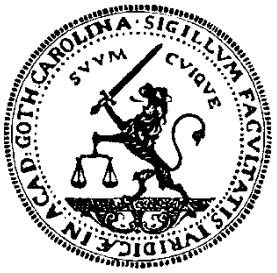

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Migrant Workers as Subjects of Human Rights

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Contents

Summary

This thesis examines the international protection of migrant workers. After a brief description of the migration phenomenon and the corresponding international legal framework, the position of aliens under human rights law is addressed through a review of three human rights conventions adopted within the framework of the United Nations. Following that, focus is turned to the international conventions aiming specifically at the protection of migrant workers. Two conventions adopted by the International Labour Organization, the Migration for Employment Convention (Revised) of 1949 and the Migrant Workers (Supplementary Provisions) Convention of 1975, are examined as is the 1990 United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. The chapters focusing on these instruments outline their political context and drafting history and describe and analyse their content with special attention paid to the definitions of the 'right-bearers' - the migrant workers. In the concluding chapter, the findings from previous chapters serve as a basis for discussing 'who' the migrant worker is, with the purpose of arguing that migrant workers has become a specific subject of human rights. Finally, the possible implications of this finding are discussed with the help of two different perspectives on subjectivity to human rights.

Sammanfattning

Den här uppsatsen undersöker hur migrantarbetares rättigheter är skyddade inom folkrätt och mänskliga rättigheter. Efter en kort introduktion till internationell migration som fenomen samt de relevanta folkrättsliga normerna övergår uppsatsen till att behandla utlänningars ställning inom mänskliga rättigheter, genom en undersökning av tre av FN:s konventioner för mänskliga rättigheter. Detta följs av en granskning av de internationella konventioner som specifikt syftar till att skydda migrantarbetare. Två konventioner antagna av ILO (*International Labour Organization*) - *Migration for Employment Convention (Revised*) från 1949 och *Migrant Workers (Supplementary Provisions) Convention* från 1975 - undersöks, liksom FN:s *Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* från 1990. De kapitel som ägnas åt dessa konventioner redogör för deras tillkomst och politiska sammanhang och förklarar och analyserar deras innehåll, med särskilt fokus på hur ’rättighetsinnehavarna’ – migrantarbetarna - definieras. I det avslutande kapitlet utgör slutsatserna från tidigare kapitel grunden i en diskussion av ’vem’ migrantarbetaren är, i syftet att argumentera för att migrantarbetare har kommit att bli ett specifikt skyddssubjekt inom mänskliga rättigheter. Slutligen diskuteras innebörden av detta genom att två olika perspektiv på ’subjektet’ för mänskliga rättigheter lyfts fram.

Preface

I wish to thank Vladislava Stoyanova for supervising my thesis, and my fellow students at the Master's Programme in International Human Rights Law for inspiration and support during long hours of research and writing.

Abbreviations

CEDAW	Convention on Elimination of Discrimination Against Women
CERD	Committee on the Elimination of Racial Discrimination
CERD	Committee on the Elimination of Racial Discrimination
CRC	Convention on the Rights of the Child
CESCR	Committee on Ecnomic, Social and Cultural Rights
ECHR	European Convention on Human Rights
GCIM	Global Commission on International Migration
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
UDHR	Universal Declaration of Human Rights
UN	United Nations

1 Introduction

Migration is a drive, a possibility, a solution, an adventure, a phenomenon that can almost be said to be inherent to the human nature. People have migrated since the beginning of times, and this has led to the development of societies and individuals, as well as to collective and personal tragedies. *Migration for work*, understood as migration in order to make a living, is as ancient as migration. *International migration* is, by definition, a concept that has existed since the creation of national States, thus a phenomenon that has evolved, and continues to adapt its nature, as a consequence of other human constructions – be they lines on maps or eight meter walls. Where there are States and there is international migration, international migrants will end up as *aliens*, non-nationals, in the States they enter, unless they attain a new citizenship.

International law is, just as international migration, premised upon the existence of States. International law is created when States agree on norms in order to ensure international coherence and cooperation. While these agreements are made in many areas, the protection of *human rights* stands out in international law, as obliging States not only in relation to each other but in relation to the people in their jurisdiction, including to aliens. Human rights are not, however, simply law, but they also serve as *arguments* and *claims*, based on presumptions of their universality and, in some views, their inherence to the human as well as on States' commitments.

This thesis focuses on the concept of the *migrant worker*, and examines who falls under this label and how this category is addressed in international law, through a review of the position of aliens in human rights law, and through studies of the three international conventions aiming specifically at the protection of migrant workers: the International Labour Organization's Migration for Employment Convention (Revised)[1] and Migrant Workers (Supplementary Provisions) Convention[2], and the United Nations' International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[3] The examination shows how migrant workers have become a specific category in human rights law, and in the last chapter, the implications of this finding are discussed. This

[1] International Labour Conference, Convention concerning Migration for Employment (Revised 1949) (No. 97), adopted by the International Labour Conference 1 July 1947, entered into force 22 January 1952 (the 'Migration for Employment Convention (Revised)' or 'the 1949 ILO Convention').

[2] International Labour Conference, Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, adopted by the International Labour Conference 24 June 1975, entered into force 9 December 1978 ('the Migrant Workers (Supplementary Provisions) Convention' or 'the 1975 ILO Convention').

[3] UN General Assembly, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by General Assembly Resolution 45/158 18 December 1990, entered into force 1 July 2003 ('the ICMW' or 'the UN Migrant Workers Convention').

discussion intends to reflect upon the protection of migrant workers as a specific category in human rights law, and how the human rights argument is affected by this specific protection.

A basic premise in this study is the author's conviction that migrant workers, in the many situations and lives that the definition applies to, are indeed in a vulnerable situation, their human and labour rights often being violated, and that this calls for attention. Hopefully, the reader will find the study useful for further reflection upon how this issue should be addressed.

1.1 Purpose and Research Questions

The purpose of this thesis is to examine the standing of the 'migrant workers' as a specific subject of protection in international law, and in particular in human rights law. The examination purports to explain how international law and human rights law protect migrant workers and who falls under that protection, and to discuss the protection, in the sense of analysing its role in international law and for the human rights argument.

In practice, the research is structured around three questions, which are:

- How are migrant workers protected in international law, and how has the protection emerged?

- What is the legal definition of the subject of this protection and how has it emerged?

- What are the implications of the use of 'human rights language' in relation to migrant workers?

1.2 Method

The questions above provide the structure for the thesis, but as the first and the second question are closely related, they are addressed more or less parallelly throughout the more descriptive chapters three, four and five, while the third question is addressed separately in chapter six. The three questions require different perspectives. The first question is answered through the application of a broad perspective, with the intention to give an account of the whole framework of protection for migrant workers, including its historical and political context as well as the basic structure of the most relevant instruments. In addition, in order to explain the instruments role, the text touches upon how they have been received and regarded. The method applied for this perspective could be described as traditional legal research and consists of studies of the instruments, of records from the drafting processes, of research presenting the historical context and of evaluations of the instruments in legal doctrine.

For the second question, a more narrow perspective is applied. Here, the definitions of the subjects of the instruments, the migrant workers, are analysed, by a comparison of the definitions in the different instruments and by a review of them in the light of the scope and language of the instruments. Here, the method has thus been literal studies of the relevant provisions, and as a part of the analysis, they are related to their respective instruments.

However, the aim of the investigation is not only to outline the framework of protection of migrant workers, but to reflect upon the use of human rights language in this field. Therefore, the review of the relevant law as well as of the history is guided by a search for the evolving human rights argument and for the evolution of migrant workers as a specific category in human rights law.

In addressing the third question, the applied method consists of departing from the knowledge established and the points made in the previous sections and apply a more reflective approach. As a help in this, some points on the use of human rights are presented. These points are borrowed from authors with philosophical and feminist perspectives, and the use of them in this study result in the final question being answered not with substantial law or truths, but with reflections.

1.3 Sources

Largely, this study is based on the studies and comparison of legal texts. As there is no room for describing the full content of the instruments that are relevant for the thesis, parts of them have been left out. It has to be said, that although they have been studied with an open mind, and although secondary sources have been used to confirm what should be highlighted in order to describe the essential nature of the instruments, the descriptions might to some extent be coloured by what the study, on beforehand, had set out to show. For a full understanding of the instruments, the reader is recommended to consult the original texts.

For the accounts of the history of the instruments, and for the evaluations of the same, the doctrine of legal experts and/or migration experts have been studied. As several of the persons quoted in the thesis have had central positions in connection with the elaboration or later life of the instruments, and as the issue of international protection of migrant workers is quite political, none of these sources can be regarded fully ‘impartial’ or ‘objective’. Nevertheless, the aspiration has been to give a nuanced picture of the context surrounding the instruments, by reference to the views of these persons.

The thesis concludes by introducing two ways of considering the role of human rights, which, in the authors view, provide an interesting ground for reflecting upon the use of the human rights argument. These theories are subjectively chosen, and should not be taken to represent any general

position in any general debate, as the author is embarrassingly unaware of whether such things even exist, and what they would be. In addition, it cannot be precluded that the presentation of these theories fails to reflect their genuine intentions, as the use of them by this author and in this context might have led to their corruption.

1.4 Delimitations, Clarifications and Definitions

This study is limited to the examination of the international legal protection of migrant workers. In focus for the study are the legal instruments, and several conclusions are drawn from the use of language in those, while practical issues, as the promotion and the implementation of the instruments, i.e. the *actual* protection of migrant workers, fall outside its scope.

The thesis deals with the international protection of migrant workers, but it must be clarified while *regional* protection of migrant workers, although it forms part of international law, as well as any international law aiming at the protection of *internal* migrant workers, is excluded from its scope. Refugees are only touched by the investigation to the extent they qualify as migrant workers, while law and facts relating specifically to refugees are not addressed.

Chapter 2 of the thesis outlines some background facts with a view to describe the complex nature of international migration for work, but does not intend to *explain* the phenomenon of international migration or migrant workers' vulnerability, nor does it pretend to mention *all* the international law that can be applicable to migrant workers.

The structure of chapter four and five, which describe the specific protection of migrant workers as a form of chronological development, does not intend to indicate any hierarchy of relevance between the instruments, as there is no such thing in international law. The instruments are all in force, and their relevance in a specific country depends on whether they have been ratified or not. In chapter six, the protection of migrant workers by human rights law is discussed as a sort of 'outcome' of the development, but this view is used for theoretical purposes, and should not be interpreted as meaning that the United Nations Convention has replaced to ILO instruments on migrant workers.

A few terms need to be clarified. The references in this thesis to migrants or migrant workers being documented, undocumented or irregular or in a regular or an irregular situation might be related to a legal requirement of being 'lawfully in the territory of a State' of a specific instrument that is under investigation, and in that case, the term should be understood as relating to the fulfilment or non-fulfilment of that requirement. If any of those terms are used without such relation, they should be understood in

accordance with the United Nations definition of the term 'irregular migrant': "Someone who, owing to illegal entry or the expiry of his or her visa, lacks legal status in a transit or host country. The term applies to migrants who infringe a country's admission rules and any other person not authorized to remain in the host country."[4] Countries are, at some instances, referred to as 'of origin', 'of destination', 'of emigration', 'of immigration' ,'receiver countries', etcetera. Different terms are used for the purpose of variation, not to indicate anything more specific than whether the State is mainly concerned by its population emigrating or by the influx of immigrants. It should be acknowledged that these labels are simplifications and that they to some extent might be misleading: today many countries have multiple roles, being countries of origin, transit and destination.

The legal instruments adopted by the International Labour Organization refer to the States bound by them as 'Members to which the Convention is in force'. The use of the word 'member' thus refers to the membership of the ILO. However, in this study, the long expression indicating the proper meaning is left out at several places, and the reference to 'members' in the context of a specific convention should thus be understood as meaning 'party to the convention'.

The use of the word 'subject', when referring to migrant workers as subjects of protection, should not be confused by traditional legal subjectivity – the legal subject in international law are states. Whether the special nature of human rights might contribute to the recognition of third parties, as human beings, as legal subjects of international law is a question that falls outside the scope of the study. The subject of protection of human rights law can also be called 'right-holder' or 'right-bearer', but the former expression is the most commonly used in this thesis.

This thesis investigates 'human rights' as a language, a way of framing a claim. The concept of human rights, as used in this thesis, should not be understood as referring to something inherent in the human being or something definite, but as a strategy, an argument, a claim. In a similar way, the thesis aims to determine the meaning of the concept 'migrant worker'. The words 'human rights' and 'migrant worker', when used without reference to a specific instrument, should thus be understood as 'the concept under investigation', a concept lacking specific definition. This understanding enables speculation and comparison, for instance, of what a 'migrant worker' was a century ago, compared to what he/she is now, and of what 'human rights' aliens have according to general human rights law compared to the specific conventions on migrant workers. In the context of a specific convention, the term 'migrant worker' shall be understood to include those who come under the convention's definitions of the 'migrant worker' and the 'family' of the migrant worker.

[4] Information retrieved at <unterm.un.org/dgaacs/unterm.nsf/WebView/A91E687C85F2F2D3852571B9004F26BA>, visited on 19 May 2012.

1.5 Disposition

Chapter two of this study introduces the reader to the phenomenon of international migration, by presenting some background facts on migration and outlining how international law might apply to migrants and migrant workers. In chapter three, the position of aliens in general international human rights law is explained. The chapter starts by briefly relating the concept of State sovereignty to human rights and aliens, and goes on to examine a few human rights instruments adopted within the framework of the United Nations, with a view to conclude to what extent they apply to aliens. Chapter four focuses on the International Labour Organization's specific attention to migrant. The history of this attention is described, as well as the process of elaboration of the organisation's instruments on migrant workers. Further, these instruments are presented through descriptions of their content and scope, and their definitions of the 'migrant worker' are examined. The chapter finishes by a section dedicated to an explanation of how the instruments are supervised, and by a description of how the position of the instruments today. Chapter five follows the same structure as chapter four, but describes the specific protection of migrant workers under the auspices of the United Nations. The drafting history of the relevant instrument is outlined, the instrument is presented with specific focus to the definition of the subjects of protection, the supervisory mechanisms are explained and finally, some views regarding the instruments potential and weaknesses are presented. Each of the chapters three, four and five end with a few concluding remarks, which highlight findings that are relevant for the final discussion. These remarks are of a more subjective nature than the sections preceding them, and they are reflected in the concluding discussion, which is allocated to chapter six. In that final chapter, the findings from the previous descriptive chapters are synthesised and discussed with the help of a couple of theories on subjectivity to human rights.

2 Background

2.1 Introduction

Two features distinguish migrant workers: that of being migrants, and that of being workers. Consequently, the concept 'migrant worker' is extremely broad. This chapter gives a brief account of the complex phenomenon of international migration, thus of who the 'migrant worker' might be. Further, the international legal framework concerning migrants and migrant workers is outlined. The description of the international law that is or might be applicable to migrant workers partly serves as an introduction to the following chapters, which deal with some of these instruments more in detail, and partly intends to demonstrate, again, the complex nature of international migration, involving several legal frameworks.

2.2 International Migration – A Brief Overview

This thesis is limited to investigating the international legal instruments concerning migrant workers. The instruments that will be dealt with in further chapters are only applicable to migrant workers and their families. However, it is impossible to draw a sharp line between 'migration for work' and 'migration'. As we will see, it is not required that the 'work', the employment, be the principal aim for migration for a person to qualify as a migrant worker. Thus, many migrants, in a very broad range of situations, qualify as migrant workers. Below, a few data regarding migration in general, and migration for work in particular, are presented. First of all, it should be emphasised, that although this thesis to a large extent addresses migration as a *problem*, which has led to the elaboration of international conventions, migration is indeed recognised as a positive force, having contributed to the global economic growth as well as to the evolution of societies and the enrichment of cultures. [5]

In 2010, there were an estimated number of 213 million international migrants in the world, composing 3,1 per cent of the world's total population. Of these, around 60 per cent lived in the 'more developed' countries.[6] The top three countries in numbers of net immigration 2000-2010 have been the USA, Spain and Italy, and the three countries with

[5] Global Commission on International Migration. *Report of the Global Commission on International Migration, Migration in an Interconnected World: New Directions for Action* (GCIM, Switzerland, 2005) p. 5.

[6] United Nations Department of Economic and Social Affairs, Population Division, *International Migration Report 2009: A Global Assessment* (ST/ESA/SER.A/316) p. xviii. The figure is an estimation made 2008.

highest net emigration has been Mexico, China and India.[7] The International Labour Organization ('the ILO'), which for its purposes – the protection of migrant *workers* - estimates numbers of economically active migrants and their families, and finds these to constitute about 90 per cent of the total migrant stock.[8]

Among the many and complex reasons for migration are the following: the insecure situation, high birth rates, unemployment and/or lack of career opportunities in the country of origin, in combination with security, need for flexible labour force and/or low birth rates in the country of destination, as well as curiosity and entrepreneurship and the explosion of international communications.[9] Migrants, and migrant workers, can be placed in numerous, and often multiple, categories, as being in a regular or irregular situation, having migrated temporarily or permanently, as being low skilled or high skilled, or as being students, recruited workers, accompanying family, refugees or asylum seekers.[10] Female migrants today constitute about half of the migrant stock, and most of them migrate with a view to being employed, and not as accompanying family members.[11]

The need for international attention to migrants and migrant workers is based on the presumption that they, as category, share a common vulnerability, due to their migrant/migrant worker status. This vulnerability derives from two main factors: that of being a foreigner, with its consequences of cultural differences, language problems, legal gaps for border crossing etc, and that of being a worker, often employed in the most uncontrolled sectors.[12] For instance, migrant workers are often faced with exploitative working conditions, as forced labour, low wages, low levels of occupational safety, lack of social protection, denial of the freedom of association, discrimination, xenophobia and social exclusion.[13] Sociologist Jorge Bustamante describes the vulnerability of migrants as the "social condition of powerlessness ascribed to individuals with certain characteristics that are perceived to deviate from those ascribed to the prevailing definitions of a national", being caused by discriminatory premises in national law and practice rendering social effects of human rights violations followed by impunity.[14] Bustamante observes how the

[7] United Nations Department of Economic and Social Affairs, *supra* note 6, p. xxi. The figure is an estimation made 2008.
[8] International Labour Office, *International Labour Migration and Development: The ILO Perspective*, (International Labour Office, Geneva, 2007) section I.
[9] Global Commission on International Migration. *supra* note 5, p.6.
[10] *Ibid.*, p.7.
[11] International Labour Office, *International labour migration, A rights-based approach* (International Labour Office, Geneva, 2010) p. 1.
[12] P. de Guchteniere and A. Pécoud, 'Introduction: The UN Convention on Migrant Workers' Rights', in P. de Guchteniere, A. Pécoud and R. Cholewinski (eds.), *Migration and Human Rights, The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press, Cambridge, 2009) pp. 2-3.
[13] International Labour Conference, *Report VI, Towards a fair deal for migrant workers in the global economy* (Confrep-Report VI-2004-03-0012-1) p. 41.
[14] J. Bustamante , 'Immigrants' Vulnerability as Subjects of Human Rights', Vol. 36, *International Migration Review* (2002) p. 340.

vulnerability is linked to the demand for migrant workers: especially in the cases of irregular migrants, domestic workers and victims of trafficking:

> their ascribed vulnerability as subjects of human rights could be associated with the low cost of the services or labor they deliver, which in turn is associated with a demand for them in recipient countries, which in turn is associated with the increase in numbers of out-migrants currently observed.[15]

In conclusion, migrant workers' role in the global economy is undisputed, and essential to that role is their vulnerability.

2.3 Migration, and Migration for work - The International Legal Framework

This section contains a short account of the international law that is applicable to migrant workers. In focus for this thesis are the three international conventions that are particularly aiming at the protection of migrant workers, two of which are adopted by the International Labour Organization and one by the United Nations (the UN) General Assembly.[16] However, other instruments of international law are relevant for the people that qualify as 'migrant workers', both due to these persons being 'human beings', and due to their specific characteristics. As mentioned in the previous section, 'migrants' and 'migrant workers' are broad concepts and the persons falling within these in addition have other characteristics which might be relevant for a specific legal framework. Thus, within the framework of international law, multiple instruments are applicable to migrant workers.

Firstly, as we will see in chapter 3, 'all human beings' and 'everyone' are referred to in the Universal Declaration of Human Rights[17], and by ratifying the general human rights instruments, i.e. the UN Covenants and the UN conventions on human rights, States commit themselves to human rights obligations not only towards their nationals, but to all persons in their jurisdiction. These instruments are thus applicable also to migrants. Apart from the instruments examined in chapter 3, the Convention on the Elimination of Discrimination against Women[18], which *inter alia* obliges States to supress trafficking in women[19], the Convention on the Rights of the Child[20] and the Convention against Torture and Other Cruel, Inhuman or

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[15] J. Bustamante , *supra* note 14, p. 344.
[16] In addition to these instruments, there are several regional and bilateral agreements on migration and migrant workers, which lie beyond the scope of this thesis.
[17] UN General Assembly, Universal Declaration of Human Rights, adopted by General Assembly Resolution 217 A (III) 10 December 1984 ('the UDHR').
[18] UN General Assembly, Convention on the Elimination of Discrimination Against Women, adopted by the United Nations General Assembly 18 December 1979, entered into force 3 September 1981 ('the CEDAW').
[19] *Ibid.*, article 6.
[20] UN General Assembly, Convention on the Rights of the Child, adopted by General Assembly Resolution 44/25 20 November 1989, entered into force 2 September 1990 (the CRC).

Degrading Treatment[21], together with other international instruments of general human rights law, are also relevant and applicable to migrant workers.

Secondly, as 'migrant workers' are precisely workers, most of the conventions and other instruments of the International Labour Organization are applicable to them. The ILO is an agency of the United Nations, which has a mandate on drawing up international labour standards. These standards take the form of conventions open for ratifications by its Members, and guiding recommendations and declarations. The ILO membership is separate from the UN membership, and the ILO differs from the UN by its tripartite structure, its decision making body – the International Labour Conference - being composed not only by State representatives but also by delegates from the Member States' employers' and workers' organisations.[22] Some of the ILO instruments, while not dealing exclusively with migrant workers, are especially relevant to this category, either by referring particularly to migrant workers or by concerning sectors that where migrant workers tend to be employed.[23] As for the non-working family members of migrant workers, these conventions are of less relevance, but they too are affected by some regulations, for instance on social security. The ILO conventions are nowadays regarded as part of the international human rights framework, even if most of them do not apply a language of 'rights', but rather one of obligations of States.[24] Two ILO conventions address migrant workers specifically, and these, together with their accompanying recommendations, are examined in chapter 4 of this thesis.

To some extent, all Member States of the ILO have some obligations towards migrant workers. This was established by the 1998 ILO Declaration on Fundamental Principles and Rights at Work[25], which states that all members, by their mere membership of the ILO, have an obligation to respect, protect and realize the Organization's four fundamental principles, namely the freedom of association and right to collective bargaining, the elimination of forced of compulsory labour, the effective abolition of child labour and the elimination of discrimination in respect of employment and occupation.[26] The concern for migrant workers is mentioned in the

[21] UN General Assembly, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, adopted by General Assembly Resolution 39/46 10 December 1984, entered into force 26 June 1987.
[22] International Labour Organization, Constitution of the International Labour Organization, adopted by the Peace Conference 1April 1919 ('the ILO Constitution'), arts. 1 and 3.
[23] International Labour Office, *supra* note 11, p. 124.
[24] I. Brownlie, *Principles of Public International Law* (Oxford University Press, Oxford, 2003) pp. 530-531.
[25] International Labour Conference, 1998 Declaration on Fundamental Principles and Rights at Work, adopted by the International Labour Conference at its 86th Session 18 June 1998.
[26] International Labour Conference, *supra* note 25, para. 2.

preamble to the Declaration, and the principles are to be applied to migrant workers without distinction.[27]

The circumstances of the migration process might result in the applicability of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children[28] and the Protocol against Smuggling of Migrants by Land, Sea and Air[29], as well as the Convention against Transnational Organized Crime.[30] The reason for migration is also relevant, as distinction is usually made between migrants on one hand and refugees, asylum seekers and stateless persons on the other. While one of the ILO conventions on migrant workers does apply to refugees and asylum seekers to the extent that they enter into employment[31], the UN Migrant Workers Convention explicitly excludes refugees from its scope of application.[32] For refugees, the most relevant international instrument is the 1951 Convention Relating to the Status of Refugees[33] and its corresponding Protocol[34], which provide international standards for refugee status determination.

[27] International Labour Conference, *supra* note 13, p. 72.
[28] UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, adopted by General Assembly Resolution 55/25 on 15 November 2000, into force 25 December 2003.
[29] UN General Assembly, Protocol against Smuggling of Migrants by Land, Sea and Air, adopted by General Assembly Resolution 55/25 on 15 November 2000, not in force.
[30] UN General Assembly, Convention against Transnational Organized Crime, adopted by General Assembly Resolution 55/25 on 15 November 2000, entry into force 29 September 2003.
[31] International Labour Conference, *Migrant Workers, Report III (Part 1B), General Survey on the reports on the Migration for Employment Convention (Revised) (No. 97) and Recommendation (Revised) (No. 86), 1949 and the Migrant Workers (Supplementary Provisions) Convention (No. 143) and Recommendation (No. 151), 1975* (REP31B.E99) para. 101.
[32] The ICMW, *supra* note 3, art. 3(d).
[33] United Nations, Convention Relating to the Status of Refugees, adopted by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly Resolution 429 (V) on 28 July 1951, entry into force 22 April 1954.
[34] United Nations, Protocol Relating to the Status of Refugees, taken note of by the UN Economic and Social Council in Resolution 1186 (XLI) on 18 November 1966 and by the General Assembly in Resolution 2198 (XXI) on 16 December 1966, entry into force 4 October 1967.

3 Aliens in General International Human Rights Law

3.1 Introduction

Although the concept of the migrant worker encompasses a wide range of persons and situations, there is one thing that all people that fall under the definition share: they are human beings, and as such the international human rights law, at least in theory, protects them. This chapter starts by a short description of a basic premise in the context of international law and human rights, namely State sovereignty. Further in this chapter, the notion that international human rights law - in most cases - applies to aliens is supported by a review of statements regarding the application of human rights to aliens, made by the Human Rights Committee, the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Racial Discrimination. As we will see, these Committees confirm that the universal nature human rights, as proclaimed by the Universal Declaration of Human Rights, is reflected in the instruments' provisions on non-discrimination. Finally, the chapter contains a brief examination of a UN General Assembly Declaration regarding the applicability of human rights to aliens, which more specifically, although without legal force, outlines what rights aliens are entitled to. This chapter is thus limited to relate the *general* human rights law to migrant workers – the *specific* protection that international law provides for migrant workers will be addressed in following chapters.

3.2 State Sovereignty and Human Rights

State sovereignty is the notion that all states are equal and independent, a notion that traditionally has been considered the foundation of international law. Ian Brownlie has described the feature of sovereignty as "(1) a jurisdiction, prima facie exclusive, over a territory and the permanent population living there; (2) a duty of non-intervention in the area of exclusive jurisdiction of other states; and (3) the dependence of obligations arising from customary law and treaties on the consent of the obligor".[35] Thus, at the core of State sovereignty is the control over State territory, and States' sovereign right to control the entry and stay of aliens in their territory is well established.[36] The relation between the alien, once in State territory, and the sovereign State has deep historical roots: the formation of

[35] I. Brownlie, *supra* note 24, p.287.
[36] *Ibid.*, p 498. See also *Hilal v. The United Kingdom*, 6 June 2001, ECHR, no. 45276/99, para. 59, one of the many instances where the ECtHR has reiterated that States have the right to control the entry, stay and expulsion of aliens.

societies has led to the exclusion of others, who have had limited access to and recognition in these societies. However, although there is still clear distinction made between nationals and aliens in most legal systems, aliens have come to be granted rights as societies have desired their presence, e.g. for trade reasons, or as results of desired reciprocity, as for diplomatic protection.[37]

International law is created by sovereign States binding themselves through treaties and other international agreements. Within the field of human rights, limitations to the right to control the entry into States are present, for instance as procedural requirements for the expulsion of aliens, in international conventions.[38] By such provisions, States explicitly agree to exercise their sovereign powers in a certain manner. However, the development of international law can also create a conflict with State sovereignty. The progressive interpretation of treaties by treaty bodies might lead to principles going beyond what the State initially consented to. Regarding the control of entry onto and stay in territory, the principle of non-refoulement, established by the 1951 Refugee Convention, when interpreted into the European Convention on Human Rights[39] is an example of such development. [40]

Compared to other instruments of international law, human rights treaties are of a special nature, as they do not only confer on the contracting State a duty in relation to other States, but also oblige the State towards its own population, as well as to aliens within its jurisdiction. The so-called right-bearer of a human rights instrument is thus not another party to the instrument, but the subject referred to in the instrument. In the conventions examined in this paper, the migrant workers and their family members are the right-bearers.

[37] R. B. Lillich, *The Human Rights of Aliens in Contemporary International Law* (Manchester University Press, Manchester, 1984) pp. 5-21.

[38] L. Bosniak, 'Human Rights, State Sovereignty and the Protection of Undocumented Migrants Under the International Migrant Workers Convention', Vol. 25, *International Migration Review, Special Issue: U.N. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (1991) p. 743, referring *inter alia* to art. 13 of the ICCPR.

[39] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by the Council of Europe on 4 November 1950, entry into force 4 November 1950 ('the ECHR' or 'the European Convention on Human Rights').

[40] See for instance *Vilvarajah and others v. The United Kingdom*, 26 September 1991, ECHR, no. 45/1990/236/302-306, in which the Court applies the principle that States are obliged to refrain from extraditing aliens to coutries where they risk violations of their rights to life, or would risk being subjected to torture or cruel or inhuman treatment, which was established in the case of *Soering v. The United Kingdom*, 7 July 1989, ECHR, no. 1/1989/161/217, to an asylum case.

3.3 The Protection of Aliens Under The UN Instruments on Human Rights

3.3.1 The Universal Declaration of Human Rights

The foundational United Nations document on human rights, which is usually referred to as the basis for all the UN human rights instruments, is the Universal Declaration of Human Rights, proclaimed by the General Assembly in 1948.[41] The declaration lists the human rights that are now known as the basic ones in the civil, political, economic, social and cultural fields, and its first article states that all human beings are "equal in dignity and rights". The second article declares that "everyone is entitled to all the rights" of the declaration, and that no discrimination - on a non-exhaustive number of grounds – is permitted. The UN instruments on human rights that have been adopted after the Universal Declaration all confirm the view of human rights as "the rights of everyone", and they all address non-discrimination. Upon becoming the member of a human rights Convention, a State does not only take on a responsibility not to violate human rights, but also to fulfil and protect those rights. This includes to protect individuals from violations on behalf of private actors.[42]

3.3.2 The International Covenant on Civil and Political Rights

Article 2.1 of the International Covenant on Civil and Political Rights[43] defines the scope of the State Parties obligations, stating that each State must "respect and ensure to all individuals within its territory and subject to its jurisdiction" the rights of the Covenant, "without discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The entitlement to the rights of the Covenant is thus based on being under a State's jurisdiction[44], not on nationality. Some rights of the ICCPR are however explicitly limited to citizens, namely the rights in article 25 to participate in public affairs, to vote and to the access to public service. The right to freedom of movement in article 12 is limited to those "lawfully within the territory of a State" and article 13 provides for procedural rights regarding the expulsion of aliens who are lawfully in the State.

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[41] The UDHR, *supra* note 17.

[42] See for instance the Human Rights Committee, *General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on State Parties to the Covenant* (CCPR/C/21/Rev.1/Add.13) paras. 6 and 8.

[43] UN General Assembly, International Covenant on Civil and Political Rights, adopted by General Assembly Resolution 2200A (XXI) 16 December 1966, entered into force 23 March 1976 ('the ICCPR').

[44] This is a small simplification, as the requirement is to be "within [the State's] territory and subject to its jurisdiction", as quoted above.

In General Comment no. 18, the Human Rights Committee ('the HRC') explains the concept of discrimination as "any distinction, exclusion, restriction or preference" based on any of the discrimination grounds, which "has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms".[45]

In General Comment No. 15, the HRC deals specifically with the positions of aliens under the Covenant, highlighting that " the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens" but that in spite of this, many countries fail to ensure that aliens enjoy the same rights as nationals.[46] The HRC acknowledges that in general, "[t]he Covenant does not recognize the right of aliens to enter or reside in the territory of a State party", but continues by stating that "[h]owever, once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the Covenant".[47]

3.3.3 The International Covenant on Economic, Social and Cultural Rights

Non-discrimination is addressed in article 2.2 of the International Covenant on Economic, Social and Cultural Rights[48] , which says that the State parties shall ensure that the rights in the Covenant are "exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". The reference to "other status" indicates that the list of ground for discrimination in article 2.2 is non-exhaustive, which the Committee on Economic, Social and Cultural Rights ('the CESCR') reaffirms in its General Comment no. 20.[49] In the same General Comment, the CESCR states that the reference to "other status" covers the ground of nationality, and that the economic, social and cultural rights "apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation".[50] However, article 2.3 of the ICESCR contains a possibility for developing countries to choose to what extent non-nationals will be guaranteed the economic rights provided for in the Covenant, with regard to human rights and to national economy.

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[45] Human Rights Committee, *General Comment No. 18: Non-discrimination*, para. 7
[46] Human Rights Committee, *General Comment No. 15: The position of aliens under the Covenant*, para. 2.
[47] *Ibid.*, paras. 5 and 6.
[48] UN General Assembly, International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly Resolution 2200A (XXI) 16 December 1966, entered into force 3 January 1976 ('the ICESCR').
[49] Committee on Economic, Social and Cultural Rights, *General Comment No. 20, Non-discrimination in economic, social and cultural rights (art. 2 para. 2 of the International Covenant on Economic, Social and Cultural Rights)* (E/C.12/GC/20) para. 27.
[50] *Ibid.*, para. 30.

3.3.4 The International Convention on the Elimination of Racial Discrimination

Article 1.2 of the International Convention on the Elimination of Racial Discrimination[51] states that the "Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens". In General Recommendation No. 11, the Committee on the Elimination of Racial Discrimination ('the CERD') clarifies that this article should not be read as relieving States from reporting on legislation regarding foreigners, and that it should not be "interpreted to detract in any way from the rights and freedoms recognized and enunciated in other instruments, especially the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights".[52]

Article 5 of the ICERD addresses the obligation of State Parties to ensure both civil and political and social and cultural rights to everyone, without distinction based on the discrimination grounds listed in the Convention. In General Recommendation No. 30, the CERD addresses the applicability of these human rights to non-citizens, by stating that although some rights (e.g. the right to vote) can be limited to citizens of a State, "human rights are, in principle, to be enjoyed by all persons".[53] The Recommendation says that "differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim"[54]. Further, the rights of non-citizens are reiterated at several instances: the CERD recommends that States ensure the security of non-citizens[55] and it advices States to ensure that non-citizens do not get subjected to collective expulsion[56] and that they ensure that non-citizens are not deported to places where they risk serious human rights violations[57]. Regarding economic, social and cultural rights, the CERD states that obstacles preventing non-citizens from enjoying these rights should be removed[58], and addresses among others the right to education[59], the right to housing[60], the right to reasonable working conditions and labour rights[61],

[51] UN General Assembly, International Convention on the Elimination of Racial Discrimination, adopted by General Assembly Resolution 2101 (XX) 21 December 1965, entered into force 4 January 1969 ('the ICERD').
[52] Committee on the Elimination of Racial Discrimination, *General Recommendation No. 11: Non-citizens (Art. 1)*, paras. 2-3.
[53] Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30: Discrimination Against Non Citizens*, para. 3.
[54] *Ibid.*, para. 4.
[55] *Ibid.*,para. 19.
[56] *Ibid.*,para. 26.
[57] *Ibid.*,para. 27.
[58] *Ibid.*,para. 29.
[59] *Ibid.*,para. 30.
[60] *Ibid.*,para. 32.

and the right to health[62]. The General Recommendation does not clarify to what extent the "non-citizen" concept encompasses undocumented migrants: at one instance the CERD states that States shall ensure "that legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status"[63], which might indicate that undocumented migrants do fall within the definition. At another instance, when the CERD states that educational institutions shall be open to "to non-citizens and children of undocumented immigrants"[64], undocumented migrants seem to be referred to as a separate category.

3.3.5 The UN General Assembly Declaration on the Human Rights of Individuals Who Are Not Citizens of the Countries in which They Live

In 1985, after a lengthy drafting process, mostly due to the difficulty of meeting the different stands regarding the inclusion of undocumented migrants[65], the UN General Assembly adopted the Declaration on the Human Rights of Individuals Who Are Not Citizens of the Countries in Which They Live.[66] The Declaration departed from an analysis of the existing human rights documents that concluded that they did not adequately protect the rights of aliens.[67] In its preamble, the Declaration reiterates the universal scope of the human rights declared by the UDHR and confirms that the parties UN Covenants are to guarantee the rights in those instruments without discrimination, and acknowledges that the protection of human rights and fundamental freedoms provided for in international instruments should also be ensured for individuals who are not nationals of the country in which they live. The Declaration refers to those persons as aliens in the following articles, and defines this word as applying to "any individual who is not a national of the State in which he or she is present" in article 1. In general, the Declaration does thus apply also to undocumented migrants. However, of the following articles, some refer to all aliens and some only to those who are lawfully residing in the country, and while basic human rights are declared to be enjoyed by all, the lawfully residing aliens are awarded a few more detailed rights, relating to labour and social protection. The Declaration points out the rights that "in particular" shall be enjoyed by aliens – it does not reiterate all the rights enshrined in

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[61] Committee on the Elimination of Racial Discrimination, *supra* note 53, paras. 34-35.
[62], *Ibid.*,para. 36.
[63] *Ibid.*,para. 7.
[64] *Ibid.*,para. 30.
[65] L. Bosniak, *supra* note 38, p. 739-740.
[66] UN General Assembly, Declaration on the Human Rights of Individuals Who Are Not Citizens of the Countries in Which They Live, adopted by General Assembly Resolution 40/144 13 December 1985.
[67] United Nations Sub-commission on Prevention of Discrimination and Protection of Minorities, *The Problem of the Applicability of the Existing International Provisions for the Protection of the Human Rights of Individuals Who are Not Citizens of the Country in which they Live* (E/CN.4/Sub.2/392), cited in R. B. Lillich, *supra* note 37, p. 52.

the general human rights instrument. The Declaration is a non-binding instrument, but the UN has tended to limit the use of the term 'declaration' to resolutions on fundamental legal and political norms upon which there is high international consensus.[68]

3.4 Concluding Remarks

Aliens have a special position in national and international law, and the control over their entry into State territory is strongly associated with State sovereignty. However, international human rights conventions do confer obligations upon States also with regards to aliens that are present in their territory. There are some civil and political rights that require citizenship or legal residence, and developing countries are not obliged to realize the economic rights of non-aliens, but otherwise, entitlement to human rights seems to be based on being human, not on being national of a State. The non-discrimination clauses of the ICCPR, the ICESCR and the ICERD all reflect the Universal Declaration on Human Rights' statement that 'everyone' has human rights, and the conventions' monitoring bodies confirm that the principles of non-discrimination apply to aliens. However, it seems that the General Comment regarding the rights of aliens under the ICCPR only addresses aliens that are lawfully within the State. In contrast, the General Comment to the ICESCR does not seem to apply such a criteria. As for the ICERD, it is partly unclear if the references to non-citizens include all aliens or only those with regular status. The Declaration on the Human Rights of Individuals Who Are Not Citizens of the Countries in Which They Live is a specific indication of what rights aliens 'particularly' shall enjoy, and it distinguishes between the rights of documented and undocumented aliens. The Declaration affirms the applicability of the general human rights instruments to aliens, but the rights explicitly related to aliens by the Declaration is not a full reflection of those rights, but have a limited range. In conclusion, the terms used in the instruments and the trety bodies' interpretations of these indicate that most general human rights are applicable to 'everybody', including aliens. However, when human rights are specifically related to aliens, there seems to be a distinction between the rights of those who are in a regular and those who are in an irregular situation, and there seems to be a certain emphasis on *some* rights that are the rights of all, while other rights are not explicitly related to aliens.

[68] R. B. Lillich, *supra* note 37, p. 51.

4 The ILO Conventions on Migrant Workers

4.1 Introduction

This chapter starts by describing, in brief terms, the history of migrant workers' rights as addressed by the International Labour Organization, outlining the challenges the issue of migration has posed to the actors within the ILO and how the Organization's influence over the matter has shifted over the years. After giving an account of the historical development, the chapter goes on to describe the two main ILO Conventions regarding migrant workers and their corresponding Recommendations, and the supervisory framework that the ILO offers. The chapter finishes by presenting a few comments on the Conventions, and describing their current status.

4.2 Historical Context

The issue of migrant workers and their exposed situation has been one of the core items on the International Labour Organisation's agenda since the very foundation of the organisation. The Preamble to the ILO Constitution[69], explains the Organisation's fundamental point of departure as the conviction that "universal and lasting peace can be established only if it is based upon social justice", and enumerates several fields where labour-related injustices threaten the peace and harmony of the world, fields that call for improvement in labour conditions. Here, the "protection of the interests of workers when employed in countries other than their own" is mentioned as one of the fields that call for international attention and cooperation.

The first bilateral migration agreement had been signed between the immigration state France and the worker exporting Italy in the beginning of the 20th century, an agreement that essentially had the purpose of preventing unfair competition, but which as a consequence ensured adequate wages for immigrant workers.[70] Since the previous centenary, the need for for an international body for social and labour concerns had been promoted with increasing strength, and after World War I the international community saw itself pushed by workers organisations as well as by the threat posed by the revolutionary development in Russia.[71] When the International Labour

[69] International Labour Organization, *supra* note 22.
[70] R. Böhning, *A brief account of the ILO and policies on international migration* (The ILO Century Project, 2008) p. 4, <www.ilo.org/public/english/century/information_resources/download/bohning.pdf>, visited on 26 April 2012.
[71] M. Hasenau, 'ILO Standards on Migrant Workers: The Fundamentals of the UN Convention and Their Genesis', Vol. 25, *International Migration Review, Special Issue:*

Organization was created as a part of the peace process following the war, one of the reasons for the need for such an institution, apart for the overarching aim to build lasting peace upon social justice, was States' and trade unions' concerns over the increased migration for labour. During the work in the Labour Commission, which preceded the creation of the ILO, both France and Italy submitted rather far-reaching formulations on the protection of migrant workers. However, when the International Labour Organization was constituted as a part of the Versailles Treaty in 1919, the part of its Constitution that touched upon migrant workers was based on the less strongly worded draft submitted by the British delegation. As Micheal Hasenau describes it, the Commonwealth countries feared that "the elaboration and adoption of international labour standards on migration would pressure them into opening their frontiers to immigrants and would provide a basis for international criticism of their policy".[72] The United States were equally reluctant to agree upon migration: as a major destination for migrant workers, they were protective of their sovereignty in immigration matters. [73] The wording of the Preamble to the ILO Constitution might not indicate clearly how the Organization intends to protect the interests of migrant workers, but nevertheless, this was the first time States agreed multilaterally in a field that were closely associated with state sovereignty.[74]

The ILO's aim regarding migrant workers can be described as two-folded: to regulate the conditions in which the migration process takes place and to provide specific protection for a vulnerable category of workers.[75] Migrant Workers have been addressed in specific Conventions and Recommendations, as well as in general labour rights instruments. For instance, already in 1919, the same year as the ILO was created, the first Convention which partly concerned migrant workers was adopted: the Convention concerning Unemployment (No. 2) which established a basis for bilateral agreements on the equality of treatment of nationals and aliens in the field of unemployment insurance.[76] The provision did not constitute more than an encouragement, but can still be considered an important step, in light of the unregulated past.[77]

There was also a fair deal of activities focusing more directly on the topic of migration during the early years of the ILO, with a Migration Committee being established, conferences being held and international instruments being adopted: among others the ILO Recommendation No. 2 concerning

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U.N. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1991) p. 688.
[72] *Ibid.*, p. 689.
[73] R. Böhning, *supra* note 70, p. 6.
[74] *Ibid.*, p. 8,
[75] G. Rodgers et al., *The ILO and the quest for social justice, 1919-2009* (International Labour Organization, Geneva, 2009) p. 75-76.
[76] R. Böhning, *supra* note 70, p. 9.
[77] M. Hasenau, *supra* note 71, p. 689.

Reciprocity of Treatment of Foreign Workers[78] and the Inspection of Emigrants Convention No. 21[79]. The latter Convention is an example of the attitudes in the early years of international regulation of migration work, when then focus still to a large extent remained on the countries of emigration, and the ILO's International Emigration Committee elaborated standards on, *inter alia*, the inspection and hygiene of migrants prior to departure.[80] However, as in later years, the early work on migrant workers was also characterized by discrepancies in the attitudes of States and of challenges to the ILO's ability to act on migrant workers.[81]

While the first attempts to regulate international migration to a large extent were based in bilateral agreements, the need for a more coherent regulation that would safeguard the interests of both migrant workers and workers in the receiving countries through international conventions was recognized, not least by the States of emigration.[82] Shortly before the outbreak of World War II, in 1939, the Migration for Employment Convention (No. 66) was adopted. The incentive for this Convention had partly stemmed from the concerns of several Latin American countries over the restrictions on emigration in the European States. These states sought to strengthen the flow of settlers through the ILO. Due to the outbreak of the war, the instrument never entered into force, but it did constitute the first step towards the 1949 Convention with the same name.[83]

Before the 1949 Convention was adopted, the world had however seen a second World War and its consequences of numerous displaced persons, and come to sense a strengthened urge to do away with any discriminatory and rascist remainings in the framework for international cooperation in the field of labour. [84] The 1944 Declaration of Philadelphia emphasized all human beings' equal worth and equal rights[85], and called for renewed attention to migration.[86] These new ideals became the setting for the new Migration for Employment Convention (Revised) (No. 97)[87] and its corresponding Recommendation[88], which displayed a social-democratic view of how the working forces should be redistributed internationally according to need – from countries with surplus to countries with

[78] International Labour Conference, Reciprocity of Treatment Recommendation (No. 2), adopted by the International Labour Conference 29 November 1919, withdrawn instrument.
[79] International Labour Conference, Inspection of Emigrants Convention (No. 21), adopted by the International Labour Conference 5 May 1926, now outdated.
[80] M. Hasenau, *supra* note 71, p. 690.
[81] R. Böhning, *supra* note 70, pp 11-12.
[82] M. Hasenau, *supra* note 71, p. 691.
[83] R. Böhning, *supra* note 70, p. 13.
[84] *Ibid.*, p. 13.
[85] International Labour Conference, Declaration Concerning the Aims and Purposes of the International Labour Organisation, adopted by the International Labour Conference 10 May 1944 (The Declaration of Philadelphia).
[86] G. Rodgers et al., *supra* note 75, p. 78 and the Declaration of Philadelphia, III.d.
[87] Migration for Employment Convention (Revised), *supra* note 2.
[88] International Labour Conference, Migration for Employment Recommendation (Revised) (No. 86), adopted by the International Labour Conference 1 July 1949.

deficiency.[89] Parallelly to the development of the Convention, the ILO gained grounds in migrant workers questions through an agreement with the UN, by which the former organisation was named the competent organ when the rights and situation of migrants in their quality as workers was concerned, and the latter was awarded the mandate on migrants in their quality as aliens.[90]

The period that followed World War II displayed new patterns of migration, with increasing labour transfer between European countries, decreasing flow from Europe to the former colonies and decolonization turning intra-colonial migration into border crossing.[91] The ILO was proposed to have a central position organizing the movement, funding and administration relating to refugees and migrants, but never entered into such a position, due to the hesitation of certain states (Australia, Canada, Great Britain and the United States) to give up their sovereignty in migration matters and in some cases, to agree on the elimination of racial barriers. Further, especially the United States refused to finance migration administration involving any international organisations that contained member States with communist affilations.[92]

After that, the migration-related activities in the ILO decreased. Due to growing ideological differences between the ILO Member States, a practice of adopting recommendations rather than instruments with the capacity of being legally binding and requiring immediate changes of national law evolved. [93] Nevertheless, the second convention dealing specifically with migrants, namely the Migrant Workers (Supplementary Provisions) Convention (No. 143)[94] and its accompanying Recommendation (No. 86)[95] were adopted.[96] These instruments were developed in a time when unemployment had become a larger concern[97] and the phenomena of illegal immigration and trafficking had become more visible, and they were the result of the demands for a Convention that addressed these, as well as of the need to review and complement the existing instruments. Countries of departure and destination had taken polarised positions, and the adequacy of dealing with the obligation to combat trafficking and illegal migration and with the protection of migrant workers in the same document was debated.

[89] R. Böhning, *supra* note 70, p. 15.
[90] International Labour Organization, 'Co-ordination of International Responsibility in the Field of Migration', 30 *ILO Official Bulletin* (1947), pp. 417-420, quoted in M. Hasenau, 'ILO Standards on Migrant Workers: The Fundamentals of the UN Convention and Their Genesis', Vol. 25, *International Migration Review, Special Issue: U.N. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (1991) p. 693.
[91] R. Böhning, *supra* note 70, p. 14.
[92] M. Hasenau, *supra* note 71, p. 694.
[93] *Ibid.*, p. 694.
[94] Migrant Workers (Supplementary Provisions) Convention, *supra* note 3.
[95] International Labour Conference, Migrant Workers Recommendation (No. 151), adopted by the International Labour Conference 24 June 1975.
[96] G. Rodgers et al., *supra* note 75, p. 80.
[97] International Labour Office, *supra* note 11, p. 129.

[98] This resulted in Convention No. 143 being divided in two sections that dealt with one of the issues respectively. The Convention allows ratifying Members to denounce any of its parts, thus making it possible to commit to either of the fields covered, though with the obligation to report also on the issues covered by the other part.[99] However, not all countries were satisfied with how the protection of migrant workers was addressed by the ILO, a fact that a few years would lead to the use of a new forum for the issue, namely the United Nations, and the emergence of the Convention on the Protection of the Rights of All Migrant Workers and the Members of Their Families, which is dealt with in further detail in chapter 5.

4.3 The 1949 Instruments

4.3.1 The Migration for Employment Convention (Revised) (No. 97)

The first ILO Convention focusing exclusively on migrant workers that reached the stage of entering info force was the 1949 Migration for Employment Convention (Revised). The main purpose of the Convention was to facilitate and regulate the movement of surplus labour in Europe to other parts of the world.[100] Compared to the first version of the Migration for Employment Convention, which was adopted in 1939 but never came to enter into force, the instruments that were adopted ten years later constituted a more flexible response to the needs of migrant workers. In the 1949 Convention, the principle of equal treatment was further developed and ratification had been facilitated by the allocation of certain parts to three optional annexes.[101] In contrast to the 1939 Convention, the revised version of 1949 was not based upon reciprocity, which means that ratifying States take on obligations regarding migrant workers disregarding whether they origin from another Member State or not.[102]

In its operative articles, the Migration for Employment Convention (Revised) obliges Member States to provide information on their national laws and agreements on emigration and immigration, and especially on these issues in relation to labor (article 1), to assist and inform migrants for employment (article 2), to take steps against misleading propaganda (article 3) and to facilitate the departure, journey and reception of migrants for employment (article 4) and to provide for medical services to migrants for employment and their families (article 5). Further, Member States are to apply equal treatment to migrants for employment as to nationals in various

[98] M. Hasenau, 'ILO Standards on Migrant Workers: The Fundamentals of the UN Convention and Their Genesis', Vol. 25, *International Migration Review, Special Issue: U.N. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (1991) p. 695.
[99] Migrant Workers (Supplementary Provisions) Convention, *supra* note 3, article 16.
[100] International Labour Office, *supra* note 11, p. 128.
[101] M. Hasenau, *supra* note 71, p. 689.
[102] International Labour Conference, *supra* note 31, para. 109.

fields, as remuneration and other working conditions, freedom of association, accommodation, social security, taxes and legal proceedings (article 6). Members States are required to co-operate with other Members (article 7), to ensure that migrants for employment and their families that are permanently admitted to the State are not deported due to illness (article 8) and that they are permitted to transfer their earnings (article 9). The other articles of the Convention are more technical, covering the procedures of ratification, the communication of declarations and denunciation of the Convention. Annex I and II concern the recruitment of migrants for employment, and contain provisions regarding their recruitment, placement and conditions of labour, Annex I issues in relation to migrant workers recruited by private actors, and Annex II in relation to those recruited under government-sponsored arrangements. Annex III concern the importation of the personal effects, tools and equipment of migrants for employment, and stipulates that it be duty free. In accordance with article 13.2 of the Migration for Employment Convention, it entered into force 12 months after the registration of two Member State's ratifications, on 22 January 1952. As of May 2012, out of the 183 ILO Member States[103], 47 countries have ratified the Convention.[104]

4.3.2 The Migration for Employment Recommendation (Revised) (No. 86)

The Migration for Employment Recommendation (Revised) (No. 86) of 1949, which is a non-binding instrument, supports the Conventions provisions with more detailed proposals to Member States. Here, the attitude towards migration for work is pronounced in article 4(1), which states that "[i]t should be the general policy of Members to develop and utilise all possibilities of employment and for this purpose to facilitate the international distribution of manpower from countries which have a surplus of manpower to those countries that have a deficiency".[105] The recommendations concern, in brief, the provision of assistance and information to migrants for employment, the recruitment of the same, equality of treatment, and the return to country of nationality. The Recommendation is accompanied with an Annex, which contains a "Model agreement on temporary and permanent migration for employment, including migration of refugees and displaced persons", which is recommended for bilateral cooperation.

[103] Information retrieved at <www.ilo.org/public/english/standards/relm/country.htm>, accessed on 8 May 2012.
[104] Information retrieved at <www.ilo.org/dyn/normlex/en/f?p=1000:11300:2298286316323736::NO:11300:P11300_INSTRUMENT_ID:312242>, accessed on May 8 2012.
[105] Migration for Employment Recommendation (Revised), *supra* note 88, article 4(1).

4.3.3 Definition of the Subjects of the 1949 instruments

The Migration for Employment Convention (No. 97), its three annexes and the corresponding Recommendation refer to the protected category as 'migrants for employment', for instance in articles 2, 4, 5 and 8 of the Convention. Some of the provisions address the protection of the 'members of their families authorised to accompany or join them', see article 5(a), or just to the 'members of their families', see article 5(b), thus extending the scope of those particular provisions to persons related to the 'migrant for employment'. In article 15(3) of the Recommendation, the members of the family of the migrant for employment are defined as 'his wife and minor children', but the provision opens up for a larger scope, by stating that "favourable consideration should be given to requests for the inclusion of other members of the family dependent upon the migrant".

Article 11.1 of the Convention and article 1(a) of the Recommendation clarify that the term 'migrant for employment' as used in the instruments means "a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment". Thus, the instruments do not apply to migrants for employment that are in an irregular situation, or to their family members of those, and self-employed migrant workers fall outside their scope. The exclusion of undocumented migrant workers is also clear in article 6, which obliges the Member States to apply the same treatment as to nationals to "immigrants lawfully within [their] territory". By article 11.2 frontier workers, the short-term entry of members of the liberal professions and artistes as well as seamen are excluded from the application of the Convention.

Throughout the instruments, the migrant for employment is referred to as a male, as can be seen in the use of the word 'his' in article 11.1 of the Convention. The 'masculinity' of the migrant worker is confirmed by the above-mentioned definition of the family members of the migrant for employment.

4.4 The 1975 Instruments

4.4.1 The Migrant Workers (Supplementary Provisions) Convention (No. 143)

As mentioned in section 4.2, when the Migrant Workers (Supplementary Provisions) Convention (No. 143) was adopted as a supplement to the 1949 Convention, unemployment, irregular migration and trafficking were increasingly important concerns for many countries. Thus, the growing ambition to control the migration flows is reflected in the Convention's preamble, which mentions the need to "avoid the excessive and uncontrolled or unassisted increase of migratory movements because of their negative

social and human consequences". The preamble further adresses the fact that many countries have come to prefer the transfer of captital and technology over that of workers, and emphasises the need to address the phenomenon of trafficking of labour with specific standards.[106]

The first part of the Convention is labelled 'Migrations in abusive conditions' and starts by an explicit reference to human rights in article 1, which states that the Member States undertake "to respect the basic human rights of all migrant workers". This part contains provisions regarding the illegal employment and trafficking of migrant workers, obliging States to determine the existence of and supress such phenomena and to exchange relevant information. Further, the Member States shall issue laws and regulations for the detection and penalising of illegal employment of migrant workers, in consultation with workers' and employers' organisations. Finally, it is stated that migrant workers having resided lawfully in a State shall not be regarded as in an irregular situation due to the loss of employment, and that irregular migrant workers, that cannot be regularized, shall enjoy equality of treatment with regards remuneration, social security and other benefits related to their past employment. Thus, *all* migrant workers, disregarding their status (regular/irregular) are addressed by the first part of the Convention, but irregular migrant workers are only entitled to equality of treatment in relation to their *past* employment.

The second part of the Convention is called 'Equality of opportunity and treatment', and contains a specification of the rights that migrant workers and their family members who are lawfully in a State's territory are entitled to. These shall, according to article 10 of the Convention, be guaranteed the equality of treatment and opportunity in the field of employment and occupation, social security, trade union and cultural rights as well as individual and collective freedoms. Further provisions define 'migrant workers' for the purpose of this part of the Convention, and outline how the policy of equal opportunity and treatment shall be implemented through cooperation with employers' and workers' organisations, legislation, educational programmes directed at migrant works etcetera. Finally, with regard to this category of migrant workers, family reunification is addressed, as well as the allowed limitations on the free choice of employment.

The third part of the Convention contains provisions on ratification and denunciation. Article 16 establishes a possibility for ratifying States to exclude either part I or part II from application, by a declaration appended to the ratification. A State that ratifies the Convention but excludes one of its parts is nevertheless obliged to report on the national law and practice relevant for the excluded part as well as on whether any effect has been given to the principles in the excluded provisions, and on the reasons for the exclusion.

[106] Migrant Workers (Supplementary Provisions) Convention, *supra* note 2, preamble.

Today, there are 23 Parties to the Migrant Workers (Supplementary Provisions) Convention (no. 143), and only one of those (Albania) have excluded a part (part II). Out of the ratifying States, 17 are also parties to the 1949 Migration for Employment Convention.[107] In 2009, the States that had ratified both of the ILO's conventions on migrant workers were estimated to host five per cent (11 million) of the world's migrants.[108]

4.4.2 The Migrant Workers Recommendation (No. 151)

The Migrant Workers (Supplementary Provisions) Convention was accompanied by the Migrant Workers Recommendation (No. 151). The Recommendation addresses the equality of treatment of irregular migrant workers and the equality of opportunity and treatment of regular migrant workers in further detail. With regards to the equal treatment of undocumented migrants, the Recommendation, just as the 1974 Convention, by article 8.1 limits its scope to past employment, but adds trade union membership and the exercise of trade union rigths to the fields in which the migrant worker should be treated equally to nationals. The Recommendation further touches upon the elaboration of social policies directed at migrant workers and their needs before having adapted to the new country, the reunification of families, the protection of the health of migrant workers, their access to social services, and the recommended treatment of migrant workers in relation to their loss of employment, expulsion and return to the country of origin.

4.4.3 Definition of the Subjects of the 1975 Instruments

The Migrant Workers (Supplementary Provisions) Convention (No. 143) refers to the subjects of protection as 'migrant workers'. The first part of the Convention, which applies to both migrant workers in a regular and in an irregular status, lacks further explanation of the scope of that definition. For the second part of the Convention, the meaning of the term migrant worker is defined, in article 11.1, as "a person who migrates or who has migrated from one country to another with a view to being employed otherwise than on his own account". The term "includes any person regularly admitted as a migrant worker". Article 11.2 excludes certain categories from the application of the Convention, namely frontier workers, artistes and members of the liberal professions who have entered the country on a short-term basis, seamen, persons coming specifically for purposes of training and education, and employees of organisations or undertakings operating in a country for a limited time and that will leave after having completed their task. The second part of the Convention also contains references to the

[107] Information retrieved at <www.ilo.org/dyn/normlex/en/f?p=1000:11300:188897929625813::NO:11300:P11300_INSTRUMENT_ID:312288>, accessed on 8 May 2012.
[108] United Nations Department of Economic and Social Affairs, *supra* note 6, p. 29.

families of migrant workers, those being defined in article 13.2 as "the spouse and dependent children, father and mother". The migrant worker is referred to as a male throughout the Convention. The 1975 Migrant Workers Recommendation does not define who 'migrant workers' are, and it is indicated in the respective articles whether they apply only to migrant workers in a regular situation or are extended to irregular migrant workers. There is a definition of the family members of the migrant worker in article 15 of the Recommendation, which is equal to the one contained in the corresponding Convention.

4.5 The Supervision of ILO Conventions

The monitoring procedures of ILO Conventions are established by the Constitution of the ILO[109], where article 22 obliges Member States to report on the measures taken to give effect to the conventions it has ratified. Employers' and workers' organisations are allowed to comment on the States' reports. These reports are examined by the Committee of Expert on the Application of Conventions and Recommendations, which is appointed by the Governing Body.[110] The Committee of Experts can then publish its observations in its general report, or make direct requests to States. In relation to Convention No. 97, the latter has happened at 231 instances, and in relation to Convention No. 143, at 115 instances.[111] The report of the Committee of Experts is submitted to the International Labour Conference, whose tripartite Conference Committee on the Application of Standards can select an observation for a discussion, to which the concerned State is invited.[112]

Article 24 of the ILO Constitution allows any industrial association of employers or workers to present a so called representation against a Member State that has not complied with its obligations under a convention to which it is party. The Governing Body may examine the representation by setting up a tripartite committee, whose findings are communicated to the State, which is asked to make a statement upon them. If the State does not make a statement, or makes an unsatisfactory one, the committee's findings can be published, according to article 25 of the Constitution. Two representations have been presented regarding Convention No. 97, against China (Hong Kong, Chinese at the time) and Spain. Both were made by workers' organisations from other countries: the Philippines and Argentina respectively. One representation has been made regarding, among several

[109] The ILO Constitution, *supra* note 22.
[110] A practice that was established by a resolution of the 8th Session of the International Labour Conference, *see* International Labour Conference, Sixteenth Session, *Summary of Annual Reports Under Article 408* (International Labour Office, Geneva, 1932) p. 3.
[111] Information retrieved at <www.ilo.org/dyn/normlex/en/f?p=1000:20010:493276863840839::NO:::>, accessed on 10 May 2012.
[112] The Conference Committee is established by the Standing Orders of the International Labour Conference, Part I, General Standing Orders, Article 7.

other instruments, Convention No. 143, and it was made against Venezuela by a couple of Venezuelan employers' organisations.[113]

Article 26 of the Constitution allows Member States, the Governing Body of the ILO and delegates to the International Labour Conference (i.e. State, workers' organisations' or employers' organisations' delegates) to file a complaint to the Governing Body against another Member, alleging the non-observance of any convention the other Member has ratified. Upon such a complaint, the Governing Body chooses whether to communicate it with the concerned State and whether to refer it to a Commission of Inquiry that examines the complaint and reports on it. This far, no complaints have been filed with regards to either of the ILO Conventions on migrant workers.[114]

4.6 Evaluating the Instruments

The 1975 Migrant Workers Convention shows how the attention to human rights had grown in the ILO, by the reference in article 1 to "the basic human rights of all migrant workers". However, this reference has been regarded as a "'blanket' formula", difficult to apply in specific cases, and is not interpreted as suggesting that the whole body of general human rigths law be applicable to migrant workers, as it refers to 'basic' human rights, and as the rights of all migrant workers must be considered limited, by the following articles, to those that are to be enjoyed by both documented and undocumented migrant workers.[115]

In 1999, a so called 'General survey' on migrant workers was published by the International Labour Office, the result of an examination by the Committee of Experts on the Application of Conventions and Recommendation of the reports of both Member and Non-member States to the ILO Conventions and Recommendations on migrant workers. In the survey, the Committee of Experts noticed several lacunae in the existing Conventions, due to the evolution in the field of migration for work as well as of national law. However, the Committee concluded that the principles enshrined in the existing instruments were still valid. The Committee predicted that international migration would increase, and with that the need to provide workers with international protection.[116] It did however also acknowledge the difficulties of convincing states to "ratify instruments that touch on what is often seen as a sensitive subject with considerable political, socio-cultural and even economic ramifications"[117] and stated that

[113] Information retrieved at <www.ilo.org/dyn/normlex/en/f?p=1000:50010:518034229461716::NO:50010:P50010_ARTICLE_NO:24>, accessed on 10 May 2012.
[114] Information retrieved at <www.ilo.org/dyn/normlex/en/f?p=1000:50011:2239340234149794::NO:::>, accessed on 10 May 2012.
[115] G. Bertinetto, 'International Regulations on Illegal Migration', 21 *International Migration* (1983) p. 194.
[116] International Labour Conference, *supra* note 31, paras. 662-664.
[117] *Ibid.*, para. 664.

"experience appears to have shown that in terms of international migration, States are reluctant to ratify any international instrument, regardless of how flexible and loose they are"[118]. The Committee concluded that either, the instruments should continue to be promoted, and the gaps found in them could be covered by protocols[119], or, which the Committee suggested, the instruments could be revised and replaced by a new single Convention, aiming to better "ensure the greatest level of protection for the greatest number of migrants possible".[120] Regarding the definition of the 'migrant worker' in the 1975 Convention, the Committee held that it could have been suspected that the extension of the Convention's scope to include undocumented migrant workers would be perceived by States as an obstacle to ratification, but this fact had not been mentioned as among the major barriers by the States that provided information for the report.[121] Further, the Committee found that the exclusion of self-employed workers from the ILO Conventions' scope had been justified at the time of adoption of the instruments, but was not any longer appropriate. The fact that many migrant workers, both documented and undocumented, were self-employed and often working in the informal economy, thus standing outside the protection offered by the ILO Conventions should, according to the Committee, be included in future discussions regarding the instruments.[122]

When the survey was discussed by the Committee on the Application of Standards, during the following International Labour Conference, the decision-making organ of the ILO composed by State, worker and employer delegates, the employers' group was of the view that the existing protection was too excessive. The employers preferred the elaboration of a new instrument taking into account "todays thinking", while the workers, on the other hand, proposed promotion of the existing conventions in combination with "complementary standard-setting activities.[123]

In 2002, the ILO established the World Commission on the Social Dimension of Globalization, which in 2004 released a report relating to migrant workers proposing the creation of a multilateral framework for immigration laws, enhancing the international coherence in migration law.[124] Meanwhile, the ILO had prepared a report on migrant workers as a preparation for the 2004 Conference, to whose agenda the migration issue had been added as a response to the conclusion in the 1999 survey. The new report, named "Towards a fair deal for migrant workers in the global economy", reflected the World Commission's views that a new international regime on migration was needed.[125]

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[118] *Ibid.*, para. 666.
[119] *Ibid.*, para. 666.
[120] *Ibid.*, para. 667.
[121] International Labour Conference, *supra* note 31 para. 106.
[122] *Ibid.*, para. 111.
[123] International Labour Conference, 87th session, Geneva, 1999, Discussion in Plenary, <www.ilo.org/public/english/standards/relm/ilc/ilc87/com-appd.htm>, visited on May 8 2012.
[124] G. Rodgers et al., *supra* note 75 p. 83-84.
[125] International Labour Conference, *supra* note 13, p. 129.

However, at the 2004 Conference, the employers group rejected the ideas of promoting and revising the Conventions, and argued for a non-binding system, that would take into account the needs of the labour market. The workers group tried to resist, but safeguarded by demanding that such a system be rights-based, and as a result of the governmental delegates mostly favouring the employers view, the outcome became, *inter alia*, a plan of action that included the "development of a non-binding multilateral framework for a rights-based approach to labour migration which takes account of labour market needs, proposing guidelines and principles for policies based on best practices and international standards".[126] The ILO Multilateral Framework on Labour Migration that was consequently developed derives principles and guidelines from the existing human rights and labour rights established in international law, but states, in its preamble, that it is non-binding, and recognizes the sovereign right of all States to to determine their own migration policies.[127]

4.7 Concluding Remarks

In this chapter, we have seen that the International Labour Organization has been addressing migrant workers, although with varying wording, since the beginning of the 20th century. From the ILO perspective, there has been a natural focus on the migrant worker's quality as a worker, as the organisation's mandate is confined to addressing labour related questions. As explained in chapter 2, the ILO addresses several specific fields of labour, as well as specific categories of workers. The first ILO instruments focusing specifically on migrant workers, the 1949 Convention and its accompanying Recommendation reflect a concern for migrant workers, which is addressed by the establishment of a principle of equal treatment, but they also reflect a belief in the potential of harmonious redistribution of manpower. The scope of the instruments is limited to addressing the protection of migrant workers in a regular situation, and to fields closely related to migration and employment. The *emigration* and *recruitment* are thoroughly addressed, as requiring State control and regulation. The definition of the 'migrant for employment' is, just as the whole framework, closely related to 'his' qualities as worker and contributor to the economy, as 'he' needs to have an employment and needs to be documented. While a few provisions also are directed at the 'migrant for employment's' family, which consists of persons that are not qualified by a worker identity, the scope of the instruments is clearly the field of labour – it is a functional protection, seemingly limited to what States can be presumed to control, aiming at certain parts of the lives of persons: work and social security.

[126] International Labour Conference, 92nd session, 2004, quoted in R. Böhning, *supra* note 70, p. 32.
[127] International Labour Organisation, *ILO Mulitlateral Framework on Labour Migration, Non-binding principles and guidelines for a rights-based approach to labour migration*, adopted by the Tripartite Meeting of Experts on the ILO Multilateral Framework on Labour Migration on 31 October – 2 November 2005.

The 1975 instruments were adopted in a time of increasing migration, when trafficking and the illegal employment of migrant workers were becoming major issues on the international agenda. This resulted in a Convention that had a double purpose: to combat trafficking and illegal employment, and to protect migrant workers by assuring equality of treatment. Meanwhile, increasing attention was directed to human rights, also in the ILO, and this is reflected in the Convention's recognition of the 'basic human rights' of 'all migrant workers'. Nevertheless, the Convention in itself does not determine which these rights are, and it, just as the 1949 instruments, only touches upon fields related to labour. Still, there is a requirement of being employed for qualifying as a migrant workers, but in contrast to the 1949 Convention, the 1975 Convention does apply also to undocumented migrant workers, though only with reference to their past performances. The definition of the migrant workers family is a little extended compared to the one in the 1949 instruments, as it includes the migrant worker's 'dependent' parents, and the presumption that the migrant worker is a male seems to be somewhat weaker. The migrant workers is still referred to as a 'he', but that is the case in many instruments covering both males and females[128], and 'he' is now allowed some protection with reference to 'his' spouse, instead of his 'wife'.

Since migrant workers were first addressed multilaterally, in the preamble to the ILO Convention, there has been a constant debate regarding the desirability and extent of their protection, in which countries of emigration and immigration have taken different positions. The ILO framework on migrant workers is marked by this debate, just as it is by the diverging interests of different States and of employers' and workers' organisations: to protect workers employed in 'foreign' countries, to safeguard the national labour market, to promote and control emigration and recruitment and to supress trafficking and illegal employment. In spite of the progress attained between the elaboration of the first and the second ILO Convention, the focus of the framework remains on migration for labour, even though 'human rights' are mentioned in the later ILO Convention. The inclusion of undocumented migrant workers in the scope of the 1975 Convention could however be seen as an inclination towards formulating the instruments in accordance with the existing needs, giving certain rights to people that (on an individual basis) can be seen to have violated State sovereignty and are beyond State control. This inclusion might imply a change to the nature of the instruments, from reflecting State control, to reflecting human needs.

Today, the ILO still has a strong focus on the protection of migrant workers, and the Conventions on migrant workers are still of relevance and monitored. However, the instruments have not attracted many ratifications, especially not from the major 'receiver countries', and the Organisation has decided to focus less on their promotion, and more on ensuring the protection of migrant workers through non-binding guidelines.

[128] For example the UDHR, which in article 10 uses the word 'his'.

In conclusion, the protection of migrant workers within the framework of the ILO ensures their equality of treatment, and to a certain extent of opportunity, with nationals, and aim at areas related to labour and social security. The instruments' definitions of the migrant worker relate 'him' to 'his' employment, in a way that seems based on what States can provide to legally recognized aliens, although the 1975 Convention loosens this requirement a little by addressing undocumented migrant workers and referring to human rights. The reading of the definitions together with scope of the instruments indicates that those who are encompassed by the instruments are addressed as migrant *workers*, not in their capacity of human beings.

5 The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

5.1 Introduction

The International Convention on the Protection of All Migrant Workers and the Members of Their Families[129] was the first United Nations human rights instrument relating specifically to migrant workers. Partly, the new Convention reiterated what had already been established by the ILO Conventions on migrant workers, but the intention laying behind its creation was not only to provide the same rights in a new form, but to strengthen the protection of migrant workers' rights. This chapter describes how the need for a new convention emerged, and explains the structure and content of the instrument, as well as how States' compliance with it is monitored. Finally, a few points of criticism to the Convention are presented.

5.2 Historical Context

The United Nations' Migrant Workers Convention was initiated by countries of emigration that were not satisfied with how the ILO Migrant Workers (Supplementary Provisions) Convention (No. 143) had addressed illegal immigration and employment, focusing on the suppression on such practices. Receiver States of migrant workers on their hand, feared that the ILO Convention might discourage temporary migration. [130] The emigration countries wished to ensure more substantively the protection of their nationals working in countries where they were often abused and exploited due to their migrant status, and they hoped that the change of venue from the ILO to the UN would prove fruitful to those aims. Three factors have been held to explain sender States' choice of the UN as the new arena for protecting migrant workers: the dissatisfaction with the focus on trafficking and illegal employment in the 1975 ILO Convention, risking to render less remittances to developing countries, the tripartism of the ILO with the strong influence of employes' and workers' organisation, which might be less considerate of migrant workers' needs, and the higher chances for developing countries to gain majority in negotiations.[131] There was also the

[129] The ICMW, *supra* note 3.
[130] P. de Guchteniere and A. Pécoud, *supra* note 12, p. 7.
[131] R. Böhning, 'The ILO and the New UN Convention on Migrant Workers: The Past and Future', Vol. 25, *International Migration Review, Special Issue: U.N. International*

recognition of the ILO as confined to addressing the economic dimensions of migrant workers' situation, while a UN instrument was believed more apt to address their human rights from a broad perspective, and possibly to attract more ratifications than the ILO Conventions.[132] It was thus mainly labour exporting countries that took the first steps towards a new instrument, not least the governments of Morocco and Mexico. The Moroccan Special Rapporteur of the Sub-commission on Exploitation of labour through illicit and clandestine trafficking had a decisive role in drafting a critical report[133] regarding the ILO mandate for migrant workers[134], which suggested the preparation of a new instrument which would make "explicit certain relevant human rights which are only implicitly recognized in the existing provisions".[135] The Mexican government on the other hand, had impact on a General Assembly resolution[136] suggesting the deeper examination of the issue.[137] The resolution lead to an ECOSOC resolution setting up a working group, which in turn, on the proposal of the Mexican delegate, recommended that the Commission on Human Rights consider the development of a "convention on the rights of migrant workers".[138] Still, some governments, among them Sweden, preferred the instrument to be developed within the framework of the ILO, but after a vote in the UN General Assembly, the process of elaborating a UN convention on migrant workers was initiated.[139] At that point in time, the 'human rights language ' was well established, and a practice of addressing vulnerable groups, for which the general instruments were not always sufficient, by specific conventions had evolved, as demonstrated by the adoption of the CEDAW addressing women's rights specifically and the beginning elaboration of the CRC, dealing with the rights of the child.[140]

During the process of elaboration, the Moroccan and Mexican delegates had influential positions, and the first draft convention was found to have a

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Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1991) p. 700.

[132] S. Hune and J. Niessen, 'The First UN Convention on Migrant Workers', Vol. 9, *Netherlands Quarterly of Human Rights* (1991) pp. 132-133.

[133] The report in question was the United Nations Economic and Social Council, *Exploitation of labour through illicit and clandestine trafficking* (E/CN.4/Sub.2/L.640) and was prepared by Ms. H. Warzazi.

[134] R. Böhning, *supra* note 131, p. 699.

[135] United Nations Economic and Social Council, *Exploitation of labour through illicit and clandestine trafficking* (E/CN.4/Sub.2/L.640), p. 192, quoted in L. Bosniak, *supra* note 38, p. 738.

[136] United Nations General Assembly, *Measures to improve the situation and ensure the human rights and dignity of all migrant workers* (A/RES/31/127), <www.unhcr.org/refworld/docid/3b00f1bd68.html>, visited on 14 May 2012.

[137] R. Böhning, *supra* note 131, p. 699.

[138] United Nations Economic and Social Council (ECOSOC), Commission on Human Rights, *Measures to Improve the Situation and Ensure the Human Rights and Dignity of All Migrant Workers* (E/CN.4/1316) <documents-dds-ny.un.org/doc/UNDOC/GEN/G79/100/62/pdf/G7910062.pdf?OpenElement>, visited on 14 May 2012, para. 6.

[139] R. Böhning, *supra* note 131, p. 700.

[140] P. de Guchteniere and A. Pécoud, *supra* note 12, p. 7.

strong inclination towards the interests of States of emigration, almost encouraging illegal trafficking or at least limiting the possible measures against it.[141] Consequently, a group of countries of destination - Finland, Greece, Italy, Norway, Portugal, Spain and Sweden - took a more active role in the negotiations, and prepared a counter-proposal which constituted of a draft that would reintroduce the purpose to combat irregular migration and smuggling, and assure the involvement of the ILO in the process. [142] The aim of these countries was a convention that would contain rights already established by the ILO's Conventions on migrant workers and the UN Covenants, without going much further, and their involvement proved decisive for the final result.[143] What started as a draft protecting the individual with absolute rights, ended up as an instrument that also reflected the interests of States, with absolute rights having been replaced by recommendations and "escape clauses", referring for instance to what States "deem appropriate" and "applicable law".[144] As the Convention turned out, four major purposes of it can be identified: to unify the body of law applicable to migrant workers, to complement existing instruments to ensure the sufficient recognition of migrant workers' rights, to improve the distinctive situation of migrant workers and their families, not only by reference to equality of treatment but also by specific protection, and to reduce clandestine trafficking.[145]

The Convention was adopted by the General Assembly's Resolution 45/158 in 1990, and entered into force on 1 July 2003, when the requirement in article 87.1 of having been acceded to or ratified by 20 States was fulfilled. At present, there are 45 parties to the Convention. In 2009, the State Parties to the Convention were estimated to host about 7 per cent of the world's migrants – about 15 million persons.[146]

[141] R. Böhning, *supra* note 131, p. 701.
[142] S. Hune and J. Niessen, *supra* note 132, pp. 134.
[143] G. Rodgers et al., *supra* note 75, p. 82.
[144] J. Lönnroth, 'The International Convention on the Rights of All Migrant Workers and the Members of Their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotiation', Vol. 25, *International Migration Review, Special Issue: U.N. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (1991) p. 722.
[145] J. A. R. Nafziger and B. C. Bartel, 'The Migrant Workers Convention: Its Place in Human Rights Law', Vol. 25, *International Migration Review, Special Issue: U.N. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (1991) pp. 774-777.
[146] United Nations Department of Economic and Social Affairs, *supra* note 6, p. 30. The figure is an estimation made in 2009. Since then, Bangladesh, Guyana, St Vincent and the Grenadines and Nigeria have also become parties to the Convention.

5.3 The Convention

5.3.1 Structure and Content

The preamble to the Convention on the Protection of the Rights of All Migrant Workers and the Members of Their Families starts by stating that the State Parties take into account the principles established in the basic United Nations human rights instruments and the International Labour Organization's conventions relating to migrant workers and forced labor, and further on, that the Parties recognize the importance and extent of the migration phenomenon. As a motive for the Convention, the preamble mentions the desire to harmonize the attitudes of States towards migrant workers and their families, by obliging the States to accept a shared set of basic principles regarding the treatment of this group. The preamble further mentions the vulnerable situation of migrant workers and their families and the insufficient recognition of the rights of this group, as well as the particular difficulties faced by migrants in an irregular situation.

Part I of the Convention establishes its scope and definitions by including a provision on non-discrimination in application in article 1.1, and stating, in article 1.2, that the Convention applies during the entire migration process: during preparation for migration, departure, transit and during the whole period of stay in the country of employment, and the return to country of origin or habitual residence. In this part the rights-holders, migrant workers and the members of their families, are defined, as well as the concepts of regular and irregular migrants. Further, particular categories of migrant workers are defined. In Part II, non-discrimination with respect to rights is stated. Part III of the Convention has the label "Human Rights of All Migrant Workers and Members of Their Families", which indicates that the section applies to *all* migrant worker, disregarding the regularity of their status. In this section, basic human rights are reiterated and related to migrant workers and their families. The section builds on the principle of equality of treatment with nationals[147], and the rights referred to in it are mainly civil and political, but some are of more social and economic nature, but the section does not reflect the full content of neither the ICCPR nor the ICECSR. As examples can be mentioned that all migrant workers and their family members have the right to "any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health" according to article 28. The section also contains provisions more specifically relating to migrant status in society as well as to work and employment, as, for instance, the right to equal remuneration with nationals and the right to transfer earnings to other countries. In Part IV, migrant workers and members of their families who are documented or in a regular situation are afforded additional protection in the form of rights relating to their migration and their residence and labour in the State of employment. Part V of the Convention explains to what extent the rights provided for in part IV applies to the specific categories of migrant workers defined in part

[147] S. Hune and J. Niessen, *supra* note 132, p. 135.

I. Part VI of the Convention deals with the States Parties' undertakings regarding the conditions in connection with international migration of workers and members of their families, those undertakings mainly consisting of international cooperation in a number of areas. Among the provisions in this section is the obligation upon States to cooperate for the purpose of preventing and eliminating trafficking and illegal employment. Finally, Part VII deals with the application of the Convention, Part VIII contains general provisions and Part IX contains final provisions.

5.3.2 The Subjects of Protection

Part I of the Migrant Workers Convention establishes the scope of the Convention, by defining who it applies to and in what stages of migration. Article 1 affirms that the Convention is applicable to all migrant workers and members of their families, and that it applies during the entire migration process. In article 2.1, a "migrant worker" is defined as "a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national". The members of the families of migrant workers are defined by article 4 of the Convention, as "persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children or other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned". It is hence national law or international agreements that are the decisive factors for determining who qualifies as a family member of a migrant worker, unless the person in question is married to the migrant worker or is his or her child.

Article 2.2 defines the special categories of migrant workers, those being frontier workers, seasonal workers, seafarers, workers on an offshore installation, itinerant workers, project-tied workers, specified-employment workers and self-employed workers Among these, 'self-employed workers' deserve special attention. Those are defined as migrant workers who are engaged in remunerated activity but does not have a contract of employment and who works alone or together with family members or other migrant workers recognized as self-employed by applicable law or inter-State agreements. This category of workers is thus included in the general definition of migrant workers, and protected under the Convention.

Article 3 of the Convention excludes a range of persons from the scope of application of the Convention. Persons sent by or employed by international organisations and agencies, or employed by States to perform official functions, and for whom there are special rules in international law or agreements, do not fall within the Convention's scope of application, and neither does persons sent or employed by States who take part in development programmes and who, by an agreement with the sender State, are not considered migrant workers. Investors, refugees and stateless persons (unless included in the application by national law or other relevant international instruments), students and trainees and seafarers and workers

on offshore installations are also excluded from the Convention's application. It should be noted, that asylum seekers are not excluded from the Convention's scope, which might indicate that a person (if she or he works or is a relative of a migrant worker) can come within the scope of the Convention during the asylum process, and then fall outside upon being granted refugee status.[148]

As explained in the previous subchapter, the Convention applies to all migrant workers and their family members, but makes distinction between those in a regular and those in an irregular situation. Article 4 of the Convention defines migrant workers and the members of their families as 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", and as in an irregular situation if they do not comply with those criteria.

5.3.3 Supervision

Article 72 of the Convention states that a Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families shall be established, for the pupose of reviewing the Convention. Members of the Committee are are independent, acting in their own capacity, are nominated and elected by Member States. According to article 73 and 74, the Committee shall examine the reports on the implementation of the Convention and the migration situation that State Parties are to submit every five years, and present its finding in an annual report. The process of examining the reports include their transmission to the International Labour Office, which might assist the Committee in issues falling under the competence of the ILO.

In addition to the reporting procedures, according to article 76, States can declare their recognition of the Committees competence to receive and consider claims regarding the fulfilment of their obligations under the Convention. Such claims can only be submitted by other States that have made declarations under the article. Further, States can make a declaration under article 77, which allows individuals subject to the State's jurisdiction to, after having exhausted domestic remedies, file complaints alleging the violation of their rights under the Convention. However, both for article 76 and article 77 to come into force, there is a requirement of ten States having made the relevant declarations. Only one State, Guatemala, has made a declaration under article 76, and only three States, Guatemala, Mexico and Uruguay has made declarations under article 77.[149] At present, the Committee does thus not have any of the functions made possible by those articles.

[148] R. Böhning, *supra* note 131, p. 707.
[149] Information retrieved at <treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en>, accessed on 14 May 2012.

5.4 Evaluating the Instrument

As mentioned above, the drafting of the Convention was not an entirely harmonious procedure, but was marked, just as the 1975 ILO Convention on migrant workers, by conflicting interests. Nevertheless, the Convention is often referred to as the most comprehensive instrument on migrant workers and the fact that migrant workers in an irregular situation were included in the protection has been regarded as a great step forward for the recognition of their human rights.[150] Juhani Lönnroth, who was a central figure in the Working Group that drafted the Migrant Workers Convention, finds it, its complexity reflecting the complicated nature of the issue, to be a major achievement, and holds that the unification of migrant workers' rights in a single instrument gives those rights applicability as international standards and a validity that serves for their promotion.[151] He holds that the previous protection of migrant workers was either, as for the general human rights law, insufficient as the formulation and implementation of those rights to a large extent restricted the effective enjoyment to nationals, or, for the specific protection, limited to address certain areas (labour and social rights) or regions.[152] Lönnroth further finds the Convention be to breaking new ground by the inclusion of new categories, as self-employed workers, in the definition, and explains that there was a consensus that the changing nature of migration required that new groups were included.[153]

Among the more critical reviews of the Convention is the examination performed by James A. R. Nafziger and Barry C. Bartel through a comparison between the Convention's provisions and general human rights law. These authors point to how the choice of wording in the preamble of the Convention, "taking into account" the existing relevant instrument, might cast some doubt on these instruments' intended applicability to migrant workers, but conclude that they ought to be intended to play an overarching role.[154] In comparing the Convention to existing human rights law, the authors find four different sorts of relationships. Firstly, they, presuming the universal applicability of the general human rights law where nothing else is indicated, find many that the Convention's rights at many instances overlap with what is already established in terms of basic human rights, for instance regarding the prohibitions of torture and slavery. Secondly, they find how some rights – the right to liberty and security of the person, the right to privacy, the right to free expression and the protection against expropriation - are extended, being more detailed in the Convention. Thirdly, they find that some new rights and protections are created by the Convention, which are specifically related to migrant workers' status as aliens, and the special needs entailed to that status, as for information on their rights, protection of documents and regulations regarding expulsion

[150] It should however be noted, that there are also those who do not think that human rights should be extended to this category, see L. Bosniak, *supra* note 38, p. 749.
[151] J. Lönnroth, *supra* note 144, pp. 734-735.
[152] *Ibid.*, p 711.
[153] *Ibid.*, p 720.
[154] J. A. R. Nafziger and B. C. Bartel, *supra* note 145, p. 780.

and stay. Finally, Nafziger and Bartel find that the Convention seems to be limiting some of the existing rights, especially for undocumented migrant workers and their families, as it addresses rights referred to in the general instruments, but in a more limited way. An example is how documented migrant workers' right to education, housing and services are provided for in the Convention, with no reference to the right to an adequate standard of living, in contrast to how those rights are connected in the UDHR. Regarding undocumented migrants, the limited scope of rights applicable to them in combination with the steps that States are encouraged to take against them, is found to affect their enjoyment of human rights.[155] Nafziger and Bartel furhter criticizes some of the provisions of the Convention for being ambiguous and awkward.[156] In their view, the Convention is problematic as it introduces a new rights language for migrant workers, which might hinder the enforcement both of the Convention and of general human rights law in relation to migrant workers, and they argue that the distinction between the rights of all migrant workers and those of documented migrant workers makes interpretation and implementation of the Convention problematic. In addition, they hold that the distinction of migrant workers from other aliens is justified only as long as the specific problems of workers are addressed. The authors conclude by proposing other ways of protecting migrant workers, as reference to the group in the general human rights instruments, clarification of existing rights or separate instruments relating to separate issues regarding migrant workers, e.g. work, migration and trafficking.[157]

Linda Bosniak, in an article that focuses on the UN Conventions protection of undocumented migrants, describes the Convention as "as striking for its exclusion of undocumented immigrants from the scope of certain important rights and protections as it is for its explicit coverage of them by others". She finds the instrument to be characterized by a tension between individuals' rights (in particular, the rights of undocumented migrants) to be treated in accordance with international human rights standards, and States' rights to control the entry into their territory.[158] Bosniak holds that, if ratified and implemented, the Convention does have a potential to protect undocumented migrants, who are not mentioned, or sometimes explicitly left out, in most human rights instruments[159], from the abusive exercise of state power "under certain circumstances", and to provide them with "a degree of social protection".[160] However, she also notices how the Convention allows the State parties to discriminate against indocumented migrants in a number of fields: family unity, the liberty of movement, participation in public affairs, social service, equality of treatment for family

[155] J. A. R. Nafziger and B. C. Bartel, *supra* note 145, p. 781-784.
[156] *Ibid.*, p. 786.
[157] *Ibid.*, p. 788.
[158] L. Bosniak, *supra* note 38, pp. 741-742.
[159] *Ibid.*, p. 739, where Bosniak refers to how, where undocumented migrants are (indirectly) referred to in human rights conventions , they are excluded from protection, for instance by article 12(1) and 13 of the ICCPR ,which are exclusively applicable to persons lawfully within the territory of a State.
[160] *Ibid.*, p. 742.

members, freedom from double taxation, employment protection and trade unions rights, and that the Convention simultaneously reflects a strong emphasis on States' sovereignty in immigration matters.[161] Bosniak sees the universality of human rights as constrained by national sovereignty, manifesting itself in poor responses the need of undocumented migrants, but finds the UN Convention a proof of willingness to "rise to the challenge of universality" of human rights law.[162]

In spite of its aspirations to universally protect the rights of migrant workers, the Migrant Workers Convention has attracted relatively few ratifications. Srdjan Vucetic argues that the instrument's complexity, especially the fact that it addresses both regular and irregular migrants, along with the "preciseness" of its provisions are likely to be two of the explanations to States' reluctance to ratify it[163]. In contrast to Nafziger and Bartel, Vucetic holds that the Convention is precise, for instance in its comprehensive and detailed definition of the migrant worker. A precise instrument is, according to Vucetic, less attractive to States as it leaves less room for interpretation and argumentation.[164] However, he is of the view that the Convention in itself does not hold the main responsibility for the low State commitment, but that the major factors lie in domestic politics.[165]

As G. Battistella highlights, the definitions of migrant workers and their families does not indicate whether settled immigrants fall within the scope of the Convention. Battistella argues that States' unwillingness to ratify might partly be explained by major countries of settlement's resistance to accept a document that did not clearly exclude permanent settlers from its scope, together with some States' view that the matters concerned where to be handled by the ILO, and the perceived loss of sovereignty in migration matters that accession to the Convention with imply.[166] The difficulties in regulating migration are also, in Battistellas view, traceable to the international 'fatigue' of multilateralism, manifested by the ILO choosing to address migration issues by non-binding guidelines, and, not least, to the rules of the labour market, which demands flexibility, a feature that derives from a protection deficit.[167]

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[161] L. Bosniak, *supra* note 38, p. 741.
[162] *Ibid.*, pp. 764-765.
[163] S. Vucetic, 'Democracies and International Human Rights: Why is There No Place for Migrant Workers?', Vol. 11, *The International Journal of Human Rights* (2007) p. 404.
[164] *Ibid.*, pp. 411-413.
[165] *Ibid.*, p. 406. This theory is confirmed by a UNESCO study of obstacles to ratification in the European context (E. MacDonald and R. Cholewinski, *The Migrant Workers Convention in Europe* (United Nations Educational, Scientific and Cultural Organization 2007) p. 88), which shows that the perceived legal, administrative and financial obstacles can be described as mere misconceptions of the implications of the Convention, or could be overcome by simple reservations to certain provisions, and concludes that the major reasons for unwillingness to ratify are political.
[166] G. Battistella, 'Migration and human rights: The uneasy but essential relationship', in P. de Guchteniere, A. Pécoud and R. Cholewinski (eds.), *Migration and Human Rights, The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press, Cambridge, 2009) pp. 59-62.
[167] G. Battistella, *supra* note 166, pp. 66-67.

Jorge Bustamante, in addition, points to that the poor ratification of the UN Convention is far from the only concern regarding the protection of migrant workers. He describes a gap between States manifested concern for migrant workers' rights and their *de facto* refusal to ratify the UN Convention: the will demonstrated at international level by the international community is not matched by national efforts by individual States. Bustamante points to the fact that many States where severe violations of migrant workers' human rights occur are already bound by international human rights standards, which should direct their treatment of foreigners. He argues that a Catch 22 situation might be created when States' refusal to accede to the protection of migrant workers' rights is met by a demand for more standards, and that until more ratifications are achieved, migrant workers' needs should be addressed, at UN level, by other means based on the political reality.[168]

The low number of ratifications has also been addressed by de Guchteniere and Pécoud, who see the binding nature of the Convention and some State's fear of involving the UN in the migration debate as reasons for States' unwillingness to ratify the Convention. These authors argue that the Convention will suffer from a large handicap as long as major receiver countries does not ratify it. Nevertheless, in examining three different ways forward: to give up on the Convention's promotion, to complement it with alternative instruments, for instance non-binding guidelines, or to continue the promotion of the Convention, they prefer the latter option, as they consider that the achievements made through the Convention might be hard to attain in a new form.[169]

5.5 Concluding Remarks

The initiative to the elaboration of the UN Migrant Workers Convention mainly came from 'countries of departure', which wanted to enhance the international protection of migrant workers' rights. The aim was to protect not only their rights in fields relating to labour, but their *human rights*, an aim which, naturally, built on the knowledge that migrant workers were often subjected to severe human rights violations. Other UN human rights instruments directed at vulnerable groups were being elaborated, and although the aim regarding migrant workers partly was to improve the protection in areas that had previously been within the mandate of the ILO, the process of drafting a new convention on migrant workers was eventually initiated under the United Nations' auspices. During the drafting process, the obligation of States to combat trafficking and illegal employment was introduced as part of the framework, after countries that were more concerned by immigration had taken an active role. The result became an instrument that reflected the ILO conventions on migrant workers as well as the general human rights law. The UN Convention does thus specifically

[168] J. Bustamante , *supra* note 14, pp. 348-350.
[169] P. de Guchteniere and A. Pécoud, *supra* note 12, pp. 37-40.

state what human rights migrant workers have. Its preamble refers to the general human rights law, not in the strongest terms but by 'taking it into account'. The Convention distinguishes between the human rights of *all* migrant workers and their family members, and the rights of those who are in a regular situation. Some of the rights of the Convention are of a general nature, while some are more specific, aiming at protecting the migrant worker in her/his quality of a worker in a foreign country, or just as an alien.

In comparison with the ILO instruments, the UN Migrant Workers Convention has a broad definition of the subject of protection, as the whole instrument refers to migrant workers and the members of their families, in contrast to how the ILO instruments only include the family members in certain provisions. The definition of the family members in the UN Convention might or might not be broader than that of the 1975 ILO Convention, as the UN Convention's definition makes reference to national law for the determination of who, more than 'partners'[170] and dependent children, qualifies as family. Further, the UN Convention is, to a larger extent than the ILO instruments, applicable to undocumented migrant workers and their family members, as these have a whole set of rights explicitly applicable to them, while the 1975 ILO Convention and Recommendation only apply to them in a with regards to rights deriving from their past employment. As for those who are excluded from the application of the instruments, the UN Convention does explicitly exclude more categories than the ILO instruments, but meanwhile, it includes a large amount of people by extending its scope to self-employed migrant workers.

The UN Convention has been found a great step forward in the protection of migrant workers human rights, as it articulates and substantiates these rights, but it has also been found to limit some human rights with regards to migrant workers, especially those in an irregular situation. As we have seen, the instrument is considered to reflect a conflict between upholding State sovereignty and the protection of undocumented migrants. Nor is the Convention's mix of aims, the protection of human rights and State obligations with regard to criminal activity, i.e. trafficking and illegal employment, considered unproblematic. States have been hesitant to ratify the UN Convention, for reasons which seem to have to do with fear of placing migration issues on an international level, a fear that has followed the protection of migrant workers since the beginning.

In conclusion, the UN Migrant Workers Convention has a history of deep connections with the ILO protection, as it derives from dissatisfaction with the ILO Conventions on migrant workers and is partly based on those, but its language and approach are clearly formed by the human rights tradition. Compared to the ILO instruments, the UN Convention appears less functional, as it does not only address migrant workers and their families in their qualities of being or being related to migrants employed in a foreign

[170] See article 4 of the ICMW, or section 5.3.2 for the requirements for a partner in other relationships than marriage to qualify as family member within the meaning of the Convention.

country, but seems to address them as ‘whole human beings’, providing them, to an extent determined by the legality of their stay, with a bouquet of human rights. The scope of the UN Convention’s definition of the subject of protection is broad, and not as related to an employment relationship as the ILO convention, as it includes family members and undocumented (often illegaly employed) migrant workers to a larger extent, and as it included self-employed. The definition of the subjects of protection seems to aim to reflect the actual situation of international migration, just as the provision of these subjects with their ‘own’ human rights seems to be an attempt to answer to an actual need. Thus, the UN Migrant Workers Convention aims to protect migrant workers by addressing them with a specific human rights instrument, and the category that it addresses seems to be determined by needs, resulting in an instrument covering persons that are not so much migrant workers as just migrant human beings.

6 The Migrant Worker – a Subject of Human Rights

6.1 Introduction

The previous chapters have answered the first two questions of this study, namely how migrant workers are protected in international law, and how the migrant worker – the subject of this protection - is defined. Chapter 3 explained how general human rights law applies to aliens, while chapter 4 and 5 examined the specific protection of migrant workers in international law. The concluding remarks to each chapter have highlighted some points that will be drawn upon in this chapter, which addresses the third question: what are the implications of the use of 'human rights language' in relation to migrant workers? The chapter starts by presenting two views on subjectivity to human rights, one from a feminist perspective and one from a philosophical. Further, the findings from previous chapters are discussed, with a little help from these theories. In the discussion, it is argued that the 'migrant worker' has become a specific subject of human rights, that this specificity has its explanation in the history of the protection of migrant workers, but that it might be counter-productive to migrant workers claims to human rights, as well as to the logic of human rights.

6.2 Having a Specific Identity in Human Rights

The conflict between the worth of claiming universality and that of claiming specificity has been thoroughly examined in the doctrine of femininst scholars. Wendy Brown has pointed to the paradox of the rights discourse with regards to women's rights, arguing that on the one hand, specified rights might build a fence that locks the subject they are supposed to protect in their position of oppression, merely addressing the conditions *within* that position, and that these rights might be encoding a definition of the subject premised upon its subordination. On the other hand, recognition solely within the "universal" obscures the particular needs of the subject. In Brown's discourse, this refers to women in relation to the male norm and suppression.[171] Brown refers to the historian Joan Wallach Scott, who found that a paradox emerges from arguing women's rights in a discursive context where rights are identified with masculinity. In addition to this, according to Brown, the invocation of a right for a particular subject on a particular issue in a particular domain, in spite of all this being logically based on a specific need (and though it might politicize the standing of the subject, issue, domain), might "tend to depoliticize the conditions they articulate". As she concludes:

[171] W. Brown,'Suffering Rights as Paradoxes', 7 *Constellations* (2000) p. 231

"Rights function to articulate a need, a condition of lack or injury, that cannot be fully redressed or transformed by rights, yet can be signified in no other way within existing political discourse. Thus, rights for the systematically subordinated tend to rewrite injuries, inequalities, and impediments to freedom that are consequent to social stratification as matters of individual violations and rarely articulate or address the conditions producing or fomenting that violation. Yet the absence of rights in these domains leaves fully intact these same conditions. "[172]

This theory, which addresses women's rights in a patriarchal society, might also apply to migrant workers' rights. The emergence of the 'migrant worker' as a specific subject of human rights is indeed based on the vulnerable situation of migrant workers, but as the specific rights of migrant workers have become encoded, they have explicitly been distinguished from the general human rights, placing the migrant worker in a position of being awarded only a limited extent of those. As mentioned in chapter 5, the preamble of the UN Migrant Workers Convention does reiterate the application of the general human rights instruments to migrant workers and the members of their families, but when the human rights of these subjects are specified in the convention, they result restrained. Further, in accordance with the language of rights, several of the main *causes* of the vulnerability of migrant workers are not addressed.

So, what is then the value of addressing the paradox? Brown describes paradoxes as distinguished by their "irresolvability", consisting of "multiple yet incommensurable truths, or, truth and its negation in a single preposition"[173], adding that they appear "endlessly self-cancelling, as a political condition of achievements perpetually undercut, a predicament of discourse in which every truth is crossed by a counter-truth, and hence a state in which political strategizing itself is paralyzed".[174] Brown recognizes, as an emblematic fact, that "the language carrying the fatality of paradox occurs in the temporality of a progressive historiography"[175] - the fact that a system of rights is evolving and gaining progress does not preclude the paradox inherent in the system. She does not, however, provide any clear answer to what role the paradox is to play.

6.3 Being a Subject of Human Rights

One of many attempts to apply and understand the concept of 'human rights' has been made the philosopher Jacques Rancière In an article, he discusses theories that have based conclusions on human rights upon how people, due to citizenship or exclusion are either a part or not of the political arena, thus trying to find the subjectivity to human rights either in the human or the political. In Rancière's view on 'politics' and 'human rights', 'rights' make sense when used by those who do not have them. Human rights can thus be understood neither as the rights of those who already have

[172] W. Brown, *supra* note 171, p. 239
[173] *Ibid.*, p. 238
[174] *Ibid.*, p. 239
[175] *Ibid.*, p. 239

rights or the rights of those who have no rights, but as the process of enacting the rights that one does not have. The attention to, and challenge to the border between inclusion and exclusion is the process of politics, and the enactment of rights. [176] Rancière finds the potential of human rights resting in the constraint, in the "back-and-forth movement between the first inscription of the right and the dissensual stage on which it is put to test", and argues that there does not need to be a 'subject' of the rights. On the contrary, it is the lack of subject that enables the use of rights of those who are denied their rights.[177]

In addition, the search for a 'subject' of human rights is dangerous, when it ends up identifying those who have no rights as the subjects of rights, creating a *consensus* by "patching over the possible gaps between appearance and reality or law and fact" Rancière describes the evolution of a consensus as the turning of abstract rights into substantial ones, attached to certain groups and situations, which results in the law as a description of society. The matching of law and society, the consensus, closes the space where dissensus could evolve, where a gap between law and reality could cause a constraint, a process of change. The view of the rightless as the subject of rights leads to rights ending up void, reflecting the subject's situation of deprivation of rights. [178]

Rancière applies his argument to the way human rights are used in humanitarian intervention, in his view being "sent to the rightless" and then returned to sender, to legitimize an intervention.[179] Humanitarian invervention is indeed a topic separate from the protection of migrant workers, but Rancière's points are interesting as a basis for reflecting upon the use of human rights. Rancière seems to be of the conviction that law can fulfill a purpose as something distant from reality, in the sense that it can create dissensus, arguments, movement and change. Human rights can serve as a strong argument, and it is possible that essential to that strength is the upholding of rights as something almost utopian. When human rights are not practical, but abstract, universal and far from reflecting any actual situation, there is indeed a room for action, for claims. On the other hand, the identification of a vulnerable group as a specific subject of human rights, seems to risk to have the effect that Rancière refers to: to nullify the meaning or at least compromise the strength of those rights.

6.4 Concluding Discussion

As we have seen, migrant workers and other aliens are entitled to protection under general human rights law. They come under the scope of the human rights instruments that have been examined for this thesis, and, at least in theory, they have most of the rights that nationals have. However, the

[176] J. Rancière, 'Who Is the Subject of the Rights of Man?', 103 *South Atlantic Quarterly* (2004), p 303-305.
[177] *Ibid.*, p. 305.
[178] *Ibid.*, p. 306-307.
[179] *Ibid.*, p. 309.

Declaration that specifically relates human rights to aliens is more restrictive than the general law, and undocumented migrants seem to have fewer rights than aliens that are lawfully in the territory of a State.

In addition to the general human rights law, the specific protection of migrant workers has been an issue of international concern for a long time. However, the nature of the protection has shifted since workers 'employed in countries other than their own' were first mentioned in a multilateral treaty. The first ILO instruments that addressed migrant workers contained provisions relating to migration, as well as to the stay and employment in the foreign State, regulating several practical aspects of the situation of a migrant workers. The second set of instruments elaborated by the ILO partly had a different aim, establishing international obligation on States to supress trafficking and illegal employment, but they did also contain provisions on the protection of migrant workers, through equality of treatment and of opportunity. Moreover, the 1975 ILO Convention made reference to human rights, by recognising all migrant workers 'basic human rights', and to some extent, its addressed undocumented migrant workers. The UN Migrant Workers Convention came from an initiative to strengthen the protection of migrant workers, but the final draft came to reflect what was established by the ILO Conventions and in general human rights law. However, the introduction of the UN Migrant Workers Convention constituted a change of nature of the protection of migrant workers. In contrast to the 1975 ILO Convention, it does not only affirm the respect for migrant workers' human rights, but it specifies what the rights of the migrant workers and their families are. In doing this, the UN Convention applies a distinction between the rights of migrant workers in a regular and migrant workers in an irregular situation, granting fewer rights to the latter. The preamble of the UN Convention refers to "the principles embodied in the basic instruments of the United Nations concerning human rights"[180], but the structure of the Convention, as well as how it has been received in doctrine, seems to indicate that the human rights of migrant workers are those that are established by the Convention.

As for the definition of the migrant worker, it started as a practical and simple view of the male worker emigrating for employment. Over the years, it has come to include a larger variety of persons, and the UN Migrant Workers Convention contains a definition that is gender neutral and includes undocumented migrant workers and self-employed workers. The change of the definition's scope reflects the change of the nature of the instruments, from the early ILO instruments being a clear product of the ILO's mandate to address labour questions with practical regulation, to the 1975 ILO Convention considering 'basic human rights' and taking the actual situation of vulnerable migrant workers into account by partly addressing undocumented migrant workers, and finally to the UN Migrant Workers Convention taking a human rights perspective, and seeming to base its definition of a migrant worker largely on an understanding of who

[180] The ICMW, *supra* note 3, preamble.

migrant workers are. In order to come under the UN Migrant Workers Convention's definition of a migrant worker, there is no need to be legally in the country or for an employment relationship. In conclusion, the definition seems to encompass people that are migrants rather than migrant workers.

The specificity of the protection, which has its roots in the approach of the ILO but has remained within the framework of the UN, seems to have lost its original intentions with regards to the definition of the migrant worker, the concept having become so broad that it is almost synonymous to 'alien'. However, while the subject of the protection has become less specified, the rights related to this subject have attained increasing specificity, resulting in a specific set of human rights for 'migrant workers'. The increasing recognition of the human behind the migrant worker, which is reflected in the ICMW's comprehensive definition of the migrant worker as well as in the very nature of the Convention, answering to human needs by human rights, has, paradoxically, separated the 'migrant worker human being' from other human beings, those that are the subjects of the general human rights. As has been proposed by Wendy Brown, specific rights might correspond to specific needs, but they may also identify the specific category with its vulnerability.

This argument is reflected in the views of Jacques Rancière, who sees the potential of human rights in the constraint, in the gap between the law and the reality. There is indeed a gap between *migrant workers' human rights* and the reality, in which migrant workers are often refused *any* rights, which might provide an arena for political movement and change, and the granting of specific human rights to migrant workers might be the best way to ensure minimum guarantees. However, while 'aliens' are recognized to have a claim for general human rights, the granting of specific rights to migrant workers, who more or less are synonymous to aliens, might deprive this category of that claim. As for the implications for the human rights argument in itself, the derivation from the principle of universality might lead to its logic appearing less clear, and its strength being compromised.

Thus, the paradox that Brown describes seems to appear when specific rights are directed at migrant workers. Their specific, although endlessly varying, situation as aliens, their vulnerability and States' demand for them in combination with their unwillingness to protect them, seems to require special measures. Addressing the paradox of the specific protection may not be the most effective way to improve the situation of migrant workers, but as the human rights argument is a widely used one, and as the paradox is there, not addressing the paradox would be accepting human rights, and the situation of migrant workers only being able to claim them to a limited extent, as something that does not deserve to be challenged.

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Convention on the Elimination of Discrimination Against Women, adopted by the United Nations General Assembly 18 December 1979, entered into force 3 September 1981.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, adopted by General Assembly Resolution 39/46 10 December 1984, entered into force 26 June 1987.

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