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The Protection of Migrant Workers' Human Rights

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Introduction

Moving from one geographical place to another is what differentiates animals from plants biologically, and migration is also one of the most typical characteristic of human kind. The migration of different groups of people was the driving force behind many of the biggest historical changes and, according to United Nations (hereinafter: UN) estimates, today also more than 175 million people live permanently or temporarily in a country other than their own.[1] Looking for better living and working conditions motivated people to leave their home and try their luck in another country. This is true for our globalizing world as well, where more than the half of the people who decide to migrate do this because of an economic reason and another quarter follow family members who took this decision earlier.[2] This is only 3% of the World's entire population, but their numbers are expected to grow on steadily, and migration has a much greater impact on social relations, culture, national and international politics in both in sending and receiving countries than these numbers suggest.[3] The remittances sent home by migrant workers is a major source of income for a number of countries from Albania to Zimbabwe.[4]

The difference between the freedom of the circulation of goods, capital and services on the one hand, and the restrictions in the way of the free movement of people on the other is therefore one of the most pressing contradictions of our times. While in the WTO the free movement of goods and capital is legally facilitated and negotiations about services liberalization are under way, there is no generally recognized system for the protection of the fundamental rights of migrants.

Migrant workers are usually the most vulnerable group of the workforce; they often work in so called "three-D" jobs: dirty, dangerous and difficult.[5] Local workers in industrialized countries shy away from these unpopular jobs even in the case of high unemployment. Migrants are often employed in the least skilled or the most unpleasant tasks and are frequently victims of discrimination, hostility, abuse

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[1] UN Department of Economic and Social Affairs: *International Migration Report 2002*: New York, United Nations, 2002, p 2

[2] S. CASTLES, M.J. MILLER: *The Age of Migration*. MacMillan, London, 1998, p 162

[3] S. CASTLES: Globalization and migration: some pressing contradictions; *International Social Science Journal* Vol. 50 No. 156 June 1998, pp 179–180

[4] P. MARTIN, T. STRAUBHAAR: Best Practices to Reduce Migration Pressures; *International Migration* Vol. 40 No. 3 2002, p 6

[5] P. A. TARAN: Human Rights of Migrants: Challenges of the New Decade: *International Migration* Vol. 38 No. 2 2000, p 13

and violence. Not being nationals of their host country, they do not have political rights and are hard to organize into trade unions. Irregular or undocumented migrants[6] avoid all kinds of contact with state authorities out of fear from deportation and become so the most vulnerable group. In times of economic recession or rising domestic unemployment they are simply removed from the host country, as it happened during the 1997 Asian financial crisis in Malaysia, Thailand and South Korea.[7] Migrants are often outside the protection of labour safety, health, minimum wage and other legal standards, or are only protected in the case, that the state of employment wants to encourage immigration. Bilateral agreements might offer protection to some groups, but these are becoming generally rare, and are usually valid only for a given period of time and for temporary migrants.[8]

There are a number of international instruments aimed at the protection of all – including foreign born – people and also instruments especially aimed at the protection of migrant workers. Different international and regional organizations have also adopted measures with the same goal. The sad fact however remains that – except for the European Union – these cannot fulfill their role, and either remain mere declarations, are not complied with or are simply not taken into consideration by states. In the following paper I will look at these different instruments and analyze the reasons for their failure or success. My hypothesis is that there already exists a body of international law that, if complied with, would provide adequate protection to migrant workers. Due however to different political, social and economic reasons – which I will also try to present – these do not function properly.

After a short historical overview of the protection of foreigners in international law in the past centuries, I will present how universal human rights instruments might be used to protect them. After that I will introduce the main provisions and problems of the special instruments of both the International Labour Organization (hereinafter: ILO) and the UN aimed at protecting the rights of migrant workers. Finally I will look at how different regional organizations try to cope with the question.

Research by the World Bank shows, that the free movement of people from areas of low productivity to areas of high productivity increases the economic output of the world.[9] Nevertheless I try to keep human rights perspective in the

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[6] As Taran points out the categorization as "illegal migrants" contradicts two fundamental human rights: the right to recognition before the law, and the right to a due process. This is why for example the UN has stopped using the term, and uses the irregular or undocumented migrant. TARAN 2000a, p 23

[7] ANDRE LINARD: *Migration and Globalisation, The new slaves*: ICFTU Brussels 1998, p 4–14.

[8] Which is also why migrants employed under such bilateral agreements are usually referred to as 'guestworkers'. On the failure of 'guestworker' programs in Western-Europe see: U. DAVY: *Die Integration von Einwanderern*. Campus Verlag, Frankfurt- New York. 2001

[9] A. SOLIMANO: *International Migration and The Global Economic Order*: An Overview: The World Bank, Washington Nov. 2001, p 24

following article. Its premise is that the extension of human rights to unprotected groups is the foundation of global social peace and development.

I. The Protection of Migrants in International Law before 1945

The earliest examples of the legal treatment of aliens go back to the ancient Greek city states. Here we can observe a very clear division between principles of ethnic solidarity and hospitality on the one hand and the fact that non citizens were treated as non persons in these cities on the other hand. During the middle age migrants – traveling merchants for example – did not have any official legal protection, however kings and other noblemen often granted them immunities and offered their protection to encourage trade. Later merchants became organized and formed such powerful organizations as the Hanseatic Union. At this point they had their own courts, land and cities.[10]

By the end of the Middle Ages two solutions emerged for the protection of migrants: granting them special rights as groups – for example in the Ottoman empire, or diplomatic protection. In the second case if a national of a country was harmed in another country, then the country of origin could take reprisal. In 1758 Emmerich de Vattel created the theoretical basis for this practice in his work: *The Law of Nations*.[11] What exact form the reprisal could take was up to the states will, theoretically it could also be war, but this was only exceptionally used – usually only as a *casus belli* for an otherwise planned attack. The abuses of the Vattel doctrine have led to the emergence of new theories, which limited states' rights to interfere in other states matters. The so called 'Calvo doctrine' established by Carlos Calvo limits the right of states and only allows for local remedies if a migrants are not treated equally to own nationals. The problem with this approach is the lack of universal minimum standards, which can lead to the equal abuse of own citizens and foreigners – a scenario disliked by the colonial powers of the 19th century.

World War I, and the establishment of the League on Nations brought changes to previous law. In the 1920's codifications of the rights of foreigners began under the auspices of the League of Nations, but the attempt failed because of states lacking will to limit their sovereignty. At the same time numerous bilateral agreements were signed on labor migration and also about exchange of populations.[12] The International Labour Organization – as we will see later – also began working on the issue. Real changes however only occurred following WW II with the birth of the UN human rights system.

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[10] LILLICH: p 6
[11] AMS Publisher, London 1975
[12] LILLICH: p 34

II. Universal Human Rights Instruments

1. The Universal Declaration of Human Rights

The basic document of the modern international human rights regime, the *Universal Declaration of Human Rights*[13] (UDHR) covers a wide range of rights. Of particular relevance to migrants is the right to life, liberty and security of persons (Art. 3), the prohibition of slavery, servitude (Art. 4) or torture (Art. 5), the right to recognition as a person before the law (Art. 6), the right to equality before the law and equal protection before the law (Art. 7). The UDHR also includes the right to leave any country and to return to one's own (Art. 13), but not the right to enter another state, which, interpreted strictly, is contradictious. The UDHR also contains a number of economic and social rights which are often more important to migrant workers than political ones.

The question however remains, whether these elaborate provisions provide protection to people who do not have the nationality of the state they are living in. The UDHR does not explicitly mention aliens, but the wording of the Declaration ('everyone has the right to...', 'no one shall be deprived of...') allows us to draw the conclusion that they are indeed covered. Some might argue that the absence of nationality[14] at the enumeration of forbidden discrimination grounds contradicts the previous conclusion, but the list in Article 2 is not a comprehensive one. This does however not mean that all rights also refer to migrants as well, for example the right to participate in political life is only granted to the persons 'own country'.[15] These examples make it also probable that in the case of other rights where this distinction is not made, everyone in covered.

The UDHR is nevertheless not an efficient instrument in the protection of migrants. This is not due to its wording, but to the absence of an efficient implementation mechanism.[16] The Declaration however can provide help in the interpretation of other instruments and it forms the basis of other legally binding UN instruments.

2. The International Covenant on Civil and Political Rights

The rights listed in the UDHR were transformed into legally binding instruments by the two covenants, the *International Covenant on Civil and Political Rights*[17]

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[13] UN GA Res. 217A (III), adopted 10 Dec. 1948

[14] The UDHR does contain national origin as a ground for forbidden discrimination, but that does not refer to citizenship. R. CHOLEWINSKI: *Migrant workers in international human rights law: their protection in countries of employment;* Oxford, Clarendon Press 1997, p 56

[15] Lillich shows an interesting interpretation of the term 'his country', as from a sociological point of view it is possible that this is the country of the citizenship. R.B. LILLICH: *The Human Rights of Aliens in Contemporary International Law*. Manchester University Press, Manchester, 1984, p 43

[16] P. SIEGHART: *The International Law of Human Rights*. Clarendon Press, Oxford, 1995, p 45

[17] 16 Dec. 1966; 999 UNTS 171

(ICCPR) and its counterpart, the *International Covenant on Economic, Social and Cultural Rights*[18] (ICESCR) in 1966. According to Article 2 of the ICCPR

> "1. 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, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

So according to this, migrant workers fall under the protection of the covenant. Its terminology also underlines this, as the rights in the ICCPR are provided 'to everyone', 'to all persons', 'to every child' or 'to all men and women of marriageable age'. So we can draw the conclusion that similarly to the Declaration the ICCPR also covers migrant workers. This is also supported by the fact, that despite the lack of the enumeration of nationality as a forbidden ground for discrimination, the ICCPR prohibits 'distinctions of any kind' between people.

Article 25 grants certain political rights, such as the right to vote, the rights to participate directly or indirectly in public life and the right to access to public service to citizens. This however does not mean that it is forbidden to grant these rights to migrants, it only means that it is not required to do so by state parties. Of special importance to migrants is Article 13 which gives procedural protection against arbitrary expulsions. The ICCPR, like the UDHR only grants the right of free movement to citizens and people lawfully on the territory of the state, so not to illegal migrants. The Human Rights Commission has also stated that the rights listed in the covenant are granted to everyone regardless of reciprocity and nationality.[19]

3. The International Covenant on Economic, Social and Cultural Rights

The ICESCR is much stricter in granting rights to foreigners, which is due to the difference of the rights enlisted in it. The effective protection of economic and social rights requires the state to take positive actions and usually also requires more financial assets than political rights. The solidarity enshrined in these rights normally refer to a group of people who live on the same territory and have some kind of historical or cultural link with each other. The nationals of the state are the contributors to these protective systems, and they are the ones who want to benefit from them.[20]

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[18] 16 Dec. 1966; 993 UNTS 3

[19] UN. *Report of the Human Rights Committee*, 41 UN GAOR, Supp. No. 40, UN Doc. A/41/40 Annex VI, para. I

[20] M. ZULEEG: International Instruments on Equal Treatment in Social Security Matters. *Social Security in Europe – Equality Between Nationals and Non-Nationals*, Departamento de Relações Internacionais e Convenções de Segurança Social, Lissabon 1995, p 91

The ICESCR allows developing states to decide to what extent they want to grant the rights to citizens of other countries. This however means that developed states are not allowed to make such distinctions and favor their own nationals. The Committee on Economic, Social and Cultural Rights has also taken the position that the rights should also be granted to a certain group of non-nationals: asylum seekers.[21]

Despite the facts that the enjoyment of economic, social and cultural rights are essential to migrant workers well being and, as seen above, the interpretation of the Covenant also allows the premise that they are indeed protected by it, the ICESCR is not really effective in protecting them. This is due to the lack of the effective enforcement of the rights. The ICESCR emphasizes the progressive achievement of the standards set out in it. So each country has to achieve those goals according to its resources [Art. 2 (1)], but according to the Committee on Economic, Social and Cultural Rights they also have a so called 'core content' which has to be respected by every country regardless of its economic situation.[22] The exact definition of such 'core contents' is very difficult and so far the Committee has only given an own definition of a few. So despite its importance the ICESCR can not fulfill its role in the case of migrant workers.

4. The International Convention on the Elimination of All Forms of Racial Discrimination[23]

Migrant workers often differ from the people of their host state also in their physical appearance, thus the convention on the elimination of racial discrimination from 1965 could be an effective instrument in their protection. The convention however, after declaring that discrimination based on nationality is regarded as racial discrimination states in paragraph 2 of its Article 1, that

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

Because of this provision it is difficult to justify the reasoning that foreign nationals are protected by this international instrument, and many states have denied to report on the rights of foreigners in respect to the convention because of

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[21] UN Doc. E/C.12/1/Add.25 (1998); UN Doc. E/C.12/1994/19 (1994); UN Doc. E/C.12/1994/7 (1994); UN Doc. E/C.12/Add.10 (1996); Quoted by J.A. DENT: *Research Paper on the Social and Economic Rights of Non-Nationals in Europe*, European Council on Refugees and Exiles, London, 1998, p 5

[22] Committee on Economic, Social and Cultural Rights, *General Comment No. 3 on The Nature of State Parties' Obligations (Art. 2, para. 1 of the Covenant), adopted at its Fifth Session in 1990.* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies. 1994, UN Doc. HRI\GEN\1\Rev. 1

[23] G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195,

these words.[24] This clearly contradicts the intentions at the time of the drafting of the convention and the opinion of the Committee which controls the implementation of the instrument.[25] According to the supervisory Committee it is not a breach of the convention if foreigners, who happen to belong to a different racial group are excluded from certain political rights. It is however a case of racial discrimination if foreigner is maltreated because of his or her skin color. In its decision *Yilmaz-Dougan v. the Netherlands*[26] the Committee found, that racially discriminatory remarks in a dismissal notice were a breach of the convention regardless the fact that the person was of Turkish nationality. This interpretation is also supported by the fact that that paragraph 3 of Article 1 also forbids discrimination between non-nationals because of their race.[27]

The International Convention on the Elimination of All Forms of Racial Discrimination could be an effective mechanism to protect migrant workers who belong to a different racial group than the host community in many respects. It lacks however widespread acquaintance and the complicated phrasing of its Article 1makes it also difficult to use it as an effective instrument.

5. The Convention on the Elimination of All Forms of Discrimination against Women[28]

The convention which was adopted in 1979 with the intention to eliminate the widespread discrimination of women does not contain provisions on nationality based discrimination. Besides granting some special rights relating to women, the convention obliges its member states to guarantee the equal treatment of men and women. This instrument is therefore not really efficient for the protection of migrant workers rights, as discrimination of foreigners is not prohibited in the convention, if it is equally carried out for both sexes.[29] This is especially sad as more and more women also decide to migrate around the world.[30] We must also not forget that most migrant workers move to countries where the equality of men and

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[24] Cited by R. CHOLEWINSKI: *Migrant workers in international human rights law: their protection in countries of employment;* Oxford. Clarendon Press 1997. at 62

[25] Committee on the Elimination of Racial Discrimination: *General Recommendation No. XI, Non-citizens (Art. 1)* Forty-second session, 1993. A/46/18, point 2-3

[26] Communication 1/1984, *Yilmaz-Dougaz v. the Netherlands* in UN. *Report of the Committee on the Elimination of Racial Discrimination*, 43 UN GAOR Supp. No. 18. UN Doc. A/43/18. Annex IV, 185-7

[27] Committee on the Elimination of Racial Discrimination: *General Recommendation No. XI, Non-citizens (Art. 1)* point 1

[28] G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46

[29] DENT: p 40

[30] ILO Committee of Experts on the Application of Conventions and Recommendations: *International labour standards – A global approach.* International Labour Organization, ILO. Geneva 2001 p 182; See also L.L. LIM: *The sex sector: The economic and social bases of prostitution in South-East Asia.* ILO Geneva 1998; G. M. F. CHAMMARTIN: The feminization of international migration. *Labour Education No. 129. Migrant Workers.*

women is more or less accepted and respected. In those host countries – most notably in the Middle East – where discrimination against women is more common, the overall system of human rights protection also stands on a weak basis. This way, female migrant workers often find themselves rights deprived both as migrants and as women.

6. The International Convention on the Rights of the Child[31]

The convention on the rights of the child, which was adopted in 1989 is one of the most widely recognized and complete international human rights instruments. The rights protected by this convention are granted to every person under the age of 18 who happens to be on the territory of the state. It is usually recognized that paragraph 1 of Article 2 prohibits among others any form of discrimination based on citizenship between children.[32] This is supported by Article 22 which speaks about the special rights granted to children seeking asylum in a foreign country.

The lack of a really effective implementation mechanism – an individual complaints system, and the fact that despite their growing number, most migrant workers are still older than 18 years weakens the role of this instrument. It is nevertheless very important in the case of children who do not work themselves, but are the children of migrant workers. For them rights such as the right to nationality, the right to preserve his or her identity, the right to remain with his or her parents and the obligation to fight against illicit trafficking of children are of utmost importance.

7. The Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment[33]

This UN human rights instrument covers the widest personal scope, as it forbids torture and other inhuman or degrading treatment on the whole territory of the states which have ratified the convention. This means that everybody is protected by its provisions regardless of their nationality, citizenship or any other distinction. Article 3 of the convention is especially important for migrants, as it states that

> "No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

This provision is however more important to political migrants than economic migrants such as migrant workers, so probably this instrument plays the smallest role in the protection of this group.

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[31] G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989)

[32] G. VAN BUEREN: *The International Law of the Rights of the Child.* Martinus Nijhoff, Leiden, 1995, p 362

[33] G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)

III. The International Labour Organization (ILO) and the protection of migrant workers' rights

Introduction

The ILO – as the main international institution with the obligation to protect the rights of those working – has paid attention to the situation of migrant workers since its beginnings. The Constitution of the organization states that one of the objects of the ILO is the "protection of the interests of workers when employed in countries other than their own".[34] This has also been reinforced by the document setting out the goals of the ILO after World War 2, the Philadelphia Declaration. The Declaration states that "The Conference recognizes the solemn obligation of the International Labour Organization to further among the nations of the world programmes which will achieve ... the transfer of labour, including migration for employment and settlement;"[35] A document with similar objectives from 1998, which defines the role of the ILO in the globalized world also reaffirms this commitment. According to the Declaration on Fundamental Principles and Rights at Work, "... the ILO should give special attention to the problems of persons with special social needs, particularly the unemployed and migrant workers"[36]

The principle form of providing protection to migrant workers – besides technical and statistical advice to states – was and is the adoption of legally binding conventions, and non-binding recommendations. Some of these were specially adopted to protect the rights of migrant workers are employed abroad, while others regulate the access of migrants to social security schemes, and some however were originally not designed especially for migrants, but provide important protection to them anyway.[37] The ILO also differentiates on the basis of whether the conventions' goal is to protect the human rights of migrants or to facilitate migration flows.[38] Because of the nature of the ILO, the organization concentrates on the protection of the economic and social rights of migrants, but this distinction of course often becomes blurred.

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[34] http://www.ilo.org/public/english/about/iloconst.htm 29.09.2005

[35] *Declaration concerning the aims and purposes of the International Labour Organization.* Philadelphia. 1944, Article III (c)

[36] *ILO Declaration on Fundamental Principles and Rights at Work.* Geneva, 1998, Recital 4

[37] International Labour Office: *Towards a fair deal for migrant workers in the global economy*; International Labour Conference, 92nd session, Geneva 2004, pp 72–81

[38] International Labour Office: *International Labour Standards, A global approach.* Geneva 2001, p 138

1. General ILO Conventions on the Rights of Migrant Workers

Soon after the end of WWI and the foundation of the organization work began on a convention on convention designated to stop the labor recruitment practices before the war, which caused a lot of suffering to migrants. France – struggling with labour shortages – was the biggest supporter of the idea, while Canada and Great-Britain – out of fear of a great influx of migrants – opposed the plan.[39] Convention No. 2 on the prevention of unemployment from 1919 adopted at the very first International Labour Conference therefore only partly refers to the problems of recruiting workers form abroad. It however forbids discrimination against migrants in unemployment benefit schemes, and it calls upon states to sign bilateral treaties on the exportation of such benefits after returning home. At the very same Conference two recommendations were also adopted, one dealing with unemployment and suggesting the approval of sending countries before starting to recruit on their sole, and the other recommended equal treatment – regarding social security and trade union rights – of foreigners and own nationals in the case of reciprocity. The personal scope of these two recommendations was extended to seafarers and agricultural workers in 1920 and 1921.

Convention No. 19 and Recommendation No. 25 introduced the notion of equal treatment to work accidents. More than 120 countries have ratified this instrument, what makes it one of the most widely recognized ILO convention on migrants. Another, more technical recommendation (No. 19) was adopted in 1922 which obliges states to produce statistical data on emigration, immigration, and transfer of migrant workers to the ILO. In 1926 another convention, regulating emigration on board of ships was adopted. This contains provisions on medical examinations, separation of male and female passengers and the applicable law on the ship regarding the migrants rights. The ratification of this convention was suspended in 1986, because emigration on ships became very rare.[40]

2. The 1939 Recommendation on emigration

In 1924 and in 1928 two conferences were held in Rome and in Havana on migration. Here the representatives of states and international organizations realized the fact, that despite a number of bilateral agreements, migrants are still very often exploited. The economic crisis after 1929 however diminished the hope of a comprehensive convention on the rights of migrant workers, and states turned inwards. Both emigration and immigration were restricted in most countries in this time.[41] Nevertheless as the United States of America joined the ILO in 1934, new

[39] M. HASENAU: ILO Standards on Migrant Workers: the fundamentals of the UN Convention and Their Genesis; *International Migration Review*, 1991, No. 4 p 689

[40] RICHARD PLENDER: *International Migration Law*; Kluwer Academic Publisher Dortrecht/Boston/London 1988. p 296

[41] HASENAU: p 692

impetus was given to lawmaking. So in the shadow of the rising threat of WWII the western powers adopted Convention concerning the Recruitment, Placing and Conditions of Labour of Migrants for Employment and two recommendations with similar subjects in 1939. Due however of the war, no country has ratified this convention, but it forms the basis of the future work of the ILO in this field.

3. The convention on immigration for employment

After World War II, millions of people found themselves as fugitives or displaced persons in countries different from their own. This has caught the attention of various newly founded or older international organizations such as the UN, the ILO, the World Bank, the UNHCR and the FAO.[42] There were also rivalries between the winning powers, and the Soviet Union clearly opposed the idea of an international convention on migrants, because in its view – quite cynically, countries have to develop circumstances where nobody wants to emigrate. In 1947 an agreement has been reached between the ILO and the UN in which they divided the responsibilities between the two organizations.[43] This way obstacles to adopt a new ILO convention were overcome, and the re-established Committee on Migration drafted a treaty in 1949, which was adopted the same year as Convention No. 97 by the International Labour Conference.

The convention consist of 12 articles with general provisions and 3 annexes, which deal with non-government managed recruitment of foreign workers; government sponsored recruitment of foreign workers and import of personal belongings of migrant workers to the host country. It is up to the ratifying state to decide whether it wants to adhere to the annexes or only the core of the convention at all, or only a later date. Thanks to this flexibility 43 states have ratified convention No. 97,[44] including some with a large number of migrant workers on their territory.

The starting point of the convention is that after the war labour shortages have become a problem in large parts of the industrialized world, and therefore it is necessary to allow workers to go to places where their workforce is required.[45] This is reinforced by article 4 of the accompanying recommendation (No. 86), which states that the goal is "to facilitate the international distribution of manpower and in

[42] PLENDER: p 298

[43] Co-ordination of International Responsibility in the Field of Migration: *ILO Official Bulletin.* No. 30 1947, p 417–420

[44] The countries that have ratified the convention are as follows: Albania, Algeria, Bahamas, Barbados, Belgium, Belize, Bosnia and Herzegovina, Brazil, Burkina Faso, Cameroon, Cuba, Cyprus, Dominica, Ecuador, France, Germany, Grenada, Guatemala, Guyana, Israel, Italy, Jamaica, Kenya, Macedonia, Madagascar, Malaysia, Mauritius, Netherlands, New Zealand, Nigeria, Norway, Portugal, Saint Lucia, Serbia and Montenegro, Slovenia, Spain, Tanzania, Trinidad and Tobago, United Kingdom, Uruguay, Venezuela and Zambia.

[45] CHOLEWINSKI: p 95

particular the movement of manpower from countries which have a surplus of manpower to those countries that have a deficiency."

According to the convention a migrant worker is 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". This definition points out the biggest weakness of this ILO convention – and the others as well – namely, that it only protects those, who entered the country and take up employment in a regular or documented way. Frontier workers, artists and seafarers are excluded from the protection of this convention, as are the family members of migrant workers.

Despite the strict and narrow personal scope of convention No. 97, it remains a very important instrument in the protection of migrant workers human rights. It obliges states to inform the ILO and each other on migratory trends, to take steps against misleading propaganda, to provide medical examinations to migrants and to facilitate the sending home of their earnings. One of the most important provisions of the convention is its article 6, which requires the equality of treatment with own nationals with respect to a number of state services. Special arrangements are allowed however in the case of contributory based social security schemes.

4. The recommendation on migrant workers in underdeveloped countries

As through decolonization membership of the ILO grew, new problems arose in respect to the human rights situation of migrants. The adoption of new conventions became very hard due to the fact that these new member states were much poorer and less developed than the previous members.[46] At the same the boundaries of the neo-liberal approach to migration reflected in earlier instruments also became obvious. This change is detectable in the recommendation No. 100 on migrant workers in underdeveloped territories which was adopted in 1955. In article 16 of the recommendation it is stated, that "The general policy should be to discourage migration of workers when considered undesirable in the interests of the migrant workers and of the communities and countries of their origin by measures designed to improve conditions of life and to raise standards of living in the areas from which the migrations normally start"

5. The 1975 convention and recommendation on migrant workers

Despite the changes noted above, the two decades following the Second World War can be seen as the 'golden age' of migration. To allow the fast economic growth in this time, industrial countries introduced so called 'guest-worker' schemes,[47] aimed at recruiting workers from poorer countries into richer ones. The oil crises in 1973 and 1974 changed things dramatically. The reoccurrence of mass

[46] HASENAU: p 694

[47] S. CASTLES, M. J. MILLER: *The Age of Migration*. Macmilan Press. Houndsmill, 1998, p 68–76

unemployment made immigration programs unnecessary and – more importantly – the population in host countries turned more or less against migrants. This has led to various the reemergence of racist parties at elections, and violence against such groups. Previous immigration countries thus introduced restrictions, and tried to send the immigrants already on their sole home. This had two unwanted consequences: immigrants who feared that upon returning to their original country wont be allowed in again to the country of their employment decided to stay, and brought their family members with; and at the same time human trafficking became a very imminent problem.

The ILO also had to react to these changes somehow, and in 1974 work on a new convention began. The differences between sending and receiving countries were big as ever, and thus no comprehensive instrument, but once again only a compromise could be reached in 1975 when convention No. 143 was adopted. These changing attitudes toward labour migration are clearly detectable in the preamble of the convention, which states 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". The convention is divided into two parts, part one which is set out to regulate international efforts against illegal migration, while part two lists rights which are to be granted to migrant workers equally. Countries can ratify both parts or just one, nevertheless only 18 countries have decided so far to ratify this ILO instrument.[48]

Part two of the convention opens more difficult legal questions than the more technical first part. The general equal treatment instruments of the ILO (Convention No. 111 and its recommendation) do not list nationality as a forbidden ground for discrimination. This means that migrant workers can only rely on this convention if discrimination was based on its race, religion or sex, but not on his or her nationality.[49] This was also one of the reasons convention No. 143 was adopted. This convention contains equal treatment provisions with respect to employment, social security, trade union rights and cultural rights and it also lists measure states have to adopt to reach these goals. It is not clear from the text of the convention who has to be treated equally migrants and own nationals or different groups of migrants. Both Plender and Lillich argue in favor of the first interpretation.[50] This is also underlined by article 12 of the convention that explicitly states that in the case of work conditions different migrant groups have to be treated equally, and *a*

[48] These are the following: Benin, Bosnia and Herzegovina, Burkina Faso, Cyprus, Guinea, Cameroon, Kenya, Macedonia, Norway, Italy, Portugal, San Marino, Serbia and Montenegro, Slovenia, Sweden, Togo, Uganda and Venezuela.

[49] C. VITTIN-BALIMA: Migrant workers: The ILO standards. In *Labour Education*, No. 129 2002, p 6

[50] PLENDER: p 304; LILLICH: p 71

contrario this means that the other provisions regulate equal treatment of migrants and nationals. It remains however difficult to use these rules in cases where – for example in the Gulf States – migrants carry out work that nationals never would.

6. ILO conventions on migrant workers' social security

The question of social security is of utmost importance for migrant workers. Often they do not receive the same benefits as do nationals or they cannot export their benefits when they return home. They might at the same time however loose their social security rights in their home country. This is why social security conventions play a crucial role in the ILO's activities relating to migrant workers.[51]

The first of these was already adopted in 1935 and it guaranteed the protection of pensions for migrant workers. This allowed in the case of reciprocity the addition of times spent as an insured and the exportation of pensions abroad. Ratification of this convention was suspended in 1982, but because all ex-Yugoslav states are members of the instrument it still plays an important role in the region.

The main ILO convention on social security, number 102 adopted in 1952 only marginally deals with the issue of migrant workers. Part XII of the convention lists the rights of migrants, granting them equal access to social security schemes, except for state funded ones. The convention however only obliges states to do so in the case of reciprocity, so this convention cannot protect most migrant workers either.

A much more comprehensive instrument is convention number 118 from 1962. This enumerates different social security systems, such as old age pensions, health insurance or unemployment benefits. Ratifying countries can choose on which of these they want to extend equality of treatment, but again, only have to do so in the case of reciprocity.

The convention No. 157 adopted at the 68th session of the International Labour Conference in 1982 is aimed at the protection of social rights under acquisition. This is also a very important issue for migrant workers, as they often do not spend enough time to get social security entitlements. This convention therefore obliges its members to establish an international system with the goal to protect such entitlements. So far only three countries, the Philippines, Spain and Sweden have ratified the convention, which could however become an important instrument if more countries would join.

7. Other ILO conventions

Generally speaking almost all ILO conventions forbid discrimination with respect to the rights enshrined in them on the basis of nationality.[52] This however is not

[51] International Labour Office: *Towards a fair deal for migrant workers in the global economy*; International Labour Conference, 92nd session Geneva 2004, p 77

[52] CHOLEWINSKI: p 98; An important exception is convention No. 111.

widely recognized in practice, or at least not referred to. The Committee of Experts on the Application of Conventions and Recommendations (CEACR) has on the other hand often referred to various ILO conventions in respect to the protection of migrant workers. These include instruments for the protection of wages, private employment services and work conditions in the tourism industry – where a lot of migrants are usually employed.[53] Other conventions which – according to the CEARC – could be relevant to migrants include the conventions on work conditions in agriculture, plantations and employment policy.

In the case of some conventions ratifying states get the opportunity to exclude certain groups from its protection. Migrant workers are never mentioned as such groups, but as workers in hotels and in agriculture are, and they are often migrants, it is possible that some ILO conventions do not cover foreign workers.

8. The ratification of the conventions

As we have seen in the case of the UN convention, the lack of the widespread recognition of these instruments is the biggest obstacle to their effectiveness. Only twelve countries have ratified both general migrant workers conventions of the ILO, and Italy and Norway are ones with bigger foreign born population. A study prepared by the ILO o the prospects of further ratification shows a dim picture, only 10 and 12 countries have signaled that they might consider to ratify one of the conventions in the nearer future.[54] The fact that none of the conventions referring to migrant workers has been included in the so called 'core conventions' does not help either, as the ones left out might fall into a second category, considered to be less important.[55]

IV. Regional arrangements for the protection of migrant workers

1. Africa

The biggest current migration trend on the African continent is emigration. Thanks to that around 700,000 Africans live in Europe and 900,000 in the USA. The biggest receiving countries of the continent are Libya, South Africa and the coastal states of both West and East Africa.[56] It is also an important feature of African migration that the lines between migration because of economic reasons on one

[53] CEACR Report, International Labour Conference: 89th Session, Geneva p 358

[54] ILO 2004, p 160

[55] P. ALSTON: 'Core Labour Standards' and the Transformation of the International Labour Rights Regime. *European Journal of International Law*, Vol. 15 No. 3 2004, p 488

[56] H. ZLOTNIK: *International Migration in Africa: An Analyses Based on Estimate of the Migrant Stock.* www.migrationinformation.org/Feature/display.cfm?ID=252 21.08.2005

hand, and political reasons on the other are blurred.[57] At the same time the proportion of asylum seekers, refugees and internally displaced persons is the highest in the world.[58] It is also a great problem that because of the continents colonial past state boundaries often do not follow the ethnic, economic and natural boundaries, and thus migration takes place much more often but at the same time without any state supervision than in other places.[59] There are different regional organizations which have adopted measures for the protection of migrants, but these usually do not function properly.

The biggest regional organization with 53 members on the continent is the African Union (AU), which was established in 2002 as a successor to the Organization of African Unity. The constitution recognizes the role of Africans living elsewhere and declares them to be part of the human resources of the continent. The African Charter on Human and Peoples' Rights[60] – adopted in 1981 – forbids discrimination based on nationality with respect the rights enlisted in it. It also guarantees to move freely inside a country, but only for legally admitted persons. The fact that individuals cannot file a complaint in front of the supervisory Commission turns the abovementioned provisions into mere declarations. The AU has started to pay more attention to migration policy since 2004,[61] but with the goal to better include the African Diaspora in the development projects of the organization, and not with the goal to protect the human rights of the migrants. Various other organizations closely affiliated with the AU – for example the New Partnership for Africa's Development or the African Economic Community – could however play a more crucial role. We must also not forget that Pan-Africanism is the main ideology of the AU, so based on this it is possible to develop a system of free movement, similar to that of the EU, in the future.

Other regional organizations on the continent, more of an economic nature also have various systems aimed at allowing the free movement among their member states. These include the Economic Community of West African States, the Common Market for Eastern and Southern Africa, the Southern African Development Community and the East African Community. Except for the first and the last organization these until now have only remained plans and political declarations. It is however very important to stress that economic integrations are usually more effective in ensuring the rights of migrants than human rights organizations. Therefore the fate of these plans is very important for millions of

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[57] D. NDACHI TAGNE: Living on the edge – refugee and migrant workers in Africa. *Labour Education.* 2002/4, No. 129 Migrant Workers. p 95-98

[58] M. ERIKSSON, P. WALLENSTEEN, M. SOLLENBERG: Armed Conflict. 1989-2002. *Journal of Peace Research* Vol. 40 No. 5 pp 593–607

[59] International Organization for Migration (IOM): *World Migration 2005 : Costs and Benefits of International Migration.* Geneva 2005, p 27; Global Commission on International Migration: *Regional Hearing for Africa – Summary Report.* Cape Town, 2005, p 2

[60] OAU Doc. CAB/LEG/67/3, Kenya, Nairobi, 27th of June1981

[61] African Union: *Vision and Strategic Plan 2004-2007.* Addis Abeba, 2004, Article 3

people on the continent, however without good governance at national level and peace, these provisions of free movement can not fulfill their roles.[62]

2. The Americas

The American continent has the biggest differences in wealth among countries, which has a very strong influence on migration trends in the continent. The USA is the biggest immigration country in the World with 28,4 million foreign people living on its territory, 51% of whom come from other countries in the continent.[63] The continent also has a great tradition of immigration, however especially in Central and South America emigration now exceeds immigration. Besides from the US and Canada, Mexico, Chile and Costa Rica are the most popular destination countries for migrant workers.[64]

The most prestigious of the regional organizations on the Western Hemisphere is the Organization of American States (OAS), founded in 1948 with 35 member states. The main objective of the OAS, despite various new duties, remains the protection of human rights and the spreading of democracy, and thus it is no surprise that the problems of migrant workers have been on the agenda for a long time. The basic documents of the OAS's human rights protection system are the American Convention of Human Rights from 1969, and the Optional Protocol from 1982, which protects economic and social rights.[65] Two institutions supervise the implementation of the conventions, the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights. Both of these have adopted protective measures for migrants in their case law.

According to the Inter-American Court, every human being has the right to nationality, so a stateless child has to automatically receive the citizenship of the country of birth. The Court found it to be illegal to break up families when sending foreigners home, as well as mass expulsions. The right to a fair trial has also been called upon often in front of the court, which often found a breach of the Convention by different OAS member states.[66] From these examples we can see that most cases referred to administrative issues, and not to discrimination against migrants in various fields of life. This is interesting in the light of the fact that both

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[62] Other organizations on Africa, such as the Maghreb Union, the Union of Sahelo-Saharan States, the Economic Community of the Great Lakes Region and the Central African Economic and Customs Union have all had migration policies in the 1970's and 80's. Nowadays however they do not function at all or have given up plans on common migration policies and therefore I will not go into details any further. On their previous activities see: International Labour Conference: *Report III (1 B) Migrant Workers.* ILO Geneva 1999, point 66-67

[63] U.S. Census Bureau: *The Profile of the Foreign Born Population in the United States:2000.* Washington DC, 2001, p 9

[64] IOM 2005, p 90-91

[65] OAS Treaty Series No. 36, San José, 18th July 1978; OAS Treaty Series No. 69, San Salvador, 17th Nov. 1988

[66] I. LAROCHE: *The Inter-American Human Rights System and the Protection of the Rights of Migrants.* 2001 http://www.december18.net 23.02.2004

the Convention and its Optional Protocol state that the rights protected by it are granted to everybody regardless of the persons' nationality, as the rights stem from their being as humans and not their citizenship. The interpretation of this article took place in 2002 when Mexico filed a case against the US, because of the continuous discrimination of its 6 million citizens working and living in the USA. Mexico asked the Court for an advisory opinion, which was proclaimed in 2003[67] and is a milestone in the protection of migrant workers rights not just from a regional, but from a universal point of view as well.

Mexico based its question on concrete cases of discrimination, and asked for the interpretation of various articles of the Convention and the Optional Protocol. The main question was whether the right to equality before law and the freedom from discrimination – both declared by the legal instruments – is breached in the case when irregular or undocumented migrants – because of their status, are deprived of other rights similarly protected by the documents. The importance of the issue is underlined by the fact that six countries expressed their views, either verbally or in written form during the decision making, nine NGOs sent *amicus curiae* briefs to the Court and both the ILO and the UN shared their opinions as well.

The Court in its advisory opinion gave a positive answer to Mexico's question, and expressed the view that equality before law and freedom from discrimination have become part of the international *ius cogens*. States therefore can only make such differences between migrants and nationals which are objectively gratified, rational, proportionate and not harm their human rights. According to the Court if undocumented migrants enter an employment relationship, the rights granted to workers automatically protect them as well. So for example the ban on forced or child work, special protection to female workers, the right to form and join trade unions all automatically is extended to them. Non-documented migrant workers have the right to adequate wages that allow decent living conditions for them and their families, safe and healthy working conditions, rest time and social security benefits.

With this opinion the Inter-American Court on Human Rights gave a wider interpretation of migrants' rights than any other regional or universal institution ever before. Because of the nature of advisory opinions no legal obligations can be derived from it, nevertheless on the long term it will definitely influence the human rights situation of migrants on the continent. The OAS's interest in the issue of migrant workers is also proved by the fact that since 1997 a special rapportuer has been designated to deal with the question. The rapporteur writes reports[68] on the

[67] Inter-American Court of Human Rights: Advisory Opinion OC-18/03 of September 17. 2003, Requested by the United Mexican States – *Juridical Condition and Rights of the Undocumented Migrants*

[68] See for example: *Fifth Progress Report of the Rapporteurship on Migrant Workers and Their Families – 2003* OAE/Ser.L/V/II.118 Doc. 5 rev. 2 Dec. 2003

practice of the different OAS members, and highlights special problems also in the case if they do not reach the Court.

Another regional instrument, the North American Free Trade Agreement (NAFTA), between the USA, Mexico and Canada, also contains provisions on the free movement of workers. This however is restricted to businessmen, and has no connection to human rights law at all. More emphasis is however put on the consequences of free trade on migratory flows.[69] This neglect of human rights issues is also true for the North American Agreement on Labour Cooperation (NAALC), which only obliges member states to respect rules of their national legislation,[70] however there are negotiations between the US and Mexico to sign a social security agreement in the NAALC framework.[71] This would enable the addition of insurance times and the exportation of benefits abroad.

In South America the Southern Common Market (Mercado Común del Sur – MERCOSUR), made up of Argentine, Brazil, Paraguay and Uruguay has special programs relating to labour migration, but again more from a technical perspective.[72]

Another regional organization in South America, made up of Bolivia, Columbia, Ecuador, Peru and Venezuela, the Andean Community (Comunidad Andina de Naciones – CAN) has similar, although better developed measures regarding migration.[73] In decisions Number 545 and 546 of the CAN, equality of treatment is guaranteed for migrant workers from other member countries. They are allowed to send remittances freely home, however it leaves the opportunity open to restrict labour migration in times of economic recession. Special arrangements have also been made for social security schemes. A very important step from a human rights perspective is the Andean Charter for the Promotion and Protection of Human Rights which was adopted in 2002 and which contains a whole chapter on the rights of migrants. It among others calls upon members of the CAN to ratify the UN Convention from 1990, and guarantees the freedom from discrimination, the right to family reunification and rights of the children of migrants. The practical weight of the Charter is nevertheless diminished by the fact that it does not create rights for individuals.

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[69] A. I. CANALES: International Migration and Labour Flexibility in the Context of NAFTA. *International Social Science Journal*, Vol. 52. No. 165 2000. p 409–419; P. C. Martin: Trade and Migration: NAFTA and Agriculture. *Policy Analyses in International Economics*. No. 38. Institute for International Economics, Washington, 1993

[70] H. W. ARTHURS: Collective Labour Law of the Global Economy. In *Labour Law and International Relations at the turn of the Century – Liber Amicorum in Honor of Roger Blanpain.* Kluwer Law International 1998. p 146

[71] D. C. JOHN, S. JOHNSON: *How a U.S.-Mexico Social Security Agreement Could Benefit Both Nations.* The Heritage Foundation, Executive Memorandum No. 849, Washington 2003

[72] J. VERVAELE: MERCOSUR and Regional Integration in Souht America. *International and Comparative Law Quarterly*, Vol. 54. 2005, p 390

[73] P. TORALES, M. E. GONZÁLEZ, N. P. VICHICH: *Migraciones laborales en Sudamérica: la Communidad Andina.* Estudios sobre Migraciones Internacionales 60. Oficina Internacional del Trabajo, Geneva 2003. p 85

The Caribbean Community (CARICOM) is the last organization in the Americas with common migration initiatives. The great economic differences make the effective implementation of these policies in the Caribbean region very difficult.[74]

3. Asia

There are three main features of labour migration in Asia. First here, unlike in other parts of the world, labour migration is usually better organized and controlled. Second most countries in of the continent are at the same time labour exporters and importers. And last due to the size of the countries of Asia, more than half of the Worlds' migrants are Asian descendents.[75] Income inequalities are enormous and cultural, historical and other differences are in Asia much larger between countries than in other continents. Therefore regional organizations such as the Association of Southeast Asian Nations (ASEAN), the Asia-Pacific Economic Cooperation Forum (APEC) or the South Asian Association for Regional Cooperation (SAARC) only marginally deal with social issues such as labour movements.[76]

In the Arab world migration flows also have their own specialties. On one hand in the oil rich Gulf states the proportion of foreign workers to citizens is the highest in the world. On the other hand in this region not so much nationality, but religion, ethnic or tribal belongings are important for the identity of people. For Arabs free movement is usually granted. This is reinforced by the Cairo Declaration on Human Rights in Islam, which grants the right to move freely and access to social assistance to all members of the *ummah*, if they act in accordance with *shariah'* law. There are more concrete provisions in the 1968 Arab Labour Agreement, but this is still not efficiently enforced in practice. The situation of non-Arabic migrant workers in this region is one of the worst in the World.[77]

4. Europe

A. The Council of Europe

a. The European Convention on Human Rights and Fundamental Freedoms

As the only human rights instrument of the Council of Europe (CoE) which defines its personal scope in a way that it covers every individual which happens to be on

[74] D. FUCHS, T. STRAUBHAAR: Economic Integration in the Caribbean: The development towards a common labour market. *International Migration Papers 61*. ILO, Geneva 2003, p 10-11

[75] IOM: *Labour Migration in Asia*. Geneva 200,5 p 103; See also P. WICKRAMASEKERA: *Asian Labour Migration: Issues and Challenges in an Era of Globalization*. International Migration Papers 57. International Labour Office, Geneva 2002

[76] The same can be said about the Australia – Pacific region.

[77] S. RINGEL: Arab labour on the move. *Labour Education No. 129. Migrant Workers* Vol. 4 No. 129 2002, p 131–134

the territory of one of the member states is the European Convention on Human Rights[78] (ECHR) adopted in 1950. Therefore this legal instrument plays a crucial role in the protection of foreigners, among other migrant workers in Europe. The CoE like the UN has however decided to divide human rights into two categories, and thus the ECHR only covers political and civil rights, but not economic and social ones.

The body with the duty to implement the ECHR, the European Court of Human Rights has interpreted the ECHR widely, contributing this way to the protection of migrants. In the famous *Gaygusuz*[79] decision the Court had to decide whether it is a breach of the ECHR that Austrian authorities have denied a contribution-based unemployment benefit from a Turkish citizen just because of his nationality. The Court found that although Article 14 of the ECHR only prohibits discrimination with respect to rights in the Convention, but as Protocol No. 1[80] contains the right to the peaceful enjoyment of property, Austria discriminated illegally.

The Court also found various times that member states acted not accordingly with Article 6 of the ECHR, which guarantees the right to a fair trial among other in the case of the expulsion of an alien. The ECHR despite the fact that it uses the distinction of nationals and non-nationals with respect to almost all rights protected by it is a useful instrument for the protection of migrant rights. This is however more due to its effective enforcement mechanism and not to its content.[81]

b. The European Convention on Establishment

The European Convention on Establishment adopted in 1955 in Paris[82] was the first multilateral instrument to address specially the problem of migrants in Europe. It granted rights to nationals of the member states, but only in the case of reciprocity. The rights enshrined in it referred first of all to the free movement and employment in other members. Due however to the small number of ratifications and the lack of an individual complaints procedure the Convention could not reach its original goal. This is why it is interesting more from a historical perspective and most of its provisions are now granted through instruments of the European Union or the European Economic Area.

[78] ETS No. 5 Rome 4th of Nov. 1950

[79] Gaygusuz v. Austria 39/1995/545/631 31st of Aug. 1996

[80] Protocol to the Convention for the Protection of Human rights and Fundamental Freedoms, as amended by Protocol No. 11. ETS No 9. Paris 20th of March 1952

[81] CHOLEWINSKI: p 211

[82] ETS No. 19

c. The European Convention on the Legal Status of Migrant Workers

The goal of the Convention adopted in 1977 in Strasbourg[83] was to regulate the rights of migrant workers in Europe in a comprehensive way. The results however fell short of the original goals, which was due to the change of moods towards labour migration in the 1970's. ILO experts played a crucial role in the drafting of the Convention, which led to similarities between this CoE and ILO instruments. The overall goal of the Convention was that with respect to living and working conditions migrant workers are treated as much as possible similarly to nationals.

A very important barrier is however that this Convention can only be applied to migrants coming from countries which themselves have ratified the convention, and are officially allowed to take up employment in the host state. Frontier workers, artists, sportsmen, seafarers and trainees are excluded from the protection of the Convention. The Convention among other obliges states to insure that migrant workers have the same rights regarding access to social security, health and safety at work or trade union rights as own nationals. Measures also have to bee taken to make the exportation of earnings home possible and a consultative body was set up as well. As we can see these are all obligations upon states but not rights of individuals. This is the biggest weakness of this instrument. Further derogations are allowed as well, so it is no wonder that so far only five states have ratified this CoE instrument.

d. The European Social Charter

The European Social Charter (ESC)[84] adopted in 1961 was the first international instrument with the sole goal to protect economic and social rights, which as we have seen are often more important to migrant workers than civil and political ones. The Charter however only extends its application to individuals coming from CoE a member country, which has also ratified the ESC and in the case of reciprocity. This way the ESC is not as effective from the point of view of migrants as the ECHR, and can be more regarded as a multilateral friendship agreement.[85]

Article 19 contains the special provisions relating to migrant workers and members of their families. These are very similar to the provisions of ILO Convention No. 97, and oblige among other states to inform future migrants on their opportunities, to allow family reunifications and social integration. Member states have the possibility to not ratify the ESC as a whole but only parts of it. In this case however they have to grant the rights to all migrants coming from other

[83] ETS No. 93

[84] ETS No. 35, Turin 18th of Oct. 1961

[85] D. HARRIS: *The European Social Charter.* University of Virginia Press. Virginia 1984, p 283

ESC member countries, regardless whether the country of origin has ratified the same Articles or not.[86]

Article 12 about the right to social security also refers to the special situation of migrant workers. According to its paragraph 4 member states should sign bilateral agreements about equality of treatment, exportation of benefits and addition of times spent as insured. Article 12 is one of the so called 'core articles', from which at least five have to be ratified by all members. However, it only obliges states "to take steps" towards singing such bilateral social security agreements, which makes it hard to implement in practice.

Article 13 of the ESC, about social and medical assistance also refers to rights of citizens of other member states. It obliges states to provide medical services and social assistance to people who otherwise wouldn't receive such. According to Harris this has to be interpreted in a way, that it is a right of every individual regardless of nationality and time spent in the country to receive such services, in the case the person has entered the country legally.[87]

e. The European Code on Social Security

The European Code on Social Security[88] and its Protocol contain norms of a more technical nature with respect to social security. The goal is to provide higher level social protection in the CoE members than required by ILO Convention No. 102. The Code regulates its personal scope on an article by article basis, which means there are no general rules regarding foreigners. The Code differentiates its personal application into employed persons, economically active or the whole population. Foreigners are not mentioned, but if they are in a legal employment relationship, are economically active or live in the country in a documented, regular way then we have to come to the conclusion that they are covered as well. Article 73 of the Code contains special provisions relating to migrant workers, calling on states to sign bilateral agreements on equal treatment and the exportation of earnings and benefits.

In 1990 the Code was revised[89], the level of protection was raised and the personal scope was extended. The changes however did not affect the parts dealing with the rights of foreign workers and it also not yet in force.

f. The European Agreement on social security

Acting according to the obligations set out in the Code, in 1972 the European Agreement on social security[90] and its Protocol were adopted. The goal of the

[86] H. WIEBRIGHAUS: Introduction. In D.C. John. S. Johnson: *25 years, European Social Charter.* Norwell, Kluwer Law and Taxation Publishers, 1987. p 15

[87] HARRIS: p 122

[88] ETS No. 48, Strasbourg 16th of April 1964

[89] ETS No. 139, Rome the 6th of Oct. 1990

agreement is to contribute to the integration and development of the CoE member states by providing equality of treatment to foreigners. The agreement covers eight types of social security schemes, from old age pensions to unemployment benefits, except for social assistance and medical care which are covered by other CoE instruments. According to Article 4 of the agreement the personal scope extends to all citizens and surviving family members of member states as well as refugees and stateless persons. The most important element of the agreement can be found in its Article 8, which grants equal treatment with respect to the eight areas to the persons falling under its application. The rest of the agreement deals with more technical issues but it also relies on special bi- or multilateral arrangements for its implementation. This instrument – like the other CoE instruments – is again only applicable in the case of reciprocity.

g. The European Agreement on medical and social assistance[91]

This last CoE instrument extends the obligation of equal treatment between migrant workers and nationals to the fields of medical care and social assistance to the needy. The agreement once again is only applicable to documented or regular migrants in the case of reciprocity.

B. The European Union

The free movement of workers is one of the 'fundamental freedoms' of the European Community since its beginnings. Article 39 (previously 48) declares this freedom and also forbids discrimination on the basis of nationality with respect to employment, wages and working conditions. At the same time due to political difficulties and economic fears the free movement of workers was only introduced in three stages in the six original member states after the founding of the institution. As a first step, starting form 1961, states were allowed to give priority to own nationals, which means that workers from other members could only take up employment if there was no own national with adequate skills. Starting in 1964 national preference was abolished, but workers form other EEC states could only apply to vacancies opened by the national employment agency. In the case of special difficulties states however still had the opportunity to close their labour markets. In 1968 total liberalization was introduced, and the rules still in force today were adopted, nevertheless after some of the enlargement rounds derogations were allowed.

The regulations grant the right to every EEC (later EC and EU) citizen to search for unemployment opportunities in other member states, to take up employment there and to remain there after the termination of the work contract. This right then was extended to their family members, self employed persons,

[90] ETS No. 78, Paris the 14th of Dec. 1972
[91] ETS No. 14, Paris 11th of Dec. 1953

pensioners and students. The European Court of Justice usually gave an extensive interpretation in the case of doubtful legal regulations which has further led to the widening of both the personal scope and the content of the free movement provisions. The many decisions of the Court however make it also very difficult to get a clear picture of the precise meaning of different rules.

Closely related to the question above, the EU also adopted a number of secondary law legislations to protect the social security rights of migrant workers. EU Directives No. 1408/71/EEC and 574/72/EEC establish the technically most advanced system of the coordination of social security systems in the world. 'Third country nationals' – people coming from non EU member states – were however since short excluded from these provisions. For them only bilateral agreements provided a lower level of rights. In 2003 the EU could no longer contravene its own fundamental principles in such a way, and thus Directive No. 859/2003/EC extended the personal scope of the coordination directives to third country nationals. This was in accordance with Article 34 of the Charter on Fundamental Rights, but irregular and non-documented migrants are still without legal protection, which is on of the biggest deficits of the EU's human rights protection system.

Conclusions

As we have seen, the protection of migrant workers' human rights is still a problem to solve. The so called international bill of rights – made up of six UN human rights conventions – covers more or less all people regardless of their nationality. Almost every country has ratified these instruments, acknowledging – at least in principle – not just the rights of their own citizens but also those of foreigners, including those who came to work. Because of various political, social and economic obstacles this however is not the case in practice,[92] leaving migrants in a vulnerable situation. This lack of legal protection has led to the adoption of special conventions both at a universal and at a regional level.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families is categorized, as the seventh fundamental human rights instrument of today.[93] It is too early to decide, whether the new instrument is overall effective or not, but the document has some very innovative features: it includes a broad definition of the term "migrant worker", it recognizes the rights relating to the family, it tries to protect all – authorized as well as unauthorized – migrant workers, it "extends and strengthens a number of rights in other international human rights instruments, such as the right to equal treatment with respect to work and employment conditions and the right to protection against

[92] H. S. MATTILA: Protection of Migrants' Human Rights: Principles and Practice: *International Migration* Vol. 38 No. 2 2000, pp 55–61

[93] TARAN 2000a, p 17

arbitrary and unfair expulsion"[94] and it also creates some new rights. The Convention constitutes the first codification of migrant workers' rights that, unlike the ILO standards includes every aspect of human life.

The Convention nevertheless has some mayor shortcomings. It does not address special concerns of migrant women, who are often more vulnerable to exploitation than men.[95] It also fails to give special protection to children of migrant workers, and does not address the needs of the second or third generation immigrants.[96] Furthermore the Convention favors the principle of state sovereignty and does not go far enough in granting rights to irregular migrant workers, leaving them in an insecure situation. The precise place of the Convention in the international human rights regime and the relation to other instruments protecting migrant workers is also unsettled. The biggest stumbling block to the new Convention: the unwillingness of rich countries to ratify it – is however not due to a failure of design or concept, but rather to the domestic politics of western states.

The Migrant Workers Convention's goal is to protect a special group of people and is an important step in establishing a truly universal human rights regime for our globalized world. It will not solve all problems facing migrant workers, but if its implementation is successful it may improve the living conditions of millions, and make the world a better place to live in.

As the international organization established with the objective to protect the economic and social rights of workers, it was a natural task for the ILO to protect the interests of migrant workers. Because of the low number of the ILO conventions' ratifications we could draw the conclusion that the ILO is unsuccessful in its more than 80 years long attempt to protect the rights of migrant workers. The picture is however not that sad in practice, as some countries which have not ratified the conventions nevertheless follow their general philosophy when creating their own national rules.[97] The ILO conventions have also been used as an example for the drafting of the 1990 UN Convention. We must also not forget that the ILO is unique among international organizations because of its tripartite structure, which allows for more wide social acceptance of the rules adopted than in the case of other organizations. Last but not least the ILO has built up an enormous amount of skills relating to labour migration which is spread among its member states through different programs of statistical and technical cooperation.

Regional organizations could also play a very important role in the protection of migrants – and in some cases they do. In Europe both the Council of Europe and the European Union has an elaborate system for the protection of human rights of

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[94] CHOLEWINSKI p 200

[95] 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: *International Migration Review* Vol. 25 No. 4 1991 p 813

[96] C. DIAS: Human Rights of Migrant Workers: A House is not a Home; *Speaking About Rights* Vol. 14 No. 1 1999

[97] TARAN: p 92

migrants. The system of the EU is more advanced, and better recognized, but the CoE standards cover more countries. Outside of Europe it is in the Americas where we can see similar measures. Here we can similarly observe the difference between organizations aimed at human rights protection (the OAS) and ones that have the goal of economic integration (NAFTA). It might however be surprising that – again like in Europe – organizations of the second type are usually more successful. In Africa we can also see some signs that the problem of labor migration is emerging on the agenda of various regional organizations, but here they have more imminent problems to solve on the short term. In Asia and in the Pacific region the situation from an organizational point of view is even worse.

The protection of migrant workers' human rights is far from resolved. The easiest solution would be to grant the discrimination free enjoyment of the rights protected by various international instruments. This however is unlikely to happen. Special arrangements either by the UN or the ILO could also play a vital role, but the steps taken so far have been more or less unsuccessful. Regional organizations, with closer political ties and better knowledge of the issues could also be an effective way to overcome the problem, outside of the EU we can however not see clear steps forward. Thus migrants remain in a vulnerable situation and only the coordinated application of the various instruments could provide some kind of solution to this great challenge of our age.

DUX LÁSZLÓ

A MIGRÁNS MUNKAVÁLLALÓK EMBERI JOGAINAK VÉDELME

(Összefoglalás)

Az emberi lét egyik meghatározó mozzanata a helyváltoztatás, amely a különböző okokból, különböző távolságokra és különböző időtartamokra történhet. A migráció egyik leggyakoribb kiváltó oka a kedvezőbb életfeltételek keresése, amelynek érdekében napjainkban is milliók kelnek útra évente, hogy saját illetve családjaik boldogulását elősegítsék. Az ilyen célból elvándorlók, a migráns munkavállalók jogi helyzete napjainkban korán sem megoldott, belépésüket különböző jogi és fizikai akadályokkal nehezítik, munkavégzésük és életük során pedig mindennapos hátrányos megkülönböztetésük. A fenti tanulmányban a ma meglévő olyan nemzetközi jogi eszközöket tekintem át, amelyek célja a migráns munkavállalók jogvédelme. Vizsgálatom eredménye az, hogy a már meglévő jogszabályok is sokat javíthatnának helyzetükön, amihez azonban az lenne szükséges, hogy több állam csatlakozzon hozzájuk és hatékonyabban hajtsák végre rendelkezéseiket.