such communication at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting shall be submitted to the General Assembly for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties in accordance with their respective constitutional processes.

3. When amendments come into force, they shall be binding on those States Parties that have accepted them, other States Parties still being bound by the provisions of the present Convention and any earlier amendment that they have accepted.

Article 91

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of signature, ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General of the United Nations, who shall then inform all States thereof. Such notification shall take effect on the date on which it is received.

Article 92

1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention that is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State Party may at the time of signature or ratification of the present Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of this article. The other State Parties shall not be bound by that paragraph with respect to any State Party that has made such a declaration.

3. Any State Party that has made a declaration in accordance with paragraph 2 of this article may at any time withdraw that declaration by notification to the Secretary-General of the United Nations.

Article 93

1. The present Convention of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Convention to all States.

APPENDIX D

COUNCIL OF EUROPE INSTRUMENTS RELEVANT TO THE PROTECTION OF MIGRANT WORKERS AND THEIR FAMILIES

[Selected Provisions]

EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, 1950

[European Treaty Series No. 5]

Article 1

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.

Article 3

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

SECTION 1

Article 5(1)(f)

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with procedure prescribed by law:

f. the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Article 8

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 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.

Article 11

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

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedom of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, or of the police or of the administration of the State.

Article 12

Men and women of marriageable age have the right to marry and to found a family, according to national laws governing the exercise of this right.

Article 13

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 16

Nothing in articles 10 [right to freedom of expression], 11 [right to freedom of peaceful assembly and to freedom of association with others) and 14 [non-discrimination] shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

Article 60

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.

PROTOCOL No. 1 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 1952

[European Treaty Series No. 9]

Article 1

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article 2

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

Article 3

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions that will ensure the free expression of the opinion of the people in the choice of the legislature.

PROTOCOL No. 4 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 1963
[European Treaty Series No. 46]

Article 2

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

Article 4

Collective expulsion of aliens is prohibited.

PROTOCOL No. 7 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS
[European Treaty Series No. 117]

Article 1

1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:

   a. to submit reasons against his expulsion,

   b. to have his case reviewed, and

   c. to be represented for these purposes before the competent authority or a person or persons designated by that authority.

2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

EUROPEAN CONVENTION ON ESTABLISHMENT, 1955

[European Treaty Series No. 19]

CHAPTER I
ENTRY, RESIDENCE AND EXPULSION

Article 1

Each Contracting Party shall facilitate the entry into its territory by nationals of the other Parties for the purpose of temporary visits and shall permit them to travel freely within its territory except when this would be contrary to *ordre public*, national security, public health or morality.

Article 2

Subject to the conditions set out in Article 1 of this Convention, each Contracting Party shall, to the extent permitted by its economic and social conditions, facilitate the prolonged or permanent residence in its territory of nationals of the other Parties.

Article 3

1. Nationals of any Contracting Party lawfully residing in the territory of another Party may be expelled only if they endanger national security or offend against *ordre public* or morality.

2. Except where imperative considerations of national security otherwise require, a national of any Contracting Party who has been so lawfully residing for more than two years in the territory of any other Party shall not be expelled without first being allowed to submit reasons against his expulsion and to appeal to, and be represented for the purpose before, a competent authority or a person or persons specially designated by the competent authority.

3. Nationals of any Contracting Party who have been lawfully residing for more than ten years in the territory of any other Party may only be expelled for reasons of national security or if the other reasons mentioned in paragraph 1 of this Article are of a particularly serious nature.

CHAPTER II
EXERCISE OF PRIVATE RIGHTS

Article 4

Nationals of any Contracting Party shall enjoy in the territory of any other Party treatment equal to that enjoyed by nationals of the latter Party in respect of the possession and exercise of private rights, whether personal rights or rights relating to property.

Article 5

Notwithstanding Article 4 of this Convention, any Contracting Party may, for reasons of national security or defence, reserve the acquisition, possession or use of any categories of property for its own nationals or subject nationals of other Parties to special conditions applicable to aliens in respect of such property.

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CHAPTER III
JUDICIAL AND ADMINISTRATIVE GUARANTEES
[Omitted]

CHAPTER IV
GAINFUL OCCUPATIONS

Article 10

Each Contracting Party shall authorise nationals of the other Parties to engage in its territory in any gainful occupation on an equal footing with its own nationals, unless the said Contracting Party has cogent economic or social reasons for withholding the authorization. This provision shall apply, but not be limited, to industrial, commercial, financial and agricultural occupations, skilled crafts and the professions, whether the person concerned is self-employed or is in the service of an employer.

Article 11

Nationals of any Contracting Party who have been allowed by another Party to engage in gainful occupation for a certain period may not, during that period, be subjected to restrictions not provided for at the time authorization was granted to them unless such restrictions are equally applicable to nationals of the latter Party in similar circumstances.

Article 12

1. Nationals of any Contracting Party lawfully residing in the territory of any other Party shall be authorised, without being made subject to the restrictions referred to in Article 10 of this Convention, to engage in any gainful occupation on an equal footing with nationals of the latter Party, provided they comply with one of the following conditions:

(a) they have been lawfully engaged in a gainful occupation in that territory for an uninterrupted period of five years;

(b) they have lawfully resided in that territory for an interrupted period of ten years;

(c) they have been admitted to permanent residence.

Any Contracting Party may, at the time of signature or of deposit of its instrument of ratification of this Convention, declare that it does not accept one or two of the conditions mentioned above.

2. Such Party may also, in accordance with the same procedure, increase the period laid down in paragraph 1(a) of this Article to a maximum of ten years, provided that after the first period of five years renewal of an authorization may in no case be refused in respect of the occupation pursued up to that time nor may such renewal be conditional upon any change in that occupation. It may also declare that it will not in all cases automatically grant the right to change from a wage-earning occupation to an independent occupation.

Article 13

Any Contracting Party may reserve for its own nationals the exercise of public functions or of occupations connected with national security or defence, or make the exercise of these occupations by aliens subject to special conditions.

Article 14

1. Apart from the functions or occupations mentioned in Article 13 of this Convention,

(a) any Contracting Party which has reserved certain occupations for its own nationals or made the exercise of them by aliens, including nationals of the other Parties, subject to regulations or reciprocity, shall at the time of signature of this Convention transmit a list of these restrictions to the Secretary-General of the Council of Europe, indicating which provisions of its municipal law are the basis of such restrictions. The Secretary-General shall forward these lists to the other Signatories;

(b) after this Convention has entered into force in respect of any Contracting Party, that Party shall not introduce any further restrictions as to the exercise of gainful occupations by the nationals of other Parties unless it finds itself compelled to do so for imperative reasons of an economic or social character. It shall in this event keep the Secretary-General fully informed of the measures taken, the relevant provisions of municipal law and the reasons for such measures. The Secretary-general shall communicate this information to the other Parties.

2. Each Contracting Party shall endeavour for the benefit of nationals of the other Parties:
to reduce the list of occupations which are reserved for its own nationals or the exercise of which by aliens is subject to regulations or reciprocity; it shall notify the Secretary-General of any such changes, and he shall communicate them to the other Parties;

in so far as its laws permit, to allow individual exemptions from the provisions in force.

Article 15

The exercise by nationals of one Contracting Party in the territory of another Party of an occupation in respect of which nationals of the latter Party are required to possess professional or technical qualifications or to furnish guarantees shall be made subject to the production of the same guarantees or to the possession of the same qualifications or of others recognised as their equivalent by the competent national authority;

Provided that nationals of the Contracting Parties engaged in the lawful pursuit of their profession in the territory of any Party may be called into the territory of any other Party by one of their colleagues for the purpose of lending assistance in a particular case.

.....

Article 17

1. Nationals of any Contracting Party shall, in the territory of another Party, enjoy treatment no less favourable than nationals of the latter Party in respect of any statutory regulation by a public authority concerning wages and working conditions in general.

2. The provisions of this Chapter shall not be understood as requiring a Contracting Party to accord in its territory more favourable treatment as regards the exercise of a gainful occupation to the nationals of any other Party than that accorded to its own nationals.

CHAPTER V
INDIVIDUAL RIGHTS

Article 18

No Contracting Party may forbid nationals of another Party who have been lawfully engaged for at least five years in an appropriate occupation in the territory of the former Party from taking part on an equal footing with its own nationals as electors in elections held by bodies or organisations of an economic or professional nature such as Chambers of Commerce or of Agricultural or Trade Associations, subject to the decisions which such bodies or organisations may take in this respect within the limits of their competence.

Article 19

Nationals of any Contracting Party in the territory of any other Party shall be permitted, without any restrictions other than those applicable to nationals of the latter Party, to act as arbitrators in arbitral proceedings in which the choice of arbitrators is left entirely to the Parties concerned.

Article 20

In so far as access to education is under State control, nationals of school age of any Contracting Party lawfully residing in the territory of any other Party shall be admitted, on an equal footing with the nationals of the latter Party, to institutions for primary and secondary education and technical and vocational training. The application of this provision to the grant of scholarships shall be left to the discretion of individual Parties. School attendance shall be compulsory for nationals of school age residing in the territory of another Contracting Party if it is compulsory for the nationals of the latter Party.

CHAPTER VI
TAXATION, COMPULSORY CIVILIAN SERVICES, EXPROPRIATION, NATIONALISATION
[Omitted]

CHAPTER VII
STANDING COMMITTEE

Article 24

1. A Standing Committee shall be set up within a year of the entry into force of this Convention. This Committee may formulate proposals designed to improve the practical implementation of the Convention and, if necessary, to amend or supplement its provisions.

.....

3. The Committee shall arrange for the publication of a periodical report containing all information regarding the laws and regulations in force in the territory of the Parties in respect of matters provided for in this Convention.

4. Each Member of the Council of Europe which has ratified this Convention shall appoint at representative to this Committee. Any other Member of the Council may be represented by an observer with the right to speak.

.....

6. Opinions or recommendations of the Standing Committee shall be submitted to the Committee of Ministers.

.....

CHAPTER VIII
GENERAL PROVISIONS

Article 25

The provisions of this Convention shall not prejudice the provisions of municipal law, bilateral or multilateral treaties, conventions and agreements which are already in force or may come into force under which more favourable treatment would be accorded to nationals of one or more of the other Contracting Parties.

Articles 26 and 27
[reservations]

Article 28
[Right to derogate in time of war or other public emergency threatening the life of the nation]

CHAPTER IX
FIELD OF APPLICATION OF THE CONVENTION
[Omitted]

CHAPTER X
SETTLEMENT OF DISPUTES
[Omitted]

CHAPTER XI
FINAL PROVISIONS

Article 32

The Protocol attached to this Convention shall form an integral part of it.

Article 33
[Denunciation]

Article 34
[Signature and ratification]

PROTOCOL
SECTION I

Articles 1, 2, 3, 5, 6 paragraph 1(b), 10, 13 and 14, paragraph 1(b)

(a) Each Contracting Party shall have the right to judge by national criteria:

(1) the reasons of "*ordre public*", national security, public health or morality which may provide grounds for the exclusion from its territory of nationals of other Parties;

(2) "the economic and social conditions" which may prevent the admission of nationals of other Parties to prolonged or permanent residence or the exercise of gainful occupations in its territory;

(3) the circumstances which constitute a threat to national security or an offence against *ordre public* or morality;

(4) the reasons specified in the Convention for which a Contracting Party may reserve for its own nationals the acquisition, possession or use of any categories of property or the exercise of certain rights and occupations or may make the exercise thereof by nationals of the other Parties subject to special conditions.

(b) Each Contracting Party shall determine whether the reasons for expulsion are of a "particularly serious nature". In this connection account shall be taken of the behaviour of the individual concerned during his whole period of residence.

(c) A Contracting Party may only restrict the rights of nationals of other Parties for the reasons set forth in this Convention and to the extent compatible with the obligations assumed by the Parties.

.....

SECTION III

Articles 1, 2 and 3

(a) The concept of "*ordre public*" is to be understood in the wide sense generally accepted in continental countries. A Contracting Party may, for instance, exclude a national of another Party for political reasons, if there are grounds for believing that he is unable to pay the expenses of his stay or that he intends to engage in a gainful occupation without the necessary permits.

(b) The Contracting Parties undertake, in the exercise of their established rights, to pay due regard to family ties.

(c) The right of expulsion may be exercised only in individual cases.

The Contracting Parties shall, in exercising their right of expulsion, act with consideration, having regard to the particular relations which exist between the Members of the Council of Europe. They shall in particular take due account of family ties and the period of residence in the territory of the person concerned.

.....

SECTION V

Articles 10, 11, 12, 13, 14, 15, 16 and 17

.....

(b) The husband or wife and dependant children of nationals of any Contracting Party lawfully residing in the territory of another Party who have been authorised to accompany or rejoin them shall as far as possible be allowed to take up employment in that territory in accordance with the conditions laid down in this Convention.

.....

EUROPEAN SOCIAL CHARTER, 1961

[European Treaty Series No. 35]

Preamble [Selected]

The Governments signatory hereto, being Members of the Council of Europe,

Considering that the aim of the Council of Europe is the achievement of greater unity between its Members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and of facilitating their economic and social progress, in particular by the maintenance and further realisation of human rights and fundamental freedoms;

.....

Considering that the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin;

Being resolved to make every effort in common to improve the standard of living and to promote the social well-being of both their urban and rural populations by means of appropriate institutions and actions,

Have agreed as follows:

PART I

The Contracting Parties accept as the aim of their policy, to be pursued by all appropriate means, both national and international in character, the attainment of conditions in which the following rights and principles may be effectively realised:

1. Everyone shall have the opportunity to earn his living in an occupation freely entered upon.

2. All workers have the right to just conditions of work.

3. All workers have the right to safe and healthy working conditions.

4. All workers have the right to a fair remuneration sufficient for a decent standards of living for themselves and their families.

5. All workers and employers have the right to freedom of association in national or international organisations for the protection of their economic and social interests.

6. All workers and employers have the right to bargain collectively.

.....

9. Everyone has the right to appropriate facilities for vocational guidance with a view to helping him choose an occupation suited to his personal aptitude and interests.

10. Everyone has the right to appropriate facilities for vocational training.

11. Everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable.

12. All workers and their dependants have the right to social security.

13. Anyone without adequate resources has the right to social and medical assistance.

14. Everyone has the right to benefit from social welfare services.

.....

16. The family as a fundamental unit of society has the right to appropriate social, legal and economic protection to ensure its full development.

17. Mothers and children, irrespective of marital status and family relations, have the right to appropriate social and economic protection.

18. The nationals of any one of the Contracting Parties have the right to engage in any gainful occupation in the territory of any one of the others on a footing of equality with the nationals of the latter, subject to restrictions based on cogent economic or social reasons.

19. Migrant workers who are nationals of a Contracting Party and their families have the right to protection and assistance in the territory of any other Contracting Party.

PART II

The Contracting Parties undertake, as provided for in Part III, to consider themselves bound by the obligations laid down in the following Articles and paragraphs.

.....

Article 9

The Right to Vocational Guidance

With a view to ensuring the effective exercise of the right to vocational guidance, the Contracting Parties undertake to provide or promote, as necessary, a service which will assist all persons, including the handicapped, to solve problems related to occupational choice and progress, with due regard to the individual's characteristics and their relation to occupational opportunity: this assistance should be available free of charge, both to young persons, including school children, and to adults.

Article 10

The Right to Vocational Training

With a view to ensuring the effective exercise of the right to vocational training, the Contracting Parties undertake:

1. to provide or promote, as necessary, the technical and vocational training of all persons, including the handicapped, in consultation with employers' and workers' organizations, and to grant facilities for access to higher technical and education, based solely on individual aptitude;

2. to provide or promote a system of apprenticeship and other systematic arrangements for training young boys and girls in their various employments;

3. to provide or promote, as necessary:

   a. adequate and readily available training facilities for adult workers;

   b. special facilities for the re-training of adult workers needed as a result of technological development or new trends in employment;

4. to encourage the full utilization of the facilities provided by appropriate measures such as:

a. reducing or abolishing any fees or charges;

b. granting financial assistance in appropriate cases;

c. including in the normal working hours time spent on supplementary training taken by the worker, at the request of his employer, during employment;

d. ensuring, through adequate supervision, in consultation with the employers' and workers' organizations, the efficiency of apprenticeship and other training arrangements for young workers generally.

Article 11

The Right to Protection of Health

With a view to ensuring the effective exercise of the right to protection of health, the Contracting Parties undertake, either directly, or in co-operation with public or private organizations, to take appropriate measures designed *inter alia*:

1. to remove as far as possible the causes of ill-health;

2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;

3. to prevent as far as possible epidemic, endemic and other diseases.

Article 12

The Right to Social Security

With a view to ensuring the effective exercise of the right to social security, Contracting Parties undertake:

1. to establish or maintain a system of social security;

2. to maintain the social security system at a satisfactory level at least equal to that required for ratification of International Labour Convention (No. 102) Concerning Minimum Standards of Social Security;

3. to endeavour to raise progressively the system of social security to a higher level;

4. to take steps, by the conclusion of appropriate bilateral and multilateral agreements, or by other means, and subject to the conditions laid down in such agreements, in order to ensure:

(a) equal treatment with their own nationals of the nationals of other Contracting Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Contracting Parties;

(b) the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Contracting Parties.

Article 13

The Right to Social and Medical Assistance

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

1. to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;

2. to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights;

3. to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove or to alleviate personal or family want;

4. to apply the provisions referred to in paragraphs 1, 2 and 3 of this Article on an equal footing with their nationals to nationals of other Contracting Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11th December 1953.

.....

Article 16

The Right of the Family to Social, Legal and Economic Protection

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

Article 18

The Right to Engage in a Gainful Occupation in the Territory of Other Contracting Parties

With a view to ensuring the effective exercise of the right to engage in a gainful occupation in the territory of any other Contracting Party, Contracting Parties undertake:

1. to apply existing regulations in a spirit of liberality;

2. to simplify existing formalities and to reduce or abolish chancery dues and other charges payable by foreign workers or their employers;

3. to liberalise, individually or collectively, regulations governing the employment of foreign workers; and recognise:

4. the right of their nationals to leave the country to engage in a gainful occupation in the territories of the other Contracting Parties.

Article 19

The Right of Migrant Workers and Their Families to Protection and Assistance

With a view to securing the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Contracting Party, the Contracting Parties undertake:

1. to maintain or to satisfy themselves that there are maintained adequate and free services to assist such workers, particularly in obtaining accurate information, and to take all appropriate steps, so far as national laws and regulations permit, against misleading propaganda relating to emigration and immigration;

2. to adopt appropriate measures within their own jurisdiction to facilitate the departure, journey and reception of such workers and their families, and to provide, within their own jurisdiction, appropriate services for health, medical attention and good hygienic conditions during the journey;

3. to promote co-operation, as appropriate, between social services, public and private, in emigration and immigration countries;

4. to secure for such workers lawfully within their territories, insofar as such matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment not less favourable than that of their own nationals in respect of the following matters:

(a) remuneration and other employment and working conditions;

(b) membership of trade unions and enjoyment of the benefits of collective bargaining;

(c) accommodation;

5. to secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals with regard to employment taxes, dues or contributions payable in respect of employed persons;

6. to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory;

7. to secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals in respect of legal proceedings relating to matters referred to in this Article;

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

9. to permit, within legal limits, the transfer of such parts of the earnings and savings of such workers as they may desire;

10. to extend the protection and assistance provided for in this Article to self-employed migrants insofar as such measures apply.

PART III

Article 20

Undertakings

1. Each of the Contracting Parties undertakes:

(a) to consider Part I of this Charter as a declaration of the aims which it will pursue by all appropriate means, as stated in the introductory paragraph of that Part;

(b) to consider itself bound by at least five of the following Articles of Part II of this Charter: Articles 1, 5, 6, 12, 13, 16 and 19;

(c) in addition to the Articles selected by it in accordance with the preceding sub-paragraph, to consider itself bound by such a number of Articles or numbered paragraphs of Part II of the Charter as it may select, provided that the total number of Articles or numbered paragraphs by which it is bound is not less than 10 Articles or 45 numbered paragraphs.

.....

PART V

Article 30

Derogations in Time of War or Public Emergency

1. In time of war or other public emergency threatening the life of the nation any Contracting Party may take measures derogating from its obligations under this Charter to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. Any Contracting Party which has availed itself of this right of derogation shall, within a reasonable lapse of time, keep the Secretary-General of the Council of Europe fully informed of the measures taken and of the reasons therefor. It shall likewise inform the Secretary-General when such measures have ceased to operate and the provisions of the Charter which it has accepted are again being fully executed.

3. The Secretary-General shall in turn inform other Contracting Parties and the Director-General of the International Labour Office of all communications received in accordance with paragraph 2 of this Article.

Article 31

Restrictions

1. The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those Parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.

2. The restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed.

Article 32

Relations Between the Charter and Domestic Law or International Agreements

The provision of this Charter shall not prejudice the provisions of domestic law or of any bilateral or multilateral treaties, conventions or agreements which are already in force, or may come into force, under which more favourable treatment would be accorded to the persons protected.

.....

Article 38

Appendix

The Appendix to this Charter shall form an integral part of it.

APPENDIX TO THE SOCIAL CHARTER

Scope of the Charter in terms of persons protected:

1. Without prejudice to Article 12, paragraph 4 and Article 13, paragraph 4, the persons covered by Articles 1 to 17 include foreigners only insofar as they are nationals of other Contracting Parties lawfully resident or working regularly within the territory of the Contracting Party concerned, subject to the understanding that these Articles are to be interpreted in the light of the provisions of Articles 18 and 19.

This interpretation would not prejudice the extension of similar facilities to other persons by any of the Contracting Parties.

.....

Part I, Paragraph 18 and Part II, Article 18, paragraph 1

It is understood that these provisions are not concerned with the question of entry into the territories of the Contracting Parties and do not prejudice the provisions of the European Convention on Establishment, signed at Paris on 13th December 1955.

.....

Article 12, paragraph 4

The words "and subject to the conditions laid down in such agreements" in the introduction to this paragraph are taken to imply *inter alia* that with regard to benefits which are available independently of any insurance contribution a Contracting Party may require the completion of a prescribed period of residence before granting such benefits to nationals of other Contracting Parties.

Article 13, paragraph 4

Governments not Parties to the European Convention on Social and Medical Assistance may ratify the Social Charter in respect of this paragraph provided that they grant to nationals of other Contracting Parties a treatment which is in conformity with the provisions of the said Convention.

Article 19, paragraph 6

For the purpose of this provision, the term "family of a foreign worker" is understood to mean at least his wife and dependent children under the age of 21 years.

EUROPEAN CONVENTION ON THE LEGAL STATUS OF MIGRANT WORKERS, 1977

[European Treaty Series No. 93]

Preamble

The member States of the Council of Europe, signatory hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its Members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress while respecting human rights and fundamental freedoms;

Considering that the legal status of migrant workers who are nationals of Council of Europe member States should be regulated so as to ensure that as far as possible they are treated no less favourably than workers who are nationals of the receiving State in all aspects of living and working conditions;

Being resolved to facilitate the social advancement of migrant workers and members of their families;

Affirming that the rights and privileges which they grant to each other's nationals are conceded by virtue of the close association uniting the member States of the Council of Europe by means of its Statute,

Have agreed as follows:

CHAPTER 1

Article 1

Definition

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

2. The Convention shall not apply to:

a. frontier workers;

b. artists, other entertainers and sportsmen engaged for a short period and members of a liberal profession;

c. seamen

d. persons undergoing training;

e. seasonal workers; seasonal migrant workers are those who, being nationals of a Contracting Party, are employed on the territory of another Contracting Party in an activity dependent on the rhythm of the seasons, on the basis of a contract for a specified period or for specified employment;

f. workers, who are nationals of a Contracting Party, carrying out specific work in the territory of another Contracting Party on behalf of an undertaking having its registered office outside the territory of that Contracting Party.

CHAPTER II

Article 2

Forms of recruitment

1. The recruitment of prospective migrant workers may be carried out either by named or unnamed request and in the latter case shall be effected through the intermediary of the official authority in the State of origin if such an authority exists and, where appropriate, through the intermediary of the official authority of the receiving State.

2. The administrative costs of recruitment, introduction and placing, when these operations are carried out by an official authority, shall not be borne by the prospective migrant worker.

Article 3

Medical examination and vocational test

1. Recruitment of prospective migrant workers may be preceded by a medical examination and a vocational test.

2. The medical examination and the vocational test are intended to establish whether the prospective migrant worker is physically and mentally fit and technically qualified for the job offered to him and to make certain that his state of health does not endanger public health.

3. Arrangements for the reimbursement of expenses connected with medical examination and vocational test shall be laid down when appropriate by bilateral agreements, so as to ensure that such expenses do not fall upon the prospective migrant worker.

4. A migrant worker to whom an individual offer of employment is made shall not be required, otherwise than on grounds of fraud, to undergo a vocational test except at the employer's request.

Article 4

Right of exit - Right to admission - Administrative formalities

1. Each Contracting Party shall guarantee the following rights to migrant workers:

- the right to leave the territory of the Contracting Party of which they are nationals;

- the right to admission to the territory of a Contracting Party in order to take up paid employment after being authorised to do so and obtaining the necessary papers.

2. These rights shall be subject to such limitations as are prescribed by legislation and are necessary for the protection of national security, public order, public health or morals.

3. The papers required of the migrant worker for emigration and immigration shall be issued as expeditiously as possible free of charge or on payment of an amount not exceeding their administrative cost.

Article 5

Formalities and procedure relating to the work contract

Every migrant worker accepted for employment shall be provided prior to departure for the receiving State with a contract of employment or a definite offer of employment, either of which may be drawn up in one or more of the languages in use in the State of origin and in one or more of the languages in use in the receiving State. The use of at least one language of the State of origin and one language of the receiving State shall be compulsory in the case of recruitment by an official authority or an officially recognised employment bureau.

Article 6

Information

1. The Contracting Parties shall exchange and provide for prospective migrants appropriate information on their residence, conditions of and opportunities for family reunion, the nature of the job, the possibility of a new work contract being concluded after the first has lapsed, the qualifications required, working and living conditions (including the cost of living), remuneration, social security, housing, food, the transfer of savings, travel, and on deductions made from wages in respect of contributions for social protection and social security, taxes and other charges. Information may also be provided on the cultural and religious conditions in the receiving State.

2. In the case of recruitment through an official authority of the receiving State, such information shall be provided, before his departure, in a language which the prospective migrant worker can understand, to enable him to take a decision in full knowledge of the facts. The translation, where necessary, of such information into a language that the prospective migrant worker can understand shall be provided as a general rule by the State of origin.

3. Each Contracting Party undertakes to adopt the appropriate steps to prevent misleading propaganda relating to emigration and immigration.

Article 7

Travel

1. Each Contracting Party undertakes to ensure, in the case of official collective recruitment, that the cost of travel to the receiving State shall never be borne by the migrant worker. The arrangements for payment shall be determined under bilateral agreements, which may also extend these measures to families and to workers recruited individually.

2. In the case of migrant workers and their families in transit through the territory of one Contracting Party en route to the receiving State, or on their return journey to the State of origin, all steps shall be taken by the competent authorities of the transit State to expedite their journey and prevent administrative delays and difficulties.

3. Each Contracting Party shall exempt from import duties and taxes at the time of entry into the receiving State and of the final return to the State of origin and in transit:

a. the personnel effects and movable property of migrant workers and members of their family belonging to their household;

b. a reasonable quantity of hand-tools and portable equipment necessary for the occupation to be engaged in.

The exemptions referred to above shall only be granted in accordance with the laws and regulations in force in the States concerned.

CHAPTER III

Article 8

Work Permit

1. Each Contracting Party which allows a migrant worker to enter its territory to take up paid employment shall issue or renew a work permit for him (unless he is exempt from this requirement), subject to the conditions laid down in its legislation.

2. However, a work permit issued for the first time may not as a rule bind the worker to the same employer or the same locality for a period longer than one year.

3. In case of renewal of the migrant worker's work permit, this should as a general rule be for a period of at least one year, in so far as the current state and development of the employment situation permits.

Article 9

Residence Permit

1. Where required by national legislation, each Contracting Party shall issue residence permits to migrant workers who have been authorised to take up paid employment on their territory under conditions laid down in this Convention.

2. The residence permit shall in accordance with the provisions of national legislation be issued and, if necessary, renewed for a period as a general rule at least as long as that of the work permit. When the work permit is valid indefinitely, the residence permit shall as a general rule be issued and, if necessary, renewed for a period of at least one year. It shall be issued and renewed free of charge or for a sum covering administrative costs only.

3. The provisions of this Article shall also apply to members of the migrant worker's family who are authorised to join him in accordance with Article 12 of the Convention.

4. If a migrant worker is no longer in employment, either because he is temporarily incapable of work as a result of illness or accident or because he is involuntarily unemployed, this being duly confirmed by the competent authorities, he shall be allowed for the purpose of the application of Article 25 of this Convention to remain on the territory of the receiving State for a period which should not be less than five months.

Nevertheless, no Contracting Party shall be bound in the case provided for in the above sub-paragraph, to allow a migrant worker to remain for a period exceeding the period of payment of the unemployment allowance.

5. The residence permit, issued in accordance with the provisions of paragraphs 1 to 3 of this Article, may be withdrawn:

a. for reasons of national security, public policy or morals,

b. if the holder refuses, after being duly informed of the consequences of such refusal, to comply with the measures prescribed for him by an official medical authority with a view to the protection of public health.

c. if a condition essential to its issue or validity is not fulfilled.

Each Contracting Party nevertheless undertakes to grant to migrant workers whose residence permits have been withdrawn, an effective right to appeal, in accordance with the procedure for which provision is made in its legislation, to a judicial or administrative authority.

Article 10

Reception

1. After arrival in the receiving State, migrant workers and members of their families shall be given all appropriate information and advice as well as all necessary assistance for their settlement and adaptation.

2. For this purpose, migrant workers and members of their families shall be entitled to help and assistance from the social services of the receiving State or from bodies working in the public interest in the receiving State and to help from the consular authorities of their State of origin. Moreover, migrant workers shall be entitled, on the same basis as national workers, to help and assistance from the employment services. However, each Contracting Party shall endeavour to ensure that special social services are available, whenever the situation so demands, to facilitate or co-ordinate the reception of migrant workers and their families.

3. Each Contracting Party undertakes to ensure that migrant workers and members of their families can worship freely, in accordance with their faith; each Contracting Party shall facilitate such worship within the limit of available means.

Article 11

Recovery of sums due in respect of maintenance

1. The status of migrant workers must not interfere with the recovery of sums due in respect of maintenance to persons in the State of origin to whom they have maintenance obligations, arising from a family relationship, parentage, marriage or affinity, including a maintenance obligation in respect of a child who is not legitimate.

2. Each Contracting Party shall take the steps necessary to ensure the recovery of sums due in respect of such maintenance, making use as far as possible of the form adopted by the Committee of Ministers of the Council of Europe.

3. As far as possible, each Contracting Party shall take steps to appoint a single national or regional authority to receive and despatch applications for sums due in respect of maintenance provided for in paragraph 1.

4. This Article shall not affect existing or future bilateral or multilateral agreements.

Article 12

Family reunion

1. The spouse of a migrant worker who is lawfully employed in the territory of a Contracting Party and the unmarried children thereof, as long as they are considered to be minors by the relevant law of the receiving State, who are dependant on the migrant worker, are authorised on conditions analogous to those which this Convention applies to the admission of migrant workers and according to the admission procedure prescribed by such law or by international agreements to join the migrant worker in the territory of a Contracting Party, provided that the latter has available for the family housing considered as normal for national workers in the region where the migrant worker is employed. Each Contracting Party may make the giving of authorization conditional upon a waiting period which shall not exceed twelve months.

2. Any State may, at any time, by declaration addressed to the Secretary General of the Council of Europe, which shall take effect one month after the date of its receipt, make the family reunion referred to in paragraph 1 above further conditional upon the migrant worker having steady resources sufficient to meet the needs of his family.

3. Any State may, at any time, by declaration addressed to the Secretary General of the Council of Europe, which shall take effect one month after the date of its receipt, derogate temporarily from the obligation to give the authorization provided for in paragraph 1 above, for one or more parts of its territory which it shall designate in its declaration, on the condition that these measures do not conflict with obligations under other international instruments. The declaration shall state the special reasons justifying the derogation with regard to receiving capacity.

Any State availing itself of this possibility of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and shall ensure that these measures are published as soon as possible. It shall also inform the Secretary General of the Council of Europe when such measures cease to operate and the provisions of the Convention are again being fully executed.

The derogation shall not, as a general rule, affect requests for family reunion submitted to the competent authorities, before the declaration is addressed to the Secretary General, by migrant workers already established in the part of the territory concerned.

Article 13

Housing

1. Each Contracting Party shall accord to migrant workers, with regard to access to housing and rents, treatment not less favourable than that accorded to its own nationals, in so far as this matter is covered by domestic laws and regulations.

2. Each Contracting Party shall ensure that the competent authorities carry out inspections in appropriate cases in collaboration with the respective consular authorities, acting within their competence, to ensure that standards of fitness of accommodation are kept up for migrant workers as for its own nationals.

3. Each Contracting Party undertakes to protect migrant workers against exploitation in respect of rents, in accordance with its laws and regulations on the matter.

4. Each Contracting Party shall ensure, by the means available to the competent national authorities, that the housing of the migrant worker shall be suitable.

Article 14

Pre-training - Schooling - Linguistic training - Vocational training and retraining

1. Migrant workers and members of their families officially admitted to the territory of a Contracting Party shall be entitled, on the same basis and under the same conditions as national workers, to general education and vocational training and retraining and shall be granted access to higher education according to the general regulations governing admission to respective institutions in the receiving State.

2. To promote access to general and vocational schools and to vocational training centres, the receiving State shall facilitate the teaching of its language or, if there are several, one of its languages to migrant workers and members of their families.

3. For the purpose of the application of paragraphs 1 and 2 above, the granting of scholarships shall be left to the discretion of each Contracting Party which shall make efforts to grant the children of migrant

workers living with their families in the receiving State - in accordance with the provisions of Article 12 of this Convention - the same facilities in this respect as the receiving State's nationals.

4. The workers' previous attainment, as well as diplomas and vocational qualifications acquired in the State of origin, shall be recognized by each Contracting Party in accordance with arrangements laid down in bilateral and multilateral agreements.

5. The Contracting Parties concerned, acting in close co-operation, shall endeavour to ensure that the vocational training and retraining schemes, within the meaning of this Article, cater as far as possible for the needs of migrant workers with a view to their return to their State of origin.

Article 15

Teaching of the migrant worker's mother tongue

The Contracting Parties concerned shall take action by common accord to arrange, as far as practicable, for the migrant worker's children, special courses for the teaching of the migrant worker's mother tongue, to facilitate, inter alia, their return to their State of origin.

Article 16

Conditions of work

1. In the matter of the conditions of work, migrant workers authorised to take up employment shall enjoy treatment not less favourable than that which applies to national workers by virtue of legislative or administrative provisions, collective labour agreements or custom.

2. It shall not be possible to derogate by individual contract from the principle of equal treatment referred to in the foregoing paragraph.

Article 17

Transfer of savings

1. Each Contracting Party shall permit, according to the arrangements laid down by its legislation, the transfer of all or such parts of the earnings and savings of migrant workers as the latter may wish to transfer.

This provision shall apply also to the transfer of sums due by migrant workers in respect of maintenance. The transfer of sums due by migrant workers in respect of maintenance shall on no account be hindered or prevented.

2. Each Contracting Party shall permit, under bilateral agreements or by any other means, the transfer of such sums as remain due to migrant workers when they leave the territory of the receiving State.

Article 18

Social Security

1. Each Contracting Party undertakes to grant within its territory, to migrant workers and members of their families, equality of treatment with its own nationals, in the matter of social security, subject to conditions required ny national legislation and by bilateral or multilateral agreements already concluded or to be concluded between the Contracting Parties concerned.

2. The Contracting Parties shall moreover endeavour to secure to migrant workers and members of their families the conservation of rights in course of acquisition and acquired rights, as well as provision of benefits abroad, through bilateral and multilateral agreements.

Article 19

Social and Medical Assistance

Each Contracting Party undertakes to grant within its territory, to migrant workers and members of their families who are lawfully present in its territory, social and medical assistance on the same basis as nationals in accordance with the obligations it has assumed by virtue of other international agreements and in particular of the European Convention on Social and Medical Assistance of 1953.

Article 20

Industrial accidents and occupational diseases
- Industrial hygiene

1. With regard to the prevention of industrial accidents and occupational diseases and to industrial hygiene, migrant workers shall enjoy the same rights and protection as migrant workers, in application of the laws of the Contracting Party and collective agreements and having regard to their particular situation.

2. A migrant worker who is a victim of an industrial accident or who has contracted an occupational disease in the territory of the receiving State shall benefit from occupational rehabilitation on the same basis as national workers.

Article 21

Inspection of working conditions

Each Contracting Party shall inspect or provide for inspection of the conditions of work of migrant workers in the same manner as for national workers. Such inspection shall be carried out by the competent bodies or institutions of the receiving State and by any other authority authorised by the receiving State.

Article 22

Death

Each Contracting Party shall take care, within the framework of its laws and, if need be, within the framework of bilateral agreements, that steps are taken to provide all help and assistance necessary for the transport to the State of origin of the bodies of migrant workers deceased as the result of an industrial accident.

Article 23

Taxation on earnings

1. In the matter of earnings and without prejudice to the provisions on double taxation contained in agreements already concluded or which nay in future be concluded between Contracting Parties, migrant workers shall not be liable, in a territory of a Contracting Party, to duties, charges, taxes or contributions of any description whatsoever either higher or more burdensome than those imposed on nationals in similar circumstances. In particular, they shall be entitled to deductions or exemptions from taxes or charges and to all allowances, including allowances for dependants.

2. The Contracting Parties shall decide between themselves, by bilateral or multilateral agreements on double taxation, what measures might be taken to avoid double taxation on the earnings of migrant workers.

Article 24

Expiry of contract and discharge

1. On the expiry of a work contract concluded for a specified period at the end of the period agreed on and in the case of anticipated cancellation of such a contract or cancellation of a work contract for an unspecified period, migrant workers shall be accorded treatment not less favourable than that accorded to national workers under the provisions of national legislation or collective labour agreements.

2. In the event of individual or collective dismissal, migrant workers shall receive the treatment applicable to national workers under national legislation or collective labour agreements, particularly as regards the form and period of notice, the compensation provided for in legislation or agreements or such as may be due in cases of unwarranted cancellation of their work contracts.

Article 25

Re-employment

1. If a migrant worker loses his job for reasons beyond his control, such as redundancy or prolonged illness, the competent authority of the receiving State shall facilitate his re-employment in accordance with the laws and regulations of the State.

2. To this end the receiving State shall promote the measures necessary to ensure, as far as possible, the vocational retraining and occupational rehabilitation of the migrant worker in question, provided that he intends to continue in employment in the State concerned afterwards.

Article 26

Right of access to the courts and administrative authorities in the receiving State

1. Each Contracting Party shall secure to migrant workers treatment not less favourable than that of its own nationals in respect of legal proceedings. Migrant workers shall be entitled, under the same conditions as nationals, to full legal and judicial protection of their persons and property and of their rights and interests; in particular, they shall have, in the same manner as nationals, the right of access to the competent courts and administrative authorities, in accordance with the law of the receiving State, and the right to obtain the assistance of any person of their choice who is qualified by the law of that State, for instance in disputes with employers, members of their families or third parties. The rules of private international law of the receiving State shall not be affected by this Article.

2. Each Contracting Party shall provide migrant workers with legal assistance on the same conditions as for their own nationals and, in the case of civil or criminal proceedings, the possibility of obtaining the assistance of an interpreter where they cannot understand or speak the language used in court.

Article 27

Use of employment services

Each Contracting Party recognises the right of migrant workers and of the members of their families officially admitted to its territory to make use of employment services under the same conditions as nationals, subject to the legal provisions and regulations and administrative practice, including conditions of access, in force in that State.

Article 28

Exercise of the right to organise

Each Contracting Party shall allow to migrant workers the right to organise for the protection of their economic and social interests on the conditions provided for by national legislation for its own nationals.

Article 29

Participation in the affairs of the undertaking

Each Contracting Party shall facilitate as far as possible the participation of migrant workers in the affairs of the undertaking on the same conditions as national workers.

CHAPTER IV

Article 30

Return Home

1. Each Contracting Party shall, as far as possible, take appropriate measures to assist migrant workers and their families on the occasion of their final return to their State of origin, and in particular the steps referred to in paragraphs 2 and 3 of Article 7 of the Convention. The provision of financial assistance shall be left to the discretion of each Contracting Party.

2. To enable migrant workers to know, before they set out on their return journey, the conditions on which they will be able to resettle in their State of origin, this State shall communicate to the receiving State, which shall keep available for those who request it, information regarding in particular:

- possibilities and conditions of employment in the State of origin;

- financial aid granted for economic reintegration;

- the maintenance of social security rights acquired abroad;

- steps to be taken to facilitate the finding of accommodation;

- equivalence accorded to occupational qualifications obtained abroad and any tests to be passed to secure their official recognition;

- equivalence accorded to educational qualifications, so that migrant workers' children can be admitted to schools without downgrading.

CHAPTER V

Article 31

Conservation of acquired rights

No provision of this Convention may be interpreted as justifying less favourable treatment than that enjoyed by migrant workers under the national legislation of the receiving State or under bilateral and multilateral agreements to which that State is a Contracting Party.

Article 32

Relations between this Convention and
the laws of the Contracting Parties or international agreements

The provisions of this Convention shall not prejudice the provisions of the laws of the Contracting Parties or of any bilateral or multilateral treaties, conventions, agreements or arrangements, as well as the steps taken to implement them, which are already in force, or may come into force, and under which more favourable treatment has been, or would be, accorded to the persons protected by the Convention.

Article 33

Application of the Convention

1. A Consultative Committee shall be set up within a year of entry into force of this Convention.

2. Each Contracting Party shall appoint a representative to the Consultative Committee. Any other member State of the Council of Europe may be represented by an observer with the right to speak.

3. The Consultative Committee shall examine any proposals submitted to it by one of the Contracting Parties with a view to facilitating or improving the application of the Convention, as well as any proposal to amend it.

4. The opinions and recommendation of the Consultative Committee shall be adopted by a majority of the members of the committee; however, proposals to amend the Convention shall be adopted unanimously by the members of the committee.

5. The opinions, recommendations and proposals of the Consultative Committee referred to above shall be addressed to the Committee of Ministers of the Council of Europe, which shall decide on the action to be taken.

6. The Consultative Committee shall be convened by the Secretary General of the Council of Europe and shall meet, as a general rule, at least once every two years and, in addition, wherever at least two Contracting Parties or the Committee of Ministers so requests. The committee shall also meet at the request of one Contracting Party whenever the provisions of paragraph 3 of Article 12 are applied.

7. The Consultative Committee shall draw up periodically, for the attention of the Committee of Ministers, a report containing information regarding the laws and regulations in force in the territory of the Contracting Parties in respect of matters provided for in this Convention.

CHAPTER VI

Article 34

Signature, ratification and entry into force

1. This Convention shall be open to signature by the member States of the Council of Europe. It shall be subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

2. This Convention shall enter into force on the first day of the third month following the date of the deposit of the fifth instrument of ratification, acceptance or approval.

3. In respect of a signatory State ratifying, approving or accepting subsequently, the Convention shall enter into force on the first day of the third month following the date of the deposit of its instrument of ratification, acceptance or approval.

Article 35

Territorial scope

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval or at any later date, by declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to all or any of the territories for whose international relations its is responsible or on whose behalf it is authorised to give undertakings.

2. Any declaration made in pursuance of the preceding paragraph may, in respect of any territory mentioned in such declaration, be withdrawn. Such withdrawal shall take effect six months after receipt by the Secretary general of the Council of Europe of the declaration of withdrawal.

Article 36

Reservations

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, make one or more reservations which may relate to no more than nine Articles of Chapters II to IV inclusive, other than Articles 4, 8, 9, 12, 16, 17, 20, 25, 26.

2. Any State may, at any time, wholly or partly withdraw a reservation it has made in accordance with the foregoing paragraph by means of a declaration addressed to the Secretary General of the Council of Europe, which shall become effective as from the date of its receipt.

Article 37

Denunciation of the Convention

1. Each Contracting Party may denounce this Convention by notification addressed to the Secretary General of the Council of Europe, which shall take effect six months after the date of its receipt.

2. No denunciation may be made within five years of the date of the entry into force of the Convention in respect of the Contracting Party concerned.

3. Each Contracting Party which ceases to be a Member of the Council of Europe shall cease to be a Party to this Convention six months after the date on which it loses its quality as a Member of the Council of Europe.

Article 38

Notifications

The Secretary General of the Council of Europe shall notify the member States of the Council of:

a. any signature;

b. the deposit of any instrument of ratification, acceptance or approval;

c. any notification received in respect of paragraphs 2 and 3 of Article 12;

d. any date of entry into force of this Convention in accordance with Article 34 thereof;

e. any declaration received in pursuance of the provisions of Article 35;

f. any reservation made in pursuance of the provisions of paragraph 1 of article 36;

g. withdrawal of any reservation carried out in pursuance of the provisions of paragraph 2 of Article 36;

h. any notification received in pursuance of the provisions of Article 37 and the date on which denunciation takes place.

In witness whereof, the undersigned, being duly authorised thereto, have signed this Convention.

Done at Strasbourg, this 24th day of November 1977, in English and French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each of the signatory States.

APPENDIX E

TREATY OF ROME PROVISIONS AND EUROPEAN COMMUNITY SECONDARY LEGISLATION RELEVANT TO THE PROTECTION OF MIGRANT WORKERS AND THEIR FAMILIES

[Selected Provisions]

TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY

[Rome, March 25, 1957, 298 U.N.T.S. 11]

Article 3

For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

.....

(c) the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital;

.....

Article 7

Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein; any discrimination on grounds of nationality shall be prohibited.

The Council may, on proposal from the Commission and after consulting the Assembly, adopt, by a qualified majority, rules designed to prohibit such discrimination.

TITLE III: FREE MOVEMENT OF PERSONS, SERVICES AND CAPITAL.

CHAPTER I
WORKERS

Article 48

1. Freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after being employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

4. The provisions of this Article shall not apply to employment in the public service.

Article 49

As soon as this Treaty enters into force, the Council shall, acting on a proposal from the Commission and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about, by progressive stages, freedom of movement for workers, as defined in Article 48, in particular:

(a) by ensuring close cooperation between national employment services;

(b) by systematically and progressively abolishing those administrative procedures and practices and those qualifying periods in respect of eligibility for available employment, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to liberalisation of the movement of workers;

(c) by systematically and progressively abolishing all such qualifying periods and other restrictions provided for either under national legislation or under agreements concluded between Member States as imposed on workers of other Member States conditions regarding the free choice of employment other than those imposed on workers of the State concerned;

(d) by setting up appropriate machinery to bring offers of employment into touch with applications for employment and to facilitate the achievement of a balance between supply and demand in the employment market in such a way as to avoid serious threats to the standard of living and level of employment in the various regions and industries.

Article 50

Member States shall, within the framework of a joint programme, encourage the exchange of young workers.

Article 51

The Council shall, acting unanimously on a proposal from the Commission, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, it shall make arrangements to secure for migrant workers and their dependants:

(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;

(b) payment of benefits to persons resident in the territories of Member States.

CHAPTER II
RIGHT OF ESTABLISHMENT
(Articles 52 to 58)

CHAPTER III
SERVICES
(Articles 59 to 66)

PART III
POLICY OF THE COMMUNITY
TITLE III - SOCIAL POLICY
CHAPTER I - SOCIAL PROVISIONS

Article 118

Without prejudice to the other provisions of this Treaty and in conformity with its general objectives, the Commission shall have the task of promoting close cooperation between Member States in the social field, particularly in matters relating to:

- employment;

- labour law and working conditions;

- basic law and advanced vocational training;

- social security;

- prevention of occupational accidents and diseases;

- occupational hygiene;

- the right of association, and collective bargaining between employers and workers.

To this end, the Commission shall act in close contact with Member States by making studies, delivering opinions and arranging consultation both on problems arising at national level and on those of concern to international organizations.

Before delivering the opinions provided for in this Article, the Commission shall consult the Economic and Social Committee.

DIRECTIVE 64/221 OF 15 FEBRUARY 1964 ON THE CO-ORDINATION OF SPECIAL MEASURES CONCERNING THE MOVEMENT AND RESIDENCE OF FOREIGN NATIONALS

(O.J. Sp. Ed. 1963-64, 117)

The Council of the European Economic Community,

Preamble [Omitted]

Has adopted this directive:

Article 1

1. The provisions of this shall apply to any national of a Member State who resides in or travels to another Member State of the Community, either in order to pursue an activity as an employed or self-employed person, or as a recipient of services.

2. These provisions shall apply also to the spouse and to members of the family who come within the provisions of the regulations and directives adopted in this field in pursuance of the Treaty.

Article 2

1. This Directive relates to all measures concerning the entry into their territory, issue or renewal of residence permits, or expulsion from their territory, taken by Member States on grounds of public policy, public security or public health.

2. Such grounds shall not be invoked to service economic ends.

Article 3

1. Measures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned.

2. Previous criminal convictions shall not in themselves constitute grounds for the taking of such measures.

3. Expiry of the identity card or passport used by the person concerned to enter the host country and to obtain a residence permit shall not justify expulsion from the territory.

4. The State which issued the identity card or passport shall allow the holder of such document to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute.

Article 4

1. The only diseases or disabilities justifying refusal of entry into a territory or refusal to issue a first residence permit shall be those listed in the Annex to this Directive.

2. Diseases or disabilities occurring after a first residence permit has been issued shall not justify refusal to renew the residence permit or expulsion from the territory.

3. Member States shall not introduce new provisions or practices which are more restrictive than those in force at the date of notification of this Directive.

Article 5

1. A decision to grant or to refuse a first residence permit shall be taken as soon as possible and in any event not later than six months from the date of application for the permit.

The person concerned shall be allowed to remain temporarily in the territory pending a decision either to grant or to refuse a residence permit.

2. The host country may, in cases where this is considered essential, request the Member State of origin of the applicant, and if need be other Member States, to provide information concerning any previous police record. Such enquiries shall not be made as a matter of routine. The Member State consulted shall give its reply within two months.

Article 6

The person concerned shall be informed of the grounds of public policy, public security or public health upon which the decision taken in his case is based, unless this is contrary to the interests of the security of the State involved.

Article 7

The person concerned shall be officially notified of any decision to refuse the issue or renewal of a residence permit or to expel him from the territory. The period allowed for leaving the territory shall be stated in this notification. Save in cases of urgency, this period shall be not less than fifteen days if the person concerned has not yet been granted a residence permit and not less than one month in all other cases.

Article 8

The person concerned shall have the same legal remedies in respect of any decision concerning entry, or refusing the issue or renewal of a residence permit, or ordering expulsion from the territory, as are available to nationals of the State concerned in respect of acts of administration.

Article 9

1. Where there is no right of appeal to a court of law, or where such appeal may be only in respect of legal validity of the decision, or where the appeal cannot have suspensory effect, a decision refusing renewal of a residence permit or ordering the expulsion of the holder of a residence permit from the territory shall not be taken by the administrative authority, save in cases of urgency, until an opinion has been obtained from a competent authority of the host country before which the person concerned enjoys such rights of defence and of assistance or representation as the domestic law of that country provides for.

This authority shall not be the same as that empowered to take the decision refusing renewal of the residence permit or ordering expulsion.

2. Any decision refusing the issue of a first residence permit or ordering expulsion of the person concerned before the issue of the permit shall, where that person so requests, be referred for consideration to the authority whose prior opinion is required under paragraph 1. The person concerned shall then be entitled to submit his defence in person, except where this would be contrary to the interests of national security.

Article 10

1. Member States shall within six months of notification of this Directive put into force the measures necessary to comply with its provision and shall forthwith inform the Commission thereof.

2. Member States shall ensure that the texts of the main provisions of national law which they adopt in the field governed by this Directive are communicated to the Commission.

Article 11

This Directive is addressed to the Member States.

ANNEX
[list of diseases/disabilities]

REGULATION 1612/68 OF 15 OCTOBER 1968 ON FREEDOM OF MOVEMENT FOR WORKERS

[O.J. Sp. Ed. 1968 475]

The Council of the European Communities,

Preamble [Selected]

.....

Whereas freedom of movement for workers should be secured within the Community by the end of the transitional period at the latest; whereas the attainment of this objective entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment, as well as the right of such workers to move freely within the Community in order to pursue activities as employed persons subject to any limitations justified on grounds of public policy, public security or public health;

.....

Whereas freedom of movement constitutes a fundamental right of workers and their families; whereas mobility of labour within the Community must be one of the means by which the worker is guaranteed the possibility of improving his living and working conditions and promoting his social advancement, while helping to satisfy the requirements of the economies of the Member States; whereas the right of all workers in the Member States to pursue the activity of their choice within the Community should be affirmed;

Whereas such right must be enjoyed without discrimination by permanent, seasonal and frontier workers and by those who pursue their activities for the purpose of providing services;

Whereas the right of freedom of movement, in order that it may be exercised, by objective standards, in freedom and dignity, requires that equality of treatment shall be ensured in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons and to eligibility for housing, and also that obstacles to the mobility of workers shall be eliminated, in particular as regards the worker's right to be joined by his family and the conditions for the integration of that family into the host country;

Whereas the principle of non-discrimination between Community workers entails that all nationals of Member States have the same priority as regards employment as is enjoyed by national workers;

Has adopted this Regulation:

PART I
EMPLOYMENT AND WORKERS' FAMILIES

TITLE I
ELIGIBILITY FOR EMPLOYMENT

Article 1

1. Any national of a Member State, shall, irrespective of the place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State.

2. He shall, in particular, have the right to take up available employment in the territory of another Member State with the same priority as nationals of that State.

Article 2

Any national of a Member State and any employer pursuing an activity in the territory of a Member State may exchange their applications for and offers of employment, and may conclude and perform contracts of employment in accordance with the provisions in force laid down by law, regulation or administrative action, without any discrimination resulting therefrom.

Article 3

1. Under this Regulation, provisions laid down by law, regulation or administrative action or administrative practices of a Member State shall not apply:

- where they limit application for and offers of employment, or the right of foreign nationals to take up and pursue employment or subject these to conditions not applicable in respect of their own nationals; or

- where, though applicable irrespective of nationality, their exclusive or principal aim or effect, is to keep nationals of other Member States away from the employment offered.

This provision shall not apply to conditions relating to linguistic knowledge required by reason of the nature of the post to be filled.

2. There shall be included in particular among the provisions or practices of a Member State referred to in its first subparagraph of paragraph 1 those which:

(a) prescribe a special recruitment procedure for foreign nationals;

(b) limit or restrict the advertising of vacancies in the press or through any other medium or subject it to conditions other than those applicable in respect of employers pursuing their activities in the territory of that Member State;

(c) subject eligibility for employment to conditions of registration with employment offices or impede recruitment of individual workers, where persons who do not reside in the territory of that State are concerned.

Article 4

1. Provisions laid down by law, regulation or administrative action of the Member States which restrict by number or percentage the employment of foreign nationals in any undertaking, branch of activity or region, or at a national level, shall not apply to nationals of the other Member States.

2. When in a Member State the granting of any benefit to undertakings is subject to a minimum percentage of national workers being employed, nationals of the other Member States shall be counted as national workers, subject to the provisions of the Council Directive of 15 October 1963.

Article 5

A national of a Member State who seeks employment in the territory of another Member State shall receive the same assistance there as that afforded by the employment offices in that State to their own nationals seeking employment.

Article 6

1. The engagement of a national of one Member State for a post in another Member State shall not depend on medical, vocational or other criteria which are discriminatory on grounds of nationality by comparison with those applied to nationals of the other Member State who wish to pursue the same activity.

2. Nevertheless, a national who holds an offer in his name from an employer in a Member State other than that of which he is a national may have to undergo a vocational text, if the employer expressly requests this when making his offer of employment.

TITLE II
EMPLOYMENT AND EQUALITY OF TREATMENT

Article 7

1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment.

2. He shall enjoy the same social and tax advantages as national workers.

3. He shall also, by virtue of the same right and under the same conditions as national workers, have access to training in vocational schools and retraining centres.

4. Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorises discriminatory conditions in respect of workers who are nationals of the other Member States.

Article 8

A worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy equality of treatment as regards membership of trade unions and the exercise of rights attaching thereto, including the right to vote and to be eligible for the administration or management posts of a trade union; he may be excluded from taking part in the management of bodies governed by public law and from holding an office governed by public law. Furthermore, he shall have the right of eligibility for workers' representative bodies in the undertaking. The provisions of this Article shall not affect laws or regulations in certain Member States which grant more extensive rights to workers coming from the other Member States.

Article 9

1. A worker who is an national of a Member State and who is employed in the territory of another Member State shall enjoy all the rights and benefits accorded to national workers in matters of housing, including ownership of the housing he needs.

2. Such worker may, with the same right as nationals, put his name down on the housing lists in the region in which he is employed, where such lists exist; he shall enjoy the resultant benefits and priorities.

If his family has remained in the country whence he came, they shall be considered for this purpose as residing in the said region, where national workers benefit from a similar presumption.

TITLE III
WORKERS' FAMILIES

Article 10

1. The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State:

(a) his spouse and their descendants who are under the age of 21 years or are dependants;

(b) dependant relatives in the ascending line of the worker and his spouse.

2. Member States shall facilitate the admission of any member of the family not coming within the provisions of paragraph 1 if dependant on the worker referred to above or living under his roof in the country whence he comes.

3. For the purposes of paragraphs 1 and 2, the worker must have available for his family housing considered as normal for national workers in the region where he is employed; this provision, however, must not give rise to discrimination between national workers and workers from the other Member States.

Article 11

Where a national of a Member State is pursuing an activity as an employed or self-employed person in the territory of another Member State, his spouse and those of the children who are under the age of 21 years or dependant on him shall have the right to take up any activity as an employed person throughout the territory of that same State, even if they are not nationals of any Member State.

Article 12

The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general education, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.

Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions.

PART II

CLEARANCE OF VACANCIES AND APPLICATIONS FOR EMPLOYMENT

TITLE I
CO-OPERATION BETWEEN THE MEMBER STATES AND WITH THE COMMISSION
[Omitted]

TITLE II
MACHINERY FOR VACANCY CLEARANCE
[Omitted]

TITLE III
MEASURES FOR CONTROLLING THE BALANCE OF THE LABOUR MARKET

.....

Article 20

1. When a Member State undergoes or foresees disturbances on it lat our market which could seriously threaten the standard of living or level of employment in a given region or occupation, that State shall inform the Commission and the other Member States thereof and shall supply them with all relevant particulars.

2. The Member States and the Commission shall take all suitable measures to inform Community workers so that they shall not apply for employment in that region or occupation.

3. Without prejudice to the application of the Treaty and of the Protocols annexed thereto, the Member State referred to in paragraph 1 may request the Commission to state that, in order to restore to normal the situation in that region or occupation, the operation of the clearance machinery provided for in Articles 15, 16 and 17 should be partially or totally suspended.

The Commission shall decide on the suspension as such and on the duration therefor, not later than two weeks after receiving such a request. Any Member State may, within a strict time limit of two weeks, request the Council to annul or amend any such decision. The Council shall act on any such request within two weeks.

4. Where such suspension does take place, the employment services of the other Member States which have indicated that they have workers available shall not take any action to fill vacancies notified directly to them by employers in the Member States referred to in paragraph 1.

.....

TITLE IV
EUROPEAN CO-ORDINATION OFFICE
[Omitted]

PART III

COMMITTEES FOR ENSURING THE CLOSE CO-OPERATION BETWEEN THE MEMBER STATES IN MATTERS CONCERNING THE FREEDOM OF MOVEMENT OF WORKERS AND THEIR EMPLOYMENT

TITLE I
THE ADVISORY COMMITTEE
[Selected]

Article 24

The Advisory Committee shall be responsible for assisting the Commission in the examination of any questions arising from the application of the Treaty and measures taken in pursuance thereof, in matters concerning the freedom of movement of workers and their employment.

.....

Article 26

1. The Advisory Committee shall be composed of six members for each Member State, two of whom shall represent the government, two the trade unions and two the employers' associations.

2. For each of the categories referred to in paragraph 1, one alternate member shall be appointed by each Member State.

3. The term of office of the members and their alternates shall be two years. Their appointments shall be renewable.

On expiry of their term of office, the members and their alternates shall remain in office until replaced or until their appointments are renewed.

.....

TITLE II
THE TECHNICAL COMMITTEE
[Selected]

Article 32

The Technical Committee shall be responsible for assisting the Commission to prepare, promote and follow up all technical work and measures for giving effect to this Regulation and any supplementary measures.

.....

Article 34

1. The Technical Committee shall be composed of representatives of the Governments of the Member States. Each Government shall appoint as member of the Technical Committee one of the members who represent it on the Advisory Committee.

2. Each Government shall appoint an alternate from among its representatives--members or alternates--on the Advisory Committee.

.....

PART IV

TRANSITIONAL AND FINAL PROVISIONS

TITLE I
TRANSITIONAL PROVISIONS
[Omitted]

TITLE II
FINAL PROVISIONS
[Selected]

.....

Article 45

The Commission shall submit to the Council proposals aimed at abolishing, in accordance with the conditions of the Treaty, restrictions on eligibility for employment of workers who are nationals of Member States, where the absence of mutual recognition of diplomas, certificates or other evidence of formal qualification may prevent freedom of movement for workers.

.....

ANNEX
[Definitions]

DIRECTIVE 68/360 OF 15 OCTOBER 1968 ON THE ABOLITION OF RESTRICTIONS ON MOVEMENT AND RESIDENCE WITHIN THE COMMUNITY

[O.J. Sp. Ed. 1968, 485]

The Council of the European Communities,

Preamble
[Omitted]

Has adopted this Directive:

Article 1

Member States shall, acting as provided in this Directive, abolish restrictions on the movement and residence of nationals of the said States and of members of their families to whom Regulation (EEC) No 1612/68 applies.

Article 2

1. Member States shall grant the nationals referred to in Article 1 the right to leave their territory in order to take up activities as employed persons and to pursue such activities in the territory of another Member State. Such right shall be exercised simply on production of a valid identity card or passport. Members of the family shall enjoy the same right as the national on whom they are dependent.

.....

Article 3
[abolition of visa requirements]

Article 4

1. Member States shall grant the right of residence in their territory to the persons referred to in Article 1 who are able to produce the documents listed in paragraph 3.

2. As proof of residence, a document entitled "Residence Permit for a National of a Member State of the EEC" shall be issued.

.....

3. For the issue of a Residence Permit for a National of a Member State of the EEC, Member States may require only the production of the following documents;

- by the worker:

(a) the document with which he entered their territory;

(b) a confirmation of engagement from the employer or a certificate of employment;

- by the members of the worker's family:

(c) the document with which they entered the territory;

(d) a document issued by the competent authority of the State of origin or the State whence they came, proving their relationship;

(e) in the cases referred to in Article 10(1) and (2) of Regulation (EEC) No. 1612/68, a document issued by the competent authority of the State of origin or the State whence they came, testifying that they are dependent on the worker or that they live under his roof in such country.

4. A member of the family who is not a national of a Member State shall be issued a residence document which shall have the same validity as that issued to the worker on whom he is dependent.

Article 6

1. The residence permit:

(a) must be valid throughout the territory of the Member State which issued it;

(b) must be valid for at least five years from the date of issue and be automatically renewable.

.....

Article 7

1. A valid residence permit may not be withdrawn from a worker solely on the grounds that he is no longer in employment, either because he is temporarily incapable of work as a result of illness or accident, or because he is involuntarily unemployed, this being duly confirmed by the competent employment office.

2. When the residence permit is renewed for the first time, the period of residence may be restricted, but not to less than twelve months, where the worker has been involuntarily unemployed in the Member State for more than twelve consecutive months.

Article 8

1. Member States shall, without, issuing a residence permit, recognize the right of residence in their territory of:

(a) a worker pursuing an activity as an employed person, where the activity is not expected to last for more than three months.

.....

(b) a worker who, while having his residence in the territory of a Member State to which he returns as a rule, each day or at least once a week, is employed in the territory of another Member State. The competent authority of the State where he is employed may issue such worker with a special permit valid for five years and automatically renewable;

(c) a seasonal worker who holds a contract of employment stamped by the competent authority of the Member State on whose territory he has come to pursue his activity.

2. In all cases referred to in paragraph 1, the competent authorities of the host Member State may require the worker to report his presence in the territory.

Article 10

Member States shall not derogate from the provisions of this Directive save on grounds of public policy, public security or public health.

.....

REGULATION 1251/70 OF 29 JUNE 1970 ON THE RIGHT OF WORKERS TO REMAIN IN THE TERRITORY OF A MEMBER STATE

[O.J. Sp. Ed. 1970, 402]

The Commission of the European Communities,

Preamble [Selected]

.....

Whereas Council Regulation (EEC) No 1612/68 of 15 October 1968 and Council Directive No 68/360/EEC of 15 October 1968 enabled freedom of movement for workers to be secured at the end of a series of measures to be achieved progressively; whereas the right of residence acquired by workers in active employment has as a corollary the right, granted by the Treaty to such workers, to remain in the territory of a Member State after having been employed in that State; whereas it is important to lay down the conditions for the exercise of such a right;

Whereas the said Council Regulation and Council Directive contain the appropriate provisions concerning the right of workers to reside in the territory of a Member State for the purposes of employment; whereas the right to remain, referred to in Article 48(3)(d) of the Treaty, is interpreted therefore as the right of the worker to maintain his residence in the territory of a Member State when he ceases to be employed there;

Whereas the mobility of labour in the Community requires that workers may be employed successively in several Member States without thereby being placed at a disadvantage;

Whereas it is important, in the first place, to guarantee to the worker residing in the territory of a Member State the right to remain in that territory when he ceases to be employed in that State because he has reached retirement age or by reason of permanent incapacity to work; whereas, however, it is equally important to ensure that right for the worker who, after a period of employment and residence in the territory of a Member State, works as an employed person in the territory of another Member State, while still retaining his residence in the territory of the first State;

.....

Has adopted this Regulation:

Article 1

The provisions of this Regulation shall apply to nationals of a Member State who have worked as employed persons in the territory of another Member State and to members of their families, as defined in Article 10 of Council Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community.

Article 2

1. The following shall have the right to remain permanently in the territory of a Member State:

(a) a worker who, at the time of termination of his activity, has reached the age laid down by the law of that Member State for entitlement to an old-age pension and who has been employed in that State for at least the last twelve months and has resided there continuously for more than three years;

(b) a worker, who having resided continuously in the territory of that State for more than two years, ceases to work there as an employed person as a result of an accident at work or an occupational disease entitling him to a pension for which an institution of that State is entirely or partially responsible, no condition shall imposed as to length of residence;

(c) a worker, after three years' continuous employment and residence in the territory of that State, works as an employed person in the territory of another Member State, while retaining his residence in the territory of the first State, to which he returns, as a rule, each day or at least once a week.

Periods of employment completes in this way in the territory of the other Member State shall, for the purposes of entitlement to the rights referred to in subparagraphs (a) and (b), be considered as having been completed in the territory of the State of residence.

2. The conditions as to the length of residence and employment laid down in paragraph 1 (a) and the condition as to length of residence laid down in paragraph 1 (b) shall not apply if the worker's spouse is a national of the Member State concerned or has lost the nationality of that State by marriage to that worker.

Article 3

1. The members of a worker's family referred to in Article 1 of this Regulation who are residing with him in the territory of a Member State shall be entitled to remain there permanently if the worker has acquired the right to remain in the territory of that State in accordance with Article 2, and to do so even after his death.

2. If, however, the worker dies during his working life and before having acquired the right to remain in the territory of the State concerned, members of his family shall be entitled to remain there permanently on condition that:

- the worker, on his date of the decease, had resided continuously in the territory of that Member State for at least two years; or

- his death resulted from an accident at work or an occupational disease; or

- the surviving spouse is a national of the State of residence or lost the nationality of that State by marriage to that worker.

.....

Article 6

1. Persons coming under the provisions of this Regulation shall be entitled to a residence permit which:

(a) shall be issued and renewed free of charge or no payment of a sum not exceeding the dues and taxes payable by nationals for the issue or renewal of identity documents;

(b) must be valid throughout the territory of the Member State issuing it;

(c) must be valid for at least five years and be renewable automatically.

2. Periods of non-residence not exceeding six consecutive months shall not affect the validity of the residence permit.

Article 7

The right to equality of treatment, established by Council Regulation (EEC) No 1612/68, shall apply also to persons coming under the provisions of this Regulation.

DIRECTIVE 72/194 OF 18 MAY 1972 EXTENDING THE SCOPE OF DIRECTIVE 64/221 OF 15 FEBRUARY 1964

[O.J. Sp. Ed. 1972, 474]

The Council of the European Communities,

Preamble [Omitted]

Has adopted the following Directive:

Article 1

The Council Directive of 25 February 1964 on coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health shall apply to nationals of Member States and members of their families who pursuant to Regulation (EEC) No 1251/70, exercise the right to remain in the territory of a Member State.

.....

DIRECTIVE 73/148 OF 21 MAY 1973 ON THE ABOLITION OF RESTRICTIONS ON MOVEMENT AND RESIDENCE WITHIN THE COMMUNITY FOR NATIONALS OF MEMBER STATES WITH REGARD TO ESTABLISHMENT AND SERVICES

[O.J. 1973, L.172/14]

.....

Article 4

1. Each Member State shall grant the right of permanent residence to nationals of other Member States who establish themselves within its territory in order to pursue activities as self-employed persons, when the restrictions on these activities have been abolished pursuant to the Treaty.

As proof of the right of residence, a document entitled "Residence Permit for a National of a Member State of the European Communities" shall be issued. This document shall be valid for not less than five years from the date of issue and shall be automatically renewable.

.....

Article 6

An applicant for a residence permit or right of abode shall not be required by a Member State to produce anything other than the following, namely:

(a) the identity card or passport with which he or she entered its territory;

(b) proof that he or she comes within one of the classes of person referred to in Articles 1 and 4.

.....

Article 8

Member States shall not derogate from the provision of this Directive save on grounds of public policy, public security or public health.

.....

DIRECTIVE 77/486 OF 25 JULY 1977 ON THE EDUCATION OF THE CHILDREN OF MIGRANT WORKERS

[O.J. 1977, L199/32]

Preamble [Selected]

The Council of the European Communities,

.....

Whereas in its resolution of 21 January 1974 concerning a social action programme, the Council included in its priority actions those designed to improve the conditions of freedom of movement for workers relating in particular to reception and to the education of their children;

Whereas in order to permit the integration of such children into the educational environment and the school system of the host State, they should be able to receive suitable tuition including teaching of the language of the host State;

Whereas host Member States should also take, in conjunction with the Member States of origin, appropriate measures to promote the teaching of the mother tongue and of the culture of the country of origin of the above mentioned children, with a view principally to facilitating their possible reintegration into the Member State of origin,

Has adopted this Directive:

Article 1

This Directive shall apply to children for whom school attendance is compulsory under the laws of the host State, who are dependants of any worker who is a national of another Member State, where such children are resident in the territory of the Member State in which that national carries on or has carried on an activity as an employed person.

Article 2

Member States shall, in accordance with their national circumstances and legal systems, take appropriate measures to ensure that free tuition to facilitate initial reception is offered in their territory to the children referred to in Article 1, including, in particular, the teaching--adapted to the specific needs of such children--of the official language or one of the official languages of the host State.

Member States shall take the measures necessary for the training and further training of the teachers who are to provide this tuition.

Article 3

Member States shall, in accordance with their national circumstances and legal systems, and in cooperation with States of origin, take appropriate measures to promote, in coordination with normal education, teaching of the mother tongue and culture of the country of origin for the children referred to in Article 1.

Article 4

The Member States shall take the necessary measures to comply with this Directive within four years of its notification and shall forthwith inform the Commission thereof.

The Member States shall also inform the Commission of all laws, regulations and administrative or other provisions which they adopt in the field governed by this Directive.

Article 5

The Member States shall forward to the Commission within five years of the application of this Directive, and subsequently at regular intervals at the request of the Commission, all relevant information to enable the Commission to report to the Council on the application of this Directive.

Article 6

This Directive is addressed to the Member States.

COMMUNITY CHARTER OF THE FUNDAMENTAL SOCIAL RIGHTS OF WORKERS[1]

Preamble [Selected]

The Heads of State of Government of the member States of the European Community meeting at Strasbourg on 9 December 1989

.....

Whereas following on from the conclusions of the European Councils of Hanover and Rhodes the European Council of Madrid considered that, in the context of the establishment of the single European market, the same importance must be attached to the social aspects as to the economic aspects and whereas, therefore, they must be developed in a balanced manner;

.....

Whereas the completion of the internal market must offer improvements in the social field for workers of the European Community, especially in terms of freedom of movement, living and working conditions, health and safety at work, social protection, education and training;

.....

Whereas it is for Member States to guarantee that workers from non-member countries and members of their families who are legally resident in a Member State of the Community are able to enjoy, as regards their living and working conditions, treatment comparable to that enjoyed by workers who are nationals of the Member State concerned;

Whereas inspiration should be drawn from the Conventions of the International Labour Organization and from the European Social Charter of the Council of Europe;

.....

Whereas the aim of the present Charter is on the one hand to consolidate the progress made in the social field, through action by the Member States, the two sides of industry and the Community;

Whereas its aim is on the other hand to declare solemnly that the implementation of the Single European Act must take full account of the social dimension of the Community and that it is necessary in this context to ensure at appropriate levels the development of the social rights of workers of the European Community, especially employed workers and self-employed persons;

.....

Have adopted the following Declaration constituting the "Community Charter of the Fundamental Social Rights of Workers":

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1 The text of the Charter has been reproduced from Council of Europe, Directorate of Human Rights, *Information Sheet No. 26 (November 1989 - April 1990)* (Strasbourg: Council of Europe, 1990) Appendix XXXVI.

TITLE I

FUNDAMENTAL SOCIAL RIGHTS

Freedom of Movement

1. Every worker of the European Community shall have the right to freedom of movement throughout the territory of the Community subject to restrictions justified on grounds of public order, public safety or public health.

2. The right to freedom of movement shall enable any worker to engage in any occupation or profession in the Community in accordance with the principles of equal treatment as regards access to employment, working conditions and social protection in the host country.

.....

Employment and Remuneration

4. Every individual shall be free to choose and engage in an occupation according to the regulations governing each occupation.

5. All employment shall be fairly remunerated.

.....

6. Every individual shall have access to public placement services free of charge.

Improvement of Living and Working Conditions

.....

8. Every worker of the European Community shall have a right to a weekly rest period and to annual paid leave, the duration of which must be harmonized in accordance with national practices.

9. The conditions of employment of every worker of the European Community shall be stipulated in laws, a collective agreement or a contract of employment, according to arrangements applying in each country.

Social Protection

According to the arrangements applying in each country:

10. Every worker of the European Community shall have a right to adequate social protection and shall, whatever his status and whatever the size of the undertaking in which he is employed, enjoy an adequate level of social security benefits.

.....

Freedom of Association and Collective Bargaining

11. Employers and workers of the European Community shall have the right of association in order to constitute professional organizations or trade unions of their choice for the defence of their economic and social interests.

.....

Vocational Training

15. Every worker of the European Community must be able to have access to vocational training and to benefit therefrom throughout his working life. In the conditions governing access to such training there may be no discrimination on grounds of nationality.

The competent public authorities, undertakings or the two sides of industry, each within their own sphere of competence, should set up continuing and permanent training systems enabling every citizen to undergo retraining more especially through leave for training purposes, to improve his skills or to acquire new skills, particularly in the light of technical developments.

Equal Treatment for Men and Women

.....

Information, Consultation and Participation for Workers

.....

Health Protection and Safety at the Workplace

19. Every worker must enjoy satisfactory health and safety conditions in his working environment. Appropriate measures must be taken in order to achieve further harmonization of conditions in this area while maintaining the improvements made.

These measures shall take account, in particular, of the need for the training, information, consultation and balanced participation of workers as regards the risks incurred and the steps taken to eliminate or reduce them.

The provisions regarding the implementation of the internal market shall help to ensure such protection.

Protection of Children and Adolescents

20. Without prejudice to such rules as may be more favourable to young people, in particular those ensuring their preparation for work through vocational training, and subject to derogations limited to certain light work, the minimum employment age must not be lower than the minimum school-leaving age and, in any case, not lower than 15 years.

21. Young people who are in gainful employment must receive equitable remuneration in accordance with national practice.

22. Appropriate measures must be taken to adjust labour regulations applicable to young workers so that their specific development and vocational training and access to employment needs are met. The duration of work, must, in particular, be limited - without it being possible to circumvent this limitation through recourse to overtime - and night work prohibited in the case of workers of under 18 years of age, save in the case of certain jobs laid down in national legislation or regulations.

23. Following the end of compulsory education, young people must be entitled to receive initial vocational training of a sufficient duration to enable them to adapt to the requirements of their future working life; for young workers, such training should take place during working hours.

Elderly Persons

.....

Disabled Persons

.....

TITLE II
IMPLEMENTATION OF THE CHARTER

27. It is more particularly the responsibility of the Member States, in accordance with national practices, notably through legislative measures or collective agreements, to guarantee the fundamental social rights contained in this Charter and to implement the social measures indispensable to the smooth operation of the internal market as part of a strategy of economic and social cohesion.

28. The European Council invites the Commission to submit as soon as possible initiatives which fall within its powers, as provided for in the Treaties, with a view to the adoption of legal instruments for the effective implementation, as and when the internal market is completed, of those rights which come within the Community's area of competence.

29. The Commission shall establish each year, during the last three months, a report on the application of the Charter by the Member States and by the European Community.

30. The report of the Commission shall be forwarded to the European Council, the European Parliament and the Economic and Social Committee.

SOCIAL SECURITY

COUNCIL REGULATION 1408/71 OF 14 JUNE 1971 ON THE APPLICATION OF SOCIAL SECURITY SCHEMES TO EMPLOYED PERSONS, TO SELF-EMPLOYED PERSONS AND TO MEMBERS OF THEIR FAMILIES MOVING WITHIN THE COMMUNITY

[J.O. 1971, L149/2; O.J. 1971, 416]

As amended and updated by REGULATION 2001/83 OF JUNE 2, 1983
[O.J. 1983, L320/6]

.....

Article 2

Persons covered

1. This Regulation shall apply to employed or self-employed persons who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as well as to the members of their families and their survivors.

2. In addition, this Regulation shall apply to the survivors of employed or self-employed persons who have been subject to the legislation of one or more Member States, irrespective of the nationality of such employed or self-employed persons, where their survivors are nationals of one of the Member States, or stateless persons or refugees residing within the territory of one of the Member States.

3. This Regulation shall apply to civil servants and to persons who, in accordance with the legislation applicable, are treated as such, where they are or have been subject to the legislation of a Member State to which this Regulation applies.

Article 3

Equality of Treatment

1. Subject to the special provisions of this Regulation persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State.

.....

Article 4

Matters covered

1. This Regulation shall apply to all legislation concerning the following branches of social security:

(a) sickness and maternity benefits;

(b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity;

(c) old-age benefits;

(d) survivor's benefits;

(e) benefits in respect of accidents at work and occupational diseases;

(f) death grants;

(g) unemployment benefits;

(h) family benefits.

2. This Regulation shall apply to all general and special social security schemes, contributory or non-contributory, and to schemes concerning the liability of an employer or shipowner in respect of the benefits referred to in paragraph (1).

3. The provisions of Title III of this Regulation shall not, however, affect the legislative provisions of any Member State concerning a shipowner's liability.

4. This Regulation shall not apply to social and medical assistance, to benefit schemes for victims of war or its consequences, or to special schemes for civil servants and persons treated as such.

.....

Article 12

Prevention of overlapping of benefits

1. This Regulation can neither confer nor maintain the right to several benefits of the same kind for one and the same period of compulsory insurance. However, this provision shall not apply to benefits in respect of invalidity, old age, death (pensions) or occupational disease which are awarded by the institutions of two or more Member States, in accordance with the provisions of Articles 41, 43(2) and (3), 46, 50 and 51 or Article 60(1)(b).

.....

Article 13

General rules

1. Subject to Article 14(c), persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.

2. Subject to Articles 14 to 17:

(a) a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;

(b) a person who is self-employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State;

(c) a person employed on board a vessel flying the flag of a Member State shall be subject to the legislation of that State;

(d) civil servants and persons treated as such shall be subject to the legislation of the Member State to which the administration employing them is subject;

.....

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