

LÁSZLÓ DUX

## The UN Convention on Migrant Workers

### Introduction

One of the most distinguished features of our contemporary age of globalization is the contrast between the free circulation of goods and capital, and the restrictions in the way of the free movement of people. According to UN estimates more than 175 million people live today permanently or temporarily outside their country of origin,<sup>1</sup> 100 million of whom are estimated to be migrant workers and members of their families<sup>2</sup>. This is only two to three percent of the world's total population, but their numbers are expected to grow steadily, and migration has a much greater impact on social relations, culture, national and international politics in both sending and receiving countries than the numbers suggest.<sup>3</sup> Exporting labour is also a major source of income from Albania to Zimbabwe.<sup>4</sup>

The predominant cause for labour migration is the income inequality between rich and poor regions of the world.<sup>5</sup> Absolute poverty remains a tremendous challenge throughout the developing world, as more than one billion people live on less than one dollar a day. At the same time, the difference between the per capita GDP of the twenty richest and twenty poorest countries has more than doubled in the last forty years.<sup>6</sup> Another factor is the different demographic situation between the Western countries, where the population is ageing and decreasing, and the third world, where the population continues to expand. The role of mass communications is also of great importance as it spreads information about employment opportunities in the West, as well as Western consumption values in the developing world. Improvements in transportation infrastructure make travel easier and cheaper for migrants.

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<sup>1</sup> International Migration Report 2002; New York, United Nations 2002 p 2  
<http://www.un.org/esa/population/publications/ittmig2002/2002ITTMIGTEXT22-11.pdf>

<sup>2</sup> Current dynamics of international labour migration: Global and regional integration  
<http://www.ilo.org/public/english/protection/migrant/about/index.htm>

<sup>3</sup> STEPHEN CASTLES: Globalization and migration: some pressing contradictions. *International Social Science Journal* Vol. 50 No. 156 June 1998 pp 179-180.

<sup>4</sup> PHILIP MARTIN, THOMAS STRAUBHAAR: Best Practices to Reduce Migration Pressures. *International Migration* Vol. 40 No. 3 2002 p 6.

<sup>5</sup> PETER STALKER: *The work of strangers: A survey of international labour migration*. Geneva, International Labour Office, 1994 pp 21-26.

<sup>6</sup> World Development Report 2000/2001; The World Bank, Washington 2000 pp 46-51.

Migrant workers are usually the most vulnerable group of the workforce; they often work in so called “three-D” jobs: dirty, dangerous and difficult.<sup>7</sup> 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 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<sup>8</sup> 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.<sup>9</sup> Migrants are often outside the protection of labour safety, health, minimum wage and other legal standards. Existing international human rights instruments did not provide adequate protection for them either.

The miserable conditions of migrant workers and the worsening migration pressures have attracted the attention of governments, regional and international organizations as well as NGOs.<sup>10</sup> This led to the adoption of the International Convention on the Protection of the Rights of All Migrant Workers and members of Their Families by the UN General Assembly on the 18th of December 1990: Following the twentieth ratification by Guatemala the Convention entered into force on the 1st of July 2003.<sup>11</sup>

The following article’s aim is to make acquainted with the new UN Convention. The article first sketches the provisions of existing UN and ILO standards that protect migrant workers; then it summarizes main debates and issues during the adoption process. After that, it introduces the main provisions of the Convention, comparing them to previous instruments. Although research shows, that the free movement of people from areas of low productivity to areas of high productivity increases the economic output of the world,<sup>12</sup> the article’s viewpoint remains a human rights perspective. Its premise is that the extension of human rights to unprotected groups is the foundation of global social peace and development.

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<sup>7</sup> PATRICK A. TARAN: Human Rights of Migrants: Challenges of the New Decade. *International Migration* Vol. 38 No. 2 2000 p 13 (TARAN 2000a).

<sup>8</sup> 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. TARAN 2000a p 23.

<sup>9</sup> ANDRE LINARD: *Migration and Globalisation, The new slaves*; ICFTU Brussels 1998 pp 4–14.

<sup>10</sup> Report III (1B) of the International Labour Conference on Migrant Workers; Geneva, June 1999 <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/r3-1b.htm>

<sup>11</sup> The following countries have ratified the Convention to date: Azerbaijan, Belize, Bolivia, Bosnia and Herzegovina, Belize, Cape Verde, Colombia, Ecuador, Egypt, El Salvador, Ghana, Guatemala, Guinea, Mexico, Morocco, Philippines, Senegal, Seychelles, Sri Lanka, Tajikistan, Uganda and Uruguay; while Bangladesh, Burkina Faso, Chile, Comoros, Guinea-Bissau, Paraguay, Sao Tome and Principe, Sierra Leone, Togo and Turkey have signed the treaty, but have not ratified it yet; United Nations Press Release LT/4371 2003.

<sup>12</sup> ANDRES SOLIMANO: *International Migration and The Global Economic Order: An Overview*. The World Bank, Washington, Nov. 2001 p 24.

*1. The protection of migrant workers in international human rights law and the adoption of the new UN Convention*

*1. The rights of migrants in universal human rights instruments*

Universal human rights norms are called universal, because they protect every human being regardless of his or her nationality, social or economic status. The basic document of the modern international human rights regime, the *Universal Declaration of Human Rights*<sup>13</sup> (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 contradictory.

The rights listed in the UDHR were transformed into legally binding instruments by the two covenants in 1966. Article 2 of the *International Covenant on Civil and Political Rights*<sup>14</sup> (ICPR) ensures that all individuals on the territory of the given state enjoy the protection of the covenant. Rights of special interest to migrant workers are the prohibition of torture (Art. 7), slavery and forced labour (Art. 8). The right to free movement within a country is restricted to those, who reside lawfully within the territory of that state. The right to leave a country – any country – is granted to everyone, although the ICPR, like the UDHR lacks the right to enter a state (Art. 12). Article 13 of the document gives procedural protection against arbitrary expulsion, once again only to those, who are legal residents.

The *International Covenant on Economic, Social and Cultural Rights*<sup>15</sup> (ICES) affords less generous protection to aliens than the other covenant, stemming from the nature of those rights.<sup>16</sup> The document emphasizes the progressive achievement of the standards set out in it. So each country has to achieve those goals according to their resources [Art. 2 (1)], and developing countries are even allowed to discriminate on the basis of nationality [Art. 2 (3)]. Rights as the right to work (Art. 6), the right to just and favorable working conditions (Art. 7), the right to strike (Art. 8), the right to social security (Art. 9) or the right to an adequate standard of living (Art. 11) are all very important to migrant workers, but these economic and social rights are hard to implement, especially in the case of foreign nationals.

Other international human rights instruments addressing specific issues such as the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *International Convention on the Rights of the Child*, the *Convention on the Elimination of All Forms of Discrimination against Women* and the *Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment* all contribute to the legal protection of migrant workers. The mayor regional human rights instruments also contain provisions applying to every individual; these include the *African Charter on*

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<sup>13</sup> UN GA Res. 217A (III), adopted 10 Dec. 1948.

<sup>14</sup> 16 Dec. 1966; 999 UNTS 171.

<sup>15</sup> 16 Dec. 1966; 993 UNTS 3.

<sup>16</sup> RYSZARD CHOLEWINSKI: *Migrant workers in international human rights law: their protection in countries of employment*; Oxford, Clarendon Press 1997 p 56.

*Human and Peoples' Rights*,<sup>17</sup> the *American Convention on Human Rights*<sup>18</sup> and the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.<sup>19</sup>

Almost every country in the world has ratified the conventions mentioned above, protecting this way – at least in principle – not just the rights of their own citizens, but also those of foreigners, including those who come to work. Because of various political, social and economic obstacles this however is not the case,<sup>20</sup> leaving migrants in a vulnerable situation. This has led to the adoption of special conventions regarding the protection of the rights of migrant workers.<sup>21</sup>

## 2. *The International Labour Organization's standards on migrant workers*

The preamble of the International Labour Organization's (ILO) constitution states that one of the goals of the organization is the "protection of the interest of workers when employed in countries other than their own". This has been reinforced in the *Declaration of Philadelphia* in 1944 and in the *Declaration on Fundamental Principles and Rights at Work* in 1998. According to these provisions the ILO has adopted a set of standards that affect the situation of foreign workers. Some of these deal with the working conditions in general and establish the right to equality while others regulate subjects specific to migrant workers.

One of the very first conventions of the ILO, the *Unemployment Convention*<sup>22</sup> from 1919 calls upon member states to make bilateral arrangements that allow migrant workers from one country to benefit from the unemployment insurance schemes of the other. This was only a minor step forward that resulted from the differences between member states. France – which was dealing with labour shortages after the First World War – wanted a broad regulation of migration, Great Britain and Canada on the other hand feared that international standards would lead to more immigration.<sup>23</sup>

An important aspect of international migration was regulated in the *Inspection of Emigrants Convention*<sup>24</sup> in 1926. According to this document only officials of one government should undertake the inspection of migrants on board of a ship. The ILO stopped to promote the ratification of this convention in 1986, reasoning, that emigration by sea has practically ceased to exist.<sup>25</sup>

<sup>17</sup> 26 June 1981; OAU Doc. CAB/LEG/67/3/Rev. 5.

<sup>18</sup> 22 Nov. 1969; OAS Treaty Series No. 36.

<sup>19</sup> 4 Nov. 1950, Council of Europe ETS No. 5; The Council of Europe also has a specific instrument for the protection of migrant workers, the *European Convention on the Legal Status of Migrant Workers*; 24 Nov. 1977; COE ETS No. 93.

<sup>20</sup> HEIKKI S. MATTILA: Protection of Migrants' Human Rights: Principles and Practice; *International Migration* Vol. 38 No. 2 2000 pp 55–61.

<sup>21</sup> CHOLEWINSKI: p 75.

<sup>22</sup> ILO Convention No. 2 of 1919 concerning Unemployment.

<sup>23</sup> MICHAEL HASENAU: ILO Standards on Migrant Workers: The Fundamentals of the UN Convention and Their Genesis. *International Migration Review* Vol. 25 No. 4 1991 pp 688–690.

<sup>24</sup> ILO Convention No. 21 of 1926 concerning the Simplification of the Inspection of Emigrants on Board Ship; Hungary ratified the convention in 1931.

<sup>25</sup> RICHARD PLENDER: *International Migration Law*. Kluwer Academic Publisher Dordrecht/Boston/London 1988 p 296.

In 1939 the International Labour Conference adopted the *Migration for Employment Convention*<sup>26</sup> which was meant to regulate the whole process of labour migration. No country ratified the convention during the war, so the ILO withdrew the convention, but it is an important forerunner for the conventions following it.

After World War II the situation of millions of people, who were forced to leave their countries was a major concern to many governments. So the ILO and the UN agreed in 1947, that the rights of migrants in their quality as workers remained in the ILO's exclusive jurisdiction, while the jurisdiction over the rights of migrants as aliens became the competence of the UN.<sup>27</sup> Other organizations, such as the World Bank, the International Refugee Organization, the UNESCO and the FAO also expressed some interest in the subject.<sup>28</sup>

The reestablished ILO Permanent Committee on Migration drafted its proposal for the revision of convention No. 66 in 1949. The new *Migration for Employment Convention*<sup>29</sup> (ILO Convention No. 97) and Recommendation were adopted the same year on the Thirty-Second Session of the International Labour Conference. To make ratifications easier the convention consists of a general treaty and three Annexes. This complicated structure allows states to exclude some rights when ratifying the convention, as did France or the United Kingdom. Altogether forty-two states have ratified the convention so far, including several states of immigration, such as Canada, Australia and the United States.

Twenty-six years later, in very different economic circumstances the International Labour Conference adopted the *Migrant Workers (Supplementary Provisions) Convention*<sup>30</sup> (ILO Convention No. 143). Following the recession in the beginning of the 1970s the demand for foreign labour in industrialized countries fell sharply,<sup>31</sup> which led to restrictions in immigration laws. At the same time discrimination against migrants, human trafficking and xenophobia moved into the forefront of public concern.<sup>32</sup> This shift becomes obvious in the preamble of the convention, which states the 'need to avoid the excessive and uncontrolled or unassisted increase of migratory movements because of their negative social and human consequences' (Recital 4), and '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' (Recital 5). This new anti-liberal, restrictive approach to international labour migration has become the norm in most immigration countries since then.

The convention consists of two parts, the first deals with the protection of migrant workers in abusive conditions, and the second which was set out to promote equal opportunity for migrants. Despite the fact that ratifying states are free to exclude either

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<sup>26</sup> ILO Convention No. 66 of 1939 concerning the Recruitment, Placing and Conditions of Labour of Migrants for Employment.

<sup>27</sup> HASENAU: p 693.

<sup>28</sup> PLENDER: p 298.

<sup>29</sup> ILO Convention No. 97 of 1949 concerning Migration for Employment; The provisions of the conventions No. 97 and 143 will be dealt later, compared with the UN convention on migrant workers.

<sup>30</sup> ILO Convention No. 143 of 1975 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers

<sup>31</sup> PLENDER: p 302.

<sup>32</sup> HASENAU: p 695.

part one or two of the convention, only eighteen countries have ratified the convention so far, most of them typical sending countries.

Accompanying these conventions the ILO has adopted a set of legally not binding recommendations that also deal with problems facing migrant worker. These include the *Migration for Employment Recommendation* and the *Migration for Employment (Cooperation between States) Recommendation* from 1939;<sup>33</sup> the *Recommendation concerning Migration for Employment*, and its annex, the *Model Agreement on Temporary and Permanent Migration* from 1949;<sup>34</sup> and the *Recommendation concerning Migrant Workers* from 1975.<sup>35</sup> Other ILO instruments also contain some provisions that apply to migrant workers,<sup>36</sup> especially their entitlement to social security schemes.<sup>37</sup>

Throughout its history the ILO has played an important role in protecting the rights of migrant workers, not just with its standard setting activity, but also with its assistance to technical cooperation and research. At the same time, the status of ratifications of the ILO conventions on migrant workers is far from impressive. The main reason for this is that host countries are afraid that granting rights to migrant workers; in particular the equal treatment with nationals and the maintenance of residence rights in case of unemployment or disability will encourage more immigration.<sup>38</sup> Another important cause, closely related to the previous one, is that the instruments concerning the rights of migrants were not included in the so called Fundamental ILO Conventions in 1995, which have to be ratified and implemented by every member state of the organization. Nevertheless Convention No. 97 and 143 are important forerunners of the new UN convention on migrant workers, especially in the field of economic and social rights – but the obstacles facing their ratifications also reoccur in the case of the new convention.

### 3. The adoption of the new Convention

The drafting history of the Convention began shortly after the adoption of the ILO's second convention concerning migration, when following reports of the Secretary General<sup>39</sup> the Economic and Social Council of the UN concluded, that the protection of migrant workers is not sufficient, and that the UN should play a direct role in their protection with an own new human rights convention. Consequently an open-ended

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<sup>33</sup> ILO Recommendation No. 61 of 1939 concerning the Recruitment, Placing and Conditions of Labour of Migrants for Employment; ILO Recommendation No. 62 of 1939 concerning Co-operation between States relating to the Recruitment, Placing and Conditions of Labour of Migrants for Employment.

<sup>34</sup> ILO Recommendation No. 86 of 1949 concerning Migration for Employment (Revised).

<sup>35</sup> ILO Recommendation No. 151 of 1975 concerning Migrant Workers

<sup>36</sup> ILO Convention No. 82 of 1947 concerning Social Policy in Non-Metropolitan Territories; ILO Convention No. 110 of 1958 concerning Conditions of Employment of Plantation Workers; ILO Convention No. 117 of 1962 concerning Basic Aims and Standards of Social Policy.

<sup>37</sup> ILO Convention No. 19 of 1925 concerning Equality of Treatment for National and Foreign Workers as regards Workmen's Compensation for Accidents; ILO Convention No. 48 of 1935 concerning the Establishment of an International Scheme for the Maintenance of Rights under Invalidity, Old-Age and Widows' and Orphans' Insurance; ILO Convention No. 118 of 1962 concerning Equality of Treatment of Nationals and Non-Nationals in Social Security; ILO Convention No. 157 of 1982 concerning Maintenance of Social Security Rights.

<sup>38</sup> KEES GROENENDIJK: *The Metamorphosis of Migrant Labour: Will New Rules Help Migrant Workers?* *European Journal of Migration and Law*, Vol. 1 1999 p 173.

<sup>39</sup> JAMES A. R. NAFZIGER, BARRY C. BARTEL: *The Migrant Workers Convention: Its Place in Human Rights Law*; *International Migration Review* Vol. 25 No. 4 1991 p 773.

Working Group was established in 1979, which was open to all member states of the organization and which began its work in 1980.<sup>40</sup>

Two countries with significant emigration, Morocco and Mexico, who also chaired the Working Group, played a dominant role in the drafting process. They were members of the so called Group 77 that was made up mainly of Asian, African and Latin-American states and tried to strengthen the position of sending countries<sup>41</sup> on the expense of cutting back illegal immigration. Another country grouping, the so called MESCA group, consisting of six Scandinavian and Mediterranean states stressed the importance of Western human rights values<sup>42</sup> and the fight against clandestine trafficking. The socialist countries also formed a group, but their role was rather marginal. Some industrialized countries with large numbers of foreign workers, such as the United States or Germany stated their view from early on that there is no need for a new Convention, or if one was needed, it should be worked out in the ILO's framework.<sup>43</sup> These very different interests and opinions between sending and receiving or, in another way, rich and poor countries led to the ten year long negotiations which ended on the 18th December 1990, when the UN General Assembly adopted the Convention without a vote.<sup>44</sup> The consensus became possible, because countries who opposed the new convention, and decided not to sign it, also actively participated in the drafting process, as they wished to make it meet high legal standards and this way, at least to a certain degree, their interests were also included in the final draft.<sup>45</sup>

## *II. The UN Convention on the Protection of Migrant Worker's Rights*

### *1. Aims of the Convention*

The preamble of the Convention states a number of reasons why there was the need to adopt this document. The first one is to complement existing human rights instruments protecting the interests of migrant workers – either in universal, or in ILO standards, as the state parties were “Convinced that the rights of migrant workers and their members of their families have not been sufficiently recognized everywhere and therefore require appropriate international protection” (recital 12). The preamble also recognizes the role of the ILO in the field of labour migration, which is important, because although the Labour Organization helped certain states and the Working Group in drafting the Convention, there was also a feeling, that this new instrument is another attempt of the UN to sideline the ILO. Other international organizations, which might also play a role in managing migratory flows, are also mentioned in the preamble, such as the UNESCO, the WHO or the FAO (recital 1-8).

Another purpose of the Convention is to harmonize the migration policies of countries by establishing basic human rights principles (recital 10), without displacing

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<sup>40</sup> JUHANI LÖNNROTH: *The International Convention on the Rights of All Migrants and Members of Their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotiation*; *International Migration Review* Vol. 25 No. 4 1991 p 713.

<sup>41</sup> CHOLEWINSKI: p 144.

<sup>42</sup> LÖNNROTH p 730.

<sup>43</sup> <http://www.december18.net/UNconventionTravaux.htm>

<sup>44</sup> UN GA Resolution 45/158 18 December 1990.

<sup>45</sup> LÖNNROTH p 734.

regional and bilateral agreements and cooperation between sending and receiving countries<sup>46</sup> (recital 9).

The general purpose of the Convention of course, was to abolish the vulnerable situation of migrant workers and their family members in which they “frequently find themselves owing among other things, to their absence from their State of origin and to the difficulties they may encounter arising from their presence in the State of employment” (recital 11). As the preamble states, migrants in non documented or irregular situation were included because they are the easiest to exploit (recital 14-15), but at the same time, granting more rights to regular or documented migrants was meant to discourage illegal labour migration and reduce clandestine trafficking (recital 16).

## *2. The structure of the Convention*

The Convention consists of nine parts. Part I (Art. 1-6) following the Preamble sets out the scope of the Convention and then defines basic terms and concepts used. Part II (Art. 7) contains a general non-discrimination clause. Part III (Art. 8-35) enumerates the rights enjoyed by all migrant workers, regardless of their legal status. Part IV (Art. 36-56) lists those additional rights which only apply to documented or regular migrant workers. Part V (Art. 57-63) establishes special rights for particular categories of migrant workers, such as frontier or seasonal workers. Part VI (Art. 64-71) promotes the sound, humane and lawful conditions in connection with international migration and obliges states to combat human trafficking. Part VII (Art. 72-78) and Part XI (Art. 85-93) set forth provisions about the application of the Convention, and about its entry into force, while Part VIII (79-84) further defines the relationship between the new Convention and existing instruments.

## *3. The scope of the Convention*

The Convention is applicable to all migrant workers and members of their families, regardless to sex, race, color, language, religion or conviction, political or other opinion, national, social or ethnic origin, nationality, age, economic position, property, martial status, birth or other status, throughout the whole migration process (Art. 1 and 2). This is reaffirmed in Article 88 which states that, unlike, for example in the case of ILO Convention No. 143 (Art. 16), states may not exclude certain parts of the Convention or particular categories of migrant workers. Attempts by certain states during the drafting process to grant particular rights only in the case of reciprocity were unsuccessful.<sup>47</sup> Provisions however are possible, but these shall not be incompatible with the purpose and object of the Convention [Art. 91 (2) and 91 (3)]. So far Colombia, Egypt, Mexico, Morocco, Sri Lanka and Uganda have made either provisions or interpretative declarations,<sup>48</sup> mainly in questions of minor importance.

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<sup>46</sup> NAFZIGER, BARTEL p 775.

<sup>47</sup> CHOLEWINSKI p 148.

<sup>48</sup> UN Treaty Collection, Declarations and Reservations;  
[http://www.unhchr.ch/html/menu3/b/treaty20\\_asp.htm](http://www.unhchr.ch/html/menu3/b/treaty20_asp.htm)



#### 4. Definitions

One of the biggest accomplishments of the Convention is the comprehensive definition of the term “migrant worker”.<sup>49</sup> For the purposes of the Convention, a migrant worker is 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” (Art. 2). This is a much broader definition than the one in ILO Convention No. 97, which refers to “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” (Art. 11), or ILO Convention No. 143, for which “the term migrant worker means a person 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” (Art. 11). The biggest difference is that irregular migrant workers are included, but the protection of self-employed workers, and migrants who will be engaged in the remunerated activity in the future<sup>50</sup> is novel as well. The drafting of the term “migrant worker” took almost two years, but the consensus reached in 1985 is a success of the states who favored a more broad and inclusive approach.

The definition of migrant workers includes frontier workers, seasonal workers, itinerant workers, project-tied workers, specified-employment workers and, as mentioned above self-employed workers. Persons employed by international organizations and government officials, persons participating in development programs, investors, refugees and stateless persons, students and trainees as well as seafarers and workers on offshore installations are excluded (Art. 3). The exclusion of students and trainees is problematic, as in some states, for example in Japan,<sup>51</sup> on the job training is hard to distinguish from actual labour.

A question fiercely debated in the course of the drafting of the new Convention was the definition of the term “members of the family”. Western countries preferred their model of the nuclear family as a concept, while Islamic and some other developing countries perceived a broader definition, based on their social traditions.<sup>52</sup> A compromise was reached in the final text by using the concept of “applicable law”, although this solution favors receiving countries, as the rights – most importantly the right to family reunification – are usually exercised in them, and not in sending countries.

Articles 5 and 6 define the terms of regular, documented, irregular and non-documented migrants, as well as the terms state of origin, employment and transit.

#### 5. The non-discrimination clause

Article 7 of the Convention prohibits eighteen grounds for discrimination, which are the same as in the case of Article 1. This catalogue is given only by way of example, as it

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<sup>49</sup> S. HUNE: Drafting an International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; *International Migration Review* Vol. 21 No. 1 1987 p 123.

<sup>50</sup> This means that they hold a working contract and does not cover persons who are only seeking employment. CHOLEWINSKI p 150.

<sup>51</sup> YASUZO KITAMURA: Recent developments in Japanese immigration policy and the United Nations Convention on Migrant Workers; *U.B.C. Law Review* Vol. 27 No. 1 1993 p 126.

<sup>52</sup> LÖNNROTH p 730.

follows a general prohibition of discrimination with the words “such as”. The list nevertheless is considerably longer than in the case of most previous universal human rights instruments; age and marital status are prohibited grounds for discrimination that show how far the notion of non-discrimination has been extended in the last fifty years. Bearing in mind that the non-discrimination refers solely to the rights enumerated in the Convention,<sup>53</sup> one must also consider that human rights are distinguished from other rights by their universality, so non-discrimination is fundamental to the concept of human rights law.<sup>54</sup> This is especially true for migrant workers who are often easy to distinguish from members of the host society due to their physical features or clothes.

#### *6. The rights of all migrant workers and members of their families*

##### *a) Physical integrity*

Part III of the Convention starts with the enumeration of rights that constitute to the physical integrity of migrants and as such form the basis of the rights following them. These rights mainly overlap<sup>55</sup> with the similar ones in other universal human rights instruments, such as the UDHR or the ICPR, as well as other regional human rights conventions.

The wording of the right to life, the prohibition of torture, cruel, inhuman or degrading treatment and punishments, slavery and servitude (Art. 9-11) is nearly identical to the language of the universal instruments mentioned above, applying to everyone, including also migrant workers. The freedom of movement is crucial to migrant workers; the Convention however only establishes a right to leave any country and to enter and remain in the state of origin (Art. 8). The prohibition of forced or compulsory work is somewhat more defined than in previous documents, as the prohibition does not include forced work in the case of a punishment for a crime, imposed by a court, emergency or civil obligations (Art. 11).

The regulation (Art. 16) concerning rights relating to liberty and security of persons, including the rights granted in the case of arrest or detention are similar to the ones in the ICPR, but the Convention also contains some provisions originating from the special needs of migrant workers, such as the right to information in a spoken language and the right to communicate with consular or diplomatic authorities from the country of origin.

Some question the necessity of including the rights mentioned above in the new Convention, as these rights are protected by the other universal and regional human rights instruments. Migrant workers however are often deprived of these rights, so repeating them once again might be useful.

##### *b) Mental and moral integrity*

The freedom of thought, conscience and religion is a right especially important in multi-ethnic societies which come upon existence in countries with large immigration. The Convention in Article 12 once again follows the language of the UDHR (Art. 18) and even more, that of the ICPR (Art. 18).

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<sup>53</sup> CHOLEWINSKI p 155.

<sup>54</sup> PAUL SIEGHART: *The International Law of Human Rights*; Clarendon Press, Oxford 1995 p 75.

<sup>55</sup> NAFZIGER, BARTEL p 781.

The situation is similar in the case of freedom of opinion and expression (Art. 13), although here the restrictions include the prevention of any propaganda for war or national, racial and religious hatred, which were neither included in the UDHR nor the ICPR.<sup>56</sup> The right to privacy, honor and reputation (Art. 14) is somewhat extended in the Convention compared to the universal instruments, as it also includes the protection of “other communications” from unlawful interference. The Convention encourages states to take positive steps in maintaining the migrants’ cultural links with the country of origin (Art. 31). But it lacks to impose a positive obligation on states to teach the migrant workers’ children their mother tongue and culture. The idea of teaching these was very strongly opposed during the drafting process by the representatives of France and Germany, who argued that this would open the door to segregated school classes.

c) Legal integrity

Both the UDHR (Art. 6) and the ICPR (Art. 16) grant the right to the recognition as a person before the law to everyone, everywhere; Article 24 of the Convention simply adopts these provisions to migrant workers. The right to a nationality, like in the case of the ICPR (Art. 24) is restricted to children (Art. 29), as is the right to a name. The protection from retroactive penal laws is also included in the Convention (Art. 19), once again with language similar to that of the UDHR (Art. 11) and of the ICPR (Art. 15), although the Convention is more excessive, as it also provides for humanitarian considerations in its wording.

The rights of migrant workers during detention or imprisonment (Art. 17) are more enumerated in the Convention than in the UDHR or the ICPR. According to the Convention, migrant workers, who are detained because of a violation of immigration laws, are to be held separately from other convicted persons. They should enjoy equal treatment with nationals of the state of imprisonment and their human and cultural dignity is to be respected. The provisions of the right to a due process in criminal proceedings are also much more detailed in the Migrant Workers Convention than in the other instruments.<sup>57</sup> Article 18 builds strongly on the jurisprudence of various international and national tribunals when it lists the specific guarantees in seven points. The wording of the right to equality with nationals before the courts and tribunals caused concern in some states, which expressed reservations, that the formulation does not mean the regularization of irregular migrants.<sup>58</sup>

Other rights relating to the legal integrity of migrant workers come from the special needs in their situation on foreign soil.<sup>59</sup> For example: the failure to fulfill an obligation arising from a work contract shall not be a cause for expulsion of a foreign worker (Art. 20); or, only public officials may destroy the identity documents, entry, residence or

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<sup>56</sup> This restriction seems significant in the light of recent international political developments.

<sup>57</sup> These rights are very often breached in the Gulf-States. For example Sarah Jane Dematera, a domestic helper in Saudi-Arabia from the Philippines has been sentenced to death, without a due process. [www.amnesty.org](http://www.amnesty.org); See also PATRICK A. TARAN, EDUARDO GERONIMI: Globalization, Labour and Migration: Protection is Paramount; *Perspectives on Labour Migration* International Labour Office, Geneva 2003 p 14.

<sup>58</sup> LINDA S. BOSNIAK: Human Rights, State Sovereignty and the Protection of Undocumented Migrants Under the International Migrant Workers Convention; *International Migration Review* Vol. 25 No. 4 1991 p 757.

<sup>59</sup> NAFZIGER, BARTEL p 783.

work permits of migrant workers, but the destruction of the passport is always prohibited (Art 21).

Expulsion is one of the most important questions to migrant workers, especially to irregular ones. The Convention provides protection from collective expulsion, imposes the obligation on states to inform about the lawful decision in time, in a language they understand, in a written form, with reasoning. The expelled migrant has the right to ask for a review of the decision and the right to settle claims for wages (Art. 22). The right to communicate and take protection of consular and diplomatic authorities of the state of origin (Art. 23) extends the provisions in Article 16 to all cases when the Convention is breached.

#### d) Economic and social rights of all migrants

The right to own property is crucial to the self sufficiency and economic well-being of migrant workers. The Convention not only lists the right to property in its Article 15, but it also includes the right to “fair and adequate compensation” for expropriated property, and is this way more defined than the UDHR.<sup>60</sup> Closely related to this is the right to transfer belongings and earnings back to their country of origin upon ending their stay in the host state (Art. 32).

The equality of treatment with nationals, regarding remuneration and other conditions of work, such as hours of work or paid holidays, protects all migrant workers (Art. 25), although Part IV’s provisions relating to work are much more expansive. These rights may not be deprived by reasons of irregularity relating to the stay of the migrant worker in the host country. Article 26 of the Convention contains the right to establish or join trade unions or other organizations, and to participate in their activities, but once again it is hard to practice these rights for persons who are in an irregular legal status. States with large numbers of immigrants, such as Germany or Austria strongly opposed the inclusion of the right of equal treatment with respect to employment in the case of irregular migrants, but developing countries managed to put through their view on this point.

The right to social security benefits is defined in Article 27, which grants equal protection, as far as migrant workers or members of their families fulfill the legal requirements. If, according to the law, such a benefit is not allowed, then states must take measures to reimburse the amount of contributions made by the migrants during their employment. There is no real social security system in many developing countries, so seeking social security coverage; especially old age pension is an important reason for migrating.<sup>61</sup>

Migrant workers have the right to access health care facilities in urgent medical cases on the basis of equal treatment. Their children also enjoy the same right with respect to access education (Art. 29 and 30).

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<sup>60</sup> Neither of the two Covenants mentions the right to property.

<sup>61</sup> MARIANO SANA, DOUGLAS S. MASSEY: Seeking Social Security: An Alternative Motivation for Mexico – US Migration; *International Migration* Vol. 38 No. 5 2000 p 12.

*7. The additional rights enjoyed by legally residing migrant workers*

Migrant workers are considered to be in a 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” (Art. 5/a).

They have the right to be informed about the circumstances of their employment (Art. 37) and can temporarily leave the territory of the state (Art. 38). Documented migrants have the right to move freely in the host country, and to choose their residence (Art. 39), nevertheless their right to choose their employment (Art. 52) is significantly restricted, exceeding the restrictions in ILO Convention No. 143 (Art. 14). The Convention’s “provisions concerning the right to free choice of employment reflect a marked deference to state sovereignty, and considerably weaken the ICMW as a rights-oriented instrument.”<sup>62</sup> Their rights to form trade unions and to equal treatment regarding education, vocational training, housing, health services and cultural life (Art. 40, 43 and 45) are somewhat more broadly defined than in Part III, giving this way extra protection to legally employed immigrants.

Migrants in a regular situation, according to Article 41, can enjoy some political rights, although in contrast to that, Article 42(3) restricts these rights “in the State of employment if that State, in the exercise of its sovereignty, grants them such rights”.

The Convention fails to establish a right to family reunification, which makes up a great part of today’s migration flows and is included in ILO Convention No. 143 (Art. 13). Article 44 of the Convention can only be seen as a recommendation to allow the reunification of the families of migrant workers, although the overall view of the document recognizes that migrant workers are social entities with families,<sup>63</sup> which is a step forward.

The economic rights of regular or documented migrant workers are extended in comparison to those of all migrants. These include the right to export and import their personal belongings duty and tax free (Art. 46), the right to send their remittances home and the prohibition of double taxation (Art. 47 and 48). Remittances play a very significant role in the economies of sending countries, although its effects on local economies are sometimes negative. The families of migrants at home often use remittances non-productively on imported consumer goods, such as cars, and the extra amount of money can lead to inflation.<sup>64</sup> Their rights relating to labour include the right to equality of treatment regarding protection against dismissal, access to unemployment benefits, public and alternative work schemes (Art. 54).

The regulation of residence and work permits of migrant workers follows and extends the provisions laid down in ILO Convention No. 143. Accordingly, if the authorization of residence and employment are separately organized, then the two have to be coordinated [Art. 49(1)]. Loosing employment shall not be regarded as being in an irregular situation [Art. 49(2) and 51], which is similar to the provisions of ILO Convention No. 143’s Article 8.

The Convention encourages member states to take measures that enable members of migrant workers’ families to stay in the host country after the death of the migrant

<sup>62</sup> CHOLEWINSKI p 163.

<sup>63</sup> TARAN 2000a p 17.

<sup>64</sup> MARTIN, STRAUBHAAR: p 8.

worker or the dissolution of their marriage (Art. 50), and allow them to work as well (Art. 53).

#### *8. The rights of particular categories of migrant workers*

The Convention's Articles 57 to 63 enumerate the rights enjoyed by special categories of migrant workers, such as frontier workers, seasonal workers, itinerant workers, project-tied workers, special-employment workers and self-employed workers defined by Article 2. These include the rights listed in Part III and – with some restrictions – Part IV. The Convention recommends that states give priority to migrant workers who belong to these categories when it considers employing workers from abroad on a permanent basis.

#### *9. The protection of undocumented migrant workers and state sovereignty*

A question causing great controversy during the drafting process was how far the rights granted to irregular or non-documented migrant workers would interfere with the sovereignty of states. The protection of a state's nationals and the protection of the human rights of migrants are viewed often as a zero sum game by states.<sup>65</sup> There was also some concern, that granting rights to irregular migrants will encourage more illegal migration. On the other hand, the protection of the human rights of the group was one of the main ideas behind the new UN instrument.<sup>66</sup>

The Convention, as we have seen, lists a considerable number of rights which protect irregular and non-documented migrants, as well as regular ones. These provisions in Part III of the Convention are much more explicit than those of ILO Convention No. 143's Article 1, which only requires, that "Each Member State for which this Convention is in force undertakes to respect the basic human rights of all migrant workers" in general.

To dismantle the states which were the most critical of the idea of protecting the rights of irregular migrants a number of provisions were included. Article 34 obliges migrant workers and members of their families to comply with the laws of states of transit and employment, while Article 35 ensures that the rights in the Convention do not imply the regularization of irregular migrants. Article 79 goes even further when it states that "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". These guarantees of state sovereignty, and the fact that exercising the rights granted in the Convention exposes irregular migrants to immigration authorities limits the effectiveness of the document in protecting the rights of the most vulnerable groups.

#### *10. Obligations of states to facilitate migration flows*

Part VI of the Convention obliges member states to cooperate in promoting sound, equitable and humane conditions for migrants (Art. 64) and to maintain services to deal with these questions, especially for the distribution of information (Art. 65). The

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<sup>65</sup> JORGE A. BUSTAMANTE: Immigrants' Vulnerability as Subjects of Human Rights; *International Migration Review* Vol. 36 No. 2 2002 p 345.

<sup>66</sup> BOSNIAK pp 737-770; CHOLEWINSKI pp 186-192.

recruitment of foreign workers is to be undertaken by public, bi- or multilateral institutions (Art. 66). States must also take measures to facilitate the return and the repatriation of migrant workers (Art. 67 and 71). These provisions of Part VI of the Convention are very similar to those of ILO Conventions No. 97 (Art. 1-5) and No. 143 (Art. 4).

The elimination of clandestine trafficking is one of the goals of the new Convention; accordingly Article 68 encourages states to cooperate in these efforts and to take steps in preventing the distribution of misleading information about the circumstances of foreign employment. To discourage illegal migration, states must introduce sanctions against people who employ irregular migrants, although this provision is not as explicit as ILO Convention No. 143's Article 6. The regularization of irregular or non-documented migrants is recommended, but no such duty is imposed upon ratifying states [Art. 69 (2) and 35].

### *11. Application of the Convention*

The supervision and enforcement of the new Convention follows the examples of previous UN human rights instruments. A body named the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families is to be set up (Art. 72), with ten and, after the forty-first ratification, with fourteen members. The Committee examines the public state reports (Art. 73) and the inter-state (Art. 76), or individual (Art. 77) complaints. Despite the fact that the ILO has the right to delegate a representative with a consultative capacity [Art. 74(5)], the Labour Organization's involvement in the application of the Convention is rather limited.<sup>67</sup> It is too early to make any judgments about the enforcement of the new instrument.

### *12. The prospects for further ratifications*

It took thirteen years to reach the required twenty ratifications for the Convention's entry into force. Except for Bosnia and Herzegovina all members and signatories<sup>68</sup> are African, Asian or Latin-American states, usually with a high number of nationals working abroad. The unwillingness of host countries to join the Convention has multiple reasons. Governments lack information about the Convention and priority is given to other issues; they often misinterpret the character of the Convention as too liberal that could constitute to more immigration and this way is contradictory to their immigration policies. An even more salient obstacle is the trend to relativize human rights;<sup>69</sup> the complexity and wording does not help either.<sup>70</sup> Granting rights to immigrants, not to say to illegal ones is not likely to win much political support in Europe or North-America.

The ratification of the Convention would mean a good opportunity for western states, which often pride themselves on their good human rights record, to show that the idea of

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<sup>67</sup> CHOLEWINSKI p 196.

<sup>68</sup> Hungary has not ratified any of the ILO's conventions relating to migrants' rights, nor the new UN treaty.

<sup>69</sup> PATRICK A. TARAN: Status and Prospects for the UN Convention on Migrants' Rights; *European Journal of Migration and Law* Vol. 2 2000 pp 94-95.

<sup>70</sup> NAFZIGER, BARTEL p 784.

universal human rights is not “a set of sacred commandments revealed to ‘developing’ societies by the ‘developed’ world”.<sup>71</sup>

Efforts to promote the Convention by the UN were weaker than in the case of other conventions, so calls upon member states to ratify the treaty remained mere symbolic acts.<sup>72</sup> NGOs played a more active role, as in 1994 different churches, trade union and human rights organizations established the International Migrants’ Rights Watch Committee, which launched a global campaign to promote the Convention with significant results.<sup>73</sup>

### Conclusions

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.<sup>74</sup> 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 arbitrary and unfair expulsion”<sup>75</sup> 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.<sup>76</sup> 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.<sup>77</sup> 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

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<sup>71</sup> ALAIN SUPIOT: The labyrinth of human rights: credo or common resource? *New Left Review* Vol. 21 May/June 2003 p 129.

<sup>72</sup> See for example: Commission on Human Rights Resolution 2001/56, UN doc. E/CN.4/RES/2001/56, 24 April 2001; General Assembly Resolution 56/145 19 December 2001.

<sup>73</sup> Their web-site is located at <http://www.december18.net>

<sup>74</sup> TARAN 2000a p 17.

<sup>75</sup> CHOLEWINSKI p 200.

<sup>76</sup> SHIRLEY 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.

<sup>77</sup> CLARENCE DIAS: Human Rights of Migrant Workers: A House is not a Home; *Speaking About Rights* Vol. 14 No. 1 1999 <http://www.december18.net/paper13HrofMigrantWorkers.htm>



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.

DUX LÁSZLÓ

## A VÁNDORMUNKÁSOK VÉDELMEÉRŐL SZÓLÓ ENSZ EGYEZMÉNY

(Összefoglaló)

Napjainkban több mint százhetvenöt millió ember él más állam területén, mint ahol született. Többségük munkavállalási céllal hagyta el származási országát. Kiszolgáltatott helyzetükben gyakran legalapvetőbb emberi jogaik sérülnek, ezek védelme – különösen az illegális keretek között elvándoroltak esetében – nem megoldott. Ennek felismerése vezetett el az ENSZ keretein belül, a Valamennyi vándormunkás és családtagjaik jogainak védelméről szóló nemzetközi egyezmény elfogadásához 1990-ben. A tanulmány röviden áttekinti, hogy a korábbi nemzetközi emberi jogi egyezmények mennyiben nyújtottak védelmet a vándormunkásoknak, majd a július elsején hatályba lépett új egyezmény rendelkezéseit ismerteti.

A vándormunkásokról szóló egyezmény egyik leginnovatívabb jellemzője az, hogy a jogvédelmet kiterjeszti az illegálisan a fogadó országba érkezett munkásokra és családtagjaikra is, ami fontos előrelépés a Nemzetközi Munkaügyi Szervezet vándormunkásokat védő egyezményeihez képest. Az illegális migráció visszaszorítása érdekében ugyanakkor az engedéllyel rendelkező vándormunkások jogait szélesebben határozza meg. Az egyezmény tartalmazza a „vándormunkás” és több más munkavállalói csoport első nemzetközileg általánosan elfogadott meghatározását is. Nem veszi azonban figyelembe a vándormunkásnők, illetve gyermekeik, a másod és harmad generációs elvándoroltak speciális igényeit, valamint túl nagy tekintettel van a nemzetállamok szuverenitására.

Az egyezmény, amely elsőként próbálkozik a vándormunkások és családtagjaik teljes körű jogvédelmének kodifikációjával hozzájárulhat a globalizáció káros hatásainak csökkentéséhez. Ehhez azonban az lenne szükséges, hogy a vándormunkásokat fogadó, nyugati államok is csatlakozzanak az új egyezményhez.

