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## In search of equality - A critical analysis of non-discrimination provisions in human rights treaties as they apply to migrant workers in Sub-Saharan Africa

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FACULTY OF LAW  
Lund University

# Managing African Migrant Workers

A Comparative and Critical Analysis of State  
Management of Migrant Workers in Sub-Saharan  
Africa: the Case of Nigeria and South Africa

Manuskript inför licentiatseminarium för avläggande av juris  
licentiatexamen i mänskliga rättigheter

Seminarium den 10 oktober 2006

av

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Tilltänkt handledare: Prof em. Göran Melander

## **Foreword to the Material presented in this Licentiate Seminar**

The intention of this licentiate thesis is that it serves as an initial forum for suggestions and criticisms that can be used in the production of final dissertation on the subject. As such, I welcome any criticisms that will contribute to its development.

The main motive for this thesis is to examine State implementations of human rights principles that can be models for the treatment and management of migrant workers, especially the undocumented. The diversity of State practices in implementing human rights protections for that group of non-citizens is often incompatible with prevailing principles, hence there is a need to explore the gaps in protections that are available.

The question that link all aspects of the thesis here is the gaps in protecting foreign migrant workers and the members of their families from unequal treatment. Due to the many issues surrounding economic developments on continental Africa, I have selected the situation for migrant workers in two Sub-Saharan African States as the objects of study. The reason for that choice is because those States have large migrant worker populations and legal protections in place that seem to bridge the gaps in protection by others States with similar circumstances. The approach is to explore how their protections fit into the larger stream of human rights protections for migrant workers. As such, I briefly survey the principle of non-discrimination in human rights law, then describe and critically analyse international, regional and national instruments that are designed to respond to the gaps in the protection of foreign migrant workers.

### **A Note on Sources in the Footnotes and References**

On the advice of colleagues at the Faculty of Law, Lund University, and the Raoul Wallenberg Publications Officer Niles Hogan, I have used the style and punctuation guide recommended by the Raoul Wallenberg Institute in the preparation of this manuscript. It is available on their website ([www.rwi.lu.se/publications/styleguidelines](http://www.rwi.lu.se/publications/styleguidelines)). Where those guidelines were silent on the application of a footnote, I referred to those recommended in the 18<sup>th</sup> Edition of the BlueBook (A Uniform System of Citation) which is published by the law reviews of Columbia, Yale, and Harvard universities (2005). Of particular interest in that reference book's recommendations were those on using Internet references in Chapter 18.2.1 (b). The suggestion was to use the primary URL rather than a URL that links to alternate servers. Since secondary URLs are often long, overly complicated, change regularly and are often inaccurate, I have used only primary URLs as much as possible for all UN and ILO documents (e.g., [www.unhchr.org](http://www.unhchr.org); [www.unts.org](http://www.unts.org) or [www.ilo.org](http://www.ilo.org).) I have also used the BlueBook suggestion to indicate that the source is "available at" (see 18.2.2(a) a primary or secondary URL and the date I last accessed it. In case the primary URLs are inaccessible, many original sources can be reached through the Goggle search engine on the Internet. I hope that this facilitates researching my Internet sources.

During my entire research period, I have been privileged -- and am grateful -- to have been able to use the resources of the library of the Faculty of Law at Lund University, The Raoul Wallenberg Institute Library, Lund, the Scandinavian African Studies Institute Library, Uppsala, the Dag Hammarsköld Library at the United Nations in New York, the ILO Library in Geneva, Switzerland, and the library of the High Commission for Human Rights in Geneva. I am truly grateful for employees and others at those libraries that assisted me in the early phases of my research.

Above all, I have tried to be consistent in the references in the footnotes. Nevertheless, I welcome and would appreciate comments on adjustments needed to rectify erroneous, outdated or misleading references and styles. Any suggestions and constructive criticisms on this matter during the seminar will be greatly appreciated.

## **Anticipations**

The contributions I hope to make to international law in the final version of this work are as follows: First, I anticipate that this approach will bring attention to a largely unknown category of vulnerable persons on continental Africa who are entitled to protection under a number of international instruments. Secondly, I anticipate that this approach facilitates a method to analyse major legal instruments that are designed to provide protection to the vulnerable group they propose to protect. Thirdly, I anticipate that this approach will facilitate fresh initiatives in future studies that specifically relate to the rights of migrant workers. And finally, I anticipate that the final version of the work will expand the boundaries of international human rights scholarship by facilitating similar studies by future scholars in their own quests to extend protections for migrant workers and other vulnerable groups through international law.

## **Acknowledgements**

I would like to thank Professor Göran Melander for his advice, counsel and guidance in the writing of this seminar material. I would also like to thank professors Gregor Noll and Michael Bogdan of the Faculty of Law at Lund University and Gudmundur Alfredsson and Ulf Linderfalk for their suggestions regarding the structure and content of this seminar material. A warm thank you is also due to librarians Olle Serin, Habteab Tesfay and Lena Olson for their support in locating library material, and the same to the former Publications Officer at the Raoul Wallenberg Institute, Niles Hogan for his suggestions on style that I have used. I would also like to extend a warm thanks to staff members at the RWI for their warmth and friendliness over the years.

I am also grateful to Elaine Bosak for her editorial suggestions during the early stages of this manuscript. Last, but far from least, I would like to thank my wife Monique Fransen for her unending support in preparing the layout of this manuscript. However, I want all to know that all technical and grammatical errors found in this material are due to my own personal negligence.

I look forward to the ideas and suggestions of colleagues that will contribute to the realisation of my ambitions with this Licentiate Seminar.

M. Arthur Robinson Diakité  
Lund, 2006



## Abbreviations Used in the Text

ACHPR	African Commission on Human and Peoples Rights (< <a href="http://www.achpr.org">www.achpr.org</a> >)
ACUNS	Academic Council of the United Nations
ADRD	American Declaration of the Rights and Duties of Man
AFR	African Charter on Human and Peoples Rights
AIDS	Acquired Immune Deficiency Syndrome
AJICL	African Journal of International and Comparative Law
AMR	American Convention on Human Rights
AU	African Union
AYIL	African Yearbook of International Law
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CEIFO	Centrum för Invandringsforskning
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CHR	Commission on Human Rights
COE	Council of Europe (< <a href="http://www.coe.int">www.coe.int</a> >)
DOC	Document (Also Doc.)
ECA	Economic Commission for Africa
ECE	Economic Commission for Europe
ECHR	European Convention on Human Rights
EctHR	European Court of Human Rights
ECJ	European Court of Justice
E/CN.	Economic and Social Council Report
ECOSOC	Economic and Social Council
ECOWAS	Economic Community of West African States
E/CN	Economic and Social Council Document
ECRI	European Commission Against Racial Discrimination
EctHR	European Court of Human Rights
ENAR	European Network Against Racism
ESC	European Social Charter
EUMC	European Monitoring Centre on Racism and Xenophobia
FAO	Food and Agricultural Organisation
FCN	Federal Constitution of Nigeria
FETO	Fair Employment and Treatment (NI) Order
FFCC	Fact-finding and Conciliation Commission on Freedom of Association
GA	General Assembly
GAOR	General Assembly Official Records
GATS	General Agreement on Trade in Services
HIV	Human Immunodeficiency Virus
HRC	Human Rights Committee
HRI/CORE	Human Rights Instrument/Core document
HRW	Human Rights Watch
ICAT	International Convention Against Torture and Other Cruel Inhuman or Degrading Treatment Or Punishment
ICEDAW	International Convention on the Elimination of All forms of Discrimination Against Women
ICPD	International Conference on Population Development
ICCPR	International Covenant on Civil and Political Rights
ICEM	International Council for Education Media
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICFTU	International Confederation of Free Trade Unions
ICRC	International Convention on the Rights of the Child

ICM	International Center for Migration
ICRC	International Committee of the Red Cross
IDHR	Islamic Declaration of Human Rights
ILO	International Labour Organization
ILOLEX	Database of International Labour Organization Standards (< <a href="http://www.ilo.lex">www.ilo.lex</a> >)
IMR	International Migration Review
IOM	International Office of Migration
LFN	Laws of the Federation of Nigeria
MEIM	Meeting of Experts on Future ILO Activities in the Field of Migration
MFN	Most Favoured Nation
MWC	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
NGO	Non-Governmental Organization
NIHI	Network of International Human Rights Institutions
OATUU	Organization of African Trade Union Unity
OAU	Organisation of African Unity
OHCHR	Office of the High Commissioner for Human Rights (< <a href="http://www.ohchr.org">www.ohchr.org</a> >)
OSCE	Organization for Security and Co-operation in Europe
PICCME	Provisional Intergovernmental Committee for the Movement of Migrants from Europe
R.I.A.A.	Reports of International Arbitral Awards
RWI	Raoul Wallenberg Institution for Human Rights and Humanitarian Law
SADAC	South African Development Authority
SAMP	Southern African Migration Project
SAMAT	Southern African Multidisciplinary Advisory Team
SANAC	South African Native Affairs Commission
SASK	Trade Union Solidarity Centre of Finland
TRIPS	Trade-related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Right
UIDHR	Universal Islamic Declaration of Human Rights ( <a href="http://www.alhewar.com">www.alhewar.com</a> )
UNAC	United Nations Association of Canada
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UNESCO	United Nations Educational, Scientific, and Cultural Organization
UN	United Nations
UNHCHR	United Nations High Commissioner for Human Rights
UNICEF	United Nations Children's Fund
UNOG	United Nations Organisaton at Geneva
UNRISD	United Nations Research Institute for Social Development
UNTS	United Nations Treaty Series (< <a href="http://www.untreaty.org">www.untreaty.org</a> >)
WCL	World Confederation of Labour
WHO	World Health Organisation
WTO	World Trade Organisation
WCAR	World Conference Against Racism, Racial Discrimination, Xenophobia, and Other Intolerance
YILC	Yearbook of the International Law Commission

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## **Appendix A**

Overlapping Provisions of Protections in the Migrant Worker Convention, and other Human Rights Laws

## **Bibliography**

## 1. A General Introduction

### 1.1. *The Search of Equality for Migrant Workers in Africa*<sup>1</sup>

The principles of equality and non-discrimination apply to everyone, including non-citizens and migrant workers. They are the cornerstones of human rights laws. However, State practices frequently vary and the international community has taken further steps to strengthen the principles, in particular with regards migrant workers. Hence, a number of treaties within the UN, the ILO and regional agreements have been concluded to ensure that the principles are applied to many vulnerable groups. They are: The Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on the Elimination of All Forms of Racial Discrimination ICERD, the International Covenant on Economic, Social and Cultural Rights (ICESCR) , the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (known as the MWC, this Convention was adopted by the UN General Assembly in 1990) many ILO and regional human rights treaties.

As guidelines for the principles, these treaties are the most important safeguards in prohibiting the exclusion of persons from access to labour, housing, health services, education due to their gender, race, colour, religion, language, social status or national origin. On the side of the individual, there are a number of articles within existing universal, ILO and regional human rights treaties that offer such protection. The exception to this is Article 2.3 of the ICESCR, which allows developing States to determine the extent they can guarantee economic rights under the covenant to non-nationals. Hence, there is only one universal instrument, The International Convention on the Right of Migrant Workers and Members of their Families (1990), that is dedicated solely to the protection of migrant workers.<sup>2</sup> On the side of States, however, there remains their sovereign right to deport undesirable aliens, a right, which though it is not an object of challenge in this dissertation, has a future role in strengthening all existing rights under existing human rights treaties. The rights of both parties must somehow converge on a level playing field.

### 1.2. *The Purpose of this Study*

It is largely due to the issues described above that the purpose of this study is to bring attention to – and propose solutions for -- the practices of unfair distinction and discrimination that foreign migrant workers in democratic African States are subjected to. The study examines the extent to which two of those States have complied with the principles of ‘*no distinction*’ on the basis of ‘*country or territory to which a person belongs...*’ that is provided for in the Universal Declaration of Human Rights and subsequent treaties.<sup>3</sup> The proposed solutions are aimed at reaching an acceptable standard of treatment as outlined in the Migrant Workers Convention.

### 1.3. *The Objects of the Study*

This work is not concerned with the problems and remedies in international law protecting refugees, asylum-seekers or displaced persons; instead, it is exclusively concerned with those problems and remedies associated with the millions of individual foreign migrant workers,

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<sup>1</sup> The term “Aliens” is also commonly used. *See* Collins Dictionary and Thesaurus, London (1987).

<sup>2</sup> U.N.: GAOR, 45<sup>th</sup> Session, U.N. Doc. A/RES/45/158 (1990)

<sup>3</sup> U.N.: GAOR, 3<sup>rd</sup> Session, A/RES/217 (1948), Articles 2:1 and 2:2.



who are often so categorised because they cannot be placed under regional or international refugee and asylum-seeker laws that apply to those special categories of migrants.<sup>4</sup>hn

The State practices chosen for this study are those of Nigeria and South Africa, two States which receive large numbers of foreign migrant workers. The reasons for selecting these States for this study are explained below.

#### 1.4. Identifying some Appropriate Concepts

The concept of protection from discrimination is clearly outlined in Articles 2:1 and 26 of the International Covenant on Civil and Political Rights (ICCPR from hereon). The former provides that each State party to the Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the covenants without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status; the latter guarantees to all persons equality before the law and the equal protection by the law without any discrimination, and repeats the types of non-discriminatory distinctions of Article 2.<sup>5</sup> Another Covenant, the International Covenant on Economic, Social and Cultural Rights (the ICESCR from hereon) contains a similar provision in Article 2:2.<sup>6</sup> But it also contains a provision allowing developing states to determine the extent they can guarantee the economic rights of the Covenant to non-nationals (Article 2:3). But this limited form of distinction is subject to scrutiny under prevailing human rights instruments and norms. Hence, while the ICCPR, the ICESCR and other human rights instruments allow limited forms of different treatment for aliens, they may only be applied under special conditions to facilitate their treaty obligations, as all individuals, citizens and non-citizens, are entitled to the protections offered in human rights law.

The history of voluntary international migration for labour has its roots in push-pull factors for individual and group economic or social improvement, and foreign migrant workers are no exception to unequal and discriminatory treatment in all developing countries. As stated in a report of the United Nation's Special Rapporteur for Migrant Workers, one of the most relevant factors which led the Commission on Human Rights to create the working group on international migration and human rights was the increasing manifestations of racism, xenophobia and other forms of discrimination and inhuman and degrading treatment against migrants throughout the world.<sup>7</sup> Such practices are as widespread as the need for labour migration itself, be it voluntary or involuntary, hence there is a need to examine the norm as it applies to non-citizens in the countries that are the object of this dissertation.<sup>8</sup>

#### 1.5. Early Developments in the Non-Discrimination of Aliens

The position of foreign migrant workers and the members of their family remains inextricably tied to their status as aliens, and throughout history they have always been treated differently from citizens. Early records concerning differences in treatment between aliens and citizens are found in the histories of all ancient cultures. The Greek city-states had rigid distinctions

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<sup>4</sup> There are, of course, foreign migrant workers who find it convenient to call themselves refugees to enter some countries but that category of migrant worker is not the object of this study.

<sup>5</sup> International Covenant on Civil and Political Rights (ICCPR) Articles 2:1 and 26, available at <<http://www.UNTS.org>> visited on 8 August, 2006

<sup>6</sup> *Ibid.*

<sup>7</sup> Commission on Human Rights (CHR), 55<sup>th</sup> Session, Item 14(a), Report of the Special Rapporteur, G. Rodriguez Pizarro, *Human rights of Migrants*, U.N.Doc. E/CN.4/2000/82 para. 45 (2000).

<sup>8</sup> See the definitions of, and reasons for migration offered by P. Stalker: *The Work of Strangers*, (ILO, Geneva, 1994), pp. 3–115.

between citizens and aliens, and in Roman law, the *jus civile* applied only to citizens. With the expansion of the Roman Empire, aliens were gradually afforded protection under *jus gentium*, a law which applied only to them.<sup>9</sup>

Sixteenth and Seventeenth century architects of modern international law, Grotius and Francisco de Victoria, Vattel, all advocated fair treatment for aliens on an equal footing with nationals. Vattel was especially important in the development of international customary law of state responsibility for aliens, a doctrine which remains close to that used today.<sup>10</sup> Today's major issues of state responsibility towards aliens is faced with two conflicting approaches. On the one hand, there is the argument that aliens are to be afforded equal treatment with nationals, a position held by the Argentine jurist Calvo. The Calvo doctrine held that state sovereignty warranted a state to enjoy freedom from interference by other states, and that it should not be bound by international law without consent, even on the question of the treatment of an alien state's citizens within its territory.<sup>11</sup> This line of thought was criticised because it leaves aliens to the mercy of the state of residence, and allows them no protection from an outside source. The opposing theory to the *national treatment* doctrine is that there are fundamental international standards of justice, by which municipal law is to be measured, a position offered by the US Secretary of State Elihu Root. This position was also met with serious challenges, mainly because the rights that emerged from the doctrine accrued to the state and not to the injured individual, who still had no legal status.<sup>12</sup>

By the end of World War II, the need to adopt express international protection for the rights from oppressive State policies was a paramount issue within the international community. The Special Rapporteur to the International Law Commission on State Responsibility at that time, Garcia Amador, asserted that arguments between *the "international standard and the principal of equality of nationals and aliens"* had become obsolete, and that neither would prevail. He then proposed a compromise that aliens should enjoy the same civil rights and individual guarantees as nationals, providing they did not fall behind fundamental human rights standards.<sup>13</sup> Since that time, it is the standards provided for within international human rights instruments that have clearly raised the standards of protection for nationals and aliens. As was pointed out earlier in this study, in spite of improvements, there remains a conundrum within the system: most States are not party to the most recent human right treaty that addresses the rights of foreign migrant workers: the Migrant Worker Convention. Nevertheless, the fact that a handful of "sending countries" provided the necessary ratifications for the MWC to become a binding treaty is an indication that foreign migrant workers, be they documented or undocumented, will be the subject of many debates and discussions in the 21<sup>st</sup> Century. The need for a strong treaty such as the MWC is made more obvious by the calls for "globalisation", which itself will be dependant upon the growing population of foreign migrant workers in all regions, many of whom are increasingly undocumented.

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<sup>9</sup> See the material on Greek theories of natural justice by W. Friedmann, *Legal Theory*, Stevens Publishers, London, 1967, pp. 101–103.

<sup>10</sup> *Ibid.*, See also C. F. Amerasinghe, C.F., *State Responsibility for Injuries to Aliens*. (Oxford, 1967), p. 59; also W. Friedmann, *supra*, note 9, p. 116.

<sup>11</sup> R. Cholewinski, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment*, (Clarendon Press, Oxford, 1997), p. 43.

<sup>12</sup> *Ibid.*, pp. 44–45, where the author provides a brief history of the different doctrines.

<sup>13</sup> Draft. Article 5.1, 'Second Report' in Y.B. Int'l L. Comm'n ILC, Vol. II, U.N. Doc. A/CN.4/106,104 (1957), available at <<http://www.unts.org>>; D. J. Harris, *Cases and Materials on International Law*, 4<sup>th</sup> ed., (Sweet and Maxwell, London, 1991), 498–499.

### 1.6. The Treatment of Migrant Workers in Sub-Saharan Africa

Discussions on the treatment of migrant workers in Sub-Saharan Africa nose-dive into the history of apartheid, slave labour and Arab versus Sub-Saharan African relations, but the reasons for many categories of distinctions and their accompanying human rights violations remains unresearched. Many descriptions of human rights abuses are manifested during the act of expulsion of persons alleged to be undesirable non-nationals for a number of reasons. Many persons in Sub-Saharan countries have been victims of this practice. Reputable organisations such as UNESCO and others have published the most blatant examples of the practice to light with such as the expulsion of 10,000 natives of Dahomey (present-day Benin) 1958 in Côte d'Ivoire; the forced flight of nearly one million people from Ghana in 1969; the 1983 expulsion of 1.5 million citizens from West African countries in 1983 in Nigeria, which was followed by its 1985 expulsion of 700,000 citizens from Ghana, Niger and other countries; the second (1985) mass expulsion by Côte d'Ivoire when it expelled 10,000 Ghanaians; South Africa's 1993 expulsion of 80,000 Mozambicans, and its 1994 expulsion of 90,000 citizens from other African countries; the expulsion of 55,000 "foreigners" by Gabon in 1995 and the expulsion of 50,000 Eritreans from Ethiopia in 1998.<sup>14</sup> This particular act and its ensuring discriminatory treatment (the entire process of mass deportations) serves to highlight a number of violations of universal human rights, *i.e.*, the right to adequate health care during the process, the right to retain one's personal property, the right to legal counsel, etc, during the process continues to take place in spite of the prohibition on the practice within the African Convention on Human and Peoples Rights (1980), the major human rights instrument for the region.<sup>15</sup> There is no Regional case law for Africa because the newly created African Court of Human Rights is not yet a functioning court. Therefore, the reference to case studies on the subject will be limited to a select number of national cases to demonstrate efforts at compliance, and to a select number of recommendations found in the decisions of the African Commission on Human and Peoples Rights, which are quasi-judicial and non-legally binding on the State party in question.<sup>16</sup>

#### 1.6.1. The Relevance of Human Rights Principles

The major postulated focus is the principle of non-discrimination that is provided in nearly all the universal and regional human rights instruments. The Universal Declaration of Human Rights (1948) continues to serve as a main document inspiring policies and texts on human rights for international, regional and national instruments prohibiting discrimination. Its directions on this issue are, however, interchangeable with less defined terminology. the prohibition is referred to at times as "non-discrimination", "equal rights" or the "right to equal access."<sup>17</sup> Article 1 provides that "All human beings are born free and equal in dignity and rights", while Article 2 provides that everyone is entitled to the rights and freedoms set forth in the Declaration, without distinction of any kind...". One of the "distinctions" described is of "national origin", which clearly includes foreign migrant workers.<sup>18</sup> Since then, the major international human rights law instruments now specifically state that the principle of equality and non-discrimination is for "all persons" "everyone", "all human

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<sup>14</sup> Theophile Kouamouo, 'Trouble in the Hospitable Land', *UNESCO Courier*, September, 2000, p. 10.

<sup>15</sup> The African Commission on Human and Peoples' Rights: <[www.achpr.org](http://www.achpr.org)> visited on 4 May, 2006.

<sup>16</sup> *Ibid.* The African Court entered into force in January, 2004.

<sup>17</sup> See the examination of the question by A. Eide and Torkel Opsahl, *Equality and Non-Discrimination*, (Norwegian Institute of Human Rights, Publication No. 1, Oslo, 1990), pp. 4 – 9.

<sup>18</sup> Migrant Worker Convention (MWC from hereon) *supra*, note 2.

beings” “anyone” or “individuals. Yet the very scope of these rights remains unclear and the international community has found it necessary to adopt several subsequent treaties to protect a growing number of categories of individuals. Hence, throughout the years following the adoption of the UDHR, a number of special conventions have been adopted by the UN General Assembly explicitly prohibiting the discrimination of individuals in employment, education, race, and gender in legal terms that have been adopted in regional instruments for Europe, the Americas and Africa.

However, in spite of efforts by the United Nations (with the 1990 adoption of the Migrant Worker Convention, which is specifically designed to protect the rights of “foreign migrant workers”), and regional human rights bodies, the protection of foreign migrant workers in Sub-Saharan Africa from discrimination and unequal treatment remains largely incomplete, and they remain the one category of individuals that has received the least attention with regards the protection of those rights.<sup>19</sup> One of the major issues left unresolved in the search for equality and non-discrimination of foreign migrant workers in Africa is the link between their civil and political rights and any economic, social and cultural rights they may be entitled to. For example, Article 25 of the UDHR states that “*everyone has the right to a standard of living adequate for the health and well-being of himself and his family*”, while Article 26 includes the right to free education at least at fundamental levels. These rights are developed in more detail in Articles 11, 12 and 13 of the Covenant on Economic, Social and Cultural Rights, and in several articles in the Migrant Worker Convention.<sup>20</sup> They are all related to -- but do not directly ask -- two questions: i) how much equality and non-discrimination is necessary to ensure an acceptable standard for foreign migrant workers? ii) By what proportion is the State obligated to ensure the non-discrimination of foreign migrant workers to fulfil the “*all human being are free and equal in dignity and rights*” passage of the UDHR? The need for an analysis of current State legal practices of the dilemma as posed by that question provides the main thrust for the focus of this dissertation.

### 1.6.2. Some Main Issues in Human Rights Laws Protecting Migrant Workers

It is necessary to outline some of the major issues that are central to the protection of migrant workers in a number of Sub-Saharan African States. These will highlight the difficulty that many States operating under plural legal systems have in complying with international human rights standards. Throughout Africa and Asia, the colonists introduced their own systems of courts with formerly trained magistrates while maintaining native legal systems that were presided over by village elders or chiefs. Jurisdiction of the former concerned disputes of political and commercial nature, while the latter were largely concerned with simple criminal cases and customary law disputes.<sup>21</sup> Hence, many former colonial States have only recently been engaged in implementing human rights principles into national laws that transgress the boundaries of their plural legal systems. This is due mainly to the influence of the ILO, universal treaties, and international and national NGOs.

All former post-colonial-era States now embrace modern positivist law systems that are based on written constitutions. In many cases the new systems co-exist with indigenous customary legal practices, many of which remain relevant in each country even though they have not developed into any brand of legal scholarship.<sup>22</sup> The entire continent of Africa now consists of States embracing two, and in some cases, three, judicial systems: a constitutional

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<sup>19</sup> The region will be described as Sub-Saharan Africa from here on. M. Diakité

<sup>20</sup> See the Covenant and the Convention at <<http://www.unts.org>> visited on 7 August, 2006, *supra*, note 3.

<sup>21</sup> ‘Policies on Customary Law and Legal Pluralism’, *Human Development Report* (2004), UNDP, New York.

<sup>22</sup> J. B. Ojwang, ‘The Meaning, Content and Significance of Tribal Law in an Emergent Nation: The Kenya Case,’ in G. Woodman and A. O. Obilade, (eds), *African Law and Legal Theory*, (Dartmouth, 1995), p. 368.

system, a religious system which in most cases is an Islamic law system, and a customary (i.e., traditional, or indigenous) system. Each of these systems in turn have their own courts, officials and principles of justice and domains of jurisdiction. Furthermore, many new democracies in Sub-Saharan Africa consists of multiple cultural groups many with completely separate ethnicities, languages, indigenous cultural traditions, religions and oral laws governing various aspects of their societies.<sup>23</sup> These groups, some as large as 40 million persons, are united largely by common features such as language, religion, similar kinds of social activity and their own oral laws to regulate their behaviour. Any question of the “rights” of the individual leaves little option other than to address the question of their position in African customary laws which are designed to ensure the unity and harmony of the group under the social control of the local Chief, or by the rules of Islamic law in countries where Islamic principles rule on certain cases.<sup>24</sup> In either case, the rights of the individual in African society are not the primary focus of pre-constitutional legal systems, and any “rights” that migrant workers would like to claim are often subject to such customary legal regimes.

In Customary legal systems there is often no distinction between civil and criminal law as there is within positive law systems, and many crimes, especially those against the individual, are considered as crimes against the local Chief himself.<sup>25</sup> For instance, family law is concerned with such issues as personal capacity, the consent to marry, matrimonial rights, duties and offences; divorce procedures, custody of children, rights of inheritance and land ownership; within property law, the main concern is the right of access to and the use of valuable farm and grazing land. Within the law of “wrongs” (i.e., Torts) the main concern is compensation for wrongful injury.<sup>26</sup> In many such cases, legal claims are dealt with informally by panels of elders, who are often closely related to the local Chief, functioning as “judges”. Their main concern is to bring good sense and social accommodation to the community at large rather than to attain abstract justice founded on principles of non-discrimination for an individual in the community.<sup>27</sup>

Islamic legal systems presents a different set of principles, and there is a small number of human rights documents specifically adopted to affirm an Islamic concept of human rights that is distinct from the non-Islamic. Their single most effect has been to redefine and reformulate the human rights standards that are guaranteed in the international human rights treaties, a feat which a number of scholars feel have fallen below those standards<sup>28</sup>. There is also the Islamic Declaration of Human Rights of 1981<sup>29</sup>; the Cairo Declaration on Human Rights in Islam of 1990<sup>30</sup>, and the Arab Charter on Human Rights, that was adopted by the

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<sup>23</sup> M. Crowder, *The Story of Nigeria* (Faber and Faber, London, 1980), pp. 23.

<sup>24</sup> This is a simplification of such structures and their functions, as the systems are not uniform throughout the continent. But there are general tendencies that are common through many Sub-Saharan indigenous communities, the exceptions being where Sharia law prevails. See the structure and function of “native courts” in the following works: H. Randa, *Problems of Interaction between English Imposed System of Law and Luo Customary Law in Kenya*, (Faculty of Law, Lund University, 1987) pp. 94–98; See also A. Lema, Antoine, *Africa Divided: the Creation of Ethnic Groups*, (Lund University Press, 1993), pp. 130–1133.

<sup>25</sup> Randa, *Ibid.*, p. 54.

<sup>26</sup> Woodman and Obilade (Eds), *supra*, note 22.

<sup>27</sup> H. Randa, *supra*, note 24, p. 101.

<sup>28</sup> M. Eltayeb, *A Human Rights Approach to Committing Religious Persecution, Cases from Pakistan, Saudi Arabia and Sudan*, (Intersentia – Hart, Antwerp, 2001), p. 21.

<sup>29</sup> The Universal Islamic Declaration of Human Rights Article III, (1981).  
<[www.alhewar.com/ISLAMDECL.html](http://www.alhewar.com/ISLAMDECL.html)> visited on 4 May, 2006.

<sup>30</sup> Cairo Declaration on Human Rights in Islam, Aug.5, 1990, U.N.GAOR, World Conf. on Hum.Rts, 4<sup>th</sup> Sess, Agenda Item 5, U.N. Doc. A/Conf.157/PC/62/Add.18 (1993), available at <<http://www.unts.org>> visited on 1 July, 2006

Council of the Arab League in 1994<sup>31</sup>. Although each of these instruments addresses and uphold the moral weight of the idea of human rights that are so definitely defined in universal (and some regional) instruments, they are collective efforts to avoid the substance of the rights they claim to uphold.<sup>32</sup> The Islamic Declaration on Human Rights stands alone in its right to non-discrimination that parallels those of the UDHR and all the universal conventions.

The introduction of constitutional “rights of the individual” in many developing democracies is currently dependent upon an elitist judicial process that has leanings towards a more unsophisticated developments of positivism, where questions around “rights” and any ensuing “justice” are subordinated to the maintenance of the status quo, which in many cases is abusive.<sup>33</sup> Under such circumstances, customary social structures and ethnocentric rivalries often rule out easy access to the judicial process for considerable members of the population, and many remain strongly dependant upon customary and religious procedures as the first recourse to situations of conflict.<sup>34</sup> For that majority, the entire system of rights for the individual under the Constitutional system is a “failed system”, for many reasons. In disputes between the Constitutional and customary systems, many seek “justice” within the latter system; but unfortunately, millions of foreign migrant workers are victims of those very systems that offer others, such as women or ethnic minorities, a recourse.<sup>35</sup>

### 1.7. A Briefing on the Conflicts between the Established Postulations

Postulations on human rights law are steeped in theories of their origins in natural law, dualism and monism and a number of conflicting postulations on the merits of legal positivism over those of utilitarianism.<sup>36</sup> Each professes a superior theory (a “system”) for the implementation of human rights.<sup>37</sup> Positivists urge that law, separate from morality, is prescriptive and that citizens are obliged to obey; the utilitarianists urge that the command to obey should be written in order to produce the “*Greatest good for the Greatest number*”, and that they should be rejected if immoral or beyond the scope of habit of obedience.<sup>38</sup> Hence there is a gridlock over the merits of law as it is, law as it ought to be, judicial systems and norms and how rights under the systems can be distributed “proportionally”. Such arguments have long been the privilege of legal scholars in States with long histories of constitutional legal systems and democracies (i.e., Western sovereignties), but that scholarship in younger democracies is largely undeveloped, even though those theories have a lasting impact on the application of law in such sovereignties.

#### 1.7.1. The Central Postulation in This Study

The central postulation here is that universal principles of non-discrimination are best realised by developing democracies that adjust their constitutions to include protections already

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<sup>31</sup> Arab Charter on Human Rights, adopted by the League of Arab States, reprinted in 18 Hum.Rts., L.J. 151 (1957). <[www1.umn.edu/humanrts/instree/arabhrcharter.html](http://www1.umn.edu/humanrts/instree/arabhrcharter.html) > visited on 10 December, 2005.

<sup>32</sup> Eltayeb, *supra*, note 28, p. 24.

<sup>33</sup> J. Dugard, ‘Some Realism About the Judicial Process and Positivism – A Reply’, Vol., 98, *The South African Law Journal*, (1984) pp. 372-387.

<sup>34</sup> *Ibid.*, See also Woodman and Obilade, *supra*, note 22, pp. 114 – 125.

<sup>35</sup> UNDP, ‘Customary Law Can Promote Access to Justice Systems’, *Human Development Report*, (N.Y. 2004) p. 58.

<sup>36</sup> H. L. A. Hart, ‘Legal Positivism,’ 71 *Harvard Law Review*, (1958), pp. 593 –606).

<sup>37</sup> Woodman and Obilade, *supra*, note 22.

<sup>38</sup> See arguments by the major legal theorists (Bentham, Austin, Hart, Dworkin, Kelsen) offered by W. Friedmann, *supra*, note 9, Section Four, Five and Six.

featured in their customary (*i.e.*, local indigenous) law. In doing so, it may be necessary to adopt even more expanded utilitarian arguments to counter current failures. This could be especially necessary in the protection of foreign migrant workers in Africa due to their overall vulnerability and the diversity of the societies, traditions and legal systems they migrate to. Why this postulation should be considered seriously will be made clear at the end of the study.

### 1.8. *The Focus on Two Specific Human Rights*

The major problem with exploring human rights laws that are applicable to the protection and eventual integration of foreign migrant workers is the careful selection of a law or principle to be examined. For this purpose, I have chosen two rights that are at the core of the list of rights considered important to the integration of individuals within a States social structures. These are the *right of association* and the right to *recognition as a person*. The reason for selecting these two rights is that, even though they are cornerstones to the integration and eventual assimilation of non-citizens into the social and cultural structures of a host society, neither has had much attention regarding how important they are to facilitating the integration of migrants into Sub-Saharan host States.

Both rights are clearly provided for in Articles 6 and 20 of the Universal Declaration of Human Rights; in the ICCPR (22 and 16, respectively); the MWC (articles 24 and 26 and 40 respectively), and the African Charter on Human and Peoples Rights (articles 5 and 10 respectively). The right to form trade unions and other associations is also provided for in the ICESCR (article 8), ICERD (article 5d and 5e). However, none of these instruments contain any suggestion regarding “how” States should implement these two rights.<sup>39</sup> The right of recognition as a person is absolute and immediate under the ICCPR and the AFR. Under the former it is non-derogable in any circumstance and is subject to supervision by the Human Rights Committee; under the latter by the African Commission on Human and Peoples Rights.<sup>40</sup> In spite of this, all human rights instruments are silent on standards or routines for implementing this right, such as the need to implement a system of identity cards to facilitate the right. This is therefore one of the two practical human rights problems of foreign migrant workers in Africa that are analysed in this dissertation.<sup>41</sup>

### 1.9. *The Analytical Method and the Objects of this Study*

The general methodology of study in this work is to describe and then analyse existing universal standards for protecting the human rights of foreign migrant workers and comparing them with State practices. The routines for this will be as follows: a) a description of standards aimed at protecting foreign migrant workers that are available under universal (which include the ILO), regional, customary and State systems; b) comparing and contrasting these standards with one another; and then, c) analysing and commenting on the findings derived from the above methods. The analyses, comments and criticisms will be in the conclusions of each chapter.

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<sup>39</sup> UDHR Article 6, MWC Article 24, AMR Article 3 and ICCPR Article 16 are identical on the right to recognition as a person before the law; that of the AFR states that “Every individual shall have the right to the recognition of his legal status.” See the texts of these instruments at <<http://www.unts.org>> visited on 7 August, 2006

<sup>40</sup> *Ibid.*, ICCPR 2 on obligation and ICCPR 40 on supervision; AFR supervision by the Commission, *supra* note 15.

<sup>41</sup> See the arguments on the importance of this issue in M. Bogdan and B. Olsen, ‘Article 6 of the UDHR,’ in G. Alfredsson and A. Eide, (eds), *The Universal Declaration of Human Rights: A Commentary*, (Scandinavian University Press, Oslo, 1993), pp. 147 – 151.



In the concluding chapter I provide some critical analyses of a select number of standards on protection provided in the Migrant Worker Convention. This chapter also contains some proposed comments and recommendations on the future protection and management of migrant workers within the Sub-Saharan African context. One ambition of this method is that it can have wider applications in studying the standards of protection for foreign migrant workers in other regional contexts.

The objective of this method is to focus on the domestic legislation of two African States, Nigeria and South Africa. The focus with those States is the extent to which their domestic legislation complies with international human rights standards for non-distinction and non-discrimination of foreign migrant workers. The selection of these two Sub-Saharan countries is due to the following: both States are emerging democracies; both are parties to regional and international human rights treaties and conventions prohibiting all sorts of discrimination; and both have large populations of foreign migrant workers, both documented and undocumented within their borders.

### *1.10. Examining the Obstacles, Definitions, Principles and Method of the Study*

#### 1.10.1. Structural Obstacles Faced by the Foreign Migrant Worker

Far from being a phenomenon exclusively affecting developed countries, the situation for foreign migrant workers (a term used here to differentiate non-citizen migrant workers from national migrant workers who migrate within their state of citizenship) is more acute in developing democracies in Asia, South America and Africa. They face uncountable obstacles to their integration into host States social, economic and cultural structures: racial, ethnic, religious, cultural and political discrimination by both host-country individuals and national institutions. Most migrant workers, especially the undocumented who are engaged in farm and industrial labour, are concentrated at the bottom of the occupational ladder where their average salary is substantially less than that of nationals even when performing similar tasks. Even those at the high-end of "migrant worker" definitions – academics, researchers and so-called white-collar workers – find that their chances of advancement and promotion are impaired by the fact that they are subject to all forms of discrimination and are less likely than nationals to be advanced at their workplace. Not only do foreign migrant workers find it difficult to obtain gainful employment, they also have trouble keeping employment once found, and influencing decisions about their lives at any strategic legal, political or economic level. Foreign migrant workers are often the first to be used as a buffer stock for reserve labour when the need for labour increases and the first to be dismissed when the employment situation deteriorates.<sup>42</sup>

To restate that regimes implementing provisions for the non-discrimination of foreign migrant workers have largely failed within the framework of current international law and human rights would be redundant. There are scores of reports by numerous United Nations Special Rapporteurs, the High Commissioner for Human Rights and the ILO Committee of Experts describing the unequal and discriminatory treatment of foreign migrant workers World-Wide. Those reports are the substantial reason why this dissertation aims to examine and analyse current international law and recommend improvements for State compliance with human rights principles of discrimination with regards foreign migrant workers.<sup>43</sup>

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<sup>42</sup> See Stalker, *Supra*, note 8, p. 231. See also: M. Miroslav & D. Coleman (Eds): *International Migration: Regional Process and Responses*, (ECE Economic Studies No. 7, United Nations, Geneva, 1994), pp.1–3.

<sup>43</sup> See U.N. Charter Arts. 55 and 56; UDHR Article 2, and MWC Article 1, available at <<http://www.unts.org>> visited on 4 August, 2006.

### 1.11. Selecting a Definition of “Migrant Worker” to use in this Study

A most sensitive problem is to find suitable and acceptable definition to whom the term applies. Under international law, individuals who are not nationals of the country in which they live can be divided into several categories. They can be either foreign migrant workers, refugees, documented and undocumented aliens, asylum seekers or, individuals who have lost their nationality for one reason or another. Many who start their journeys as “foreign migrant workers” find it convenient to hide under the banner of “refugee” or “asylum seeker” due to the protection from deportation procedures those categories offer them.

In general, however, in spite of the fact that there are international human rights treaties prohibiting the discrimination of non-nationals a large number of States refuse to apply the commonly accepted generic term *migrant worker* in their legal vocabularies describing their non-citizen workers.<sup>44</sup> In order to be clear on who is a “migrant worker” in this work, the next three sections will provide a brief review of the two definitions of the term “migrant worker” that are widely used in the ILO and two universal instruments. There will also be a briefing on the definition that is used in the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, a declaration that was adopted in 1985 but does not have the force of law as the ILO and MWC instruments.<sup>45</sup>

### 1.12. The Migrant Worker Convention Definition

The International Convention for the Protection of All Foreign migrant workers and the Members of Their Families, adopted by the UN General Assembly on December 18<sup>th</sup>, 1990, came into force on December 18<sup>th</sup>, 2002.<sup>46</sup> The term “migrant worker” as defined in Article 2 refers to: ... *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.*<sup>47</sup>

The definition does not mention the reasons why anyone is a migrant worker (i.e., due to the fact that they may be displaced persons or demobilised soldiers who had been resettled, reintegrated and reclassified as migrants in a neighbouring country); yet, it is clear that by the use of the words “...a person...” that persons who may have migrated and found employment through displacement might also seek protection under this convention – providing they are “working” in order to maintain themselves.<sup>48</sup> This definition applies to the frontier worker, seasonal worker, seafarer, offshore worker, itinerant worker, project-tied worker, specified employment workers, and the self-employed which is an important category in Africa considering the large numbers of travelling “traders” and tradesmen who travel virtually throughout the continent.<sup>49</sup>

In Article 3, the convention states that its definition does not apply to ...”persons employed by a State on its behalf outside their country of origin, to those employed by an international organisation, foreign investors, refugees and stateless persons, students and trainees or seafarers who have not been admitted to take up residence in the State of

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<sup>44</sup> D. Weissbrodt, ‘Prevention of Discrimination and Protection of Indigenous Peoples and Minorities’, Commission on Human Rights, Sub-Commission on The Protection of Human Rights, 53<sup>rd</sup> Session, Item 5 of the provisional agenda, U.N.Doc. E/CN.4/Sub.2/2001/20, pp. 7–23 (2001).

<sup>45</sup> U.N. GAOR 40<sup>th</sup> Session, G.A. Res. 40/144 (1985), ‘The Declaration on The Human Rights of Individuals Who Are Not Nationals of The Country in Which they Live’.

<sup>46</sup> *Supra*, note 2. The treaty entered into force when East Timor acceded in 2001.

<sup>47</sup> *Ibid.*, Article 1.

<sup>48</sup> ‘Foreign migrant workers’, *Report III (Part 1B)*, 87<sup>th</sup> session of the ILO Conference, (Geneva, 1999), p. 41, available at <www.ilo.org/ilolex> visited on 10 July, 2006.

<sup>49</sup> *Supra*, note 2, the Preamble, Article 1 and Article 2 a – h.

employment”.<sup>50</sup> In Article 4 the term “members of the family” is defined as relationships through marriage, dependent children and others recognised as family members by applicable legislation, bilateral or multilateral agreement between States concerned. And, in Article 5, the Convention explains that it considers to include persons who are either documented or undocumented as falling under its definition of members of a migrant’s family.<sup>51</sup>

Those broad definitions of persons to whom the Convention applies are not popular with developed or “receiving” countries which are generally the intended destination for foreign migrant workers. This is best evidenced by the fact that not a single migrant worker receiving country, i.e., countries that receive foreign migrant workers, participated in the ratification procedures that led to this Convention entering into force. All of the signatures, accedings and ratifications were from sending countries.<sup>52</sup> The absence of signatures or ratifications by a considerable number of receiving countries has been duly noticed by the Commission on Human Rights’ working group of experts on the human rights of migrant workers and States that did ratify this international Convention.<sup>53</sup>

In non-asylum-seeking situations, however, protection depends upon a host of other issues that are greatly influenced by how they arrive, who they are, their identity papers and statements they make at entry borders. The ill treatment of the citizens of sending States was clearly one of the motivations for adopting the broad definition of the term “migrant worker” that is found in the MWC.<sup>54</sup> However, there are other definitions worth mention.

#### 1.12.1. The ILO Definition

The second most widely applied definitions are those offered in the International Labour Organisation’s standards, several of which are special relevance to migrant workers. Two binding ILO instruments are central to this issue. They are the revised ILO Migration for Employment Convention of 1949 (also known as Convention No. 97) and the Migrant Workers Convention of 1975 (described by the ILO as Convention No. 143).<sup>55</sup>

In Article 11:1, the ILO Convention No. 97 defines a migrant worker as “...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.” The use of the phrases “with a view to being employed” and “regularly admitted” provides a conflicting definition of who a migrant worker could be, as the former phrase could be interpreted to mean that migrant aims to find employment, while the latter seems to apply only to those admitted on a regular, i.e., documented, basis. Article 11:2 of the same Convention excludes frontier workers, short term members of the liberal professions and artists, and seamen.<sup>56</sup> Accompanying family members of foreign migrant workers are entitled to social security benefits subject to limitations.<sup>57</sup> Nor should they be returned to their country of origin or from which they emigrated due to the inability of the employed migrant to work through injury, or in case the State party renounces the Convention.<sup>58</sup> However, Convention C97 offers no clear definition of who the family members are to limited to.

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<sup>50</sup> *Ibid.*, Article 3.

<sup>51</sup> *Ibid.*, in the respective articles mentioned in the text.

<sup>52</sup> Press Release: UN High Commissioner on Human Rights (11 December, 2001), Geneva.

<sup>53</sup> U.N. ESCOR, HCHR 4<sup>th</sup> Session, E/CN.4/1999/80, para. 81 (1999).

<sup>54</sup> L. Bosniak, *et.al.*, ‘Interpreting the Convention’ *International Migration Review*, Vol.25, No. 4, (Center for Migration Studies, New York, 1991), pp. 737–741.

<sup>55</sup> See these ILO instruments and others at <[www.ilo.org/ilolex/english](http://www.ilo.org/ilolex/english)>, visited on 10 May, 2005.

<sup>56</sup> *Ibid.*, Part 2.

<sup>57</sup> *Ibid.*, Article 6, para. 1(b).

<sup>58</sup> *Ibid.*, Article 8(1). See also Article 17(4).

The second ILO convention on migrant workers, the Migrant Workers (Supplementary Provisions) Convention, 1975 (C143) has the exact same definition of who a migrant worker is as found in C97 above. However, in Article 11:2 of this Convention, however, provides that it does not apply to persons who migrated for purposes of training or education or employees admitted temporarily for a limited and defined period of time, or who are required to leave on the completion of their duties or assignments.<sup>59</sup> But in Article 12 it provides for State parties to "take steps to assist and encourage the efforts of migrant workers and their families to preserve their national and ethnic identity and cultural ties with their country of origin, including the possibility for children to be given some knowledge of their mother tongue,"<sup>60</sup> and in Article 13 it calls for State parties to take necessary measures to facilitate the reunification of families of migrant workers legally in its territory, and provides a clear definition of who is meant by the phrase "members of the family" of a migrant worker. These include the spouse, dependent children, the father and mother of the migrant worker.<sup>61</sup> This definition is the most clearly defined of the ILO standard treaties on migrant workers.

#### 1.12.2. The Definition Offered in the "Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live" (1985)

The third example of a definition of the term 'migrant worker' is the much broader but still relevant one provided in the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live that was adopted by consensus on the 13<sup>th</sup> of December 1985 by the General Assembly.<sup>62</sup> In its Preamble, the Declaration considers the respect for human rights and fundamental freedoms of all human beings without distinction as to race, sex, language or religion as mentioned in the Charter of the United Nations, the Universal Declaration of Human Rights, and the International Covenants on Human Rights. It specifically refers to the fact that the rights and freedoms in those documents calls for them to be respected, observed and exercised "without distinction" or "discrimination" of any kind.<sup>63</sup> Article 1 defines the term "alien" as "*any* individual who is not a national of the State in which he or she is present" (emphasis added). In its articles, the Declaration provides for the respect of fundamental human rights of aliens, including the right to life, the right to privacy, equality before the courts and tribunals, freedom of opinion and religion, and retention of language, culture and tradition. In addition, it prohibits individual or collective expulsion on discriminatory grounds in Article 7, and provides for trade union rights, the right to safe and healthy working conditions and the right to medical care, social security, and education.<sup>64</sup>

But, in contrast to the rights provided for in the UN Migrant Worker (1990) and ILO conventions, the Declaration is not a legally binding instrument and has no binding force in international law. At the time of its adaptation it did contain a number of novel rights that are now incorporated into the Migrant Worker Convention, but lacking the binding force of law deprives it of any obligating influence in international law.

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<sup>59</sup> See ILO C 143, paras. 11(d) and (e). <[www.ilo.org/ilolex](http://www.ilo.org/ilolex)> visited on 10 July, 2006

<sup>60</sup> *Ibid.*, Article 12(f).

<sup>61</sup> *Ibid.*, Articles 13:1 and 2.

<sup>62</sup> The Declaration was the result of the Sub-Commission on Human Rights study on the rights of non-citizens and covers all individuals who are not nationals of the State in which they are present. *Supra*, note 46.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

### 1.12.3. The Preferred Definition that is used in this Dissertation

The definition of a migrant worker provided in Article 2 of the Migrant Worker Convention is the one I prefer when referring to “migrant worker” in this work. It reads: “The term migrant worker refers to 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.” There are several reasons for this preference: the first is that it applies to persons who only expect to be engaged in a remunerated activity, which could be any type of activity, in contrast to the ILO definition which is restrictive to persons “*with a view to being employed*”.<sup>65</sup> The MWC definition provides no time-line for when protection for those it defines it will protect begins or ends. The second reason for this preference is that while Article 13:2 of ILO C143 restricts the definition of family members to “the spouse and dependent children, father and mother”, the MWC makes no such judgements. Instead, the MWC includes persons married to or having a with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by legislation or bilateral or multilateral agreements between the States concerned.”<sup>66</sup> A third reason is that the MWC convention offers protection to a wide variety of persons who, due to the nature of their stages or strategy of a remunerated activity, clearly could be in need of the protections they would be entitled to if they are considered migrant workers.

Although the MWC definition provides a more precise definition of who is a migrant worker than the ILO’s, it fails to cover migrants who may be considered objects of “brain drain” migrations. This largely undescribed category of migrants often migrate in the interest of studies or research and had neither the intention nor the desire to “settle” in their host country. But due to overwhelming economic advantages or political circumstances they found employment.<sup>67</sup> In Article 3:e the Convention states that it does not cover “students and trainees”, and it makes no provisions for persons who are “converted” from one of its own unprotected categories to one that it does protect. I find this to be a minor flaw in the range of protections the MWC offers by way of its own definitions.

The Convention also protects “*self-employed*” workers, a category which definitely applies to many types of African workers who work for themselves during all phases of their labour migration. The language used to describe that category of migrant is also in tune with my definition of the term migrant worker, hence when applied, I am referring to the entire range of migrant workers that is referred to in Article 2:2 of the Convention.<sup>68</sup>

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<sup>65</sup> Protections for foreign students and tourists who work in their host seasons come to mind. See Article 11 in ILO Convention No. 97 and Convention No. 143, available at <[www.ilo.org/ilolex](http://www.ilo.org/ilolex)> visited on 10 July, 2006.

<sup>66</sup> MWC, *supra*, note 2, Article 4.

<sup>67</sup> Although there are an abundance of terms for non citizens that are related to how and why they left their countries of origin, the definitions used often fail to clearly distinguish the categories of foreign migrant workers adequately when they are applied to specific case studies. Those terms used include *economic migrants, guest workers, regular or irregular, illegal, clandestine, organised, documented, undocumented, professional or contract*. Due to conditions attached to arrival status in host countries, many individuals find it convenient to enter the country of choice as an asylum seeker, a category that offers protection from harsh State deportation procedures. Based on discussions with Prof. Göran Melander and Gudmunder Alfredsson during a seminar, Lund, 2004.

<sup>68</sup> Other definitions are available, such as the one offered in the commission on Human Rights Fifty-sixth session on Specific Groups and Individuals, but these are of no importance here, since I have elected to use the Migrant Worker Convention definition. M. Diakité.

1.13. *The Framework for Studies on the Laws of Migration in Africa*

The above mentioned directions the study will take are based on previous studies and comments on the protection of non-citizens and state obligations under human rights law. A detailed explanation of all the issues is not necessary here, but the following brief references are imperative to a more thorough understanding of the most important issues involved in state obligations to their human rights treaties.

Studies of migration and migrants in Sub-Saharan Africa are continually structured within four frameworks. Firstly, they are regularly structured along the lines of geographical factors. The focus here is the connection of migration with geographical factors that are related to environmental reasons as the major “pull” factor for migration. Land erosion, flooding, fires, and the desire to move on to an environment more favourable to agricultural production at the subsistence level have all been featured in this approach to studies of migration in Africa. But even though these may have been significant reasons for mass group migrations of peoples that occurred prior to colonialism, they can no longer be the exclusive reason for future migration in Africa.<sup>69</sup>

Sociological structures and approaches have always closely followed the geographical format. The focus in these approaches is often on the attractive social circumstances – religion, culture, ethnic group, etc, -- under which people could live in the destination countries as being the major pull for the movers. Higher salaries, better living standards, religious reasons and other social factors feature highly in this approach. Overlooked in this approach is the fact that while many social considerations might induce migration, they are not capable of accounting for the many varied types and trends of migration in Africa. Hence the focus on this approach has largely been stifled by its own specialised focus.<sup>70</sup>

The third approach is described as being dominated by political and economic factors, which focus on a combination of economic *and* political factors as constituting the motivating consideration of the migrants.<sup>71</sup> This approach deals with political and economic policies, processes, their interrelations, and their influence on social institutions such as “development authorities”. But this focus has little room for any expansion, and is therefore incapable of expanding itself beyond the studies of development theories for which it is so well known.

The fourth and perhaps largest and most favoured approach is the purely economic approach, with its focus on economic factors as the stimuli to which individuals react in their mobility behaviour.<sup>72</sup> This has become the favourite approach for migration studies in Africa since the end of the cold war, and it is strongly dependent on the idea that people respond rationally to the forces of supply and demand based on perfect information and a free market environment. But as all-encompassing as this approach is, it leaves enormous issues in the picture of migration in Africa due to the fact that it overlooks the political and legal systems which in actual fact have considerably more influence than the other approaches care to acknowledge.

Studies of any number of migration patterns in Africa would reveal that it is perhaps the political and legal systems that offer new sets of important factors, all of which could account for increasing volumes, patterns and trends in regional migration. The refugee and

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<sup>69</sup> R. July, *A History of the African People*, (Waveland Press, Illinois, 1998), pp. 3–15, where he discusses early developments of mankind and the environment in Africa. See also A. A. Afolayan, ‘The Political and Legal Systems of Regulation Hindering or Promoting Emigration in Sub-Saharan Africa’, A. Adepoju and T. Hammar (Eds), *International Migration in and from Africa: Dimensions, Challenges and Prospects* (CEIFO, Stockholm, 1996.) pp. 53-60.

<sup>70</sup> A. A. Afolayan, *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

undocumented migration phenomenon in Africa are but two of such new patterns that could be associated with the political and legal approach to migration in Africa today.

Even though the above described approaches comprehensive coverage of the phenomena of migration in Africa, there is a gap in the overall picture of structures. That gap lies within the domain of legal phenomena as an approach to studying migration in Africa, and this is the approach that will be taken in this study. In adopting the approach for this study, I intend to continue the work done by a number of earlier studies where law and legal issues were clearly the dominant factors involved in the research on migration as it applies to other regions, especially Europe.<sup>73</sup> These will be referred to in the section on the survey of literature on this issue in Chapter 2.

#### *1.14. The Structure of this Dissertation*

The dissertation will consist of eight chapters. Chapter one will contain a general introduction while chapter two will offer some background material on the issues of major concern for migrant workers in Africa. Chapters three, four and five will provide briefings on current standard of human rights protection for migrant workers within universal, African regional, ILO and customary law regimes. Chapters six and seven will examine the practices of the two states that are the objects of the study, while Chapter eight contains a final comparative analyses of protections available to migrant workers in the Migrant Worker Convention. There will also be a section providing final comments and recommendations.

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<sup>73</sup> Cholewinski's work, focusing on Europe, comes to mind, but there are many others examining migration with a legal focus for other regions. *Supra*, note 11.



## 2. Background Literature and Major Concerns of This Study

### 2.1. Background Literature on these Issues

There are a number of earlier publications examining developments of the rights of foreign migrant workers. Each of them is a valuable resource on the history of the development of standards of acceptance for foreign migrant workers in general, but have severe shortcomings as nearly all of them fail to apply any standards of human rights to African foreign migrant workers. Those that do are over engaged in examining the "refugee problem in Africa", a phrase that is ubiquitous to nearly all studies on migration in that continent. It is because of this gap in the study of foreign migrant workers in Africa that I have selected the following studies as the ones that are imperative to review in the context of how they relate to this study.

First of all, there is a small volume of books and articles on international migration that are easily available in libraries or bookstores. Secondly, there are specialised reports and publications that are published by either by the ILO or the various United Nations treaty monitoring bodies or specialised agencies publishing on various issues. Of all the publications and reports available, only a select number will be described here because of the attention they have given to the issues involved in human rights protection for foreign migrant workers. Many others not selected here, however are referred to throughout the text and in the bibliography.

#### 2.1.1. Publications

The first publication examined here is entitled *The Human Rights of Aliens in Contemporary International Law*, by Richard B. Lillich (Manchester University Press, 1984). Lillich's work provides an important but brief summary of pre-twentieth-century and post-twentieth-century developments in the history of protection of non-citizens ("aliens" as he calls them) in international law.

Peter Stalker's *The Work of Strangers: A Survey of International Labour Migration* (ILO, Geneva, 1994) is another publication that is worth mentioning. This book is organised in two parts. Part One provides a categorisation of the different types and motivations for migration.<sup>74</sup> Part Two examines "Country experience" and describes factual details and data about migration in a number of sending and receiving countries. In the section on foreign migrant workers in Sub-Saharan Africa, Stalker correctly identifies the fact that the majority of cross-border flows in Africa is undocumented, and that it is impossible to gather accurate statistics on movements.<sup>75</sup> Though the attention devoted to the substantial material on migration in Sub-Saharan Africa in this section is rather Spartan, it suffices to inspire further research. This study stands alone in its holistic approach to the subject of international labour migration.

*The Migration Experience in Africa* (Jonathan Baker and Tade Akin Aina, editors, *Nordiska Afrikainstitutet*, 1995) is a work which provides conceptions and themes that cover a number of issues concerned with migration in Africa. These include non-metropolitan migration and development, poverty, cultural issues, involuntary migration, the role of apartheid, pastoralist migrations to small towns, and a large section concerned with gender issues. This work, with its strong emphasis on economic, social and cultural issues, clearly belongs to the vast body of studies that are focused on economic and social factors of migration in Africa.

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<sup>74</sup> Stalker is the first of the many writers in migration to include the Trans-Atlantic slave trade as a feature of migration for labour. *Supra*, note 8, pp. 3–5.

<sup>75</sup> *Ibid.*, p. 231.

International Migration In and From Africa: Dimensions, Challenges and Prospects (Edited by Aderanti Adepoju and Tomas Hammar, Dakar, 1996). This is one of the few studies of migration in Africa that provides surveys of the four major dimensions of migration (i.e., the political, the economic, the geographic and the social). This study also introduces the importance of the link between the political (and other factors) and legal issues that concern migration.<sup>76</sup>

Another important study examining the legal issues that can affect migration in Africa is by Sergio Ricca: *International Migration in Africa: Laws and Administrative Aspects* (ILO, 1989). This study contains the most complete review of the importance of African State municipal, international, regional and ILO instruments concerned with migration in Africa. It reviews all the ILO standards and recommendations, treaties with African States, and details of all the sub-regional groupings at the time, though a number of them, including the OAU, have since become obsolete. The study examines the question of clandestine migration and offers suggestions on the problems and the importance of creating conditions conducive to the return of all foreign migrant workers. Ricca's study provides a most in-depth examination of the legal factors involved in migration in Africa, and as such remains unique.

As a contrast to publications described above, there is a more recent work that is worthy of mention since it is a study on human rights law and foreign migrant workers: Ryszard Cholewinski's *Migrant Workers in International Human Rights Law* (Clarendon Press, Oxford, 1997). Cholewinski's analysis of the ILO's work in this field is very thoroughly examined. His analysis of the Migrant Worker Convention is in considerable detail and is clearly one of the most important analyses of the Convention.

#### 2.1.2. The ECOSOC Sub-Commission Report

In resolution 1999/7 of 25 August 1999, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities recommend that the Economic and Social Council authorise the appointment of a Special Rapporteur to focus on the rights of non-citizens. It was also decided that the Special Rapporteur's mandate was to consist primarily of reporting on the status of non-citizens, but also to take into account the different categories of citizens regarding different categories of rights in countries of different levels of development with different rationales to be offered for such distinctions.<sup>77</sup> In its decision number 2000/104 (25<sup>th</sup> April 2000), the Commission on Human Rights, requested the Economic and Social Council to authorise the Sub-Commission to appoint one of its members as Special Rapporteur with the task of preparing a comprehensive study of the rights of non-citizens. The Council approved this request in its decision 2000/283 of 28 July 2000.<sup>78</sup> The result of these decisions is the report known as *Prevention of Discrimination and Protection of Indigenous Peoples and Minorities: The Rights of Non-Citizens* (E/CN.4/Sub.2/2001/20).<sup>79</sup> The report is in six parts and there is an addendum containing brief summaries of the various jurisprudences and concluding observations upon which the main section of the preliminary report is based.

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<sup>76</sup>A. A. Afoloayan, 'Comparison of the Structure and Change of Political and Legal Systems of Regulation Hindering or Promoting Emigration in Sub-Saharan Africa', in A. Adepoju and Tomas Hammar (eds.) *Supra*, note 69.

<sup>77</sup> See Weissbrodt, *supra*, note 44, paras. 4-7.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*, page 10.

### 2.1.3. ILO Reports

The ILO publishes a large number of reports on standards for foreign migrant workers, a number of which are located in footnotes and the bibliography here. The ILO survived the demise of the League of Nations and it has continued to exist as a specialised agency of the UN. Due to its position, the ILO is frequently approached by developing country governments regarding the design and implementation of labour migration policies, and it is in this capacity that the organisation has published a number of manuals for both sending and receiving countries. Two more ILO publications are important references on standards of protection for migrant workers.

The first is W. R. Böhning's *Employing Foreign Workers: A Manual on Policies and Procedures of Special Interest to Middle and Low-Income Countries* (ILO, Geneva, 1996). The manual is important because it clearly outlines some of the considerations and options that policy-makers, planners and academics can draw upon when faced with the question of managing their foreign migrant workers.<sup>80</sup> Böhning's practical manual avoids describing the situation for any specific country or region, nor does it give any reference to specific state need. The combination of theory and practical applications, though at times very general, are virtually too important to ignore and clearly makes this a landmark study. It is worthy of mention because its basic premise provides useful and relevant structural combinations.

The second is a report by the ILO entitled *Towards a Fair Deal for Migrant Workers in the Global Economy*.<sup>81</sup> This report examines labour migration from a perspective and details past and current global practices of the treatment, conditions and regulations of migrant workers. The report contains a history of the ILO's role in protecting migrant workers and a briefing on the treaties and conventions developed by the UN, the ILO, the WTO, Regional and Bilateral agreements. It concludes with comments on the impact of international regulation of migrant workers, and examines the need for a more comprehensive approach to management of irregular migration. An important feature of this report is its briefing on the need for more policies regulating labour migration in countries of origin, a proposal which it describes as difficult due to the restrictions it will impose on overseas employment opportunities.<sup>82</sup> This study is particularly useful to understanding the situation for migrant workers in sub-Saharan Africa.

The literature described above is devoted to finding suitable solutions to the ageless issues concerning the protection of aliens from unfair distinctions and discrimination. Two issues concerning the rights of foreign migrant workers in Africa are the main areas of interest in this dissertation, each of them briefly introduced below.

## 2.2. *The Issues of Major Concern*

### 2.2.1 Introduction

The principle of non-discrimination is fundamental to the concept of equal treatment and is based on the principle that differential treatment due to the special features of a person or the group to which he or she belongs to is not in accordance with human rights principles. These

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<sup>80</sup> W.R. Böhning, 'The protection of migrant workers and international labour standards', ILO Publications, Geneva, 2003. <[www.ilo.org/public/english/bureau/inst/download/bohning.pdf](http://www.ilo.org/public/english/bureau/inst/download/bohning.pdf)>, visited on 3 March, 2005.

<sup>81</sup> Report VI, International Labour Conference, 92<sup>nd</sup> Session, Geneva 2004.

<sup>82</sup> *Ibid.*, para. 409.

principles emerged with those of “natural rights” in the 17<sup>th</sup> century.<sup>83</sup> The principle had unsuccessful attempts during the drafting of the Covenant of the League of Nations, but with the adoption of the Universal Declaration on Human Rights (UDHR), and especially in the Preamble of the UN Charter, non-discrimination clauses applying to every individual became a source of written and recognised international law.<sup>84</sup> The rights protecting foreign migrant workers and the members of their families belong to the category of rights protecting individuals. Regardless of legal status or whether or not they arrive with their documents, they are, in principal, entitled to all of the non-discrimination provisions of the treaties of the International Bill of Rights, the CERD, CEDAW and the regional instruments for Europe, Africa and the Americas.

Foreign migrant workers may seek redress for host State violations of their rights as individuals under treaty provisions within international law. There is a substantive body of binding provisions for the protection of all human rights in treaties, conventions and covenants that apply directly to individuals seeking protection or redress for the violation of their human rights by their State of residence. There are also a number of non-substantive and non-binding provisions in declarations, resolutions and agreements between States that *may* also provide protection and redress for host-state violations.<sup>85</sup> However, the extent of protection in non-binding agreement is strictly a matter of the will of the State in question. Foreign migrant workers in Africa, especially the undocumented, face all of the problems that have been itemised and addressed in the Migrant Worker Convention, but this dissertation will focus on only two of them. These are: a) the right to an identity; and b) the right to freely establish an association.

### 2.2.2. The Right to an Identity

Undocumented foreign migrant workers in Africa, as are those in other parts of the world, are regularly confronted with social, cultural, institutional and economic obstacles that deny them the full protection of the a principle human right called for in the UDHR: the right to non-distinction based on the provisions of Article 2:1 and 2:2.<sup>86</sup> Although they may be assumed to be citizens of a neighbouring State, they often lack documentation or any form of identification such as passports or other documents. As a consequence, millions of migrant workers in Africa are frequently denied being recognised as a person before the law. This facilitates many States failures to apply universal and ILO human rights standards prohibiting many of the categories of distinctions and discrimination that are called for in the human rights treaties they have ratified. Those migrant workers are often subjected to harsh and disempowerment treatment by border guards and others within the boundaries of their host state, and are regularly confronted with xenophobic behaviour from host nationals based on inter-religious, gender and inter-ethnic distinction. Vulnerable family members such as women and children are even more harshly treated and are often exposed to many forms of the slave labour and child abuse including the sex trade. They are often denied equal treatment for health-care in HIV/AIDS related diseases and are, in some cases, deported because they are “suspected” of being HIV carriers. They are furthermore, often denied equal

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<sup>83</sup> See the brief introduction to that history by Sigrun Skogly on ‘Article 2 of the UDHR’, in G. Alfredson and A. Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Kluwer Law International, The Hague, 1999) p. 76.

<sup>84</sup> UDHR’s Article 2, is the basis for the prohibition of discrimination that applies to several other human rights. See the discussion at *Ibid.*, pp. 77–78

<sup>85</sup> Substantial treaties are also known as “hard law”, while non-substantial declarations and resolutions and agreements are also known as “soft law”. Material gained during a seminar with Göran Melander and Gudmunder Alfredsson, Lund, April, 2004.

<sup>86</sup> See UDHR Article 2 at <<http://www.unts.org>> visited on August 7, 2006.

opportunities in education and training for themselves.<sup>87</sup> They suffer losses and seizures of their personal property, often without due process or compensation, and are frequently subjected to unwarranted imprisonment, violence, murder and arson attacks.<sup>88</sup>

Above all, international undocumented foreign migrant workers in Africa are especially vulnerable because in the absence of identity cards, they are often conveniently considered to be “stateless”, a condition that supersedes all other factors – push-pull factors, brain drain, etc., – involved in the migration process. Although the question of statelessness is addressed in human rights law, the alleged condition of many foreign migrant workers facilitates their abusive treatment.<sup>89</sup> Only two human rights conventions address the issue of the right to an identity document, hence millions of migrants in Africa (as well as in other regions) are victims of discrimination and abuse only because they lack adequate identification.<sup>90</sup> The problem in Africa is one which only a few states have bothered to attempt to rectify, and it is one of the two problems that will be addressed in this dissertation.

Throughout continental Africa the general trend is that persons only acquire an identity card when one is needed to facilitate acquiring an education, employment, travel abroad or participation in the democratic process, such as elections. The need to acquire an identity card during cross-border migration in Africa was introduced to the continent during the colonial era, when inter-colony migration of labour was started. In spite of its imposed historic background, the practice (and its problems, one of which was cross-border certification of the colonial concept of “citizenship”), has yet to become widespread on the continent.<sup>91</sup> Within most national jurisdictions, persons who are not equipped with a national identity card, or who are otherwise not registered within the civil system, officially do not exist. On an individual level, this complicates enrolment in school and exposes many under-aged persons to illegal adoption, trafficking, exploitation as cheap labour, or involvement in the sex-trade and criminal activities. Governments that lack accurate registration systems and a census of their citizens are thus hampered in planning the development and implementation of health, education and welfare programmes for their populations. Few African States facilitate universal civil registration of citizens on a scale that is essential for the management of their populations. Accordingly, it can be argued that in many cases, the right to an identity card is violated by the absence to facilitate the civil registration of citizens.

A primary step in any civil registration procedure would be the issuance of a birth certificate with the birth of each child, a procedure that would enable governments to initiate a census of its those born on its territory. Such a registration is the community's first recognition of a person's legal identity and eventual nationality, yet, in many countries, registration

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<sup>87</sup> See the Report of the Secretary-General on Violence Against Women Migrant Workers (UN Doc. ECN4/2000/76); Report of the Working Group of Experts on the Human Rights of Migrants (CHR 4<sup>th</sup> Sess., UN Doc. ECN 4/1999/80); Written statement submitted by Human Rights Advocates (UN Doc. ECN4/1990/NGO/96); Working Paper on the Rights of Non-citizens (UN.Doc. ECN4/Sub.2/1999/7). All available at <<http://www.unts.org>> visited on August 5, 2006.

<sup>88</sup> See for example the statement by Perruchoud, Richard: Migrant's Rights and International Law, IOM Seminar, 23-24 April, 1998, Wash., D.C. at <[www.iom.int](http://www.iom.int)> visited on 4 March, 2004. See also the first report by the Special Rapporteur on Migrants, E/CN.4.2000/82, *supra*, note 7.

<sup>89</sup> Problems of statelessness and nationality are addressed in a number of human rights conventions, a number of which have been ratified by a number of African states. See: The Convention on the Reduction of Statelessness, The Convention Relating to the Status of Stateless Persons, The Convention on the Rights of the Child, (Article 7), The Convention on the Elimination of Discrimination Against Women, The International Covenant on Civil and Political Rights and The Convention on the Rights of All Migrant Workers and the Members of their Families available at <<http://www.unts.org>> visited on August 5, 2006.

<sup>90</sup> These are the Convention Relating to the Status of Stateless Persons (1954), and the 1951 Convention Relating to the Status of Refugees (1951), available at <<http://www.unts.org>> visited on August 5, 2006.

<sup>91</sup> See the overview provided by A. Adepoju, 'Migration in Africa', in J. Baker and T. Akin Aina (Eds): *The Migration Experience in Africa* (Nordiska Africa Institute, 1995), pp. 93–94.

systems are not yet fully implemented, forcing governments to overlook their own rules requiring proof of birth and nationality in order to access services. In Africa this is especially the case in rural areas where rates of registration are considerably lower than those in urban areas. A comprehensive report published by UNICEF shows that countries such as Kenya, and Uganda officially require a birth certificate for school enrolment but do not generally enforce that regulation in rural areas.<sup>92</sup> Even when children do receive services in the absence of a birth certificate, the lack of registration means that their needs were not anticipated, hence they are more likely to miss out on school and health care programmes due to inadequate budgeting. Such persons are simultaneously more vulnerable to exploitation, which is most likely to occur should they become foreign migrant workers in a neighbouring country. In spite of such provisions for civil registration, some forty million births per year remain unregistered in continental Africa.<sup>93</sup>

### 2.2.3. The Right to an Identity Document

In order to bring some clarity to the urgency of the issue, provisions in two universal and one regional instrument concerned with this issue will be briefly discussed. The selected instruments are The Universal Declaration of Human Rights, the Migrant Worker Convention (MWC), the International Covenant on Civil and Political Rights (ICCPR) and the African Charter will be contrasted. The right of every person to be recognised before the law is located in Article 6 of the UDHR as “Everyone has the right to recognition everywhere as a person before the law.” This language is nearly identical in subsequent human rights instruments. For example, Article 16 of the ICCPR reads “Everyone shall have the right to recognition everywhere as a person before the law”, while Article 24 of the MWC reads “Every migrant worker and every member of his or her family shall have the right to recognition everywhere as a person before the law.”<sup>94</sup>

In contrast, Article 5 of the African Charter reads “Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status.”<sup>95</sup> The language in AFR does not offer the individual the recognition under the law offered in the UDHR, the MWC, ICCPR and subsequent instruments. For one, the word “everywhere” is missing throughout the text, even though the rest of the article prohibits several categories of exploitative and degrading treatment (i.e., slavery, torture, cruel, inhuman and degrading treatment.). The argument that Article 5 in the AFR needs to be interpreted in light of Article 29 addressing the duties to one’s State, or to ILO conventions prohibiting forced labour (C 29 and C 105) clearly fails to satisfy the requirements of the standards on recognition everywhere that is provided in the universal instruments.<sup>96</sup> This right, as provided for in the ICCPR and the MWC is particularly relevant for migrant women, as addressed by the General Comment No. 28 of the Human Rights Committee.<sup>97</sup> Above all, the right to recognition as a person everywhere has major consequences for a number of subsequent human rights, hence their being addressed in the Migrant Worker Convention. Although the right to recognition as a person everywhere is clearly proscribed for in the ICCPR and the MWC, neither convention is clear on the method of ensuring the recognition of the person everywhere is implemented.<sup>98</sup> This could best be resolved with a specific call

<sup>92</sup> UNICEF report: The Right to A Birth Certificate. <www.unicef.org> visited on 12 June, 2005.

<sup>93</sup> *Ibid.*

<sup>94</sup> The full text of these instruments is available at <www.unts.org.>.

<sup>95</sup> *Supra*, note 15.

<sup>96</sup> See F. Ouguergouz, *The African Charter on Human and Peoples Rights, A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*. (Martinus Nijhoff, The Hague, 2003), p. 110.

<sup>97</sup> Human Rights Committee, General Comments No. 28, CCPR/C/21/Rev.1/Add.10, 29 March, 2000, para. 19.

<sup>98</sup> See the full text of the Migrant Worker Convention, Article 29 at <www.unts.org> visited on 7 August, 2006.

for the right to an identity card, issued by the migrant worker's state of citizenship. The importance of an implementation procedure becomes acutely clear when one reads MWC Article 29 and contrasts it with ICCPR 24 and Articles 7 and 8 of the International Convention on the Rights of the Child (CRC). The provision in the MWC article reads "Every child of a migrant worker shall have the right to a name, to registration of birth and to a nationality." But this provision is perhaps the weakest of all the MWCs articles on the rights of migrant workers considering that many migrant workers are children, many of them under the age of 18.

In contrast, Article 24 of the ICCPR provides that every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. It also provides that every child shall be registered immediately after birth and shall have a name. Paragraph two states clearly that every child shall be registered after birth and have a name; while paragraph three states that every child has the right to acquire a nationality. The law is quite clear on this point, and it should be available even to the children of foreign migrant workers, be they documented or not. A number of African States have ratified the ICCPR, but only a very few have bothered to implement this provision of this covenant. But neither of the three paragraphs in this article states that a child has a right to an identity document, and there is no requirement for citizenship by parents of unborn children, or that they be related to a citizen or have some other connection to the State of eventual citizenship anywhere in the article.<sup>99</sup>

The right to be registered immediately after one's birth is also provided for in Article 7 of the Convention on the Rights of the Child. This Article also provides that a child shall have the right from birth to a name, to acquire a nationality, and to know and be cared for by his or her parents.<sup>100</sup> In spite of the fact that nearly all of Africa's States have ratified this convention, there is a scarcity of implementations of its provisions even by those who have ratified it. Birth registration continues to lag in countries with large, rapidly growing populations, not least in countries with large migrant worker populations. There are a considerable number of specific reasons for the failure to register births of new-born children, some seemingly irrational. The most common reason is that families in rural areas, especially migrant farm workers, simply are unable to overcome logistical hurdles of getting to the proper office for registration, a situation which governments must take steps to solve.<sup>101</sup> The major problem with this is that children who are not registered may not be able to obtain an identity document or passport as there is no evidence of their citizenship. In conclusion, it is not erroneous to state that all of these articles fail to mention whether or not the right to recognition as a person under the law everywhere should be under the principle of *jus sole* or *jus sanguis*, and there is no mention of how such rights are to be applied to adopted children.

The aforementioned UNICEF report shows that in South Africa, citizens and permanent residents of 16 years and older must possess an identity document. The implementation of such presupposes a proper system of birth registration, but the reality in extreme rural regions may not support the ideals. On the other hand in Nigeria, Africa's most populous country with an estimated 5 million births a year, the percentage of births that are registered is unknown.<sup>102</sup> As

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<sup>99</sup> See ICCPR, Article 24, paras. 1 and 2. Para. 3 calls for a "nationality", which is not the subject of this dissertation.

<sup>100</sup> *Ibid.*

<sup>101</sup> In many African States even though vital statistics systems exist, their reliability and efficiency are hampered problems such as insufficient funding, inadequate technology, poorly trained staff, lack of publicity and a corresponding lack of public awareness of the importance of registration. UNICEF, *supra*, note 92.

<sup>102</sup> *Ibid.* The burden of responsibility for registering children at birth typically falls on mothers, adding another burden to their heavy workload. This is especially true in rural Africa where more than half of the babies are



difficult as it is to be without a birth certificate in a settled community, to be denied proof of identity beyond the borders of one's home country complicates matters in deportation proceedings. The obstacles to birth registration range from being born in a State whose borders are in dispute, to being born to parents in an undocumented situation, to being victims of direct discrimination due to their ethnic heritage or religious beliefs.<sup>103</sup> Civil registration systems lag in sub-Saharan Africa because of underdevelopment, poverty, lack of political will and corruption at the administrative levels of society. In some countries, the leftover structures of colonial migrant labour systems and structures survive to the benefit of State mining, farming and agricultural industries.<sup>104</sup> A number of Sub-Saharan States might consider assessing their political willingness to eliminate this situation by setting specific targets for improvement and follow-up programmes. This could be accomplished with ratifications of existing international instruments and the implementation of their provisions within municipal law in order to avoid the major categories of discrimination of foreign migrant workers. How the elimination of this dilemma for African foreign migrant workers could be beneficial to both State parties and foreign migrant workers will be examined further on.

### 2.3. *The Right to the Freedom of Association*

Although the freedom of association is provided for in international law in a number of human rights instruments, there is an absence of any single, generally accepted definition of what associations are, how they should be structured, or what their purposes or functions should be. The term "association" is often interchanged with either "civil society" or "non-government organisation" and both terms are used to define associations ranging from well managed and structured labour unions to loosely structured and managed social groups, churches, sports clubs, economic development associations and other informal associations. Acronyms for these organisations abound, but the international community is most familiar with the terms NGO (non-government organisation) the term that will be used from hereon.<sup>105</sup> One of the problems with defining or classifying associations in many African States is the fact that most of them pursue multiple objectives which in itself renders them difficult to classify. One useful set of definitions is by Arne Torstensen, *et. al.*, who structures a number of definitions along functional lines, one of which is a "legal" structure. He proposes that the primary benefactor of this procedure may be the State itself in its attempts to institute some form of institutional control.<sup>106</sup> Most States, however, in their adherence to a "legal"

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not born in hospitals. But in a number of countries local health or missionary staff officials are beginning the process of providing a nationality and an identity card at the site of birth, usually the local hospital. To reach children not born in hospitals traditional "birthing attendants" are being trained in Ghana to register babies immediately after they are delivered. But the number of countries that have taken such initiatives to bring about changes on the continent remains too few, and too few countries have taken birth registration seriously.

<sup>103</sup> *Ibid.*

<sup>104</sup> A. Adepoju, *supra*, note 91, pp.94–95.

<sup>105</sup> The acronyms for many associations often provoke questions, and include: NGO (non-governmental organisation); PVO (private voluntary organisation); PVDO (private voluntary development organisation); CBO (community based organisation); CSO (civil society organisation); QUANGO (quasi non-governmental organisation); GONGO (government non-governmental organisation); GANGO (gap-filling non-government organisation); CO (charitable organisation); PO (people's organisation); GO (grassroots organisation); IO (independent organisation); PO (private organisation); VO (voluntary organisation); AGO (anti-government organisation); NGI (non-governmental individual); MONGO (my own non-governmental organisation), and many more. See Chadwick F. Alger: NGOs and the UN System: ACUNS discussion paper, New York, June 19-21, 1995.

<sup>106</sup> Their other definitions, which this study is not concerned with, are: the *economic/financial* definition, which take their cues from the revenue base of civil society organisations; the *functional definition*, which focus on

definition, require associations to follow the basic principles of a democratic organisation and then register with a State institution in order to operate.<sup>107</sup>

But the neatness of this legal procedure, though attractive (especially for foreign “donors”) has several problems.<sup>108</sup> The first of these is the fact that the legislation for which registration is required has been enacted by the state, and would clearly represent the state’s interest in controlling associations by defining the parameters for their operation in terms of management and financial conditions. The second, is that many organisations are denied registration on account of not being able to conform to the State’s legal stipulations, while others face the risk of being de-registered owing to the displeasure of the state. Third, because of such perplexing registration procedures, a host of people involved in the informal or quasi-formal activities of civil society never bother to seek registration or choose not to do so to avoid repercussions from State officials.<sup>109</sup> And finally, from a comparative perspective, the legal structure approach has failed international foreign migrant workers in Africa because it lacks uniformity from one country to another, and has no clear definitions concerning functions or guidelines within regional or international treaties.

### 2.3.1. *The Question of Developing Strategies for Empowerment*

NGOs are often found functioning as a link between the complex, unfamiliar world of government and various vulnerable social and economic groups. They are not primarily interest or pressure groups, but often lobby bureaucrats and elected government representatives for more favourable conditions of their constituents. The major activities include drafting new proposals to legislation, organising public opinion around specific issues, informing broader publics about various concerns, and seeking favourable changes within government that will be beneficial to a vulnerable group. As pressure groups they are a continuous source of feedback about the impact of government policies to their constituents in their attempts to improve a portion of society without any direct benefit to themselves. NGOs constitute both a precondition for, and a supplement to, the constitutionally defined political process and the formal political bodies of the democratic state. As voluntary organisations they often pursue idealistic causes, many of which are crucial to the functioning of a modern democratic society. NGOs perform three absolutely indispensable functions: information gathering, evaluating their information, and disseminating the results of the first two. The function keeps the political process open for creating and maintaining a political space for democratic forces.<sup>110</sup> NGOs operating in the interest of migrant workers in a number of Sub-Saharan Countries are especially hindered by limitations within immigration and anti-terrorist laws on their right to establish conduct certain activities within host states. Such restrictions deny them of the opportunity to defend a number of basic human rights of members. Hence, many migrant worker NGOs are unable to enact the strategies of empowerment that domestic NGOs have been able to develop and execute.

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the stated purposes, objectives and functions of NGOs; and the *structural-operational* definition, which emphasises basic structure and operations. See the description of the multitude of classifications provided by A. Torstensen, I. Tvedten and M.Vaa (Eds): ‘The Urban Crisis, Governance and Associational Life’, in *Associational Life in African Cities: Popular Responses to the Urban Crisis* (Nordiska Afrika Institute, Uppsala, 2001) pp. 11–24.

<sup>107</sup> This varies from State to State. States such as Sweden require registration with the local tax authorities. See *Folkrörelse och Föreningsguiden* (Utbildningsförlaget, Brevskolan, Stockholm, 1999).

<sup>108</sup> Arne Torstensen, *et al.*, *supra*, note 106, p. 14.

<sup>109</sup> *Ibid.*, pp.14–16.

<sup>110</sup> L. S. Wiseberg, ‘Defending Human Rights Defenders: The Importance of Freedom of Association for Human Rights NGOs’ (Int.’l. Centre for Human Rights and Democratic Development, Montreal, 1993), pp. 4–6.

The most clear examples of the application of NGO empowerment as a strategy in African contexts are those lobbying on behalf of specific ethnic groups.<sup>111</sup> Tension inevitably exists between African governments and those NGOs because even though States aim to safeguard their autonomy by adopting draconian measures to contain their activities, there are moments when the two are compelled to co-operate as partners occasionally. Such relationships, especially in the area of human rights, often vacillate between obliging partnerships and brutal antagonists. The exception to this situation exists in socio-economic development plans, where NGOs and governments need to co-operate with internationally funded development and democracy programmes. Tension also exists between the two partners when NGOs monitor and report on governments' human rights abuses, a position that warrants them to call for serious changes.

There is an obvious need to establish migrant worker associations in countries of migrations. The reasons are as follows: migrant worker NGOs need to exist and to develop strategies to protect their interest group. The major strategies used, the Three Es, *education*, *empowerment* and *enforcement* inevitably lead to three others, the Three Ds, namely *documentation*, *democratisation* and *development*.<sup>112</sup> These strategies are the major means used to bring governments into line with the human rights of individuals World-Wide. Hostility and direct interference by governments however, indicate that the success rate of these strategies could use some improvements. This is evidenced by the fact that in spite of the need for *education* throughout Africa, there are relatively few human rights NGOs using education as a primary strategy, the exception being the education of women and children on health matters, and the prevention of sexually transmitted diseases. The second strategy, *empowerment*, entails deliberate political mobilisation of the community the NGOs seek to serve. Far more than education, empowerment confronts the status quo and poses the most serious political challenges to governments. Empowerment refers to politically (as well as historically, socially, and economically) disadvantaged groups. Typical groups for whom empowerment has been sought include displaced peasants, uneducated rural women, children and ethnic minorities. The third major approach used by African human rights NGOs, *enforcement* is a sophisticated, popular but rather limited strategy and is the most familiar means of protecting human rights in developed countries. It is also the strategy facing the most significant obstacles in most African states. At the national level it requires several crucial institutions: 1) a framework of laws and constitutional norms (the "rule of law"); 2) a functioning court system, whose judges are not subject to strong pressure to skew their decisions ("independence of the judiciary"); and 3) a functioning system of legal assistance, giving the less affluent access to the legal system as a whole. Internationally, the strategy of enforcement also depends on three conditions: 1) specific conventions ratified by governments; 2) willingness by these government to honour their treaty commitments (notably by submitting detailed periodic reports, incorporating necessary changes in their constitutions and legal frameworks, and acting in accordance with their treaty commitments); and 3) a supervising committee, staffed by informed persons with professional support. These must be ready to take an active role when human rights violations are called to their attention by NGOs or from official international reports.<sup>113</sup>

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<sup>111</sup> In Nigeria, the Movement for the Survival of the Ogoni People (MOSOP) skilfully drew international attention through publications, lobbying, (especially within the United Nations) and high-profile leadership. The Movement's message was direct: the Ogoni people (who live in a major oil-producing section of Delta state) face severe threats to their continuation as a distinct group; they argued they should receive a greater share of petroleum revenues; self-determination and greater political rights must be provided. MOSOP crystallised around a determined leader. See the explanation by C. E. Welch, *Protecting Human Rights in Africa: Roles and Strategies of Non-Governmental Organisations* (Philadelphia: University of Pennsylvania Press, 1995), p. 60.

<sup>112</sup> *Ibid.*, p. 52.

<sup>113</sup> *Ibid.*, p. 56.

Efforts at empowering NGOs to conduct such tasks are seen as a challenge to authority at best, and as treasonable at worse. This attitude is widespread by government officials throughout Africa. The reaction by African leadership has generally been to react with violence (i.e., sending the military to quell the "rioters"), or to pass legislation banning such organisations.<sup>114</sup> But migrant workers NGOs are noticeably absent from the list of organisations using such strategies, and hence are often unable to address the violations of the human rights of their constituents. This is the challenge which awaits to be developed by African NGO communities. By enabling migrant worker NGOs the freedom of association and the right to develop and apply the above named strategies would be a major step in turning the lives of migrant workers around from being the least protected to one of empowerment. The reinforcement of this feature of human rights culture in Africa requires the combination of democratisation and empowerment.<sup>115</sup>

African migrant worker associations are faced with a myriad of problems ranging from poor economies and management to State oppression. While there is a growing number that is based on UNDP development policies involving small-scale enterprising, economic co-operatives, trading and craftsmanship associations, most function largely as networks ascribing to kinship and ethnicity, and combine these valuable functions with migration, religion, business, employment, domestic settlement in combination with other social and economic functions. The reach of these networks is often confined to local urban communities, but it also extends to foreign states amongst diaspora populations. These NGO networks often control considerable financial resources which are used for members and participants in their activities.<sup>116</sup> The understanding of associations in African societies requires an understanding of their networking functions more than of their internal self-government procedures.<sup>117</sup> The internal procedures for managing the affairs of many African NGOs is often confusing, as the principles of democracy, accountability and transparency are often observed with difficulty. This feature alone has led to much misunderstanding of the structure and functions of NGOs and civil society organisations on the continent.

At the heart of these issues is the basic fact that State compliance with the principles of "equal treatment" that are enshrined in international law remains largely selective when it comes to how they should treat foreign migrant workers. Furthermore, this position is not in line with either the provisions or the intentions of the UDHR, the Covenants, the MWC, the African Charter or the ILO, hence the need for continued critical studies. For, in spite of the fact that there is now a single universal human rights treaty supporting the rights of foreign migrant workers, through their failure to ratify it, States continue to facilitate the abuse of foreign migrant workers and selectively chose which rights are to be implement for all categories of migrants. States may continue to do so even if foreign migrant workers do possess an identity document as long as their country of citizenship (or origin) remains unwilling to intervene. So the issuance of an identity document alone will not solve this problem.

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<sup>114</sup> *Ibid.*, p. 53–58.

<sup>115</sup> *Ibid.*, p. 60

<sup>116</sup> Although many such organisations in developing countries are based on membership, many of them are not – particularly in Africa. Rather, people gravitate towards these associations on basis of functional or descriptive identities. In many cases it may be being measured in terms of participation rather than formal enrolment and payment of membership fees. Leaders are often self-proclaimed rather than elected. Thus, the internal procedures for handling the affairs of the organisation tend to become blurred. As a corollary, the principles of accountability and transparency are rarely observed. See the study by A. Torstensen, *et. al.* (eds), *supra*, note 106, pp. 11–24.

<sup>117</sup> There are few exceptions to this model, one of which is political parties. See L. Laakso and A. O. Olukoshi (Eds.), 'The Crisis of the Post-Colonial Nation State Project in Africa', *Challenges to the Nation-State in Africa* (Nordiska Afrikainstitutet, Uppsala, 1996) pp. 7 – 10.

### **3. Current Regimes Offering Protections of the Foreign Migrant Workers from Discrimination**

#### *3.1. Introduction to Binding Universal Regimes*

The focus of the next this chapter is to provide a descriptive survey of the universal instruments that address the principles and norms of equality and non-discriminatory treatment of foreign migrant workers generally. The conclusion contains comments on the instruments examined in this section. It should be borne in mind that human rights instruments are either binding treaties or non-binding declarations and recommendations, and it is important to separate these treaties under the type of protection they offer: either hard law (binding) or soft law (non-binding) protections. Most hard law human rights treaties are supervised by monitoring bodies, and State parties usually agree to the recommendations of these bodies upon ratification. Each of the major United Nations treaties has a its own monitoring committee, while The International Labour Organisation's constitution provides for a Committee of Experts to monitor compliance with its treaties.<sup>115</sup> However, what is important here is that there are a number of conventions that are relevant to the rights of migrant workers with implementation mechanisms that are also of relevance.

#### *3.2. Protections Available under the United Nations System*

The provisions of seven of the major UN Human Rights treaties are especially relevant to the protection of migrant workers from discrimination. The supervision of protection provided by those human rights treaties (and others) instruments falls under the regime of the United Nations main bodies, and the issue of Human Rights is on the agenda of virtually all bodies within the United Nation and regional bodies for Europe, the Americas and Africa. Each of these bodies provides substantial protection for the human rights of foreign migrant workers, although none contains a categorical prohibition on distinctions against them. In fact a number of these treaties contain provisions that are at times confusing regarding the obligations not to discriminate and the scope of duties to provide measures that provide full equality. A particular responsibility lies, however, upon the Commission of Human Rights, a subsidiary body comprising 53 member States appointed by ECOSOC.<sup>116</sup> In 1999, failing the entry into force of the MWC, the Human Rights Commission adopted a resolution appointing a Special Rapporteur for foreign migrant workers with the mandate to examine ways and means to overcome the obstacles existing to the full and effective protection of the human rights of this group, including migrants in an irregular or non-documented situation. The Rapporteur's duties are to collect information on the violation of migrant's human rights, recommend action at the national, regional and international levels that could eliminate the violation of their rights, and to give special attention to the discrimination and violence against migrant women.<sup>117</sup>

There are also seven human rights treaty bodies: the Human Rights Committee (HRC), the Committee on Economic, Social and Cultural Rights (CESCR), the Committee on the

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<sup>115</sup> The full text of these documents is available at UNTS.

<sup>116</sup> The UN Charter expressly places the organisation under an obligation to encourage respect for human rights in Articles 1(3) and 55. The UN contains a number of organisations that were established by the Charter, which are The General Assembly, the Security Council, The Economic and Social Council, The Trusteeship Council, and The Secretariat and the International Court of Justice. *See: The United Nations and Human Rights*, (UNDPI, N.Y.,1995), p. 6.

<sup>117</sup> CHR, 55<sup>th</sup> Sess., U.N. Doc. E/CN.4/Res/1999/44 (1999).

Elimination of Racial Discrimination (CERD), the Committee on the Elimination of Discrimination Against Women (CEDAW), the Committee Against Torture (CAT), the Committee on the Rights of the Child (CRC) and the Committee on Migrant Workers (CMW).

Each Convention has a corresponding Committee as a supervisory mechanism. The legal basis for the establishment of those treaty bodies can be found in the treaties themselves. However, in the case of the ICESCR, the monitoring body was established by a resolution of ECOSOC. Four of the committees (HRC, CERD, CAT and CEDAW) can, under certain circumstances, receive petitions from individuals who claim that their rights under treaties have been violated. But there are a number of other human rights treaties lacking the enforcement procedures of the major instruments mentioned above.<sup>118</sup> Though lacking the reporting procedures and individual complaint provisions of the major treaties all treaties and treaty bodies are facilitated by the Office of the High Commissioner for Human Rights except the Committee on the Elimination of Discrimination against Women (CEDAW) which is serviced by the Division for the Advancement of Women in New York.<sup>119</sup>

### 3.2.1. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families<sup>120</sup>

The Migrant Worker Convention (the shortened name for this convention) is the most important human rights convention available within any regime. It is comprehensive, contains a preamble and nine parts comprising 93 articles. The catalyst for the Convention was the 1975 Economic and Social Council (ECOSOC) Report on the “Exploitation of Labour Through Illicit and Clandestine Trafficking” which brought the precarious position of foreign migrant workers to the attention of the international community.<sup>121</sup> Despite this, there were voices from countries such as Sweden who preferred that the new convention be elaborated within the framework of the ILO, but Third World countries voted against this proposal 65 to 17. It was not until December, 1979 that UNGA resolution 34/172 was adopted in December 1979.<sup>122</sup>

### 3.2.2. The Importance of the Migrant Worker Convention (MWC)

The motivation for first examining the MWC is that it is the most important of all the human rights conventions protecting migrant workers. There are a number of reasons for stating this so strongly, and a short-list of reasons for it would include facts such as: it is in step with the scope of international labour standards that are called for in several ILO Conventions; it adheres with the principles of equal treatment with nationals at work that are outlined in Article 7 of the ICESCR (“the right of everyone to the enjoyment of just and favourable conditions of work...”; it identifies foreign migrant workers and members of their families as vulnerable persons in a global situation in need of protection regardless of their legal status; it recognises both men and women as migrants, and defines categories of migrant works that are

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<sup>118</sup> *Ibid.*

<sup>119</sup> UNHCHR: *Introduction to the Conventional Mechanisms* (treaty monitoring bodies): <[www.unhchr.org](http://www.unhchr.org)> visited on 30 September, 2005.

<sup>120</sup> See Migrant Worker Convention, *supra*, note 2.

<sup>121</sup> The convention was adopted after the 1975 ILO Convention No. 143, a convention that was aimed at curtailing undocumented and so-called “illegal” foreign migrant workers. See W.R. Böning, ‘The ILO and the New UN Convention on Foreign migrant workers: The Past and Future’, *IMR* Volume XXV, No. 96 (1991), pp. 698-708.

<sup>122</sup> *Ibid.*

applicable to every region of the world; it takes into consideration the fact that foreign migrant workers are more than labourers or economic entities and provides them with rights as entities *with* families that includes the right of family reunification. It furthermore extends measures of human rights protection to a special category of individuals who currently lack protection while extending protection to other categories of vulnerable migrants. The MWC emphasises that all categories of foreign migrant workers, the documented and the undocumented, be accorded fundamental human rights and extends the concept of "equality of treatment" to them and the members of their families. It also reinforces the indivisibility of human rights regardless of nationality.

The MWC recognises the critical role which the migration of workers plays in the global economy and provides a set of international standards to address the treatment, welfare and rights of foreign migrant workers and members of their families as well as a set of obligations and responsibilities for all states that benefit from international foreign migrant workers. This means sending States, States of transit, and host States. It seeks to establish minimum standards of protection in legal, political, economic, civil, social and cultural rights for foreign migrant workers and members of their families, which would facilitate its role in preventing and eliminating the exploitation of all foreign migrant workers and members of their families throughout the migration process. In particular, the MWC seeks to put an end to the illegal or clandestine recruitment and trafficking of foreign migrant workers and may actually function as a deterrent to the employment of foreign migrant workers in irregular or undocumented situations.<sup>123</sup>

Finally, the MWC seeks to address States that lack national standards of human rights protection and encourages them to bring their legislation in harmony with universal standards presented in the Convention. Simultaneously, the MWC emphasises that non-nationals are not to have more rights than nationals, and it encourages workers and employers to respect and comply with the laws and procedures of the States concerned. It also seeks to establish mechanisms for its implementation which would provide new opportunities for NGOs, individuals and others in the global community to protect the rights of foreign migrant workers and their families.

### 3.2.3. Substantive Rights in the MWC

Paragraph two of the Preamble to the Convention states that the State Parties (to the Convention) are taking into account the principles, standards and objectives of the relevant instruments elaborated within the framework of the ILO. It specifically mentions the Convention concerning Migration for Employment (No. 97), the Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of migrant workers (No. 143), the Convention Concerning Forced or Compulsory Labour (No. 29) and the Convention Concerning Abolition of Forced Labour (No. 105).<sup>124</sup> The Preamble further recognises the importance of the work done in connection with foreign migrant workers and members of their families in various organs of the United Nations, in particular within the Commission on Human Rights, the FAO, UNESCO, WHO and other international organisations. In Paragraph three it recalls the Convention Against Torture, the Slavery Convention, the Declaration on the Prevention of Crime and the Treatment of

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<sup>123</sup> R. Perruchou, 'Best Practices Related to Migrant Workers', (A Workshop Paper presented in Santiago de Chile) *International Migration Office*, Geneva (19-20 June, 2000).

<sup>124</sup> This paragraph also mentions the ILO Recommendation concerning Migration for Employment (No. 86). See the Preamble in the Convention at the UNTS.

Offenders and the Code of Conduct for Law and Enforcement Officials.<sup>125</sup> It then goes on to recognise the progress made in certain States and by people concerned with establishing norms and principles concerning the treatment of foreign migrant workers and members of their families; and finally it explains how the overall goal of the Convention is to reaffirm and establish basic norms in existing human rights legislation and compile them in a comprehensive instrument which could be applied universally to a group of non-national individuals - foreign migrant workers and members of their families.

PART I of the Convention (Articles 1 through 6) covers the scope and definition of a migrant worker, the extent of its application with non-distinction based upon age, sex, race, colour, language and religion.<sup>126</sup> In Article 2.1, for example, the term "migrant worker" refers to 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", and in Article 2 (a - h) it also defines specific categories of foreign migrant workers: "frontier worker", "seasonal worker", "seafarer", "worker on an offshore installation", "itinerant worker", "project-tied workers", "specified-employment worker", and "self-employed worker". Article 3 addresses persons to whom the Convention does not apply. These include those employed by international organisations and agencies, those employed by a State, "investors", refugees and stateless person as well as students, trainees, seafarers and workers on offshore installations. Article 4 provides a definition of "members of the family", which it defines as: "...persons married to foreign migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognised as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned."<sup>127</sup>

Article 5 is the all inclusive article of this treaty, and includes foreign migrant workers who are documented, or in a regular situation, and non-documented, or in an "irregular situation". Article 6 defines the terms state of origin, employment and transit, as used in the Convention.

PART II consists of a single article (Article 7) which is dedicated exclusively to the non-discrimination with respect to rights of foreign migrant workers. It specifically calls for the rights enumerated in the Convention to be respected without distinction of any kind. It adds that these rights are to be respected and ensured "in accordance with the international instruments concerning human rights".<sup>128</sup>

Part III addresses the right of migrant workers to be treated equally with nationals in a number of areas of concern to them. The section consists of 28 articles (Article 8 through 35) and describes the civil, political, economic, social, and cultural rights that are applicable to all foreign migrant workers and members of their families regardless of legal status. A number of them reiterate rights found in other human rights treaties. These include the to leave any State, including the State of origin, and the right to re-enter and remain in their country of origin (Article 8); the right to life and to be protected by law (Article 9); the prohibition of torture or other cruel, inhuman or degrading treatment (Article 10); the prohibition of slavery,

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<sup>125</sup> Adopted in 1926 under the auspices of the League of Nations, the Slavery Convention went into force the following year and is considered by some scholars to be the first true intentional human rights law treaty. It was amended in 1953 by a UN Protocol substitution references to the League with the UN. A Supplementary Convention on the Abolition of Slavery, the Slave Trade, and institutions and practices similar to Slavery was adopted in 1956. UNTS

<sup>126</sup> *Ibid.*

<sup>127</sup> Article 4 concerns the definition of a family member, which has a corresponding definition in the ESC Appendix with reference to Article 19, where it defines "family" as including at least the wife and dependant children. See MWC and the comparison chart in the Appendix here, reprinted with permission.

<sup>128</sup> Overlapping provisions can be found in UDHR 2; ICESCR(2)2; CRC 2; ICCPR 2(1), 3, 26; ICERD 1(1); AFR 2, 18(39, 28; AMR 1(1, 2); EHR 14, 16; ADRD 11. See Appendix A. Full texts available at UNTS.



servitude, forced or compulsory labour (Article 11); the right to freedom of thought, conscience and religion (Article 12); the right to hold and express opinions (Art. 13); the prohibition of arbitrary or unlawful interference with the privacy, family, home, correspondence (Article 14); the prohibition of arbitrary deprivation of their property (Article 15). The right to due process, equality before tribunals, the right to liberty and security of person, the prohibition of arbitrary arrest or detention are contained in four articles (Article 16 - 20). There are two new “rights” that are not included in other human rights Conventions in this section: Article 21, which is a prohibition of unauthorised destruction of documents, including a passport or equivalent document of a migrant worker or a member of his family, but whether or not this applies to migrant workers destroying their own document is unclear. There is also a nine-paragraphed prohibition of collective expulsions (Article 22), yet calls for each case of expulsion to be examined and decided individually.

One of the most innovative articles in the MWC is Article 23, which provides that “Migrant workers and members of their families shall have the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin or of a State representing the interests of that State whenever the rights recognised in the present Convention are impaired.”<sup>129</sup> The wording of this right is important because although the right to recourse to consular or diplomatic protection does not appear in any other human rights treaty, this facilitates the MWC to follow the principles of the Vienna Conventions on Diplomatic and Consular Relations respectively (see section 3.3 below). The right to enjoy treatment that is not less favourable than that applying to nationals in respect of remuneration and other conditions of work are addressed in Article 25.<sup>130</sup> The right to participate at all levels in meetings, associations and activities of trade unions and other associations is provided for in two articles: Article 26 and 40. No restrictions are to be placed on the exercise of these rights in either article, except those that are proscribed by law and which are necessary in a democratic society for the interests of national security, public order or the protection of the rights and freedom of others. Equality is also to be respected in such fields as urgent medical assistance (Article 28) and access to education (Article 30).<sup>131</sup>

Upon completion of their term of employment, migrant workers have the right to transfer their earnings and savings as well as their personal effects and belongings in Article 32; and in Article 33 State Parties, States of origin and States of transit are obligated to inform all migrant workers, including irregulars and illegals, about the rights arising from this Convention. The obligation of this article includes taking measures to ensure that the information is disseminated to them through trade unions and other appropriate bodies, institutions or other States concerned with migrant workers. Neither of these rights that have any parallels in the universal system. Article 34 calls for foreign migrant workers and family members to comply with the laws and regulations of any State of transit or employment and to respect the cultural identity of the inhabitants of such States, while Article 35, the final article in Part III, points out that none of the articles in that section should be interpreted to implying the regularisation of non-documented migrant workers or their family members.<sup>132</sup>

PART IV provides for more social rights to migrant workers and their families who are in a regular situation to be provided on equal terms with nationals. It consists of 26 articles, twelve of which have no parallel in other human rights instruments. They address additional rights of

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<sup>129</sup> See MWC Article 23, at UNTS.

<sup>130</sup> *Ibid.* Provisions on equality with nationals are broader in a number of other human rights instruments: UDHR Article 7 and ICCPR Article 26 of the ICCPR provide much broader clauses on equal protection before courts and due process. Article 12(2) of the ICRC provides children with the right to be heard in proceedings affecting the child.

<sup>131</sup> *Ibid.* The articles on equality before the law here also overlap with UDHR 7, 8, 10 and 11(1); ICCPR 14 and 26; ICERD Articles 5(a) and 6; AMR 4; AFR 3(1) (2); and ADRD II. UNTS.

<sup>132</sup> MWC Articles 33 – 35.

foreign migrant workers and members of their families who are “documented or in a regular situation” in the State of employment. These are the right to information regarding conditions of employment, remunerated activities during employment and the satisfaction of the State authority for modification of their conditions in Article 37. There is also the right to return after a temporary absence in Article 38 :1 which provides that States of employment shall make efforts to authorise migrant workers and their families to be temporarily absent without it affecting their authorisation to stay or to work. It also points out that the State should take into account of their special needs and obligations of themselves and the members of their families. They must also be fully informed of the terms of any temporary employment. Article 38:2 provides that migrant workers and the members of their families have to the right to be fully informed of the terms on which their temporary absences are authorised. Article 39 concerns the freedom of movement, which has parallels in Article 13(1) of the UDHR. Article 40 concerns the right to form trade unions and other associations. Article 41 concerns the right to participate or vote in the public affairs of the State of origin, and to vote and to be elected at elections of that State, in accordance with its legislation.<sup>133</sup> Articles 42 through 45 all have parallels in other universal conventions. These provide for State parties to consider allowing foreign migrant workers to enjoy political rights in the State of employment (providing the State grants them such rights). They also provide for foreign migrant workers and members of their families to enjoy equality with nationals of States of employment with regards having access to housing, education, vocational guidance and placement services, vocational training, retraining, housing, protection against exploitation with regards to social and health services, rents, self-management enterprises, access to participation in cultural life, and the integrity of the family.

But Articles 46 through 55 have no parallels in other instruments. They address: exemptions from import and export duties and taxes on their personal property and the equipment needed for remunerated activity in their State of employment (Article 46); the right to transfer earnings in their State of employment (Article 47); entitled to equality with nationals when taxed (Article 48); the right to freely choose their remunerated activity (Article 49:2); the right to fair consideration of the right to stay on termination of a relationship through divorce or death (Article 50); the right not to lose their residence or remunerated activity through such a loss (Article 51); limited access but nevertheless the right to freely choose a remunerated activity after the termination of short-term employment and lawful residence (Article 52: 1, 2 and 3). Articles 54 and 55 are also concerned with equality of foreign migrant workers with nationals regarding employment, both of which have parallels in other human rights instruments. Article 56 is a prohibition from expulsion of foreign migrant workers, except for reasons defined in the national legislation of the State subjects to safeguards established in Part III (above).

PART V (Articles 57 through 63) contains six articles with provisions that are applicable to particular categories of foreign migrant workers and members of their families. It does, however allow State parties to limit some rights of certain categories of workers and their family members, in to particular frontier, seasonal, itinerant, project-tied, specified and self-employed workers based on the length of time they spend in the host country.<sup>134</sup> This limitation has a parallel article in a draft ILO treaty.<sup>135</sup>

PART VI (Articles 64 – 71) contains eight articles, some of which address the issue of preventing irregular, illegal and clandestine migrant workers. The first of these, Article 64, addresses the obligation of State Parties to consult, co-operate and promote sound equitable,

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<sup>133</sup> Compare the appropriate texts in Appendix A.

<sup>134</sup> See especially Article 59 (1) which takes into account the length of time present in the host country. UNTS

<sup>135</sup> Draft ILO Multilateral Framework on Labour Migration, p. 10, Principle 9 (a). Available at <[www.ilo.org/ilolex](http://www.ilo.org/ilolex)>

humane and lawful conditions in connection with the international migration of workers and members of their families. It calls for due regard to be paid not only to their labour needs, but to the social, economic, cultural and other needs of migrant workers and members of their families as well as to the consequences of the migrant communities concerned.<sup>136</sup> Article 65 calls for State Parties to maintain appropriate services concerned with international migration and their families; to formulate policies, exchange information, to consult and co-operate with other State Parties involved with such migration and to provide adequate consular and other services that are necessary to fulfil the needs of migrant workers and the members of their families. Articles 66 and 67 call for them to adopt measure for the orderly recruitment and return of migrant workers when they decide to return or when their employment expires. These measures are even to be applied to irregular migrant workers.

Article 68, which has parallel provisions in CRC 11 and 35, calls upon receiving and transit States to collaborate to prevent and eliminate “illegal or clandestine” movements and the employment of foreign migrant workers in an irregular situation; to take appropriate measures against the dissemination of misleading information relating to emigration and immigration; to take measures to detect and eradicate illegal or clandestine movements of migrant workers and their families and to impose effective sanctions on persons, groups or entities which organise, operate or assist in organising clandestine migration; and to impose effective sanctions on persons, groups or entities which use violence, threats or intimidation against foreign migrant workers and their families who are in an irregular situation. Article 70 calls for States to take measures that are not less favourable than for nationals to ensure that working and living conditions of migrants in a regular situation keep with the standards of fitness, safety, health and principles of human dignity; while Article 71 calls for State parties to facilitate the repatriation to the State of origin the remains of deceased foreign migrant workers and members of their parties, and to ensure that compensation matters relating to deceased foreign migrant workers are promptly settled.

Part VII (articles 72 through 77) of the MWC calls for the establishment of a system to monitor and implement the protection of the rights of all migrant workers and members of their families. The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) is the body of independent experts that monitors implementation of the Convention. It is the most recently created treaty body and it held its first session in March 2004. The Committee is also, under certain circumstance, able to consider individual complaints or communications from individuals claiming that their rights under the Convention have been violated once 10 States parties have accepted this procedure in accordance with article 77 of the Convention. The Committee meets in Geneva and normally holds one session per year.

PART VII (Articles 72 through 78) describes how implementation of the Convention and supervision procedures are to be conducted. States parties are obliged to submit regular reports to the Committee on how the rights are being implemented. Their initial report is due one year after acceding to the Convention and then after, every five years. The Committee is to examine each State report and address its concerns. It may then publish its concerns and recommendations to the State party in the form of “concluding observations”. This part also addresses the establishment of a supervising Committee, their functions, lengths of service and the competence of the Committee to receive and consider communications from State parties. All of the articles on supervision procedures in this convention have parallel provisions in other human rights conventions.<sup>137</sup> Article 76 provides for State Parties to recognise the competence of the Committee to receive and consider communications

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<sup>136</sup> MWC, Articles 64 and 65.

<sup>137</sup> *Ibid.* Compare the procedures in ICCPR, ICERD, CRC and the CEDAW.

regarding the fulfilment of its obligations under the Convention.<sup>138</sup> Article 77 of this part allows for individual complaints to the committee providing a State party recognises the competence of the committee to receive and consider from or on behalf of individual subjects to its jurisdiction who claim that their rights under the MWC have been violated. Article 78 provides that the provisions of Article 76 of the MWC should be applied equally to all parties, but also allows them to set their own criteria to the settlement of disputes in accordance with international agreements that are in force between them.<sup>139</sup>

PART VIII (Articles 79 - 84) covers General Provisions and starts with Article 79 which protects the right of each State to establish the criteria governing admission of foreign migrant workers and members of their families. But the next two articles (Articles 79 and 80) are paralleled in the UDHR and ICCPR, ICESCR, CEDAW and CRC. They provide that the Convention should not affect bilateral or multilateral treaties in force for the State parties concerned or more favourable rights or freedoms that State party law or practice already grant to foreign migrant workers and their families. Article 82 provides for how the rights of migrant workers are not to be renounced. It states that no form of pressure upon migrant workers and members of their families should be applied with a view to exerting pressure on them to relinquish or forego any of the rights in the Convention, and that it shall not be possible to derogate the rights by contract, a unique principle in human rights law. Article 83 provides that States are to ensure effective remedies for the violation of any of the rights and that remedies shall be enforced when granted, while Article 84 calls for State parties to adopt the legislative and other measures that are necessary to implement the provisions of the Convention. These provisions have parallels in other human rights conventions.<sup>140</sup>

Part IX, contains the Final Provisions, where Article 88 does not permit a State ratifying or acceding to the present Convention from excluding the application of any part of it or any particular category of foreign migrant workers.

The MWC offers a number of other special features, the most important being that it while it acknowledges that irregular migrant workers (identified as either undocumented or illegal) have rights that State Parties are obligated to, it clearly adheres to the principle of preventing and eradicating illegal or clandestine movements and migrant workers and calls for sanctions on persons or groups which organise and operate such movements. This brings attention to the need for all States and their institutions to protect and to integrate all persons who are involved in labour migration due to its importance in the economic development of all parties concerned. But in spite of its multiple protections, the MWC has a number of weaknesses regarding the protection of irregular migrant workers. The first of these concerns the limitations to emergency medical care that is mentioned in Article 28 that may apply to irregular migrants. Such a level of care is not up to the standards of Article 12 of the ICESCR, which is to be applied without discrimination on any social grounds. The Committee on Economic, Social and Cultural Rights have stated that State are under the obligation to respect the right to health even to illegal immigrants.<sup>141</sup> Another weakness concerns access to housing of migrants and their families who are in a “regular situation as outlined in Article 70. Again, this provisions does not appear to be in step with the Committee’s comment which points out that this right must, in accordance with Article 2.2 of the ICESCR, not be subject to any form of discrimination.<sup>142</sup> A third weakness of the MWC is that, having included non-documented and irregular migrants as a category of persons who are the objects of protection of the treaty,

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<sup>138</sup> For comparisons see ICCPR 41 and ICERD 11 and 14.

<sup>139</sup> See MWC at UNTS.

<sup>140</sup> See ICCPR 2:3 and 9:5; ICERD 6; ILO 169:152, 16:4,5; ESCR 13, AFC 21. UNTS

<sup>141</sup> UN, ESCOR, ESC Committee, 22<sup>nd</sup> Session, Geneva, 25 April – 12 May 2000, General Comment No. 14 (2000), para. 34, available at <<http://www.unts.org>> visited on August 8, 2006.

<sup>142</sup> *Ibid.*, 6<sup>th</sup> Session, Geneva, 11 December, 1991, General Comment No.4, para. 6.

it fails to provide any specific means for them to practically implement the limited rights they have in the treaty.

In spite of those gaps in its articles on protecting migrant workers, the Migrant Worker Convention is a substantial tool for monitoring and supervising migrant workers while ensuring their universal human rights. It provides a number of pioneering rights and obligations that have not been considered by other human rights treaties, and calls for State parties to play an active role in managing migrants through consultation, co-operation and ensuring that illegal migration does not persist. The sum of its articles places it in a unique position within the body of human rights regimes.

#### 3.2.4. Binding Protection in other United Nations Treaties and Treaty Bodies

The mainstay of human rights protection and remedies for abuses of the rights of the individual lie within the growing body of human rights conventions and their treaty bodies (Committees) which supervise compliance with the treaties through a system of reviewing State reports and individual complaints. Those human rights proscribed for in the Universal Declaration of Human Rights are described in more detail in each of the major international human rights treaties, which State parties ratify, whereby they become legally binding.<sup>143</sup> There are a number of parallel articles in each of these, as already pointed out above and in the briefing on the Migrant Worker Convention made earlier. However, it is important to bear in mind the protections available and the wide range of differences in protection offered to foreign migrant workers in the MWC and a select few of the other universal human rights Conventions.

#### 3.2.5. Protection for migrant workers Under the International Covenant on Civil and Political Rights (ICCPR)

Equality before the law through providing for the non-discrimination of all persons is clear under Article 26 of the ICCPR. The article specifically calls for each State party to undertake to respect and to ensure to all individuals the rights recognised in the Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. As it took its cadence from Article 2 of the UDHR, it is worthwhile to compare the language of both instruments when explaining the rights they aim to protect.

The protection provided under the Covenant in Article 26 should apply to everyone, irrespective of reciprocity, nationality or statelessness because its opening states that “all persons...” are equal before the law and entitled without any distinction to the equal protection of the law.” It then continues to state that the law shall prohibit discrimination on any ground...including birth or other status.<sup>144</sup> The law under the Covenant prohibits discrimination of such groups as those listed in UDHR Article 2(1), which protects “everyone”. The ICCPR provides a number of protections from discrimination that also apply to foreign migrant workers. In Article 2:1 the Covenant ensures rights to all individuals within a state party’s territory who are subject to its jurisdiction without mentioning reciprocity or nationality. The general non-discrimination provisions in the same article and in Article 26 are open-ended, other categories and “status”, but do not specifically list nationality or alienage among the prohibited grounds of distinction. The non-discrimination provision in Article 4(1), relating to derogation does not prohibit distinctions against non-nationals, but

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<sup>143</sup> See the list of UN Resolutions and dates of entry of all the human rights treaties.*Ibid.*

<sup>144</sup> ICCPR Article 26, available at <[www.unts.org](http://www.unts.org)> visited on August 7, 2006.

derogation is subject to a strict rule of proportionality.<sup>145</sup> The articles offering equal protection for the rights in the ICCPR can be divided into several categories as they relate to the protection of migrants from distinction.<sup>146</sup>

First, there are those that must be provided on an equal basis to nationals and migrants, either because the right is absolute or because selective denial would never be reasonable or proportionate. These are the right to life in Article 6; the prohibition on torture and cruel, inhuman, or degrading treatment or punishment in Article 7; the prohibition on slavery, servitude, forced or compulsory labour in Article 8 (which does not, however, include national or military services). Others include the humane treatment of prisoners in Article 10; imprisonment for contractual debt in Article 11; the right to leave the country Article 12(2); equality before the law and fair trial rights in Article 14; the prohibition on retroactive criminal penalties in Article 15; the right to recognition as a person before the law in Article 16; the freedom of thought, conscience, and religion in Article 18; the freedom of opinion in Article 19(1); the prohibition on the advocacy of national, racial or religious hatred that constitutes incitement to discrimination in Article 20; the right to marry in Article 23; the right of children to measures of protection that is found in Article 24; and the right of minorities to culture, religion, and language of Article 27. In the section on minority rights, General Comment No. 15, addresses aliens, but there are a number of scholars who claim that this right is restricted to national minorities. Some of these rights, such as those in articles 6,7,8 (1-2), 11, 15, 16 and 18 are non-derogable under Article 4.2.

Secondly, a number of ICCPR's articles prohibit arbitrary state actions that permit narrow distinctions between nationals and migrants. The prohibition on arbitrary arrest and detention does not exclude immigration detention only of migrants; it limits detention for everyone and does not permit migrants to be treated differently in the criminal proceedings. Furthermore, the right to judicial proceedings to challenge the lawfulness of detention applies in all contexts and is non-derogable.<sup>147</sup> In Article 17 the family is protected against "arbitrary or unlawful interference", and in certain (but not all) circumstances this may preclude deportation of family members.<sup>148</sup>

A third category of ICCPR protections may allow distinctions provided they are justified under limitation clauses permitting restriction on such grounds as national security or public order should legitimate state aims and proportional means exist. The rights affected by these allowances include the manifestation of religion (Article 18), the freedom of expression (Article 19), and the freedom of association (Article 22). The same rule of legitimate aims and proportional means should apply when migrants are subjected to expulsion for their exercise of these rights.

Fourthly, a number of political rights are explicitly limited to citizens. Amongst these are the right to take part in public affairs, the right vote in host-country elections, and the right to have access to public service (Article 25). The right of the child to acquire a nationality (Article 24:3) makes no provision for whether or not it should exclude the application of *jus sanguinis* in favour of *jus soile* principles. Hence, as there are no routines for State parties to abide by on this very important issue, many apply one at the exclusion of the other as a matter of routine. Fifthly, some provisions, such as articles 12:1 and 13 (which addresses the freedom of internal and a prohibition on expulsion) specifically protect migrants who are lawfully present within a foreign country. The debate as to whether the right to enter "his own

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<sup>145</sup> J. Fitzpatrick, 'The Human Rights of Migrants', *Migration and International Legal Norms* (Asser Press, The Hague, 2003) T. Alexander Aleinikoff and Vincent Chetail (Eds), p. 175.

<sup>146</sup> *Ibid.*

<sup>147</sup> See the Human Rights Committee, General Comment No. 29 (States of Emergency).

<sup>148</sup> Fitzpatrick comments that the balance between state interests and family unity as it appears in Article 8 of the ECHR remains to be developed with this article in the ICCPR *Supra*, note 140, p. 174.

country" applies to long-resident migrants is unresolved. Manfred Novak, however, finds that the term "his own country" demonstrates that the protection in Article 12:4 extends to aliens and stateless persons on who have such a strong attachment to a State that they view it as "their own country" or their home.<sup>149</sup> Two other rights deserve mention as being of special value to migrants: Article 14:3:f, which provides for the right to an interpreter in criminal proceedings, and Article 16, on the right of everyone to recognition as a person before the law. These rights make no distinctions between citizen or non-citizens. Finally there are the definite and strong protection provided for under the Protocols to the ICCPR. Article 2 of the first protocol simply states that "individuals" claiming their rights under the Covenant have been violated, and they have exhausted all available domestic remedies may submit a written communication to the Committee on Civil and Political Rights for consideration. The protection is not restricted to citizens or non-citizens, and as such is open and available even to migrants, regardless of their category.<sup>150</sup>

Articles 28 through 39 calls for the establishment of Committee that monitors implementation of the ICCPR by its State parties. State parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States themselves must report to the committee one year after acceding to the Covenant. Following this first report they must submit a report whenever the Committee requests one, usually every four years. The Committee examines each report, addresses its concerns and recommendations to the State party in the form of concluding observations.

Article 41 of the Covenant provides for the Committee to consider inter-state complaints, and the First Optional Protocol to the Covenant gives the Committee competence to examine individual complaints with regard to alleged violations of the Covenant by States parties to the Protocol. The Committee publishes its interpretation of the content of human rights provisions as general comments on thematic issues or its methods of work.<sup>151</sup>

### 3.2.6. Protection Under The International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>152</sup>

The ICESCR is often seen as a convention that provides fewer protections to aliens in comparison with the UDHR and the ICCPR. There are two reasons for this observation, both stemming from the nature of the rights within the convention. The first is found in Article 2 (1) which states expressly that the standards are to be achieved "progressively". The result of this is that neither citizens nor non-citizens can anticipate any immediate benefits from any standards resulting from this provision. The second reason is that the rights in the ICESCR involve affirmative measures by the State, which is considered especially taxing for developing countries and their economies. While it is true that States are entitled to favour their own nationals, the fact remains that the rights and protections provided for under the ICESCR may be exercised without discrimination only as long as they are not in violation of Article 2:2.

It remains unclear whether or not this provision is open to the admission of any further grounds of discrimination, including that of nationality. The list of enumerated grounds in

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<sup>149</sup> This interpretation is confirmed by the *travaux préparatoires*. See M Novak, *The UN Convention on Civil and Political Rights: CCPR Commentary* (N.P. Engel, Strasbourg, 1993), para. 48.

<sup>150</sup> Under the Second Optional Protocol to the Covenant, the protection is even stronger. Article 1 states in uncertain terms that no one within the jurisdiction of the State Party to the Protocol shall be executed. UNTS.

<sup>151</sup> UNHCHR website, available at <<http://www.unhchr.org>> visited on August 7, 2006.

<sup>152</sup> U.N. GAOR, A/Res. 2200 A (XXI) of 16 December, 1966. Entered into force on 3 January, 1976 in accordance with Article 27. <[www.unts.org](http://www.unts.org)> visited on August 7, 2006.

Article 2(2) is not stated expressly to be exhaustive, especially since it does not have a general norm of non-discrimination against aliens as compared with the ICCPR. But the provision is sufficiently broad to limit the circumstances in which discrimination against aliens is justified, even though the next article, Article 2(3), allows developing countries an escape route in guaranteeing economic rights which may be used to defeat the purpose of the treaty with regards migrants. One might argue that the use of the words '*as to*' instead of '*such as*' in Article 2:2 do not necessarily mean that the list of grounds of discrimination in Article 2(2) was intended to be exhaustive given the absence of any discussion on this point during drafting. It has further been advanced that the drafters were of the view that the inclusion of additional grounds, such as 'association with minority groups', were unnecessary because they were adequately covered in the provision by the terms 'without discrimination of any kind' and 'other status'.<sup>153</sup>

There are also arguments over whether or not the majority of drafters believed that the word '*discrimination*' in Article 2(2) gives states sufficient leeway to make distinctions between aliens and nationals with respect to certain rights. This is especially important with regards the right to work and receive social benefits which governments continue to prefer to restrict to nationals.<sup>154</sup> But the practice of the Committee on Economic, Social and Cultural Rights under the ICESCR indicates that it is prepared to consider the possibility of including additional grounds of discrimination in Article 2(2), such as health, disability, age, sexual orientation, poverty, and *nationality*. The present position of the Committee appears to be that non-nationals are entitled to equal treatment, to a large extent, and that they have a right to the enjoyment of the minimum core content of the rights guaranteed by the ICESCR. Any confusion surrounding the extent of rights which non-citizens are entitled to under Article 2(2) is finalised by Article 2(3) which, if interpreted narrowly, enables developing States to give preferences to their nationals with regards economic rights.<sup>155</sup>

All the other rights which migrants might seek to exercise under this Covenant are affected by the provision, with the use of the phrase "*may determine*" that they have the discretion to determine whether or not to fully extend these rights to migrants and non-citizens. This, however, also means that their economic rights may be limited, although not removed altogether, a guarantee which is provided for in Article 5 (1) where it is prohibited to destroy or limit the economic rights to a greater extent than is provided for in the Covenant. The extent to which that is allowed is not stated, nor are there any minimum standards provided, hence the statement offers little protection for both citizen and non-citizen alike. The remainder of the Covenant, Articles 6 through 15, appear to offer no specific limitations on the rights of non-citizens to the rights provided. These include the right to work, to an adequate standard of living, to adequate food, housing and clothing, to the improvement of living conditions, to physical and mental health, to a cultural life, to social security and social insurance, to marriage and a family, to form and join trade unions, to strike within the law, to the enjoyment of favourable conditions of work, to a culture, a creative and literary life, to participate in scientific research, and to an education at all levels.<sup>156</sup>

A general limitation clause similar to the one found in Article 29(2) of the UDHR is also found in the ICESCR's Article 4, where it provides that States' parties recognise that they may subject ESC rights only to such limitations as are determined by law if they are for the purpose of promoting the general welfare in a democratic society.<sup>157</sup> The provision here,

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<sup>153</sup> See comments by Cholewinsky, *supra*, note 11, p. 56.

<sup>154</sup> *Ibid.*

<sup>155</sup> U.N. doc. E.C.N.4.1987/17, , The Limburg Principles on the Implementation of the ICESCR, Part B, paras 42 – 44. <[www.unts.org](http://www.unts.org)> visited on August 7, 2006.

<sup>156</sup> ICESCR, Articles. 6 through 15, available at UNTS.

<sup>157</sup> *Supra*, note 153, paras 46 – 51.



which is broader than the one offered in UDHR 29(2) does not prohibit State Parties from adopting specific laws to discriminate against non-nationals or foreign migrant workers. However, a number of scholars confer on the opinion that discriminatory practices can never be compatible with the nature of the rights enshrined in human rights law, and that 'the promotion of the general welfare can never be achieved at the expense of one section of society.'<sup>158</sup>

The Committee on Economic, Social and Cultural Rights (CESCR) is the body of independent experts that monitors implementation of the International Covenant on Economic, Social and Cultural Rights by its States parties. It was established under ECOSOC Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the United Nations Economic and Social Council (ECOSOC) in Part IV of the Covenant. State parties are obliged to submit regular reports to the Committee on how the rights are being implemented. States must report initially within two years of accepting the Covenant and thereafter every five years. The Committee examines each report and addresses its concerns and recommendations to the State party in the form of "concluding observations". The Committee cannot consider individual complaints, although a draft Optional Protocol to the Covenant is under consideration which could give the Committee competence in this regard. The former Commission on Human Rights, which is now known as the Human Rights Council, established a working group to this end. However, it may be possible for another committee with competence to consider individual communications to consider issues related to economic, social and cultural rights in the context of its treaty. This Committee meets in Geneva and normally holds two sessions per year. The Committee also publishes its interpretation of the provisions of the Covenant, known as general comments.<sup>159</sup>

### 3.2.7. Protection under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)<sup>160</sup>

As with the earlier international human rights instruments discussed above, the ICERD is universal in coverage and applies especially relevant to migrant workers who may be ethnic minorities in a host state. The Convention defines racial discrimination in Article 1 (I) as any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.<sup>161</sup>

Article 2 calls for State Parties to condemn racial discrimination in all its forms and to promote understanding among all races. In sub-paragraphs, that same article request State Parties to refrain the practice of racial discrimination of groups of persons, institutions and to ensure that their authorities and institutions refrain from sponsoring or promoting racial discrimination or organisations, to take effective measures to review policies and laws that had the effect of perpetuating racial discrimination, to encourage integrationalist, multiracial organisations, and to discourage anything which tends to strengthen racial divisions.<sup>162</sup> Article 3 calls upon State Parties to eradicate practices of discrimination in territories under their jurisdiction, while Article 4 calls upon them to condemn all propoganda, the dissemination of ideas or the promotion of racial discrimination by public institutions and authorities.<sup>163</sup> Article

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<sup>158</sup> Cholewinski (citing Klierk), *supra*, note 11, p. 61.

<sup>159</sup> UNHCHR, *supra*, note 147

<sup>160</sup> See the full text at UNTS.

<sup>161</sup> *Ibid.*, Article 1(1).

<sup>162</sup> *Ibid.*, Article 2:1 a , b, c, d.

<sup>163</sup> *Ibid.*, Article 4: a, b, c.

5 provides a list of political, civil, economic, social and cultural rights that State Parties are obligated to honour.<sup>164</sup> Article 6 calls for the assurance of everyone to effective protection and remedies through competent national tribunals and other State institutions and to adequate reparations or satisfaction for damages suffered as a result of racial discrimination that is contrary to the Convention.<sup>165</sup> Article 7 calls for State Parties to adopt immediate and effective measures in teaching, education, culture and information that will combat racial discrimination and to promote understanding, tolerance and friendship among nations and racial and minority groups. It also calls for them to propagate the principles and purposes of the Convention and the earlier UN Declaration on the Elimination of All Forms of Racial Discrimination.<sup>166</sup>

Article 8 of the Covenant calls for the establishment of a Committee on the Elimination of Racial Discrimination (CERD), the body of independent experts that monitors implementation of this Convention. States parties are obliged to submit regular reports to the Committee on how the rights are being implemented within their own domestic systems. Their initial report is due one year after acceding to the Convention and then after every two years.<sup>167</sup> The Committee examines each report and addresses its concerns and recommendations to the State party in the form of concluding observations. In addition to the reporting procedure, the Convention establishes three other mechanisms through which the Committee performs its monitoring functions: the early-warning procedure, the examination of inter-state complaints and the examination of individual complaints. The Committee also publishes its interpretation of the content of human rights provisions, known as general recommendations (or general comments), on thematic issues and organises thematic discussions.

The Committee's role in the protection of migrant workers from discrimination and unequal treatment is best outlined in General Recommendation XXX, where it points out that the Committee recognises the need to clarify the responsibility of State parties to CERD with regard to non-citizens. The recommendation noted that since its earlier recommendations (Nos. XI and XX,) it has become evident from examinations of State reports that groups other than migrants, refugees and asylum-seekers are also of concern for the Convention, including undocumented non-citizens and persons who cannot establish the nationality of the State on whose territory they live, even where such persons have lived all their lives on the same territory. Hence, the need to clarify the responsibilities of States parties to the International Convention on the Elimination of All Forms of Racial Discrimination with regard to non-citizens. The report based its action on the provisions of Article 5 of the Convention, which requires States parties to prohibit and eliminate discrimination based on race, colour, descent, and national or ethnic origin in the enjoyment by all persons of civil, political, economic, social and cultural rights and freedoms. The Committee stated that the new general recommendations replaced general recommendation No XI (1993).<sup>168</sup>

In the section concerning the responsibilities of State parties to this Convention, the Committee affirmed that while Article 1, paragraph 1 of the Convention defines racial discrimination, Article 1, paragraph 2 provides for the possibility of differentiating between citizens and non-citizens. However, it also affirmed that Article 1, paragraph 3 declares that with regards nationality, citizenship or naturalisation, the legal provisions of States parties must not discriminate against any particular nationality. On this matter it furthermore found

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<sup>164</sup> *Ibid.*, Article 5.

<sup>165</sup> *Ibid.*, Article 6.

<sup>166</sup> *Ibid.*, Article 7.

<sup>167</sup> Full text available at <[www.unhchr.org](http://www.unhchr.org)> visited on August 7, 2006.

<sup>168</sup> Committee on the Elimination of Racial Discrimination, General Recommendation XXX: Discrimination Against Non Citizens, 01/10/2004, UNHCHR, Geneva, Preamble, and para. 39,

that Article 1, paragraph 2, must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognised and enunciated in particular in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.<sup>169</sup> The Committee furthermore pointed out how Article 5 of the Convention incorporates the obligation of States parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights. It allowed that some of these rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons, and that States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognised under international law.<sup>170</sup>

The Committee also affirmed that under the Convention, 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. It made clear that differentiation within the scope of article 1, paragraph 4 of the Convention relating to special measures is not considered discriminatory. It concluded its affirmation of the general principles by a reminder of the fact that States parties are under an obligation to report fully upon legislation on non-citizens and its implementation, and that they should include in their periodic reports, in an appropriate form, socio-economic data on the non-citizen population within their jurisdiction, including data desegregated by gender and national or ethnic origin.<sup>171</sup>

The Committee recommended that State parties review and revise legislation, as appropriate, in order to guarantee that such legislation is in full compliance with the Convention, in particular regarding the effective enjoyment of the rights mentioned in article 5, without discrimination; ensure that legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status, and that the implementation of legislation does not have a discriminatory effect on non-citizens; pay greater attention to the issue of multiple discrimination faced by non-citizens, in particular concerning the children and spouses of non-citizen workers, to refrain from applying different standards of treatment to female non-citizen spouses of citizens and male non-citizen spouses of citizens, to report on any such practices and to take all necessary steps to address them; ensure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent, or national or ethnic origin; and ensure that any measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping. Other recommendations to State parties were concerned with protection of non-citizens and migrants from hate speech and racial violence; non-discrimination with regards access to citizenship or naturalisation, the disadvantages of the denial of citizenship for long-term or permanent residents, the reduction of statelessness, in particular statelessness among children, and allowing both parents to transmit their citizenship to their children. The Committee also recommended that non-citizens enjoy equal protection and recognition before the law, effective legal remedies, the right to seek just and adequate reparation for any damage suffered as a result of violence, security with regard to arbitrary detention, the

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<sup>169</sup> *Ibid.*, paras. 1 and 2.

<sup>170</sup> *Ibid.*, para. 4.

<sup>171</sup> *Ibid.*, paras. 3 and 5.

administration of justice, expulsion and deportation proceedings, and that conditions in centres for refugees and asylum-seekers meet international standards.<sup>172</sup>

The Committee also provided recommendations for the economic, social and cultural rights of non-citizens. The emphasis called for States to remove obstacles that prevent the enjoyment of all economic, social and cultural rights by non-citizens, notably in the areas of education, for adults and children, non segregated housing, employment, working conditions and employment rights, including the right of assembly; health care and health services including mental health care. It was furthermore recommended that State parties take measures to prevent and redress the serious problems commonly faced by non-citizen workers, in particular by non-citizen domestic workers, including debt bondage, passport retention, illegal confinement, rape and physical assault; take measures to prevent practices that deny non-citizens their cultural identity, such as legal or de facto requirements that non-citizens change their name in order to obtain citizenship, and to take measures to enable non-citizens to preserve and develop their culture; and ensure the right of non-citizens, without discrimination based on race, colour, descent, and national or ethnic origin, to have access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafés, theatres and parks.<sup>173</sup>

### 3.2.8. Protection in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

This Convention is the only human rights treaty which affirms the reproductive rights of women and targets culture and tradition as influential forces shaping gender roles and family relations. It affirms women's rights to acquire, change or retain their nationality and the nationality of their children. States parties also agree to take appropriate measures against all forms of traffic in women and exploitation of women.<sup>174</sup> CEDAW does not contain the limitations on rights expressed in Article 2.3 of the ESCSR and Article 1.2 of CERD. Provisions within the CEDAW are applicable and relevant to all women, and, without limitations, even to migrant women.

Article 1 defines the discrimination of women as “...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”. While article two provides a comprehensive list of principles and measures that State parties should adopt in order to protect women from practices of discrimination in many areas. This includes the repeal of all national legislation which constitutes discrimination. Article 6 advocates suppressing the exploitation of women, and Article 7 calls for States to take all measures to eliminate discrimination against women in political and public life, to enable them to vote and stand for elections and to formulate and implement government policies to hold public office. Article 9 addresses the right of women to retain or change their nationality and gives them equality with men regarding their children’s nationality.<sup>175</sup> The provisions in CEDAW should also apply to many foreign women who, because of their foreign citizenship, are not able to leave their husbands for fear of reprisals such as the denial of the extension of their residence permits or the right to determine the citizenship of children. Equality of rights in respect to

<sup>172</sup> *Ibid.*, paras. 4 – 14.

<sup>173</sup> *Ibid.*, paras. 18 – 38.

<sup>174</sup> Full text of the convention available at <[www.unts.org](http://www.unts.org)> visited on August 7, 2006.

<sup>175</sup> U.N. GAOR, GA Res. 34/180 of 18 December, 1979. Entered into force 3 September, 1981, at UNTS, available at <[www.unts.org](http://www.unts.org)> visited on August 7, 2006.

employment and work is provided for in Article 11 and relates to clearly described rights such as the right to work, to free choice of profession and employment, health care and other social and economic rights. Rural women are of special focus in this section, while equal remuneration, relates to real life situations that are faced by thousands of women daily in all levels of society.

Part V (Articles 17 – 22) of the Convention provides for a system of implementation and supervision of State Parties to the Convention with the establishment of a Committee.<sup>176</sup> State parties are to submit reports on their application of the convention to the Secretary General of the United Nations. The Committee makes its suggestions and recommendations to the General Assembly through ECOSOC. The Committee on the Elimination of Discrimination has adopted a considerable number of recommendations that are applicable to provision of adequate health and health care for all women, which clearly include migrant women. In General Recommendation No. 24 (XX) the Committee pointed out that State Parties have a duty to ensure access to health-care services, information and education for women on a basis of equality with men and that failure to do so is a violation of Article 12 of the Convention.<sup>177</sup> One of the major faults with this Convention, however, is that it is absent communications procedures from other States and from individuals.

### 3.2.9. The International Convention on the Rights of the Child (ICRC)

The ICRC requires State parties to not only provide children with those rights without discrimination, but also to take action to ensure that they enjoy those rights on par with adults, be they citizens or not of the countries they are in. By enunciating that these rights are to be implemented regardless of the position of child's parents (Article 2:1), the Convention places the responsibility to justify any exception to the equality principle onto the shoulders of State parties. The ICRC offers a framework of non-discrimination that is applicable to all children regardless of nationality, migration status or state of residence. Its provisions also apply to children of migrants, or in some cases, child-migrants.<sup>178</sup> The Convention enunciates non-discrimination of the civil and political rights of children, as well as their economic, social and cultural rights. Of the Articles outlining the principles that serve as guidelines for the interpretation of the Convention there is Article 2:1 which addresses non-discrimination for all of the child's political and social rights, and Article 2.2 which calls for State parties to take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment, even those that are the basis of the opinions, status or beliefs of their parents, guardians or family members. There is also Article 3: 1 – 3 which provides that State shall have the best interest of the child as the primary consideration in all actions concerning children, whether in the public or private sector, social welfare institutions, courts of law, administrative authorities or legislative bodies. The norm of non-discrimination is to be applied irrespective of the child's parent's migration status.

There are several more "general principles" that are in the best interests of the migrant child as a primary consideration in all State actions concerning children. These are Article 6 on the right to life, survival and development; articles 7 and 8 which provide for the child to have the right to an identity, including a name and family relations. But this provision only forbids unlawful State interference, which leaves the question of legal State interference open to debate. Revival and existence; articles 9 and 10 which provide for States to ensure that

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<sup>176</sup> *Ibid.*, Article 17.

<sup>177</sup> <[www.un.org/womenwatch/daw/cedaw/recommendations/index.html](http://www.un.org/womenwatch/daw/cedaw/recommendations/index.html)>, para. 13, visited on 2006-06-03

<sup>178</sup> *Ibid.* The CRC defines a child as every human being below the age of eighteen unless under the law, majority is attained earlier. See the full text of the Convention at <[www.unhchr.org](http://www.unhchr.org)> visited on August 7, 2006.

children are not separated from their parents against their will and to enter or leave a State party for the purpose of family reunification; and Article 11 which calls for State parties to take measures to combat the illicit transfer and non-return of children abroad. The second paragraph of this article calls for States to enter into bilateral or multilateral agreements in order to facilitate the provisions of this article. Other rights that are important for non-citizen children are: the right to the freedom of association and peaceful assembly (Article 15). This right is important because it gives full protection to the right of children to participate in religious or education institutions without restrictions unless such are in the interest of national security or public safety, or for the protection of public health, morals, rights and freedoms of others. Account should also be taken of Article 29, paragraph 1 (c), in which State parties agree that the education of the child must be directed to the development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate and for civilisations different from his or her own.<sup>179</sup> Subsequent articles in the ICRC offer non-discriminatory protection for children who are disabled (Article 23), an attainable standard of health (Article 24), mental health (Article 25), social security and social insurance (Article 26), an adequate standard of living (Article 27), a free primary education (Article 28), to practice their own culture, religion or language (Article 30), and economic exploitation (Article 32). Article 37 also provides for State parties to ensure that children will not be subjected to torture or other cruel, inhuman or degrading treatment, capital punishment, arbitrary arrest detention or imprisonment; and Article 38 calls for State parties to ensure that they will respect the rules of international humanitarian law that are relevant to children in armed conflicts, and that they will not recruit children to take part in such conflicts.

Monitoring children's rights under this convention is addressed in Part II, articles 42 through 45. The Committee on the Rights of the Child (CRC) is the body of independent experts that monitors implementation of the Convention on the Rights of the Child by its State parties. It also monitors implementation of two optional protocols to the Convention, on involvement of children in armed conflict and on sale of children, child prostitution and child pornography. States parties are obliged to submit regular reports to the Committee on how the rights are being implemented in Article 44. Their initial report is due two years after acceding to the Convention and then every five years. The Committee examines each report and addresses its concerns and recommendations to the State party in the form of concluding observations.

The Committee cannot consider individual complaints, although child rights may be raised before other committees with competence to consider individual complaints. The Committee meets in Geneva and normally holds three sessions per year consisting of a three-week plenary and a one-week pre-session working group. The Committee also publishes its interpretation of the content of human rights provisions, known as general comments on thematic issues and organises days of general discussion.<sup>180</sup>

### 3.2.10. The International Convention against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment (ICAT)

The International Convention Against Torture is another important document offering protection from treatment that could clearly be seen as discriminatory towards non-citizens and foreign migrant workers: the act of deportation to a place where they could be subjected

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<sup>179</sup> *Ibid.*

<sup>180</sup> UNHCHR.

to torture.<sup>181</sup> Unlike the prohibition offered in Article 7 of the ICCPR, Article 1:1 of the ICAT provides a definition of what is meant by torture for the purpose of the Convention. Article 2:2 allows no circumstances for exceptions to torture whatever, “*whether a state of war international political instability or other public emergency may be invoked as a justification of torture.*” Article 3:1 is clearly the most important article in this convention for migrant workers because it prohibits the expulsion, return or extradition of a person to another State where there are substantial grounds for believing that he/she would be in danger of being subjected to torture.<sup>182</sup> In Article 3:2, the treaty calls for State parties to take into account all relevant considerations of the receiving State when determining whether or not there are grounds for refoulement. But the Committee Against Torture allows no exceptions to this article, not even for national security, and has criticised several states for allowing exceptions to the overall intentions of the Convention.<sup>183</sup> Although not specifically addressing non-citizens, Article 3 of the CAT protects “*a person*” from refoulement to another State where they would be in danger of torture.<sup>184</sup>

Monitoring and implementation of the prevention of torture and other cruel, inhuman or degrading treatment or punishment is called for in Part II of the Convention in Articles 17 through 24 which establish The Committee Against Torture (CAT). This consists of a body of independent experts that monitors implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by its State parties. State parties are obliged to submit regular reports to the Committee on how the rights are being implemented. The initial report is due one year after acceding to the Convention and then after every four years. The Committee examines each report and addresses its concerns and recommendations to the State party in the form of concluding observations.<sup>185</sup>

In addition to the reporting procedure, the Convention establishes three other mechanisms through which the Committee performs its monitoring functions: it may consider inter-state complaints (Article 21:a ); under certain circumstances, consider individual complaints or communications from individuals (Article 22:1); or it may undertake inquiries based on any communication making a declaration of a violation of the provisions of the Convention.<sup>186</sup>

A proposed Optional Protocol to the Convention will create a sub-committee and allow in-country inspections of places of detention to be undertaken in collaboration with national institutions. The Committee also publishes its interpretation of the content of human rights provisions, known as general comments on thematic issues.

### 3.2.11. Protection from Slavery, Trafficking and Similar Practices

The smuggling and trafficking of migrants has led to the establishment of a number of conventions and protocols whose aims are to re-enforce existing conventions that protect individuals from more modern forms of slavery. The earliest universally binding convention that has been the most useful to international migrants as individuals is the International Convention for the Suppression of the White Slave Traffic of 1910. This was followed by the International Convention for the Suppression of the Traffic in Women and Children of 1921, the International Convention for the Suppression of Slavery of 1927, the International Convention for the Suppression of the Traffic of Women in Full Age of 1933, and the

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<sup>181</sup> U.N. GAOR., GA Res. 39/46 of 10 December, 1984. Entry into force: 26 June, 1987 available at <[www.unts.org](http://www.unts.org)> visited on August 3, 2006.

<sup>182</sup> *Ibid.*

<sup>183</sup> See U.N. GAOR 53<sup>rd</sup> Sess., Report of the Committee Against Torture, A/53/44, Annex IX, Gen. Comment No. 01 (1998) available at <[www.unhchr.org](http://www.unhchr.org)> visited on August 4, 2006.

<sup>184</sup> *Supra*, note 181, Article 3:1.

<sup>185</sup> *Ibid.*, Articles 21 and 22.

<sup>186</sup> *Ibid.*, Articles 2:1 and 22:1 and 3.

Supplementary Convention on the Abolition of Slavery, the Slave Trade Institutions and Practices Similar to Slavery that entered into force on April 30, 1957.<sup>187</sup> The above named instruments are especially interesting to migrant workers because they not only prohibit the sale of all persons (women and children) as slaves, but they also prohibit institutions and practices that are similar to slavery. The Supplementary Convention provides a definition of “slavery” which includes a powerless servile status, debt bondage, serfdom, and institutional practices where a tenant is bound to labour on land belonging to another and is not free to change his or her status. It also includes protection for women who are promised in marriage for monetary consideration, who are inherited by another person on the death of their husbands, and who are subjected to transference for value or money. The Supplementary Convention furthermore protects children under the age of 18 who are “delivered” by a parent or guardian with a view to be exploited for labour. One of the most important features of the Supplementary Convention, however, is that no reservations of any kind are allowed. Only two State parties were required for this convention to enter into force. However, neither the Slavery Convention nor the Supplementary Convention allowed for individual complaints.<sup>188</sup>

More recent instruments protecting international migrants include the major conventions described earlier (ICMW, ICEDAW, ICRC and its Optional Protocol of 2000), The Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoptions (1993) and the United Nations Convention against Trans-national Organised Crime and its Additional Protocols (i.e., Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air).<sup>189</sup> The latter Convention and its Protocols aim to prevent and combat the trafficking and smuggling of persons by criminalising such acts; to treat those who are trafficked and smuggled as victims with inherent rights; and to promote international co-operation to combat those practices between law enforcement officials. By “trafficking in persons” the instruments mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments for benefits to achieve the consent of a person having control over another person for the purpose of exploitation.<sup>190</sup> By “smuggling of migrants” the instruments mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State party of which the person is not a national or a permanent resident.<sup>191</sup> However, this Convention and its protocols do not offer a clear mandate for commitment from governments as State parties are only required to adopt legislative measures to allow residency in “appropriate cases”, and are only required to give appropriate consideration to humanitarian and to adopt “appropriate measures” that permit victims of trafficking to remain in its territory, temporarily or permanently in “appropriate cases”. Besides this weakness, the criminalisation emphasis of these instruments undermines the position of those seeking refugee status, which provides substantial

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<sup>187</sup> There were also a number of non-binding Protocols on the prevention and suppression of trafficking in persons, especially women, children and migrants by land, sea and air. See the complete list of these instruments at UNTS.

<sup>188</sup> *Ibid.* See the Supplementary Convention, Articles 1 – 2.

<sup>189</sup> There are also UNICEF’s *Guidelines for the Protection of the Rights of Children Victims of Trafficking in South-eastern Europe* (2003) the UN High Commissioner for Human Rights’ *Principles on Guidelines on Human Rights and Trafficking* (2002) and the WHO’s *Ethical and Safety Recommendations for Interviewing Trafficked Women* (2003). <[www.un.org](http://www.un.org)> visited on 10 April, 2005.

<sup>190</sup> V. Muntarhorn, ‘Combating Migrant Smuggling and Trafficking in Persons, Especially Women The Normative Framework Re-appraised’ in T.A. Aleinkoff and V. Chetail (Eds), *Migration and International Norms*, (Asser Press, The Hague, 2003) p. 157.

<sup>191</sup> See Commission on Human Rights, 57<sup>th</sup> Session, item 14: E/CN.4/2001/83 at <[www.unhcr.org/english](http://www.unhcr.org/english)> visited on 15 May, 2006.



guarantees, through the process of being smuggled, or as it may occur in some cases, trafficked while being smuggled from a worse situation. Hence, the labels trafficked and smuggled in these instruments have been criticised by a number of NGOs.

The ILO also adopted a number of instruments calling for the protection of international migrant workers, such as: The ILO Convention Concerning Forced Labour (entered into force in 1932, it is also known as ILO Convention No. 29) and the ILO Convention Concerning the Abolition of Forced Labour (entered into force in 1959, also known as ILO Convention No. 105) each made important contributions to the prevention and prohibition of forced labour.<sup>192</sup> Hence, none of the above instruments offer any clear or decisive definition of what forced labour or slavery entails and are therefore not of much use to many categories of migrant worker.

There are also a number of regional binding human rights instruments which are applicable to the protection of foreign migrant workers the European Convention on Human Rights; the American Convention on Human Rights; and the African Charter on Human and Peoples Rights. Article 5 of the African Charter prohibits all forms of degrading treatment including slavery and slave trading, but also calls for duties to family, society, parents, the defence of territorial integrity without mentioning compensation. The Charter and its articles are examined further on.

### 3.3. The Right to Protect Citizens through Consulates

With exception for persons seeking asylum, the primary responsibility for the promotion and protection of the rights of citizens in a foreign State is the diplomatic Consulate of their State of origin.<sup>193</sup> The 1963 Vienna Convention on Consular Relations provides specific guidelines for States to protect their nationals on foreign soil. This consists of protecting in the interests of its own nationals and even those of a third State where there is no objections by the host State.<sup>194</sup> Such protection can be provided in accordance with the laws of the host State even in the absence of a treaty or other such agreements, and are appropriate within the purposes of States to promote friendly relations between them in accordance with the Convention.<sup>195</sup> Consular functions also consist of performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State. Such functions include those to which no objection is taken by the receiving State, or which are referred to in the international agreements in force between the sending State and the receiving State.<sup>196</sup>

Although absent in the main body of human rights law, this feature of protection for non-citizens in a host State is strengthened through Article 23 of the MWC, where it entitles foreign migrant workers and their family members to have the right to recourse to the protection and assistance of the consular or diplomatic authorities of either their State of origin, or of a State representing the interests of that State whenever the rights of the

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<sup>192</sup> See the explanation by P. Siegarht, *The International Law of Human Rights*, (Oxford, 1992 ), pp. 233–235. The ILO instruments are examined further on.

<sup>193</sup> See Article 3, para. 1:b of the Vienna Convention on Diplomatic Relations states that the function of a diplomatic mission consists *inter alia* in protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law. Adopted 16 April, 1961, by the UN Conference on Diplomatic Intercourse and Immunities held in Vienna, 1961. U.N.Doc.A/Conf.20/13), available <[www.unts.org](http://www.unts.org)> visited on June 7, 2006.

<sup>194</sup> See Article 5:e of the Vienna Convention on Consular Relations and Optional Protocols Done at Vienna on 24 April, 1963, entered into force on 19 March, 1967. Available at <[www.unts.org/ilc/texts/instruments/english/conventions/9-2-1963.pdf](http://www.unts.org/ilc/texts/instruments/english/conventions/9-2-1963.pdf)>, visited on August 15, 2006.

<sup>195</sup> *Ibid.*, Article 5b.

<sup>196</sup> *Ibid.* Article 7

Convention are impaired. This recourse should be especially protected in cases of expulsion, when the authorities of the expelling State should facilitate the exercise of the right to information regarding this right.<sup>197</sup>

The absence of any dialogue or practice by many consulates on this right has contributed to the abuse of foreign migrant workers in a number of countries.

### *3.4 Protections under the ILO*

The International Labour Organisation is the UN specialised agency which seeks the promotion of social justice and internationally recognised human and labour rights. It was founded in 1919 and is the only surviving major creation of the Treaty of Versailles which brought the League of Nations into being and it became the first specialised agency of the UN in 1946. The ILO formulates international labour standards in the form of Conventions and Recommendations setting minimum standards of basic labour rights. It also provides technical assistance vocational training, rehabilitation, employment policy, labour law and industrial relations and other labour related areas. The organisation accomplishes its work through tripartite structure with workers and employers participating as equal partners with governments in the work of its governing organs.<sup>198</sup>

The ILO's contributions to the improvement of conditions for workers takes three directions. The first is through its conventions and recommendations that set standards for national laws, judicial and administrative procedures relating to employment. The second direction is through technical co-operative projects. The third is through its supervision and enforcement procedure, which requires member States to file reports on the improvements adopted under the ILO conventions. These are then examined by the Committee of Experts on the Application of Conventions and Recommendations (CEACR), whose members are appointed by the Governing Body of the ILO. The reports are then discussed during the tripartite forum, a procedure which enables the ILO to secure a number of human rights protection for workers of its member States. Any member state, employer or worker organisation or other type of organisation in consultative status with the ILO may submit written complaints of violations of the obligations incurred under the treaties.<sup>199</sup> The organisation offers a mechanism established in Articles 24 and 25 of the Constitution for complaints made by trade unions or employer organisations; mechanisms established in Articles 25 to 34 providing for complaints made by State Parties against one another; a mechanism for handling complaints regarding the freedom of association which are presented to the Committee on the Freedom of Association (CFA); a mechanism for handling complaints concerning discriminatory practices which may only be used by States, trade unions, employer organisations or NGOs in consultative status with the ILO; and a mechanism for enabling studies by the Governing Body's Committee on Discrimination against any member State, whether or not they have ratified the ILO Convention Against Discrimination.<sup>200</sup> A more detailed explanation of the protections available under the ILO are provided in Chapter Four.

#### 3.4.1. Binding Protection under UNESCO

The fundamental objectives of UNESCO are the reduction of illiteracy, the dissemination of scientific know-how, the facilitation of scientific educational and cultural communications

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<sup>197</sup> See Article 23 of the Migrant Worker Convention, UNTS.

<sup>198</sup> See 'Basic facts about the United Nations', (UN Dept. of Public Information, NY 1995), p. 274.

<sup>199</sup> <[www.ilo.org/public/english/depts/fact.htm](http://www.ilo.org/public/english/depts/fact.htm)> visited on 21 March, 2005.

<sup>200</sup> See the ILO Constitution, *Ibid.*, Articles 24 and 25.

and the preservation of human kind's artistic and cultural heritage. The organisation's activities are organised around promoting studies on education, science and culture, developing, sharing and transferring knowledge, formulating international standards, providing technical assistance to governments and exchanging information.<sup>201</sup> UNESCO has a number of Conventions with monitoring mechanisms requiring periodic reports from State parties on the measures taken to put into practice the obligations called for when ratifying a UNESCO Convention. These are studied by the Committee on Conventions and Recommendations on Education, a body composed of representatives of Member States of UNESCO. The body meets twice per year.

The right to an education is also provided for in the UNESCO Convention Against Discrimination in Education which calls for State parties to undertake to "give foreign nationals resident within their territory the same access to education as that given to their own nationals".

In 1978, the Executive Board of UNESCO laid down a confidential procedure, known as the 104 EX/3 Procedure for examining communications (complaints) received by the organisation concerning alleged violations of human rights in education, science, culture and information. Individuals, groups and NGOs may submit complaints to UNESCO concerning human rights violations, the remedies of which are offered to governments through resolutions and recommendations.<sup>202</sup>

### 3.5. African Regional and Sub-Regional Human Rights Instruments

#### 3.5.1. The African Charter on Human and Peoples' Rights<sup>203</sup>

In 2001, the Constitutive Act of the African Union entered into force for the signatory States that adopted it.<sup>204</sup> Although, clearly an instrument of political unity, the Act included the promotion and protection of human and peoples' rights in the list of objectives it aimed to achieve, and it identified The African Charter on Human and Peoples' Rights as one of the instruments that were relevant to the goals of the Act. The provisions of the Charter are to be supervised by The African Commission on Human and Peoples' Rights.<sup>205</sup>

Although the Charter does not mention migrant workers in any of its articles it contains a provision on the freedom of movement in Article 12, and restricts that freedom to those

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<sup>201</sup> UNESCO, <www.unesco.org> visited on 24 May, 2005.

<sup>202</sup> *Ibid.*

<sup>203</sup> The principle "hard law" regional human rights instruments for Africa are *The African [Banjul] Charter on Human and Peoples' Rights*, adopted June 27, 1981 (entered into force Oct. 21, 1986); the *Additional Protocol* to that Charter of 1997; the *African Charter on the Rights and Welfare of the Child*, of 1990 (entered into force November 29<sup>th</sup>, 1999); the *Convention Governing the Specific Aspects of Refugee Problems in Africa*, (entered into force June 20, 1974); the *International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence*, UN Doc. ITR/3/REV.1 (1995), entered into force 29 June 1995. There is also the *OAU Convention for the Elimination of Mercenaries in Africa*, OAU Doc. CM/433/Rev.L, Annex 1(1972). "Soft law" instruments include the *Dar es Salaam Declaration on Academic Freedom and Social Responsibility of Academics* (1990); *The Khartoum Declaration on Africa's Refugee Crisis*, September (1990); *The Kampala Declaration on Intellectual Freedom and Social Responsibility* (1990). Also of minor importance for migrant workers in Africa are two major sub-regional Sub-Saharan organisations whose mandates are primarily concerned with economic development and trade. These are SADC (*the Southern African Development Community*) and *The Economic Community for West African States*, ECOWAS, and a number of others. See F. Söderbaum: *Handbook of Regional Organisations in Africa* (Nordiska Afrikainstitutet, Uppsala, 1996.)

<sup>204</sup> See the Constitutive Act of the African Union, Article 5(1) 23.15). OAU Doc. CAB/LEG/15, which entered into force May 26, 2001, available at the RWI Library.

<sup>205</sup> Part II, Article 30 of the African Charter, *Supra*, note 203.

abiding by law. It provides no provisions for undocumented migrant workers but provides for the right to seek and obtain asylum in other countries in accordance with host State laws and international conventions, addresses nearly all of the civil, political, social and economic rights contained in a number of earlier human rights conventions. One major improvement over universal conventions is the absence of a time limit for individuals who wish to file complaints as long as they are submitted within a “reasonable period from the time local remedies have been exhausted”.<sup>206</sup>

But there are two major drawbacks for human rights protection in the African Charter. The first is that it contains clawback (State Limitations) clauses which allow exceptions on the rights of all people, including documented and undocumented migrant workers. But these are best understood through understanding Article 27(2) which calls for the rights and freedoms of individuals to be exercised with due regard to the rights of others, collective security, morality and common interest. Hence, though threatening, the clawback clauses have been nullified by the African Commission in a decision that left State parties with no derogation clause in the African Charter. In a case involving the seizure of a magazine by the Nigerian government, the Commission stated that “a limitation may never have the consequence that the right becomes illusory”, and applied the principle of the article to its decision against the Nigerian government for violating Articles 6, 9.1, 7.1, (c), 14, et 16 of the African Charter.<sup>207</sup> The second major drawback is that there is no coercive enforcement mechanisms that enables the African Commission to enforce its recommendations on member States. The Commission’s powers in such matters is to send reminders of their obligation to honour its decisions in Article 1 of the African Charter, which is that: “Member States of the Organization of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.”<sup>208</sup>

In 2004 the African Court on Human and Peoples Rights was established under a protocol to the African Charter on Human and Peoples’ Rights as an organ of the African Union.<sup>209</sup> The Court has jurisdiction over matters arising from the interpretation of the African Charter on Human and Peoples’ Rights and other relevant human rights instruments ratified by the African States, and is competent to adjudicate matters arising from the interpretation of Constitutive Act of the African Union.<sup>210</sup> The Court has a particular relationship to the African Commission on Human and Peoples’ Rights where it complements the protective mandate of the African Commission on Human and Peoples’ Rights.<sup>211</sup> Only member States and organs of the African Union can submit cases to the African Court of Justice.<sup>212</sup> However, there is a provision in the protocol establishing the African Court on Human and Peoples’ Rights for individuals and other non-governmental entities to file cases directly before the court upon a State Party that has declared it has accepted such jurisdiction of the Court.

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<sup>206</sup> *Ibid.*, . Article 56

<sup>207</sup> African Commission on Human and Peoples Rights, 12<sup>th</sup> Activity Report (1998/1999), para. 70, available at <www.achpr.org> visited on 13 June, 2006. *See also* comments by F. Ouguergoz, *The African Charter on Human and Peoples’ Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (Martinus Nijhoff, The Hague, 2003), pp. 429–433.

<sup>208</sup> *Supra*, note 203 Article 1.

<sup>209</sup> *Ibid.*

<sup>210</sup> *Supra*, note 207: Protocol to the African Charter on Human and Peoples’ Rights establishing the African Court on Human and Peoples’ Rights, Article 3(1). OAU/LEG/MIN/AFCHR/PROT.1, rev2 (1997), entered into force January 25, 2004.

<sup>211</sup> *Ibid.*, Article 2.

<sup>212</sup> *Ibid.*, Article 18(1). Article 18(1)(d) makes provision for third parties to submit cases to the Court under conditions to be determined by Assembly and with consent of the State party concerned. This could be making provision for an *amicus curiae* brief.

Article 3 of the African Court Protocol extends the jurisdiction of the African Court to disputes arising from “any other relevant human rights instrument ratified by the States concerned”. This could be interpreted as the basis for including proceedings arising from provisions in universal instruments such as the ICCPR and the ICESCR, the ILO, and proceedings from African Committee of Experts within the ambit of the African Court on Human and Peoples’ Rights. But in the absence of treaty provision authorising them to do so, claimants before the African Committee of Experts and the Committee may lack such standing before the African Court.

All member States of the African Union have committed themselves to strengthening human rights protection mechanisms in Africa, and migrant workers on the continent would clearly be one of its benefactors.<sup>213</sup> But this will require the integration of both institutions, the African Commission, and the African Courts into a substantive unit with a clear mandate and routines. The Constitutive Act of the AU will also need to be amended to reflect the new character of such an integrated court. Until then, however, the protection of migrant workers under the existing system remains marginal, at best.

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<sup>213</sup> *Ibid.*, Articles 2 and 4 of the Constitutive Act of the African Union.

### 3.6. Analysis, Comments and Conclusions

Until the United Nations adopted the Migrant Worker Convention, neither universal nor regional regimes had a comprehensive instrument that was specifically aimed at protecting the rights of migrant workers.<sup>214</sup> The limited number of human rights instruments with provisions that also apply to non-citizens failed to address the contemporary needs of many categories of migrant workers and their family members.

On the one hand, none of the Conventions define the term “discrimination”, or indicate what constitutes the act. As it is migrants who are most vulnerable to discrimination, it is convenient that the first article of the ICERD provides what “racial discrimination” shall mean, and that the conventions on women (CEDAW) and children (CRC) address the discrimination of their own specific groups. The vulnerability that applies to migrants of a different ethnicity also applies to women migrants, who invariably have a double vulnerability because they are also intimidated from complaints regarding violence, trafficking or smuggling activities. But the rights available in most human rights conventions do not specifically address migrants and the members of their families. Hence, the non-discrimination provisions that are so prevalent in human rights covenants appears to permit the differentiation of the treatment of migrants within those categories. But the Human Rights Committee has made it clear that it believed that the term “discrimination” should be used to imply any “distinction, exclusion, restriction or performance based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status which has the purpose of nullifying...rights and freedoms”.<sup>215</sup> The civil and political rights outlined in the ICCPR are therefore, particularly important in this context.

On the other hand, the application of non-discrimination principles to the economic, social and cultural rights continue to remain less certain regarding their applicability to migrants under the ICESCR. Because Article 2:3 allows developing countries with an escape route to the non-discrimination provisions in Article 2:2, and Article 4 allows general limitations in the interest of the general welfare in a democratic society, the instrument can be seen as offering less protection to migrant workers than the ICCPR or those designed to protect specific groups (i.e., women or children). Even though the categorical exclusion of migrants from all the rights in the instrument are not allowed, the proportionality principle would support distinctions between so-called legal migrants and those who are clearly illegal within the receiving countries borders. Furthermore, an initial reading of the ICERD might inspire migrants who are also ethnic or racial minorities to look for a secure level of protection from discrimination. But Article 1:2 of this convention contains a disclaimer to the application of the convention by a State Party between citizens and non-citizens. There seems to be a restoration of rights in this convention if migrants seek protection from discrimination under Article 1:3, which provides the Convention does not affect State Party laws concerning nationality, citizenship or naturalisation providing those laws do not discriminate against any particular nationality.

Thirdly, the emergence of more universal conventions specifically aimed at protecting the rights of migrant workers has more support from sending countries than it does from receiving countries. It is the wide application of rights within the Migrant Worker Convention, as opposed to the more limited provisions in ILO treaties (*supra*, Chapter five) that is the reason for this phenomena. Besides offering a wide range of rights – and in some cases, a number of new ones – the MWC embraces legal and illegal (irregular) migrants, family members and other groups of migrant workers. It also provides for an expanded range

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<sup>214</sup> This does not include the ILO’s instruments, which are examined in the next chapter.

<sup>215</sup> Human Rights Committee, General Comment No. 18 (37) (Non Discrimination), para. 13, (1989), at UNTS.

of social, cultural and procedural rights with regards information, education, detention and deportation.

Another of the more important gaps in human rights laws that are designed to protect all persons from discrimination, including migrants, is that the procedures for individual complaints to be heard may be limited for migrants in an undocumented, or illegal, situation. Only four of the human rights treaty bodies may, under certain circumstances, consider individual complaints or communications providing State parties agree to consider them: the committees for ICCPR, ICERD, ICEDAW (under the optional protocol), ICAT and the Migrant Worker Convention.

And finally, even though State parties are bound to honour their obligations to protect beneficiaries from discrimination, none of the binding conventions and covenants places an obligation on parties to integrate migrant workers into their economic and social structures. This absence in any of the human rights treaties is one of the most important gaps in protection for migrant workers within human rights law.

## **4. Protection for Foreign Migrant Workers in ILO Instruments**

### *4.1. Introduction*

The ILO provides its own labour standards that are binding on State parties to protect all categories of workers. They are comprehensive in their specification of migrants' individual rights. In successive stages over a period of more than forty years, by constantly evaluating past failures and achievements, the organisation has contributed to the enhancement of the dignity of migrants and improved guarantees against abuses with political correctness and continuity. They mainly address the problems of migration from the perspective of the individual migrant's needs and rights. However, a number of pre-ambular paragraphs and articles express value judgements and lack the coherence of the provisions concerning individual rights.

In 1949, migration was regarded as the path towards individual progress, and The Declaration of Philadelphia that was appended to the ILO Constitution that year recognised that the transfer of labour, including migration for employment, was a means of attaining full employment. In the same manner, the 1949 Recommendation recognised that to make the most of employment opportunities, member countries should facilitate the transfer of workers from countries with a labour surplus of labour to those with a shortage. The underlying aim of these standards is to ensure the implementation of two fundamental human rights principles: i) the promotion of non-discrimination, and ii) the achievement of international co-operation, both of which are cornerstones of the major human rights instrument.

In June, 1998 the ILO adopted the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (the 1998 Declaration from heron) at its Eighty-sixth Session in Geneva. It called upon members to reaffirm the commitments of the organisations member states to respect, promote and realise in good faith the right of workers and employers to freedom of association and the effective right to collective work. It further called for the elimination of forced labour, the abolishment of child labour, and the elimination of discrimination in respect of employment and occupation. It further declared that all ILO members, even those that had not ratified other Conventions, had an obligation to promote, respect and realise the fundamental rights which are the subject of those conventions.<sup>190</sup>

According to the 1998 Declaration, all ILO member States have an obligation – arising from the very fact of membership of the Organisation – to respect, to promote and to realise, in good faith and in accordance with the Constitution, four categories of principles and rights at work, even if they have not ratified the Conventions to which they refer: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation. The fundamental principles and rights at work are universal and applicable to all people in all States, regardless of the level of economic development. They thus apply to all migrant workers without distinction, whether they are temporary or permanent migrant workers, or migrants in an irregular situation. Besides, the 1998 Declaration makes specific reference to groups with special needs, specifically including migrant workers.<sup>191</sup>

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<sup>190</sup> ILO, 86<sup>th</sup> Session Report, 'World of Work' (1998), Geneva, available at <[www.ilo.org/ilolex](http://www.ilo.org/ilolex)>

<sup>191</sup> ILO, *Report VI of the 92nd Session of the ILO* (2004), Geneva, para. 229. *Ibid.*



#### *4.2 ILO Standards Protecting Migrant Workers*

The ILO has developed specific standards regarding the protection of migrant workers. In 1926 it adopted the Inspection of Emigrants Convention (No. 21), and the Migration (Protection of Females at Sea) Recommendation (No.26); in 1939 the Migration for Employment Convention (No. 66), and Recommendation (No. 61), and the Migration for Employment (Co-operation between States) Recommendation (No. 62); and in 1947 the Social Policy (Non-Metropolitan Territories) Convention (No. 82). Convention No. 66 never entered into force due to lack of ratifications; it was accordingly decided to revise it in 1949, when the Migration for Employment Convention (Revised) (No. 97) and Recommendation (Revised) (No. 86) were adopted. In 1955, the Conference adopted the Protection of Migrant Workers (Underdeveloped Countries) Recommendation (No. 100); in 1958, the Plantations Convention (No. 110) and Recommendation (No. 110); and in 1962, the Social Policy (Basic Aims and Standards) Convention (No. 117). Finally, in 1975, the Conference supplemented the 1949 instruments by adopting the Migrant Workers (Supplementary Provisions) Convention (No. 143) and the Migrant Workers Recommendation (No. 151).

The 1949 instruments were encouraged by the interest in facilitating the movement of surplus labour from Europe to other parts of the world. The provisions of the Migration for Employment Convention (Revised), 1949 (No. 97) and the supplementing Migration for Employment Recommendation (Revised), 1949 (No. 86) focus on the standards applicable to the recruitment of migrants for employment and their conditions of work. By 1975, host governments in industrial countries had become concerned about unemployment and the increase in irregular migration, and the focus shifted from facilitating the migration of surplus labour to bringing the flows of migrant workers under control. This facilitated the ILO to adopt two new standards: the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), 21 and the Migrant Workers Recommendations of 1975 (No. 151). These instruments were the first multilateral attempt to deal with irregular migrants. They also provided for sanctions against “traffickers”. Convention No. 143 reiterates that member States have a general obligation to respect the basic human rights of all migrant workers. It also provides that migrant workers should not only be entitled to equal treatment (as provided for in Convention No. 97) but also to equality of opportunity, e.g. equality with regard to access to employment, trade union rights, cultural rights and individual and collective freedoms.<sup>192</sup>

Both Conventions Nos. 97 and 143 cover issues concerning the whole migratory process, including emigration, immigration and transit, and apply to persons who migrate from one country to another with a view to being employed otherwise than on their own account. With the exception of Article 8 of Convention No. 97 and to some extent Part II of Convention No. 143, the instruments do not make a distinction between permanent or non-permanent migrants. The provisions in these instruments do not depend on reciprocity and also cover refugees and displaced persons in so far as they are workers employed outside their home country. Both Conventions allow for exceptions from their scope of application, namely seamen, frontier workers, and artistes and members of the liberal professions who have entered the country on a short-term basis. Convention No. 143 also excludes trainees and employees admitted temporarily to carry out specific duties or assignments from the coverage provided by the general provisions of Part II.<sup>193</sup>

There have been considerable difficulties for a number of State parties to ratify ILO conventions, and even some difficulty in applying their standards. Governments most

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<sup>192</sup> The question of equality of treatment between nationals and regular migrants was also addressed in Recommendation No. 86, which supplemented Convention No. 97. *Supra*, note 81, para. 240.

<sup>193</sup> See the Convention and its accompanying recommendation at <[www.ilo.org/ilolex](http://www.ilo.org/ilolex)>

frequently cited two paragraphs of Convention No. 97 as being difficult to comply with: Article 6 concerning equality of treatment for foreign workers and nationals, and Article 8 on the maintenance of residence rights for permanent migrant workers in the event of incapacity for work. With regards Convention No. 143, Article 8 offers protection for lawfully admitted migrant workers in the event of loss of employment; Article 10 provides equality of opportunity and treatment; and Article 14(a) provides migrant worker with the right to geographical and occupational mobility. The CEACR has commented that certain difficulties in the application of Conventions Nos. 97 and 143 appear to have been from misunderstanding of the obligations in certain provisions of those conventions.<sup>194</sup>

In comparison to the UN's Migrant Worker Convention, these ILO instruments failed to offer protection to itinerant, project-tied and self-employed migrant workers. They also failed to provide protection to migrant workers involved in the sex trade, to the right to self-choice of employment, and to the rights of family members to choose their own work. Such rights to migrant workers are all covered in the MWC.<sup>195</sup>

### *4.3. Instruments Protecting Specific Categories of Migrant Workers*

#### *4.3.1. Domestic Migrant Workers*

One of the manifestations of the increase of female migration has been the increase in the number of women engaging in domestic work as regular migrant workers, but also often as irregular migrants. Both international and national domestic work is an area that is characterised by a particular absence of any regulatory systems. At the international level, the flexibility of international standards is used to exclude this type of work from their scope. At the national level, domestic work is often excluded from the scope of national labour laws. There may thus be cases where domestic migrant workers are only protected by generally applicable fundamental principles and rights and basic human rights. But, as with migrant workers in an irregular situation, the crucial issue in these cases is whether domestic workers have effective access to appeals procedures and/or to other institutions such as independent human rights commissions or similar bodies, in order to be able to claim their rights to protection.<sup>196</sup> The ILO's approach has been geared towards prevention by regulating the recruitment process, and the use of model contracts incorporating basic issues such as salary, hours of work and weekly rest. The result of this approach is that some good practices have been observed in this respect. It remains a matter of debate whether this gap concerning migrant domestic workers should be filled at the international level, or more generally by encouraging wider dissemination of the practice in certain countries of providing protection for domestic workers in their national labour legislation.

Hence, it is important to consider a number of the ILO's conventions. This is because they are some of the oldest conventions available, offer a number of sound protections that have been overlooked in universal systems, yet clearly illustrate a number of the gaps in protection that the Migrant Worker Convention intends to fill.

#### *4.3.2. Agricultural Migrant Workers*

Many workers in agriculture in a large number of countries are migrant workers. The protection of workers in the agricultural sector has long been a concern for the ILO, and there

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<sup>194</sup> *Supra*, note 81, paras. 243–244.

<sup>195</sup> MWC, Articles 50 through 52.

<sup>196</sup> *Supra*, note 81, paras. 273–275.

are several standards that apply to agricultural workers in general. One of these is of particularly relevance for this category of migrant workers. The Convention Concerning Conditions of Employment of Plantation Workers, of 1958 (C110) and its Protocol of 1982, P110, which revises the definition of the term plantation.<sup>197</sup> Article 2 of this Convention includes “nationality” and “tribe” in its list of provisions to be applied equality and without distinction to all plantation workers.<sup>198</sup> Other standards which C110 calls for include maternity protection for women and children, whether or not they are married or born out of wedlock. The protection is extended to the employment of expecting mothers and forbids their being dismissed for up to six weeks during child birth.<sup>199</sup> Fixed wages and weekly rest periods are also featured in this Convention. Convention No. 110 is a comprehensive instrument covering a wide range of issues, i.e., medical care, housing and the right to organise and bargain collectively. Such issues are very relevant to the category of international migrant workers engaged in plantation work. Implementation of its standards is through a system of labour inspectors who are to enforce the provisions relating to conditions of work and the protection of the workers.<sup>200</sup>

However, Article 6 the Convention states clearly that “recruiting the head of a family shall not be deemed to involve the recruiting of any member of the his family”, and hence is not as inclusive as the MWC 1:2, which offers protection to members of the families of migrant workers.<sup>201</sup> It also provides State parties with an article enabling them to denounce the Convention ten years from the date it came into force.<sup>202</sup>

The second of these is Convention No. 184, which provides standards on occupational safety and health for workers in agriculture. In specifically refers to the principles embodied in C110, but fails to mention migrant workers or their family members. Its recommendations provides for measures to be taken to ensure that temporary and seasonal workers receive the same safety and health protection as that accorded to comparable permanent workers in agriculture and that adequate and appropriate training and comprehensible instructions on safety and health and any necessary guidance or supervision are provided to workers in agriculture ...taking into account their level of education and differences in language. This Convention also provides more generally that relevant national laws and regulations on welfare and accommodation facilities, working time arrangements and coverage against occupational injuries and diseases should apply to workers in agriculture. In addition, and as with the case of domestic workers, the ILO standard-setting approach has been to advocate the conclusion of model contracts and bilateral agreements. In practice, there are quite a few examples of such bilateral agreements.<sup>203</sup>

Implementation of this Convention is through reports by the ILO Governing Body to the General Conference on the State party’s implementation of this Convention.<sup>204</sup> However, Article 21:1:2 enables State parties to denounce this convention.

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<sup>197</sup> ILO P110 Protocol to the Plantations Convention, 1958, in force 18.06.1982. <[www.ilo.org/ilolex](http://www.ilo.org/ilolex)>

<sup>198</sup> ILO Convention C110, adopted during the 42<sup>nd</sup> Conference of the ILO, 1958 and entered into force in 1960.  
*Ibid.*

<sup>199</sup> *Ibid.*, Articles 46 – 50

<sup>200</sup> *Ibid.*, Articles 71-74:1, 2.

<sup>201</sup> *Ibid.*, Article 6.

<sup>202</sup> Article 94:1.

<sup>203</sup> See the list of ILO bilateral agreements at <[www.ilo.org/ilolex](http://www.ilo.org/ilolex)>

<sup>204</sup> ILO Convention C184, adopted 21 June, 2001. Article 27.

#### 4.3.3. Protecting Migrant Workers in Building and Construction

In terms of specific problems, construction is a sector with one of the highest incidences of occupational accidents and the ILO has adopted several instruments of general relevance in this area, as well as a Convention and a Recommendation specifically dealing with occupational safety and health in construction – Convention No. 167, and Recommendation No. 175. This Convention provides that the term employer includes any physical or legal person who employs one or more workers on a construction site; and includes, as the context requires, the principal contractor, the contractor or the subcontractor. This standard appears to be particularly relevant to migrant workers and is applicable to them, but the CEACR has not yet had the opportunity to address the conditions of migrant workers in this context.<sup>205</sup>

In its Preamble, C167 takes note of the relevant ILO conventions and recommendations that address safety provisions in a number of earlier Conventions but makes not reference to ILO Convention C111 of 1958. Its standards may be applied to “such self-employed persons as may be specified by national laws or regulations”,<sup>206</sup> it leaves the definition of worker to mean “any person engaged in construction” who is protected in the hands of the “national laws” of State parties,<sup>207</sup> and it makes no mention of migrant workers, members of their families, or that the principles should be applied equally between nationals and non-nationals.

Implementation of this Convention calls for State parties to provide inspection services to supervise the application of the measures of the Convention,<sup>208</sup> and a report by the Governing Body will be made to the General Conference “at times as it may be necessary.”<sup>209</sup> However, Article 39 enables State parties to denounce the Convention after ten years.

#### 4.3.4. Protecting Temporary Migrant Workers

ILO standards were not drafted with the protection of temporary migrant workers in mind and the provisions applicable to other lawfully admitted migrant workers do not offer that group of migrant workers suitable protection. This issue was discussed at a Tripartite Meeting of Experts on Future ILO activities in the Field of Migration (MEIM, 21-25 April 1997). The result was the adoption of the *Guidelines on special protective measures for migrant workers in time-bound activities* (MEIM/1997/D.4, Annex I). These guidelines covered issues such as accommodation, tied employment, wages and other terms of employment, family migration and reunification, freedom of association, social security and return.<sup>210</sup> Temporary migrant workers enjoy the protection of the fundamental principles and rights of Convention No. 97 and are entitled to benefit from its provisions concerning equal treatment. Part II of Convention No. 143 provides for equality of opportunity and treatment for all lawfully admitted residents, Article 11 excludes certain specific categories of temporary migrant workers from the scope of this Part (even though Recommendation 151, its accompanying recommendation does not contain such an exclusion). Article 11(2)(e) of Convention No. 143 excludes “employees of organisations or undertakings operating within the territory of a country who have been admitted temporarily to that country at the request of their employer to undertake specific

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<sup>205</sup> *Supra*, note 81, para. 288.

<sup>206</sup> ILO Convention C167, Safety and Health in Construction Convention (1988) entered into force on 11.01.91. See Article 1: 3. <[www.ilo.org/ilolex](http://www.ilo.org/ilolex)>

<sup>207</sup> *Ibid.*, Article 2:d.

<sup>208</sup> *Ibid.*, Article 35:b.

<sup>209</sup> *Ibid.*, Article 42.

<sup>210</sup> *Supra*, note 81, para. 89, with the explanation that there are no reports on the impact of these guidelines.

duties or assignments, for a limited and defined period of time, and who are required to leave the country on the completion of their duties or assignments.<sup>211</sup>

Another exclusion in Article 11 of Convention No. 143 concerns “artists and members of the liberal professions who have entered the country on a short-term basis”, which especially applies to female migrant workers recruited for employment abroad and issued permits to work as dancers in night clubs or as hostesses in bars, often becoming “sex workers.” But this category of workers is now addressed by the new international standards on trafficking. Convention No. 143 applies equally to lawfully admitted temporary and other migrant workers, although temporary migrant workers’ rights to equal treatment in the case of loss of employment is limited to the duration of their residence or work permit.<sup>212</sup>

With regards social security rights, the relevant ILO instruments make no distinction between temporary and other regular migrant workers. But residence requirements may hamper the possibility of temporary migrant workers’ acquiring benefits. The maintenance of acquired rights when leaving the country (including the export of benefits), and the right to benefit from the accumulation of rights acquired in different countries, current standards provide for such entitlements but they are limited by the principle of reciprocity, as social security issues are often the subject of bilateral or multilateral agreements that are recommended by ILO standards.<sup>213</sup>

Current ILO Conventions do not regulate the question of access to public health care, but according to Recommendation No. 151 migrant workers lawfully residing in a country should also be entitled to equality of opportunity and treatment with nationals in respect of the benefits of social services and educational and health facilities. Convention No. 143 together with Recommendations Nos. 86 and 151 contain largely similar conditional provisions concerning the right of migrant workers to be united with their families, though the ILO definition of family is considerably more narrow than the one used by the MWC. The ILO supervisory bodies have noted that in some cases of temporary, seasonal or project-related work, family reunification may be inappropriate for practical reasons, but the individual circumstances of each case should be taken into consideration.<sup>214</sup>

#### *4.4. Protection under the ILO Convention on Non-Discrimination*

Although not specifically addressing foreign migrant workers, the ILO Discrimination Convention of 1958 (described in ILO literature as C111, the Employment and Occupation) prohibiting discrimination in employment defines discrimination and includes “any distinction based upon...national extraction...”<sup>215</sup> in Article 1, which prohibits State parties from discrimination based on national origin.

Convention No. 111 protects all workers from discrimination “on the basis of race, colour, sex, religion, political opinion, national extraction, social origin”, and other criteria “as may be determined by the Member concerned after consultation with representative employers’ and

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<sup>211</sup> In the preparatory work preceding the adoption of Convention No. 143, it was stressed that this provision applied essentially to workers having special skills who go to a country to undertake specific short-term technical assignments. *Ibid.*, para. 283.

<sup>212</sup> *Ibid.*, paras. 284–286.

<sup>213</sup> In some cases, and in the absence of bilateral or multilateral agreements, migrant workers who leave the country are granted a refund of the contributions that they have paid for long-term benefits. *Ibid.*, paras. 287–288.

<sup>214</sup> *Ibid.*, paras. 288–289.

<sup>215</sup> Adopted at the ILO’s 42<sup>nd</sup> Session, 25 June, 1958, entered into force 15 June, 1960. <[www.ilo.org/ilolex](http://www.ilo.org/ilolex)>

workers' organisations".<sup>216</sup> The protection applies to all sectors of employment and occupation, both public and private, and extends to access to education, vocational guidance and training, employment and occupation (i.e., to work, whether through self-employment, wage employment or in the public service), access to placement services, access to workers' and employers' organisations, career advancement, security of job tenure, collective bargaining, equal remuneration for work of equal value, access to social security, welfare facilities and benefits related to employment and other conditions of work including occupational safety and health, hours of work, rest periods and holidays.<sup>217</sup> Discrimination is defined in this Convention as "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity and treatment in employment or occupation"<sup>218</sup>

The Implications of this definition is that the presence of "intent" is not necessary to identify a situation of discrimination; both direct and indirect discrimination are covered by this definition. What really matters here is the "effect" of any deprivation or limitation of equal opportunity and treatment arising from a difference in treatment. Measures that do not constitute discrimination include measures based on the inherent requirements of a particular job, measures intended to safeguard the security of the State, and special measures of protection (e.g. to address the specific health needs of women or men) or assistance (e.g. affirmative action and accommodation measures).<sup>219</sup>

State Parties to this ILO Convention must establish and implement a national policy to promote equality of opportunity and treatment in employment and occupation with a view to eliminating discrimination. Under Article 3 each Member for which this Convention is in force undertakes, by methods appropriate to national conditions and practice: (a) to seek the co-operation of employers' and workers' organisations and other appropriate bodies in promoting the acceptance and observance of this policy; (b) to enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy; (c) to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy; (d) to pursue the policy in respect of employment under the direct control of a national authority.<sup>220</sup> This ILO policy applies to both the public and the private sectors, as well as to vocational guidance, vocational training and placement services under the control of national authorities.

States are required to co-operate with workers' and employers' organisations in the preparation and implementation of national policy.<sup>221</sup> These organisations, in turn, must promote national policy in the workplace and within the organisation itself. The Convention provides that educational activities are a further means to foster the observance of national policy, and states that the elimination of certain forms of discrimination may require affirmative action measures.<sup>222</sup> Article 4 states that: "Any measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State shall not be deemed to be discrimination, provided that the individual concerned shall have the right to

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<sup>216</sup> *Ibid.*, Article 1(1a).

<sup>217</sup> See the definitions and commentary offered in 'Time for Equality at Work', *Report 1(B)*, 91<sup>st</sup> Session of the ILO (2003), p. 16.

<sup>218</sup> There is stronger language on this matter in the Migrant Worker Convention. UNTS.

<sup>219</sup> Report 1(B), 91<sup>st</sup> Session, *supra*, note 217, p. 41.

<sup>220</sup> *Supra*, note 215, 42<sup>nd</sup> Session, Article 3(a – d).

<sup>221</sup> *Ibid.*, Article 3(a).

<sup>222</sup> *Ibid.*, Article 3 (b).

appeal to a competent body established in accordance with national practice.<sup>223</sup> In spite of the language in this Convention, it is the State, in accordance to the specific national circumstances, which determines which measures are to be developed for the promotion of equal opportunity and treatment.

#### *4.5. Protection for Migrant Workers under other Core ILO Conventions*<sup>224</sup>

With the exception of the specific instruments relating to migrant workers mentioned above, the bulk of ILO Conventions and Recommendations are of general application and cover all workers, irrespective of citizenship even though there is always an awareness of the need to adopt instruments specifically protecting migrant workers. With this factor in mind, the ILO monitoring committee may refer to other Conventions which, although they do not contain provisions dealing specifically with migrant workers, contain provisions relating to a standard of treatment which the Committee may refer to in supervising their application of the Convention. These other Conventions are: the Minimum Wage-Fixing Machinery Convention, 1928 (No. 26); the Forced Labour Convention, 1930 (No. 29); the Labour Inspection Convention, 1947 (No. 81); the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); the Employment Service Convention, 1948 (No. 88); the Right to Organise and Collective Bargaining Convention, 1949 (No. 98); the Equal Remuneration Convention, 1951 (No. 100); the Maternity Protection Convention (Revised), 1952 (No. 103); the Abolition of Forced Labour Convention, 1957 (No. 105); the Indigenous and Tribal Populations Convention, 1957 (No. 107); the Discrimination (Employment and Occupation) Convention, 1958 (No. 111); the Discrimination (Employment and Occupation) Recommendation, 1958 (No. 111), the Workers' Housing Recommendation, 1961 (No. 115); the Employment Policy Convention, 1964 (No. 122); the Human Resources Development Recommendation, 1975 (No. 150); the Occupational Safety and Health Recommendation, 1981 (No. 164); the Termination of Employment Convention, 1982 (No. 158); the Employment Policy (Supplementary Provisions) Recommendation, 1984 (No. 169); the Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168); the Indigenous and Tribal Peoples Convention, 1989 (No. 169); and the Private Employment Agencies Convention (No. 181) and Recommendation (No. 188), 1997.

Convention No. 138 is the Minimum Age Convention, (1973). The aims of this convention are the abolition of child labour, and it stipulates that the minimum age for admission to employment shall not be less than the age of completion of compulsory schooling. Convention No. 182 is the convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999). The Convention and its accompanying (non-binding) Recommendation seeks the prohibition and immediate elimination of child labour involving slavery, prostitution and pornography, illicit activities such as drug trafficking and work which will endanger the health, safety or morals of the child. This prohibition applies to all children under the age of 18.

The list is extensive, and numerous observations formulated by the Committee during its supervision of the application of the maritime Conventions have been made. In spite of this extensive use of conventions and recommendations, the most important binding ILO instruments are Conventions number 97 and 143, while the most important non-binding instruments are Recommendations 86 and 121.

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<sup>223</sup> *Ibid.*, Article 4.

<sup>224</sup> The complete list of these conventions is available at <[www.ilo.org/ilolex](http://www.ilo.org/ilolex)>

At this point it is important to note that even though a number of the newly independent countries in Africa became ILO members-states after independence, only a few have implemented the ILO's standards in accordance with any of the above named conventions. Furthermore, ratifications of the Revised Migration for Employment Convention on migration (Convention No. 97) have been insufficient to have any impact on the conditions of migrant workers on the continent.<sup>225</sup> In his study on migration in Africa, Sergio Ricca points out that a General Survey produced by the ILO Committee of Experts for the Application of Conventions and Recommendations for the previous decade shows that "legislative and administrative shortcomings prevent most African States from giving any practical effect to the provisions of the instruments."<sup>226</sup>

#### 4.5.1. Protection under the ILO Conventions on the Freedom of Association

The first ILO convention dealing with the right to organise was adopted by the organisation in 1921 with the *Right of Association (Agriculture) Convention No. 11*.<sup>227</sup> Even though this instrument did not define the right of association as detailed as later conventions did, it did establish that all those engaged in agriculture should have the same rights of association as industrial workers.<sup>228</sup> After World War II, the ILO adopted a considerable number of binding Conventions (and non-binding recommendations), all concerned with the "right of association".

In 1947 The *Right of Association (Non-Metropolitan Territories) Convention* (No. 84), was adopted. It entered into force in 1953 and dealt in general terms with the rights of workers to bargain collectively, the right of consultation, and provides for them to develop methods for the settlement of labour disputes in their territories.<sup>229</sup> This was followed by the adoption of the *Freedom of Association and Protection of the Right to Organise Convention* of 1948 (No. 87), which guarantees to all workers and employers, without distinction whatsoever and without previous authorisation, the right to establish and join any kind of organisation of their own choosing. Such organisations must have the right to draw up their own constitutions and bylaws and be able to elect their board officials and representatives in full freedom. They must also be able to freely organise their administrations and programme of activities without interference by the public authorities. They may not be dissolved or suspended by administrative authorities, and they must have the right to form federations and confederations. They should also have the right to affiliate with international organisations of workers and employers, a right that also applies to federations and confederations. The acquisition of legal personality by organisations may not be made subject to conditions restricting these rights.

In 1975 the ILO adopted the *Rural Workers Organisations Convention* of 1975 (No. 141), which applies to tenants, sharecroppers or small owner-occupiers who work with the help of their family or outside labour providing they are not permanently employed (Article 2:2.a) It also allows for the freedom of association of rural workers, and calls for national policies to enable this right without discrimination as defined in the Discrimination Convention (No. 111) of 1958 (Article 4).<sup>230</sup> Article 5 of this convention provides that Member States are to adopt

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<sup>225</sup> Ratifications of all ILO Conventions are available at <[www.ilo.org/ilolex](http://www.ilo.org/ilolex)>

<sup>226</sup> *Ibid.* African ratifications of Convention No. 97 are few.

<sup>227</sup> See the text in the ILO Convention on Freedom of Association, ILO C87 <[www.ilo.org/ilolex](http://www.ilo.org/ilolex)>, visited on 20 March, 2005.

<sup>228</sup> *Ibid.* The provisions of this convention are applicable to independent farmers, share-croppers, tenant-farmers wages earners and other category of agricultural workers.

<sup>229</sup> *Supra*, note 225.

<sup>230</sup> <[www.ilo.org/ilolex/](http://www.ilo.org/ilolex/)> visited on 25 May, 2006.



policies that would encourage economic and social development and eliminate legislative and administrative discrimination against rural workers' organisations. Implementation procedures are through reports to the Governing Body of the ILO.<sup>231</sup> Article 9 enables State parties to denounce the convention ten years from the date it entered into force for the State convened.

With regards to collective bargaining, the ILO adapted the Collective Bargaining Convention of 1981 (No. 154) and Recommendation No. 163, both of which contain provisions to encourage and promote the development of economic activity for workers. But the Convention fails to mention migrant workers, and leaves it up to national laws to determine the extent to which the term collective bargaining may be extended.<sup>232</sup>

The ILO also adopted a number non-binding recommendations on consultation which is of great importance to the right of association for workers.<sup>233</sup> The first of these is The *Co-operation at the Level of the Undertaking Recommendation* of 1952 (No.94), which provides for co-operation at the workplace on matters of mutual interest, though they may not be within the scope of collective bargaining machinery. The second is the *Consultation (Industrial and National Levels) Recommendation*, 1960 (No.113). This recommendation refers to consultation at higher levels such as between public authorities and workers' and employers' organisations. The general aim of the consultations should be "the promotion of good relations between the authorities and the organisations, with a view to developing the economy as a whole or individual branches within it, improving conditions of work and raising standards of living."<sup>234</sup> The *Examination of Grievances Recommendation*, 1967 (No.130), deals with the functions of workers' and employers' organisations in dealing with workers' grievances at the workplace.

#### 4.5.2 ILO Protection of the Social Security Rights of Migrant Workers<sup>235</sup>

Social security benefits are traditionally divided into nine different branches: medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit and survivors' benefit. Migrant workers are confronted with particular difficulties in the field of social security, as social security rights are usually related to periods of employment, contributions or residency. They run the risk of losing entitlements to social security benefits in their country of origin owing to their absence, and may at the same time encounter restrictive conditions in the host country with regard to their coverage by the national social security system.<sup>236</sup> For migrant workers it is of particular importance to have the same access to coverage and entitlement to benefits as nationals; to maintain acquired rights when leaving the country (including the export of benefits); and to benefit from the accumulation of rights acquired in different countries. All current ILO social security standards define personal scope of coverage irrespective of nationality and almost all contain similar clauses on equality of treatment for nationals and foreign workers in the host country. However, the Equality of Treatment (Accident Compensation) Convention, 1925

<sup>231</sup> ILO C141, Rural Workers Convention (1975), Article 12.

<sup>232</sup> ILO C154, Collective Bargaining Convention, (1981) (C154), Article 3, available at <www.ilo.org/ilolex>

<sup>233</sup> See a description of these in 'The Freedom of Association: A Workers Education Manual', ILO, Geneva, (1987), pp 3–5. See also the *Collective Agreements Recommendation*, of 1951 (No.91); the *Voluntary Conciliation and Arbitration Recommendation*, 1951 (No. 92); the *Co-operation at the Level of the Understating Recommendation*, 1952 (No. 94), The *Consultation (Industrial and National Levels) Recommendation* of 1960 (No. 113), the *Grievances Recommendation* of 1967 (No. 130). *Ibid.*

<sup>234</sup> *Ibid.*, 'Freedom of Association Manual'.

<sup>235</sup> See the overview of social security rights in: M. Humblet and R. Silva: *Standards for the XXIst century – Social Security*, ( ILO, Geneva, 2002), pp. 41–45.

<sup>236</sup> Report VI, 92<sup>nd</sup> Session, *supra*, note 81at para. 245.

(No. 19), specifically establishes the right to equality of treatment for foreign workers of any other State which has ratified the Convention, in respect of workmen's compensation for industrial accidents. The Equality of Treatment (Social Security) Convention, 1962 (No. 118), provides for the right to equality of treatment with regard to all nine branches of social security. For each of the nine branches that it accepts, a State party to the Convention undertakes to grant within its territory to nationals of any other State that has ratified the Convention equality of treatment with its own nationals. The provisions in both Conventions are therefore dependent on reciprocity with another State. Other social security instruments also contain special non-discrimination clauses. One such instrument is the Social Security (Minimum Standards) Convention, 1952 (No. 102). Part XI of this Convention is entirely devoted to equality of treatment of non-national residents. Article 68 of Convention No. 102, which applies to all branches of social security, provides that nationals and non-nationals should have the same rights to social security. But it also provides for flexibility allowing the expulsion of non-nationals in cases when benefits or parts of benefits are payable wholly out of public funds.<sup>237</sup>

Convention No. 118 further provides for the maintenance of acquired rights and the export of benefits. In essence, a State party to Convention No. 118 has to ensure the provision of benefits abroad in a specific branch for its own nationals and for the nationals of any other State that has accepted the obligations of the Convention for the same branch, irrespective of the place of residence of the beneficiary. Convention No. 19 also provides for the export of benefits of foreign workers covered by the Convention, but only when the ratifying State provides for such export of benefits for its own nationals.

The 1982 Maintenance of Social Security Rights Convention (Convention No. 157), and its 1983 follow-up Maintenance of Social Security Rights Recommendation (Recommendation No. 167) together comprise an international system for the maintenance of acquired rights, and rights in the course of acquisition, for workers who transfer their residence from one country to another. They also ensure the effective provision of the benefits abroad when they return to their country of origin. Under this Convention, the maintenance of acquired rights has to be ensured for the nationals of other States parties to the Convention in any branch of social security in which the States concerned have legislation in force. Within this context, the Convention provides for the conclusion of bilateral or multilateral social security agreements. In addition, Recommendation 167 contains model provisions for the conclusion of such agreements. Other social security Conventions, such as Convention No. 128, contain a specific clause for the maintenance of acquired rights.<sup>238</sup>

For regular and longer-term migrant workers, equality of treatment between national and migrant workers in the country of employment with regard to existing social security benefits has become an established standard for a number of State parties, but not for all. With regard to the export of benefits abroad, equality of treatment also seems to be the rule amongst developed countries, even though possibilities for exporting benefits vary greatly depending on the country and the branch of social security in question. Restrictions on the export of benefits most often concern unemployment benefits. In most cases where migrant workers carry out work in different countries over a period of time, they are entitled to accumulate and maintain such rights.<sup>239</sup>

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<sup>237</sup> *Ibid.*, paras. 246–247.

<sup>238</sup> *Ibid.*, para. 249.

<sup>239</sup> See the results of an ILO Migration survey on regulations, policies and treatment of migrant workers in 2003. *Ibid.*, para. 249 and Annex 1.

#### *4.6 Protection under Binding ILO Conventions and Accompanying Non-binding Recommendations*

Since its early beginnings, the ILO's annual labour conferences have maintained a twofold aim in view when adopting instruments protecting the rights of migrant workers. The primary aim has always been to regulate the conditions in which the migration process takes place, while the secondary has been to provide specific protection for a vulnerable category of workers. To achieve this, the standard-setting activities of the ILO in this area have been concentrated in two main directions. The first direction has been to establish the right to equality of treatment between nationals and non-nationals (with regards their social security rights) through instituting an international system for the maintaining established social security rights for non-citizen workers while adopting new rights for them as well.<sup>240</sup> The main objective of these ILO conferences in adopting these standards has been to limit progressively the scope of certain restrictive State provisions financing social security, and to mitigate the effects of reciprocity clauses for developing countries. In its second direction, ILO conferences have endeavoured to find comprehensive solutions to the problems facing migrant workers and have adopted a number of binding instruments (ILO Conventions) and accompanying non-binding policy instruments (ILO Recommendations) that are adopted during the same conference, usually shortly after the adoption of a Convention. Below is a brief description of Conventions and Recommendations that are specifically aimed at protecting migrant workers.

#### *4.7. The ILO System of Monitoring and Supervision*

The ILO's monitoring and supervision system comprises several distinct components, including supervisory machinery based on regular government reporting.<sup>241</sup> Reports received are examined in the first instance by the Committee of Experts on the Application of Conventions and Recommendations (CEACR), a group of 20 independent legal experts. The Committee's fundamental principles call for impartiality and objectivity in pointing out the extent to which it appears that the position in each State is in conformity with the terms of the Conventions and the obligations which that State has undertaken by virtue of the Constitution of the ILO. Committee members' task is in complete independence as regards all member States.<sup>242</sup>

The findings of the initial examination are subsequently discussed in a tripartite context in the Conference Committee on the Application of Standards at the ILO Conference. Along with its function in examining governments' reports on the application of ratified Conventions, the CEACR examines governments' reports on the situation in national law and practice as regards selected un-ratified Conventions and Recommendations.<sup>243</sup> These reports provide information

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<sup>240</sup> Accordingly, the ILO has adopted four Conventions and two Recommendations within this area of rights while at work: i) the Equality of Treatment (Accident Compensation) Convention (No. 19), and Recommendation (No. 25) in 1925; the Maintenance of Migrants' Pension Rights Convention of 1935 (No. 48); the Equality of Treatment (Social Security) Convention of 1962 (No. 118); and the Maintenance of Social Security Rights Convention of 1982 (No. 157), and Recommendation (No. 167), 1983. Available at <[www.ilo.org/public/english/sitmap.htm](http://www.ilo.org/public/english/sitmap.htm),> visited on 18 – 25<sup>th</sup> November, 2005.

<sup>241</sup> Article 22 of the ILO Constitution provides that each Member State shall "make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request". This provision regulates two distinct matters: periodicity and the contents of governments' reports. See the ILO Constitution at [www.ilo.org/publish/english/about/iloconst.htm](http://www.ilo.org/publish/english/about/iloconst.htm).

<sup>242</sup> See Swepston, Lee, 'The Future of ILO Standards', *Monthly Labour Review*, (September, 1994)

<sup>243</sup> *Ibid.*

on the actual application of ILO standards and permits monitoring of their impact in practice. The first point which the governments' reports should establish is whether the law complies with the provisions of the Convention. For a Convention that requires the establishment of administrative or other machinery, the practical arrangements made must be described, and particulars of their operation given. For a promotional Convention, the report must describe the measures taken toward the achievement of the goal of the Convention and to overcome any obstacles in the way of its full application. If any decisions of principle have been made by courts of law or other tribunals relating to the application of the Convention, details are required. A general description of the manner in which the Convention is applied in practice is then expected, with extracts from inspectors' reports, information about the number of contraventions, and so on. Finally, governments must indicate the organisations of employers and workers to which copies of its report have been sent, and whether any observations have been received from such organisations.<sup>244</sup>

Even though this phase of supervision is designed for ratified Conventions, the impact of un-ratified Conventions and Recommendations is also monitored. This is accomplished mainly through General Surveys such as the one carried out in 1999 in relation to the two Conventions and their two supplementary Recommendations concerning migrant workers.<sup>245</sup> The ILO's supervision of the situation of migrant workers is thus not limited to migrant workers in the countries that have ratified Conventions Nos. 97 and 143. Subsequent ILO research has demonstrated that this monitoring system has had a positive impact, particularly in relation to the application of the conventions on the freedom of association (No. 87) and on equality of treatment in social security rights (No. 118).

The comments made by the CEACR on the application of Conventions relevant to its monitoring are evidence that migrant worker concerns are regularly monitored not only through Conventions Nos. 97 and 143 but also through the other instruments listed above. The system and its routines therefore enable the ILO to monitor the situation of migrant workers in a large number of countries.<sup>246</sup>

#### *4.8 Examining Reports by Worker Organisations*

In examining the effect given to ratified Conventions, the Committee of Experts is not limited to the information provided by governments. Information on a country's legislation can usually be found in official gazettes and similar publications where laws and regulations are printed. Other documentation available to the Committee may include the texts of collective agreements or court decisions, the conclusions of other ILO bodies such as commissions of inquiry and the Governing Body Committee on Freedom of Association, and comments made by employers' or workers' organisations. Such comments may either be included by the government with its report, or addressed directly to the ILO by the organisation concerned. In the latter case the Office sends a copy of the observations to the government in question, so that the Committee can also consider any comment the government may wish to add in reply. The comments by workers' and employers' organisations on the application of ratified Conventions and, in general, on any other subject covered by governments' reports in the field

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<sup>244</sup> The Government's obligation to communicate copies to the recognised representative organisations of its report on the implementation of international labour standards is laid down in Article 23, para.2 of the ILO Constitution. *Supra*, note 193.

<sup>245</sup> On the basis of article 19, paras. 5(e), 6(d) and 7(b) of the ILO Constitution, the ILO has carried out a number of General Survey on one or more instruments relating to a specific subject matter each year since 1955. Report VI, 92<sup>nd</sup> Session, 2004, *supra*, note 81, para. 306.

<sup>246</sup> *Ibid.*, paras. 307-308.

of international labour standards are of great importance. They enable workers and employers to participate fully in the supervisory system of the ILO, almost continuously and at any time, and thus to contribute to a fuller implementation of international labour standards, as well as to contribute to improving working and living conditions. Furthermore, a comment from workers' or employers' organisations will typically prompt the Committee of Experts to request a report from the government even before it is next usually due. This places substantial responsibility on the social partners to be aware of the workings of the regular supervisory system.

If the Committee finds that a government is not fully complying with the requirements of a ratified Convention, or with its constitutional obligations regarding Conventions and Recommendations, it addresses a comment to that government, drawing attention to the shortcomings and requesting that steps be taken to eliminate them. The Committee's comment may take the form of i) observations, which are published in its report and which are used for the more serious or long-standing cases of failure to comply with obligations, and are also normally used when a workers' or employers' organisation has sent in comments on the application of a ratified Convention which require follow up; or ii) direct requests, which are not published but are sent directly to the governments concerned, and to workers' and employers' organisations in the country concerned for information.<sup>247</sup>

Direct requests are usually made when a minor discrepancy is involved, or when the government has not made available sufficient information to enable the Committee of Experts to assess the way in which a ratified Convention is applied. These requests, together with the observations appearing in the Committee's published report, are sent to the government for reply together with the regular request for a report on the application of the Convention concerned.

#### *4.9. The Tripartite Conference Committee*

The report of the Committee of Experts is submitted to each annual session of the International Labour Conference, where it is examined and discussed by a tripartite Conference Committee on the Application of Conventions and Recommendations. Each year the Committee begins its work with a general discussion, in which it reviews a number of broad issues relating to the ratification and application of ILO standards and the compliance by member States in general with their obligation under the ILO Constitution with regard to these standards. In this context the Committee also discusses the Committee of Experts' general survey of national law and practice in regard to instruments which have been the subject of reports under article 19 of the Constitution, i.e. reports on un-ratified Conventions and on Recommendations.<sup>248</sup>

After its general discussion, the Committee turns to an examination of individual cases. Governments that have been mentioned in the Committee of Experts' report as not fully applying a ratified Convention, may be invited to make a statement to the Conference Committee. There is no formal obligation to do so, but they rarely decline. Some circulate written statements; in many cases their representative appears personally before the Committee. If the committee is not satisfied with a written reply, it gives governments an opportunity to supply fuller information orally. Government representatives may not always find this an easy task, but they know that the Committee takes a positive attitude. Its object is

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<sup>247</sup> *Ibid.*

<sup>248</sup> The Committee of Experts on the Application of the Conventions and Recommendations is appointed by the Governing Body of the ILO to examine information and reports submitted by members of the ILO under articles 19, 22 and 35 of the ILO Constitution. See 'Report of the Committee of Experts on the Application of Conventions and Recommendations', *ILO Report III (Part 1A), 90<sup>th</sup> Session (2002)*, p. 3.

not to apportion blame, but to obtain results. Government spokespersons making statements usually explain frankly their difficulties in applying a particular standard and indicate the steps they propose to take to overcome them. The spectacle of the delegate of a country being politely questioned about his or her government's application of international labour standards by a workers' or employers' representative from the other side of the world, and responding courteously and frankly in the process, often comes as something of a revelation to people attending a sitting of the Committee for the first time. The record shows that such exchanges, based on the technical findings of the Committee of Experts, help to maintain momentum towards better compliance with standards.<sup>249</sup>

#### *4.10. Analysis, Comments, and Conclusions*

Although the ILO remains the one of the most important intra-governmental organisations with regards the rights of all workers, its Convention No. 97 of 1949 and Convention No. 143 of 1975 and their two recommendations remain the major instruments offering protection for migrant workers. In spite of this factor, each of these conventions has only received a limited number of ratifications. At the time of their adoption, the intention of the instruments was the regulation and organisation of workers from developing countries. However, by the time they were adopted and had become legal instruments, there was a clearer need for instruments that would affect the rights of labour migrants in receiving countries.

The main articles and three annexes of Convention No. 97 allow ratifying States to exclude some or all of their important provisions. There are only ten substantive articles in the Convention, and a ratifying State may denounce the Convention ten years from the date the Convention comes into force for that State. Commitments to the Convention's Annexes I and II apply to the recruitment and conditions for migrant workers who are recruited by private contractors and government-sponsored contracts, while those to Annex III apply to the importation of the personal belongings of migrant workers. State parties are committed to provide free services for migrants such as adequate information regarding their status, equality of treatment, remuneration, family allowances, membership in trade unions and social security. There have been less than fifty ratifications of this binding Convention.<sup>250</sup>

Convention No. 143 consists of a Preamble and fourteen substantial articles that calls for Members States to: adopt appropriate measures (in collaboration with other Members States) to suppress clandestine movements of migrants for employment; to not include distinctions on the basis of nationality as discrimination; to prosecute those involved in trafficking of migrants; undertake, declare and pursue a national policy designed to ensure equality of opportunity and treatment of migrants in employment, social security, cultural rights and collective freedoms. These are to be allowed for migrant workers and members of their families who are lawfully in the State party's territory.<sup>251</sup> But since its adoption in 1975, this Convention has been ratified by fewer than 20 State parties, only a few of which were receiving countries.

The ILO Convention on Discrimination (Employment and Occupation), No. C111 (1958) offers a substantial definition of the term discrimination and allows for State Party's to employ special measures of protection or assistance in order to enhance the provisions on equality of treatment of its other Conventions. The effect of this provision is that it offers a State Party an opportunity to embrace affirmative action measures if it is based on a national policy.

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<sup>249</sup> The discussions on individual cases are summarised in the annexes to the report that the committee submits to the Conference. <[www.ilo.org/ilolex](http://www.ilo.org/ilolex)>, *Ibid.*

<sup>250</sup> <[www.ilo.org/ilolex/cgi-lex/ratifce.pl?C097](http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C097)>, visited on 23 February, 2006.

<sup>251</sup> <[www.ilo.org/ilolex/cgi-lex/ratifce.pl?C0143](http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C0143)>, visited on 20 February, 2006.

Unfortunately, however, the relevance of ILO Conventions to contemporary developments in the rights of migrant workers finds them limited in a number of issues. For one, even though women migrant workers have always been prevalent to the migrant worker phenomena, none of the conventions on migrant workers provided any protection for women trafficked to work in the sex industry. For the other, the widespread increase of irregular migrants, and their widespread abuse since the adoption of the conventions, fail to adequately address the rights of particular groups of migrant workers that were described above. A third weakness is that ILO treaties offer States an escape route by providing the option to denounce a treaty ten years after the date of its ratification by a State party. The most serious weakness of the ILO system is that its monitoring system is so different from that of the UN system that there are no links between the two with regards their monitoring a protective mechanisms. This is, in my opinion, the major weakness of the entire ILO system.

The ILO clearly needs to revise its conventions and comply with the conclusions offered in a report prepared for the 2004 International Labour Conference.<sup>252</sup> The report called for the ILO to adopt a more integrated approach to any future conventions and standards on the social protection of migrant workers. Such an approach would facilitate more updated provisions to better manage and categorise more modern trends in migration (i.e., irregular migration, trafficked and smuggled migrants) and to better facilitate their social integration and eventually citizenship by receiving States.

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<sup>252</sup> Report VI, 92<sup>nd</sup> Session, 2004, *supra*, note 81.

## 5. Customary Law and Non-binding Protections for Migrant Workers in International Law

### 5.1. Protection for Migrant Workers in Customary Law

Customary law is a consistent, constant and uniform practice that is generally accepted among nations. There are a number of general practices regarding how aliens are to be treated that are generally accepted as practices in “customary law”. There are also a number of issues around the question of the national treatment standard versus the international minimum standard of treatment of aliens that are of direct concern to migrant workers. Under the former, known as the Calvo Clause, aliens agreed not to invoke the assistance of their national state in the event of a dispute; under the latter, States are to provide aliens with the same treatment as that enjoyed by aliens providing the treatment would not be less than the fundamental rights recognised and defined in contemporary international instruments. After years of debate, cases, reports and scholarly publications, the result is that for a State to incur liability its treatment of a foreign national must be below established civilised behaviour that every reasonable and impartial person would readily recognise its insufficiency.<sup>245</sup>

Hence, although States are not required to admit foreign nationals, immigration control is a right of customary law. Once an alien is admitted, they are entitled to fundamental rights and duties in host States in accordance with international minimum standards that are difficult to define. The minimum standards offered in the UDHR and the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live (described supra) are aimed at prohibiting mass expulsion, inadequate legal protection, discrimination based on ethnicity, national origin, social status, sexual preferences and torture. The violation of these minimum standards may result in a State incurring responsibility, especially if the migrant worker incurs an injury or the loss of property.<sup>246</sup> With the co-operation of his/her host country, migrant workers should be entitled to compensation for violation of protections that fall within customary law. In such cases, host States incur a liability for such violations of their human rights whether they were done wilfully or due to neglect.<sup>247</sup>

Human Rights laws and norms that could protect migrant workers have their basis in the Charter of the UN, the Universal Declaration on Human Rights, the Bill of Rights and other human treaties of a universal character. That States are bound by these laws is further supported by a large body of scholarly writings and practices supporting the concept that customary norms of international law have their sources in long established practices.<sup>248</sup> All nations, including the most recently created sovereign States are subjects of customary international law. They are bound to its principles, duties, usage, practices, norms, customs, decisions of judicial or arbitral tribunals, juristic opinions, writings and determinations of its organs of international institutions in the maintenance of peace, security, respect for human rights, non-discrimination and self-determination in conformity with the principles of international law.<sup>249</sup> These principles are embodied in Articles 1 and 55 of the United Nations

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<sup>245</sup> North American Dredging Co. of Texas v. United Mexican States (1926) 4 R.I.A.A. 26. <[law.dal.ca/kindle.intlaw/Texas.htm](http://law.dal.ca/kindle.intlaw/Texas.htm)> visited on 11 May, 2005>

<sup>246</sup> *Ibid.*

<sup>247</sup> See the Noyes Claim (U.S. v. Panama), 6 R.I.A.A., 308 at 311(1933).

<sup>248</sup> One early basic argument advanced by *opinio juris* proponents is that a customary norm of international law binds states judicially irrespective of the recognition or acceptance of the norm. See 49 Calif. Law Rev. 419, 426-29 (1961).

<sup>249</sup> See the International Law Commission's forms of “Evidence of Customary International Law: treaties, decisions of national and international courts, diplomatic correspondence, opinions of national legal advisors, practice of international organisations.” in M. Villiger, *Customary International Law and Treaties*, Martinus



Charter. Article 56 calls for a pledge for members to take joint and separate action to achieve the purposes set forth in Article 55. The human rights called for in the Charter are then more specifically detailed in the Universal Declaration on Human Rights and in the “international bill of rights” (the UDHR, the ICCPR and the ICESCR). As such, States are duty-bound to uphold these principles and the “hard law” rules of these instruments and other human rights treaties. They are also obligated to uphold the provisions that emerge from “soft law” instruments such as international declarations, resolutions, diplomatic statements, the jurisdiction of the International Court of Justice, scholarly writings and international principles, State practices and agreements by international organisations, which have had an increasing role in the developments of human rights law recently.

## *5.2. Assistance to Foreign migrant workers through Inter-Governmental Organisation*

### *5.2.1. The International Labour Organisation’s General Secretariat (ILO)*

In addition to adopting binding Conventions and recommendations for State parties to implement, the Secretariat of the ILO provides a number of other services to state and non-state parties. It provides knowledge bases for studies on migration trends, their consequences and evaluating policies of countries of employment; technical co-operation and assistance primarily in the fields of vocational training and vocational rehabilitation, employment policy, labour administration, labour law and industrial relations, working conditions, management development, co-operatives, social security, labour statistics and occupational safety and health. It promotes the development of independent employers' and workers' organisations and provides training and advisory services to those organisations; capacity building in co-operation with ILO training centres; and Special Action Programmes to Combat forced labour. The ILO is also giving attention to identifying challenges and remedies concerned with reducing the risk of HIV/AIDS amongst migrant worker populations, mainly in associations with UNAIDS, the WHO and the IOM.<sup>250</sup> The Secretariat also adopts non-binding Recommendations which provide guidance on policy, legislation and practice for State parties to refer to when adopting policies. Such minimum standards are to be applied to rights such as the freedom of association, the right to organise, collective bargaining, abolition of forced labour, equality of opportunity and treatment, and other standards regulating conditions across the entire spectrum of work related issues. The ILO The organisation’s four principle strategic objectives are to promote and realise standards, fundamental principles and rights at work, to promote greater opportunities for women and men to secure decent employment; to enhance the coverage and effectiveness of social protection for all, and to strengthen tripartism and social dialogue. The ILO realises its objectives by i) the formulation of international policies and programmes to promote basic human rights, improve working and living conditions and enhance employment opportunities; ii) the creation of international labour standards which are supported by a united system to supervise their application and to serve as guidelines for national authorities in putting policies into action; iii) through an extensive programme of international technical co-operation, formulated and implemented in an active partnership with constituents, to assist countries in making those policies effective in practice; and through training, education, research and publishing activities to help advance all of its efforts.

The ILO Secretariat has a tripartite structure where employers’ and workers’ representatives have an equal voice with those of governments in shaping its policies and

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Nijhoff Publishers, Dordrecht, 1985, p. 4. *See also* The Yearbook of the International Law Commission, 1950 II 368ff. *See also* Article 1 of the UN Charter.

<sup>250</sup> ILO, *Report VI, 92<sup>nd</sup> Session, supra*, note 81, paras. 320–346.

programmes. The tripartism with member states is encouraged by promoting social dialogue between trade unions and employers in formulating and implementing national policy on social, economic and other issues for workers. An International Labour Conference is held annually and it is during these Conferences that minimum labour standards and policies are established. Every two years, during the ILO's biennial conference, a work programme and a budget which is financed by members is adopted. The Conference also provides an international forum for discussion of world labour and social problems. Each Member State has the right to send four delegates. Of these, two may represent the government, while one each represents employers and workers. The delegates speak and vote independently. Between annual sessions of the Conference, the work of the ILO is guided by the Governing Body of 28 government workers and 14 worker and employer members. The work of the Governing Body and of the main office of the ILO in Geneva are supported by tripartite committees, each covering a major industry. There is also a committee of experts on such matters as vocational training, management development, occupational safety and health, industrial relations, workers' education and special problems of women and young workers. There are also Regional meetings of the ILO member States that are held periodically to examine matters of special interest in various regions.<sup>251</sup> The ILO's system of standards on labour migration is examined in more detail in Section C below.

### 5.2.2. The International Organisation for Migration

Although there are a number of inter-state actors that are concerned with the general human rights situation of foreign migrant workers, there is only one that was founded with the exclusive purpose of providing assistance in the migration process, The International Organisation for Migration.<sup>252</sup>

On the initiative of Belgium and the United States in 1951, the International Migration Conference that was convened in Brussels resulted the creation of the Provisional Intergovernmental Committee for the Movement of Migrants from Europe (PICCME). This eventually became the Intergovernmental Committee for European Migration (ICEM), which in turn arranged the processing and emigration of nearly half a million refugees, displaced persons and economic migrants from Europe to overseas countries. Throughout the 1960s and 1970s the ICEM is very engaged in resettlement programmes for refugees in Europe, the Soviet Union, Bangladesh and Uganda to new countries, changing its name to the Intergovernmental Committee on Migration (ICM, in 1980) and the International Organisation for Migration (IOM, in 1989) after amending its 1953 Constitution. Under its new name, the organisation has become the leading international non-state organisation working with the resettlement of displaced persons and refugees and governments in several countries.<sup>253</sup> IOM disseminates pertinent general information to migrants regarding the entire application process to target countries. Other types of assistance includes assisting in the safe movement of people for temporary and permanent resettlement or return to their countries of origin. It also provides pre-departure medical screening and cultural orientation programmes, the movement of refugees resettling in new countries, repatriating qualified nationals to their states of origin, evacuating war victims in need of medical evacuation, assisting irregular and trafficked migrants to return voluntarily to their country of origin. The organisation also

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<sup>251</sup> *Ibid.*

<sup>252</sup> Organisations such as Human Rights Watch and Amnesty International regularly file reports with the Human Rights Commission on abuse of the rights of foreign migrant workers, but they are mainly concerned with abuses after they have occurred; the IOM on the other hand, is concerned with human rights protection of foreign migrant workers at all stages. *See* their constitution: <[www.iom.com](http://www.iom.com)> visited on 23 June, 2005.

<sup>253</sup> *Ibid.*. The IOM maintains a list of member and observer States. *See* 'The International Organisation for Migration' IOM, N.Y., (1998).

assists its Member States with cultural orientation programmes; the completion of medical examinations which may be required by various governments prior to an individual's admission. Specific advantages of IOM services are professional services in assisting refugees and migrants to complete applications for emigration. The IOM strives to ensure that the rights of foreign migrant workers that are proscribed for in the MWC are achieved by both sending and receiving States. Simultaneously, it strives to increase the awareness of rights and provides training to migrants as to their rights and obligations. It is in this latter capacity that IOM plays its most important role in promoting the respect for the rights of foreign migrant workers.<sup>254</sup>

### *5.3. The Role of the World Trade Organisation (WTO) in The Protection of Migrant Workers*

#### 5.3.1. Introduction to the WTO and Two of Its Agreements

The World Trade Organisation (WTO) consists of several trade agreements signed during the Final Act of the Uruguay Round of Multilateral Trade Negotiations in Marrakech on 15 April 1994.<sup>255</sup> The agreement establishing the organisation calls for a single institutional framework encompassing the 1947 General Agreement on Tariffs and Trade (GATT) as modified by the Uruguay Round, all agreements and arrangements concluded under its auspices, and the complete results of the Uruguay Round. Its structure is headed by a Ministerial Conference meeting at least once every two years.<sup>256</sup> Although not a human rights instrument, a number of the WTO's agreements are concerned with the rights of non-citizen workers in host States and are taken into consideration in their adoption of policies to protect migrant labour.<sup>257</sup> It therefore, cannot be ignored in any study on available protections for migrant workers.

The major aims of the WTO are to establish reciprocal, mutually advantageous arrangements that are directed to the substantial reduction of tariffs and other barriers to trade, and to eliminate of discriminatory treatment in international trade relations. The focus is, therefore, not the liberalisation of State barriers to individual businesspersons, but the development of systems of obligations and rights affecting trade policies between co-operating member governments. The equitable beneficiaries are the individual actors whose equity is through the indirect rights that emerge through the WTO's principles.<sup>258</sup> Many of these individuals are migrant workers whose skills as business executives, managers and service providers are vital elements to international trade.

#### 5.3.2. Protection for Migrant Workers Under Two WTO Agreements

Two of the WTO's many agreements are increasing becoming more relevant to the rights of migrant workers. These are the General Agreement on Trade in Services (GATS) and the

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<sup>254</sup> *Ibid.* That level of commitment can best be seen from a number of recent activities, such as workshops, seminars and information dissemination campaigns specifically directed at increasing awareness of the rights accorded to migrants.

<sup>255</sup> There are several agreements totalling 550 pages. For more detailed history, see The Summary of the Legal Text: <[www.wto.org](http://www.wto.org)> visited on 15 May, 2006.

<sup>256</sup> *Ibid.*

<sup>257</sup> Sweden offers such an example in a government study on migrant labour law: Arbetskraftsinvandring till Sverige, SOU:2005:50, Norstedts Tryckeri AB, Stockholm, 2005, p. 237.

<sup>258</sup> S. Ostry, "The Uruguay Round North-South Grand Bargain: Implications for Future Negotiations". in D.L.M. Kennedy and J. D. Southwick (eds.), *The Political Economy of International/Trade Law* (2002) pp. 285–297.

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).<sup>259</sup> The former, GATS, was created to extend the multilateral trading system to services, in the same way the General Agreement on Tariffs and Trade (GATT) provides such a system for merchandise trade. All members of the WTO are signatories to the GATS and the basic WTO principle of most favoured nation (MFN) applies to GATS as well. The latter, TRIPS, deals with the copyright and related rights of performers, producers and other copyrightable material. It was negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) treaty in 1994 and also applies equally to all WTO member States.

The relevance of the GATS to migrant workers is indicated in the Annex on Movement of Natural Persons Supplying Services Under the Agreement. The Annex states that the GATS shall not apply to measures affecting natural persons seeking access to the employment market of a (WTO) Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis. While this appears to be an enormous exclusion, the exact parameters are not sharply defined. The implication is that GATS covers measures regarding employment on a *non-permanent* basis, and therefore presumably covers individuals seeking such temporary employment, even though it is not clear whether or not GATS applies to employment at all. At issue is how to interpret the provision in the Annex on Movement which suggests that GATS does not apply to persons seeking access to the employment market. When individuals are self-employed, they may be treated as being outside of the employment market; when they relocate to work for a company at its branch in a host country, they can be perceived as working outside the employment market of the host country because they are not on that country's labour market.

A key unsettled question in WTO services law is whether the GATS Agreement applies to individuals who work for companies of the host country. For example, nurses and computer technicians may want to enter a country and work for its local employers. The GATS includes service suppliers to its most-favoured-nation (MFN) and national treatment principles.<sup>260</sup> But these are not clearly defined with regards any rights of foreign migrant workers. The MFN requirement states that a government shall accord to services and service suppliers of other WTO member countries treatment no less favourable than accorded to like services or service suppliers of any other country; the national treatment provision requires that a government treat foreign services and service suppliers no less favourably than like domestic services and service suppliers in the sectors prescribed in that government's schedule of concessions.<sup>261</sup> This means that the service supplier do not acquire these substantive rights directly from TRIPS or GATS, but rather from governments via the implementation of their WTO obligations. Thus, if the treaty obligation is not fulfilled, an economic actor does not have a cause of action at the WTO but at the level of the national government's legal system in question.<sup>262</sup> As yet, there is very little WTO case law to interpret GATS as far as migrant workers is concerned.<sup>263</sup>

The relevance of TRIPS is that it also requires governments to treat foreigners no less favourably than nationals, and accords exclusive property rights for copyrights, trademarks, geographical indications, industrial designs, patents, integrated circuits, and undisclosed information. The right-holders are permitted to collect rents and to prevent others from

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<sup>259</sup> GATS came into force in January, 1995. Nearly all of the WTO agreements have their roots in treaty law, as customary international law plays only a minor role in the WTO. See Charnovitz, Steve: Trade Law Norms on International Migration, in T.A. Aleinikoff and V. Chetail (Eds), *supra*, note 145, pp. 243–244.

<sup>260</sup> Aaditya Matoo: National Treatment in the GATS: Cornerstone or Pandora's Box? (1997). WTO, Trade and Services Division, Geneva. Also available at <www.wto.org> visited on 17 May, 2005.

<sup>261</sup> GATS: Fact and Fiction. <www.wto.org> visited on 16 May, 2005.

<sup>262</sup> Wermer Zdouc: WTO Dispute Settlement Practice Relating to the GATS, in *Journal of International Economic Law*, Vol. 2, No. 2, 1999, pp. 295–327.

<sup>263</sup> *Ibid.*

infringing on their privilege for specified periods of time. For example, the works of performers and producers of sound recordings are protected from infringement for fifty years with respect to the substantive provisions of the Bern Convention of 1971.<sup>264</sup> The TRIPS Agreement includes a number of procedural obligations on member governments for the holders of private rights. One calls for transparency, and for laws and regulations to be published in such a manner as to enable governments and individual rights holders to become acquainted with them. Another calls for governments to enable an economic actor to institute administrative or judicial proceedings against any infringement of his or her intellectual property rights. There is also one requiring governments to adopt a procedure to permit a right holder to ask the customs authorities to block the free circulation of a good lacking an authentic trademark or copyright.<sup>265</sup>

### 5.3.3. Conclusions on the WTO

Even though the WTO does not formerly confer migrating individuals with a right to live and work in foreign countries, it encourages their protection by indirectly imposing obligations on governments regarding the treatment of foreign-born persons in trade disputes. So far, the best-known institutionalisation of certain rights appears to be available in TRIPS, which are partially based on existing treaties and partially *sui generis*.<sup>266</sup> Less known, though equally important, are the new procedural obligations instilled horizontally in many of other annexed WTO agreements. The obligations run from the WTO to governments, and then from governments to economic actors. These individual rights are most developed in the Antidumping Agreements and TRIPS, where, ironically, they empower individuals to *prevent* international trade that violates WTO norms.

The new relationship between the trading system and the individual actor is only beginning to be recognised in WTO jurisprudence. Because it enhances both due process and property rights of economic actors, the WTO is more than a commercial agreement; it is also a human rights agreement.<sup>267</sup> In recent years, a number of scholars have advocated that the WTO pay more attention to existing human rights norms as they apply to migrant workers, but such development has yet to gain momentum by any government party.<sup>268</sup> In spite of these weaknesses, the increasing role of WTO agreements in global business negotiations provides the WTO a place on the table of rights for foreign migrant workers.

## 5.4. Non-binding Universal Declarations and Recommendations (Soft Law)

### 5.4.1. Non-binding Protection under United Nations Organisations

A number of the subsidiary organisations, also known as agencies, within the United Nations system also actively support human rights activities that are of interest to the human rights of foreign migrant workers. In particular, four are worth mentioning, if only because they reflect organisations whose programmes offer opportunities to protect the human rights of foreign migrant workers, and since there is so little hard law (conventions) produced by these organisations. Whether or not they have the mandate to produce their own conventions, they closely follow the principles offered in the UDHR, and in many cases specifically refer to its

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<sup>264</sup> See the Summary of the WTO, *supra*, Part II.

<sup>265</sup> TRIPS Article 51, a provision that also implies that WTO member governments must employ customs authorities. See also Steve Charnovitz, *supra*, note 145.

<sup>266</sup> S. Charnovitz, *supra*, note 145, pp 6 - 10.

<sup>267</sup> *Ibid.*

<sup>268</sup> See for example, SOU:2005:50, Norstedts Tryckeri AB, Stockholm, 2005, p. 237.

articles in their constitutions, declarations, resolutions, statements or agreements with member State.

#### 5.4.2. The Universal Declaration of Human Rights

The most widely acknowledged instrument of outlining universal human rights is the *Universal Declaration of Human Rights*. Adopted by the United Nations General Assembly in 1948, the Declaration was intended as "a common standard of achievement for all peoples and nations". Its thirty articles cover a wide range of human rights, most of which are found in all other human rights instruments and it is the legal framework for the protection of all migrant worker and is the basis for standards within customary international law. Article 2 provides that everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>269</sup>

However, besides its generally accepted universal language, the UDHR contains provisions that have been interpreted as excluding aliens from their protection, as a careful reading of Article 13 demonstrates. Paragraph one of the former states clearly that "everyone has the right to freedom of movement and residence within the borders of each State" and (2) "everyone has the right to leave any country, including his own, and to return to his country."<sup>270</sup> The use of the word "Everyone" in Article 13(2) appears to grant even non-citizens, which would including foreign migrant workers, the right to leave the country in which they live and to return to their countries of origin.<sup>53</sup> But it does not, however, provide them with the right to enter any other country. With regards the right to work, the most common restrictions imposed upon aliens and foreign migrant workers concerns their right to work and to freely chose their employment wherever they are. But Article 23(I) of the UDHR extends to *everyone* 'the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment'. This article clearly contradicts all restrictions on the right to work freely, everywhere, regardless of the state concerned.<sup>271</sup>

Another article that is of concern regarding the rights of non-citizens under the UDHR paragraphs one and two of Article 29, which provide that everyone has duties to the community that enables the free and full development of their personality (paragraph one), and allows States to impose limitations that are determined by law that are necessary to meet with the just requirements of morality, public order and the general welfare in a democratic society.<sup>272</sup> An initial reading leads one to believe that the article favours States applying restrictions on rights granted to them by other articles in the UDHR. But a closer reading the entire article reveals that paragraph three states that rights, freedoms (and restrictions) of Article 29 may not be exercised contrary to the purposes of the UDHR. These rights include those under the provisions of Article 20 (1), which gives everyone 'the right to freedom of peaceful assembly and association', another issue that is of concern to migrant workers.

The importance of the UDHR is that all of its provisions are the basis of several monitoring mechanisms for the UN and other systems. Hence its principles are found in the following non-binding UN and ILO declarations that are directly related to the rights of foreign migrant workers.

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<sup>269</sup> UNTS.

<sup>270</sup> See Article 13:1, UNTS.

<sup>271</sup> However, Cholewinski tells us how 'everyone' during the drafting process was understood to mean everyone with a legal permit. *Supra*, note 11, p. 50.

<sup>272</sup> UDHR, paras. 29:1 and 2. UNTS

#### 5.4.3. Protection under the United Nations Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They live.

This Declaration was adopted by the UN General Assembly by consensus in 1985 and reiterates the non-discrimination provisions of the Preamble of the UN Charter, the UDHR, the ICCPR and the ICESCR. Its Preamble also recognises 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'.<sup>273</sup> The definition of who a migrant worker is in this Declaration has already been referred to earlier here (*supra*). Equally important is Article 2, which states that the Declaration does not legitimise illegal entry in a State, nor does it intent to restrict the rights of State to promulgate laws and regulating the entry of aliens or their right to establish differences between nationals and aliens. as long as they are not incompatible with international law and human rights. Article 3 calls for all national legislation or regulations affecting aliens be made public, and Article 4 provides that aliens should observe the laws, customs and traditions of the people of the State in which they live.

However, even though the Declaration provides for a number of essential civil and political rights, it places restrictions on economic and social rights in Article 5(1) which restricts such rights to non-citizens who are "lawfully residing in the territory of a State". The right to peaceful assembly is provided for in Article 5(2), but there is no clause explicitly guaranteeing a general right to freedom of association. The freedom of movement and the right to choose their residence in a host state is provided for in Article 5(3), and Article 5(4) recognises the right to family reunification, and imposes a duty upon the state to admit the spouse and minor children to accompany, join and stay with the alien residing in the country. Article 6 prohibits torture, inhuman and degrading treatment or punishment, and in particular prohibits medical or scientific experimentation without consent. Article 7 prohibits individual or collective expulsions on grounds of race, colour, religion, culture, descent or national or ethnic origin, but allows individual expulsions based on decisions in accordance with the law.<sup>274</sup>

As for the protection of economic and social rights Article 8(1)(a) provides lawful residents just and favourable conditions of work (but not the right to work). Article 8(I)(b) provides them with the right to join trade unions and other organisations, associations and to participate in their activities, but the article does not provide for the right to form trade unions. Article 8(1)(c), further provides for the right to medical care, social security, social services and medical care, education, rest and leisure to aliens lawfully residing in their host state, but this is conditional upon their ability to meet with the requirements for participation in public funds, which is itself an obstacle many alien foreign migrant workers find difficult to overcome. This is made even more difficult by another conditions of the article which declares that an alien must not place an "undue strain" on the resources of the State. This would easily allow a State to claim that it has undue demands on its resources in order to avoid it obligations towards non-citizens. Although similar to Article 2(3) of the ICESCR, the scope of this article covers a number of social entitlements and economic rights, and is applicable to all states, whereas the similar article in ICESCR is restricted to developing countries.

This Declaration is not a legally binding instrument, and is clearly not a rival within customary law to the UDHR. The restrictions it offers on the rights to health care, social security, education (Article 5.2)c.) and on the alien not to place an "undue strain" on the resources of the State, render this declaration a "step backwards" in the protection of the

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<sup>273</sup> U.N. GAOR, GA Res. 40/44 on 13 December, 1985.

<sup>274</sup> *Ibid.*

rights accorded all persons that are offered in the UDHR and the Bill of Rights. Besides these two non-binding declarations, provisions for equal treatment and non-discrimination can be found in nearly all other universal instruments and international agencies.

#### 5.4.4. The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Freedoms<sup>275</sup>

In 1999, the UN General Assembly adopted a Declaration to recognised the right and the responsibility of individuals, groups and associations to promote respect for and foster knowledge of human rights and fundamental freedoms at the national and international levels.<sup>276</sup> In Article 1 it provides for the right to exercise these rights and freedoms both individually and in association at national and international levels. Article 2 clarified the responsibility of States, which the document now claims to have the prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, *inter alia*, by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others are able to enjoy all those rights and freedoms in practice.

The Declaration called upon each State to adopt legislation to ensure that the rights and freedoms referred to are effectively guaranteed; to ensure that everyone has the right to meet or assemble peacefully, to form, join, participate and communicate in (and with) non-governmental organisations, associations or groups, all without discrimination of any kind.<sup>277</sup> Other provisions of this Declaration were that everyone has the right, individually and in association with others to know, seek, obtain, receive and hold information about all human rights, including to study about them, all on a non-discriminatory basis. This is to include, *inter alia*, the right, individually and in association with others, to submit to governmental bodies and agencies and organisations concerned with public affairs criticism and proposals for improving their functioning and to draw attention to any aspect of their work that may hinder or impede the promotion, protection and realisation of human rights and fundamental freedoms. The Declaration furthermore provided for States to take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, *de facto* or *de jure* adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration.<sup>278</sup>

In this connection, everyone is entitled, individually and in association with others, to be protected effectively under national law in reacting against or opposing, through peaceful means, activities and acts, including those by omission, attributable to States that result in violations of human rights and fundamental freedoms, as well as acts of violence perpetrated by groups or individuals that affect the enjoyment of human rights and fundamental freedoms. The Declaration also called for States to compensate victims of human rights violations.

This Declaration contains a number of provisions that could strengthen NGOs in their bargaining power with States on certain issues. It is one of the few instruments of international law promoting “group rights”, a category of human rights not too highly favoured by State parties.

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<sup>275</sup> U.N. GAOR, G.A. res.53/144, annex, 53 UN GAOR *Supp.*, UN Doc. A/RES/53/144 (1999), at UNTS.

<sup>276</sup> *Ibid.*, The Preamble stressed that all members of the international community to fulfil, jointly and separately, their solemn obligation to promote and encourage respect for human rights and fundamental freedoms for all without distinction of any kind, and adopted the declaration as a reaffirmation of the importance of achieving international co-operation to fulfil this obligation according to the Charter.

<sup>277</sup> *Ibid.*, Articles 2–8.

<sup>278</sup> *Ibid.*, Articles 9–10.



### 5.5. Assistance for Migrant Workers through Non-State Bodies (NGOs)

The major role that NGOs often play in the assisting foreign migrant workers is that of social-welfare, lobbying or activist organisation on behalf of their migrant worker members. It is an important role, as quite often they are the only voice of protest against massive abuse of rights that foreign migrant workers have. A large number of such NGOs are church-based or part of large umbrella organisations whose primary concern is agricultural development.<sup>279</sup> The right to build and establish associations is a right that is protected in a number of treaties in international law, including the MWC.<sup>280</sup>

NGOs are hindered by the fact that those concerned with foreign migrant workers whose management and board of directors' membership consist of migrants themselves are often severely restricted and often barred from assisting migrant workers by host governments. In spite of this, the few NGOs that are active in protecting the rights of foreign migrant workers provide important lobbying and human rights protection. The only universal instrument specifically addressing NGO rights to exist is the non-binding United Nations' Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms.<sup>281</sup>

### 5.6. Analysis, Comments and Criticisms

The above three chapters examined the inputs that binding and non-binding Universal and ILO human rights instruments purport to offer international migrant workers. The examination included a brief introduction to the small but yet insignificant role of organisations such as the WTO in the protection of the rights of migrant workers. Taken together, all the major binding and non-binding instruments offer an ideal world of basic workers rights for all categories of worker, including international migrants. However, this analysis will be restrictive to the Migrant Worker Convention and ILO instruments, since they offer the two most important instruments concerned with the rights of foreign migrant workers.

In reviewing the instruments, however, it becomes clear that the ideal world of workers' rights is only possible if the important input indicators are present and being implemented. In the field of human rights, the ratification of a Convention is the primary input indicator providing ideal world protections through human rights. Supervision, reporting and handling of complaints are clearly the second most important indicator within the process. The absence of any of those key input indicators results in an outcome gap between the ideal and the real situation for migrant workers which can be conceptualised and measured by a system of gap indicators.<sup>282</sup> There are three categories of gaps that can be used in the application of all the major systems of human rights protection for migrant workers: i) gaps in substance, which specifically are concerned with the rights in the instruments; ii) gaps in adherence, which is concerned with the implementation of available rights; and iii) gaps in outcomes, which measure deficits caused by the presence or absence of the former two categories.<sup>283</sup> The gap in substance is best indicated by considering the rights offered in the only Universal binding

<sup>279</sup> See Country Overview for Ghana: K. Amanor, *et al.*, in *NGOs and the State in Africa*, (Routledge, N.Y. 1993), K. Wellard and J. Copestake (eds), pp. 183–194.

<sup>280</sup> See also UDHR, 20 and 23; ICESCR 8; ICCPR 22 and ICERD 5:d and 5e. UNTS.

<sup>281</sup> U.N. GAOR, GA Res 53/144 of 8 March, 1999. UNTS

<sup>282</sup> See the introduction to this approach by Böhning, W.R.: Gaps in Basic Workers' Rights, ILO (Working Paper 13), Geneva, 2003, pp 1 – 3.

<sup>283</sup> *Ibid.*

human rights instrument (“hard law”) designed to protect migrant workers, the Migrant Worker Convention. The second and third gaps are best considered by their ratification and implementation by State parties.

While the hard law instruments offer substantial rights to be protected, their major weakness is in the fact that there is a lack of adherence, that is, few States ratify them or agree to be bound by all of their standards.<sup>284</sup> The MWC has a reporting system that is supervised by a Committee, but so far, as with other human rights treaties under the UN, it is weakened by the absence of adherence, and hence implementation of its provisions.<sup>285</sup> On the other hand, the ILO has a weaker number of substantial rights, but a tripartite system for monitoring implementations, and a strong system of supervision that is built into its monitoring mechanism by independent legal experts. The MWC offers protection to irregular, undocumented, frontier, itinerant, project-tied, specified and self-employed foreign migrant workers. These categories are excluded from the major ILO instruments protecting foreign migrant workers.<sup>286</sup> The Migrant Workers Convention contains rights that were previously established under hard and soft-law ILO Conventions and Recommendations, and although both systems have elaborate and detailed systems for filing complaints, neither provides to compensatory remedies for victims of unequal treatment or discrimination. These Substantial Gaps flow through the patterns of a number of other human rights conventions.

The breadth of the gap in substance for the protection of foreign migrant workers is wider still regarding the substantial right to form an association and the right to recognition through an identity document. As outlined above, within the Universal system there are a number of binding instruments that provide for the right to form associations. The principle instruments that specifically are of concern to workers are those offered in ILO 87 (and its complement, ILO 98) and MWC 26, 40.<sup>287</sup> The principle of freedom of association within the ILO system is especially protective of foreign migrant workers.<sup>288</sup> All matters concerning this right are referred to a Committee on Freedom of Association (i.e., the “FAS Committee”), a tripartite organ of the ILO composed of a governing body appointed by the ILO. Although a number of ILO Conventions specifically are concerned with the freedom of association, there is a special procedure enabling worker and employers organisations in States that are not party to ILO instruments to complain to the ILO. In such circumstances, the FAS submits its considerations and recommendations to the State concerned. As such, the right under the ILO system should apply to “everyone”, citizen and non-citizen alike.<sup>289</sup> The ILO system furthermore allows for no reservations. Hence, the gap in the Universal system is filled by that of the ILO, but it still exists because ILO treaties has not been ratified by all member States of the United Nations.

Even with the strong protections for this right in the MWC and the prohibition of renouncement, the right is weakened here because there is no corresponding right to collective bargaining to accompany the right as there is in ILO 98, for example. This constitutes a substance gap in the protection offered by this right under the MWC. States that enable

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<sup>284</sup> J.J. Stark discusses “normative treaties” and treaty-contracts in this context. See his discussion of law-making treaties in *International Law*, Butterworth’s London, 1989 p. 42–44.

<sup>285</sup> See MWC Art. 72. UNTS.

<sup>286</sup> See the comments by Böhning on the ILO’s Migration for Employment Convention (No.97), Convention No. 143 and the MWC, in *International Migration Review*, *supra*, note 54, pp. 705–706.

<sup>287</sup> See the two rights referred to here also in the 1954 International Convention Relating to the Status of Stateless Persons. Adopted by the UN Conference on the Elimination or Reduction of Future Statelessness, N.Y. 30 August, 1961, entered into force on 13 December, 1975. UNTS

<sup>288</sup> See the text of the ILO Convention on the Freedom of Association. *Supra*, note 51.

<sup>289</sup> This may also apply to illegal migrants recruited by private agents in. See Item 6 of Annex I in Guidelines on Special Protective Measures for Migrant Workers Recruited by Private Agents, (Tripartite Meeting of Experts on Future ILO Activities in the Field of Migration, GB.270/MEIM/1997/4, Geneva, 21 – 25 April, 1997), available at <www.ilo.org> visited on 10 October, 2005.

migrant worker associations are not obligated to negotiate with them on the rights proscribed for in the convention. Even more to the point here is the fact that Article 89 of the Convention on Foreign migrant workers allows for State parties to denounce the Convention, effective twelve months after the notification of the denouncement is submitted upon notice to the Secretary-General of the United Nations. With regards the gap in the right to recognition as a person, the language of MWC:24 fails to provide any indication of “*how*” the recognition is to function even though there are few corresponding provision for an identity document in many of the universal human rights instruments.<sup>290</sup> Article 92 of the MWC provides for the settlement of disputes between State parties, either by negotiation or arbitration. In contrast, the article also provides that State parties may declare that they withdraw from for this article at any time. This means that a sending State may withdraw its complaint against a receiving State at any time, even during negotiations regarding the treatment of its citizens (foreign migrant workers). This escape clause provides another serious gap in the substantial protection of foreign migrant workers within the universal system.

With regards the provisions under ILO treaties, the organisation was the first to offer treaties providing for the protection of foreign migrant workers, but developing countries generally avoid ILO C143 for several reasons. Amongst these are its purely discriminatory manner in respect to the category of persons it identifies as “illegal migrants”, its threat to cut this group of foreign migrant workers from employment opportunities, imprison their employers and its narrow and restrictive definition of whom the convention applies to.<sup>291</sup> In addition to this, many developing countries know that they can more easily achieve their equality through development aims using well-financed UN programmes than under the ILO. Another reason for rejection is that the ILO was a symbol of trade unions that were independent of governments, a system not in fashion in many developing countries. There was also the problem of the ILO system, wrought with the structure and hierarchy of labour organisations and labour politics.<sup>292</sup> Such factors are clearly only part of the reasons inhibiting many receiving States from becoming a party to its treaties concerning foreign migrant workers. Although ILO C118 and C143 offer protection for the right to establish associations, there is no corresponding right for the right to receive an identity card in any of its treaties. Hence, even State parties with citizens abroad have no obligations to honour a citizens claim to citizenship without adequate documentation. This has lead to a number of circumstances allowing the deporting State to deport persons to the wrong country of origin.<sup>293</sup> With regards to the non-binding (soft law) declarations and recommendations described above, the nature of their informal status, although important from a moral perspective, is insufficient to function as more than an appendix to a treaty or convention, hence their provisions for the rights examined in this section are less of an authority than the treaties they support. A final contrast on this issue is that the protections offered by the ILO are exclusive to State duties to prevent discriminatory practises of public authorities, or to promote equal opportunity with regard to work and employment;<sup>294</sup> while those in the Convention protect migrant workers from unequal and discriminatory treatment directly from their employers and from the routines of the host State. This feature provides a two-tier level of protection vis-à-vis the State.

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<sup>290</sup> This may give stateless persons a “privileged” position, as they are entitled to an “identity document” by those States that are parties to the 1954 International Convention Relating to the Status of Stateless Persons, available at UNTS.

<sup>291</sup> *Ibid.*, These contradictions are most noticeable in Articles. 2, 3, 6 and 11.

<sup>292</sup> See Böhning, *supra*, note 121, pp. 698–708.

<sup>293</sup> UNCHR, E.CN.4.2003/85 Report of the Special Rapporteur on Migrant Workers, available at UNHCHR.

<sup>294</sup> Cholewinski, *supra*, note 11, p.161.

But there are concerns with regards the protections offered by the MWC too, such as the fact that even though the Convention explicitly confers certain basic human rights to all (including irregular) migrants, the threat of detection and expulsion may inhibit many from seeking redress for violations of their rights under the Convention. The remedy for this is in fulfilling the provisions of MWC articles 40 (right to form association) and 65, which obliges State parties to maintain services to deal with the questions concerning international migration through exchanges of information and assistance to migrant workers and members of their families. This could easily be facilitated by strengthening migrant worker associations and enabling them to maintain structures and channels to facilitate information and services concerning their rights and duties as migrant workers. Another area of concern is that some governments are concerned that the MWC might facilitate asylum-seekers in their bid to enter a country to work. But the Convention is quite clear on that issue as mentioned in Article 3:d, where it states clearly that the Convention does not apply to refugees and stateless persons. How each State party to the Convention will deviate from this provision is entirely a matter for that State to consider.

There are indeed an number of overlapping substantial rights between the MWC and other UN treaties, which provide further indications of the gaps in outcomes for migrant workers on the whole. This fact raises the question if it is reasonable to demand that a State becomes a State Party to the MWC if it is not willing or able to comply with rules under the other Conventions. The answer to this must be in the affirmative for following reasons: the ratification of the MWC not only binds States to provide rights to migrant workers; it will also enable State parties to design more clearly defined immigration guidelines for legislation. This in turn will enable State Parties to develop more effective routines for the management of both incoming and their own out-going migrant workers, a feature which will prove beneficial to all states concerned. The ratification of the Migrant Worker Convention could place most parties onto a more level playing field regarding an ability to develop management routines – and thereby close the most important gaps that are relevant to human rights.

In conclusion, even though the UN's Migrant Worker Convention contains a number of substantial gaps, it offers a wider scope of substantial protection than equivalent ILO treaties. The MWC encompasses civil and political rights as well as economic, social and cultural rights, and it furthermore narrows down the possibility of States adopting laws conferring different rights to migrant workers according to their nationality.<sup>295</sup> Above all, however, the Migrant Worker Convention provides the widest possible opportunity for State parties to adopt effective measures and management routines for all categories of migrant workers while being able to fulfil the core human rights principle of non-discrimination. While the indicators for both systems contain implementation gaps that are based on the absence of full or non-adherence, failed supervision and reporting, and the overall outcomes of their intentions, the ideal workers' rights world where their rights are being implemented remains achievable. It will require the active roles of States, employers, and non-State actors and their examination of large and small implementation gaps to accomplish.

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<sup>295</sup> This feature complements the European Convention on Human Rights (ECHR) which is the only legally binding instrument which also grants human rights to irregular migrants. It is also in contrast to EU Directives No. 43 and 78 on racial and employment equality respectively. See European Network Against Racism Report: 'Combating Religious and Ethnic Discrimination in Employment', Brussels, April 2004. Available at <[www.enar-eu.org](http://www.enar-eu.org)> visited on April 10, 2006.

## **6. Protections Available to Foreign Migrant Workers in Nigeria**

### **6.1. Introduction**

As a modern political entity, Nigeria was created in 1914 by the British, as part of the European partition of Africa that began in the last quarter of the nineteenth century. Located off the Gulf of Guinea on the West Coast of Africa, The Federal Republic of Nigeria is bordered by the Republic of Cameroon on the east and by the Republic of Benin to the west. Niger and Chad occupy its northern border, while its coastline consists of the Gulf of Guinea. Under the system of indirect rule that was practised by the British colonial powers, traditional authorities retained powers over their communities throughout the country. For many years the coastal city of Lagos was the federal capital city, until 1991 when the government relocated to the inland city, Abuja. In the 1990s the country returned to a full democracy and currently has thirty-six administrative states in addition to the federal capital territory at Abuja, located in the north. The nation became an independent State from British colonial rule on October 1<sup>st</sup>, 1960, but a military coup in 1966 marked the beginning of long period of military rule punctuated by one brief periods of civilian rule (1979-1983) before the return to full democracy in 1999.<sup>302</sup> The nation's current legal system is based on indigenous customary law, Islamic law, and English common law – which is the nation's principle legal system.<sup>303</sup>

Most census data on occupation and employment status show that Nigeria is still predominantly an agrarian society. Seventy percent of the workforce work is in agriculture (particularly subsistence farming), 10 percent in industry and 20 percent in services. Twenty eight percent of all persons are unemployed.<sup>304</sup> Other areas of self-employment are retail commerce and sales work, hawking of small items and management of small retailing shops and kiosks come next to agriculture with just about 22 per cent. The service sector of the economy is over-sized, and there is a large number of the persons who are unemployed. Increased activities in the oil sector of the economy and increasing urbanisation have prompted expansion in employment in the production, professional and technical sectors. Analysis of the data on employment status shows that the labour force of the Nigerian economy is about 32 per cent of the total population. Forty-five per cent of this figure can be said to be economically active. The 2004 estimated population of Nigeria is slightly less than 140 million persons.<sup>305</sup>

The population consists of at least 250 different ethnic groups, and there are at least 200 indigenous African languages spoken in the country. The official language is English, a language inherited from the colonial period. Nigeria is also the home of three of Africa's largest indigenous languages, Hausa, Yoruba and Igbo.<sup>306</sup> Ethnic rivalries and violence occurs often.

### **6.2. Foreign Migrant Workers in Nigeria**

Migrant labour in Nigeria can be categorised into three main groups: i) Sub-Saharan African foreign migrant workers from neighbouring countries who are generally described as “aliens”; ii) non-African (i.e., Europeans, Middle-easterners, Asian and North Americans) foreign migrant workers who are generally described as “expatriates” or “expats”; iii) contract

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<sup>302</sup> Blaustein and Flanz (eds), *Constitutions of the Countries of the World*, (Dobbs Ferry, NY, 1986), pp. 71–72.

<sup>303</sup> T. Falola, *The History of Nigeria* (Westport, CT: Greenwood Press, 1999) p. 1.

<sup>304</sup> <[www.worldfacts.us/Nigeria](http://www.worldfacts.us/Nigeria)> visited on 4 March, 2006.

<sup>305</sup> *Ibid.*

<sup>306</sup> J. Hatch, *Nigeria, A History*, (Secker & Warburgh, London, 1971), pp. 130–168.

workers, who may be from either of the above categories of persons. Many contract workers work with international organisations, large and small global corporations (i.e., oil companies), merchants, entrepreneurs or are on special development contracts with the Nigerian government. There are no accurate statistics on the number of foreign migrant workers in Nigeria.

Though it doesn't state so clearly, it can safely be assumed that human rights principles for the treatment of foreign migrant workers, be they documented or not, are provided for in the articles of the constitution. The section on Fundamental Rights provides that "Every person" is entitled to the rights to life, liberty, dignity, freedom and liberty, a fair trial and freedom from forced labour or slavery." It goes on to state that any person is also entitled to the right not to be tortured, held in slavery or detainment, the freedom of information, to hold opinions and even to take part or be a member of a secret society.<sup>307</sup> With such a clear mandate for "all" and "every person" the only conclusion to be drawn is that this provision of the Constitution protects non-citizens and migrant workers, documented or not.<sup>308</sup> The only prohibition is on the discrimination of Nigerian citizens based on the situation of their birth, religion, political opinion, place of origin or ethnic group.<sup>309</sup>

But due to the fact non-citizens have been mass-deported on several occasions, the Nigerian government has been criticised on a number of occasions by the African Commission. The economic boom of the 1970s, which was underwritten by substantial oil export earnings, attracted more than three hundred thousand foreign migrant workers from neighbouring West African countries. It is estimated that there were at least three hundred thousand of these workers were Ghanaians who had left their country as it headed towards an economic collapse.<sup>310</sup> The sudden wave of foreign migrant workers to Nigeria also included nationals of Niger and Chad seeking escape from drought, famine and poverty in the Sahel.<sup>311</sup>

The economic benefits to both the foreign migrant workers and the Nigerian economy were mutually beneficial. There are few reliable statistical studies of economic benefits that Nigeria received from undocumented ECOWAS and other Sub-Saharan African foreign migrant workers who came to Nigeria, or of the economic benefits they received. There are indications that they did have an impact on the Nigerian economy. Stalker refers to the fact that large flows of illegal migrants take jobs that host national refuse to take, and that this suggests that immigration makes a positive contribution to the host country because the largely youthful migrants bring a new vitality to the country.<sup>312</sup>

Other researchers refer to ILO statistics on declines in real earnings due to increased urban unemployment in a number of Sub-Saharan African countries to show how the both statistics actually increased from 10 percent to about 20 per cent between 1975 and 1980 due to Nigeria's increased earnings in oil exports. Nigeria's increased earnings during the same period was 12 per cent, and the overall assessment is that international migrants to urban areas swell the populations of these areas, overcrowding African cities with surplus labour. This leads to increased unemployment and poverty in these urban centres, a situation for which there are few recourses.<sup>313</sup> The sum of this can only be that the economic disadvantages and

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<sup>307</sup> The Constitution of the Federal Republic of Nigeria, Part I, Chapter IV, paras 33 – 40, <[www.nigeria-law.org/constitution\\_of\\_the\\_federal\\_republic\\_of\\_nigeria.htm](http://www.nigeria-law.org/constitution_of_the_federal_republic_of_nigeria.htm)> visited on 10 September, 2005.

<sup>308</sup> *Ibid.*, paras 41(1) – 43.

<sup>309</sup> *Ibid.*, paras. 42(1) and (2).

<sup>310</sup> N. Van Hear, 'Consequences of the Forced Mass Repatriation of Migrant Communities: Recent Cases from West Africa and the Middle East.' (Discussion paper No. 38) *UNRISD, Geneva* (November 1992).

<sup>311</sup> Adepaju and Tomas Hammar, *supra*, note 69, p. 19.

<sup>312</sup> Stalker, *supra*, note 8, p 59

<sup>313</sup> Elizabeth Annan-Yao: 'Economic Migration: Poverty, Unemployment, Income Differentials, Population.' Adepaju and Hammar (Eds), *supra*, note 69, pp. 132.

social costs for caring for masses of foreign migrant workers far outweigh any advantages of cheap labour a host country might temporarily receive.<sup>314</sup>

A decline in world oil prices and political instability during the mid-seventies caused the Nigerian government to reconsider its open migration policies to ECOSOC nationals, especially since Nigeria's oil earnings were halved between 1980 and 1982. Austerity measures introduced in early 1982 led to large scale layoffs of workers and widespread unemployment. Such economic deterioration contributed to increasing social distress and political strain, and it was against this background that the government of President Shehu Shagari announced that all "illegal" immigrants should leave Nigeria.<sup>315</sup> This eventually led to two mass expulsions taking place in Nigeria. The first occurring in 1983 when 1.5 million citizens of other West African countries were expelled, and the second in 1985 when some 700 thousand Ghanaians were expelled.<sup>316</sup> During both mass deportation conditions, nearly all the victims were subjected to harassment, lost assets, property and belongings. Reports state that nearly all were expelled without any due process hearings or appeals of their cases.<sup>317</sup>

The military regime which ousted the democratic government of President Shagari introduced further austerity measures in a bid to rescue the ailing economy, but they primarily resulted in still greater redundancies and massive unemployment.<sup>318</sup> The government claimed that foreign migrant workers were taking jobs to the disadvantage of Nigerians and blamed the migrants for the heavy involvement in and rise in crime. The new regime defended its actions by claiming that many of those expelled in the 1985 expulsions were persons who had returned since the 1983 expulsions, or they escaped it altogether that year.<sup>319</sup> Such expulsions exclusively affected citizens of neighbouring ECOWAS countries.

In its initial State Party Report to the ICCPR of 26 February, 1996, Nigeria submitted information on its implementation of Articles 1 through 27 of the Covenant regarding the protection for the freedom of movement for foreign migrant workers in the country.<sup>320</sup> The government argued that as a result of the Economic Community of West African States (ECOWAS) Protocol of 90 Days, every citizen of an ECOWAS State has the freedom to enter Nigeria and to live there for 90 days without a visa.<sup>321</sup> But these rights are not absolute, as there are some exceptions put in place to protect national security, public order, health, morality and the protection of the rights of others. None of these issues are more clearly defined in the State Report. The government also stated that entry into Nigeria by non-citizens is governed by its immigration laws, and supports temporary refugee, asylum-seeking and political refugees from other countries, in co-operation with the office of the United Nations High Commissioner for Refugees (UNHCR).<sup>322</sup>

In its consideration of the report, the Human Rights Committee posed questions regarding Nigerian Decree No. 107 (which was the basis for the nation's military rule). The fact that a state of emergency was never proclaimed and how this state of affairs guaranteed compliance

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<sup>314</sup> *Ibid.*, p. 138.

<sup>315</sup> Theophile Koamouo, *UNESCO Courier*, (September 2000, pp 19 – 21.).

<sup>316</sup> *Ibid.*

<sup>317</sup> N. Van Hear, *supra*, note 310.

<sup>318</sup> *Ibid.*

<sup>319</sup> *Ibid.*

<sup>320</sup> See the Consideration of Reports Submitted under Article 40 of the Covenant that were due in 1994: ICCPR/C/92/Add.1, of 26 February, 1996. UNTS.

<sup>321</sup> *Ibid.*, para. 79. See section 5.3.4 *infra*.

<sup>322</sup> At the time of the report, Nigeria was hosting an estimated 1,500 refugees each from Liberia and Chad. The treatment and repatriation of refugees is normally conducted in accordance with UNHCR standards. *Ibid.*, para. 84.

with Article 22 of the Covenant<sup>323</sup> was questioned. The Committee further expressed concern with harassment and persecution of members of NGOs, the arrest and detention of officers of human rights organisations and the impounding of passports of NGO officials.<sup>324</sup> The Nigerian delegates response was that the decree in question had come into force before signing of the Covenant, and that the Committee's suggestions and recommendations would be presented to the Nigerian National Human Rights Commission which would benefit from the dialogue with the Committee.<sup>325</sup> The Committee recommended that immediate steps be taken to restore full constitutional rights in Nigeria without delay, and that Decree No. 107 of 1993 and other measures which abrogate or suspend the application of the basic rights enshrined in the 1979 Constitution be abrogated so that the legal protection of these rights would be restored.<sup>326</sup> It further recommended that any future abrogation or derogation be in strict compliance with Article 4 of the Covenant, which allows such action only in time of public emergency which threaten the life of the nation.<sup>327</sup> Any such public emergency must be officially proclaimed and communicated to the Secretary-General of the United Nations.<sup>328</sup>

### *6.3. International Treaty Obligations Protecting the Rights of Foreign Migrant Workers*

#### 6.3.1. Universal Conventions and Treaties

Nigeria has ratified the major universal human rights instruments adopted by the United Nations.<sup>329</sup> On the other hand, Nigeria has neither signed nor ratified the Migrant Worker Convention. Returning again to its initial State Report on the ICCPR, Nigeria reported that under its constitution the provisions of Article 22 of the Covenant (relating to the freedom of association) were contained in section 37 of the 1979 Constitution of the Federation of Nigeria (now in Article 40, mentioned above).<sup>330</sup> The report stipulated that there were no restrictions in Nigeria on the right to the freedom of association except in exceptional cases. One such case was upon persons employed in the public service in relation to their enjoyment of this freedom.<sup>331</sup> The references to Article 26 of the ICCPR addressed the equality of women, but did not explain if the protection of migrant women were included in its protection under that article. The government further reported that the principle of equality before the law without distinction (irrespective of sex, racial and national extraction, religion, state of origin, political convictions and other circumstances) is in many sections of the Nigerian Constitution.<sup>332</sup> It pointed out that Section 33 (1) of the Constitution guarantees "citizens" equal right in the determination of their civil rights and obligations with respect to each other

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<sup>323</sup> See Summary record of the 1505th meeting on Nigeria. para. 47, (13/08/96), here it was commented that there had been no response to comments on Articles, 14, 19 and 22 of the Covenant. <www.unhchr.ch> visited on 15 October, 2005.

<sup>324</sup> *Ibid.*, paras. 60–65. See also ICCPR.C.79/Add.65 paras. 287-290; A/51/40 paras.267-305, 24 July, 1996. Other questions concerned the situation for women, prisoners, and a general concern for rights under Article 25.

<sup>325</sup> *Ibid.*, ICCPR.C.S.R.1505, para. 73.

<sup>326</sup> *Ibid.*

<sup>327</sup> *Ibid.*

<sup>328</sup> ICCPR.C.79/Add.65 paras. 292-295. <www.unhchr.ch> visited on 10 October, 2005.

<sup>329</sup> Nigeria signed the ICERD in 1967, and the ICEDAW in 1984 without reservations. It signed the CAT in 1988 (which did not enter into force until 2001), and in 1990 the Convention on the Rights of the Child (CRC). In 1993 Nigeria acceded to the ICCPR and the ICESCR without reservations. It furthermore signed the optional protocols to CEDAW and both optional protocols to the CRC in 2000. UNTS.

<sup>330</sup> See para. 161: Initial Reports of States Parties due in 1994: ICCPR.C.92.Add.1 of 26/2/1996; ICCPR.C.SR.1495; and ICCPR.C.42.Add.2. <www.unhchr.ch> visited on 15 September, 2005.

<sup>331</sup> *Ibid.*

<sup>332</sup> *Ibid.*, ICCPR 92.Add.1 para. 183.



or to the Government, and the power to adjudicate such matters is vested in the court established by the Nigerian Constitution.<sup>333</sup> Equality before the law, the report went on, is given its clear application in section 42 (1) of the Constitution, where it provides that “any person who fears or alleges that any of the provisions of this Chapter is being or likely to be contravened in any State in relation to him may apply to a High Court in that State for redress”.<sup>334</sup> But there was no mention of protection for non-citizens or migrant workers in the report. The report then turned its attention to what Nigeria is doing regarding the discrimination of women, where it was claimed that discrimination against women has been “taken care of in Nigeria”. It was also mentioned that there was a National Commission for Women which culminated in the establishment of the Ministry of Women Affairs and Social Welfare in 1995, but again there was no mention of protection for migrant women workers.<sup>335</sup>

Within the same report there was a detail on compliance with Article 13 of the ICCPR. The report stated that the position of non-Nigerian citizens resident or temporarily present in Nigeria is widely provided for in the Immigration Act (171, of 1963, see *infra*) of Nigeria as well as the Constitution of the Federal Republic of Nigeria. The Nigerian Government may order the expulsion from Nigeria of a non-citizen. Conditions for deportation comply with the provisions of article 13.<sup>336</sup>

Even though the Nigerian Constitution does not define what discrimination is, the report noted that unreasonable restriction with double standards, which is the import of discrimination, is forbidden in Nigeria in all spheres.<sup>337</sup> It furthermore pointed out that equality before the law does not necessarily mean differentiation in treatment where State security dictates otherwise, and that Section 17 (1) of the Constitution provides that the State social order is founded on ideals of freedom, equality and justice.<sup>338</sup> Furtherance of the social order meant that (a) every “citizen” shall have equality of rights, obligations and opportunities before the law; (b) the sanctity of the human person shall be recognised and human dignity shall be maintained and enhanced; (c) governmental actions shall be humane; (d) Exploitation of human or natural resources in any form whatsoever for reasons other than the good of the community shall be prevented; and (e) the independence, impartiality and integrity of courts of law and easy accessibility thereto shall be secured and maintained.<sup>339</sup> But again there was no mention of how these protections could also be applied to migrant workers in the country.

### 6.3.2. ILO Instruments

Nigeria is not a party to ILO Convention No. C143 on Foreign migrant workers (of 1975) or to the 1958 ILO Convention on Discrimination (Employment and Occupation) (No. C111). It is, however, a party to thirty ILO Conventions including the Right of Association (Agriculture) Convention (C-11) of 1921 and the Migration for Employment Convention (Revised) of 1949 (C97), although it excluded Annexes I to III of this latter ILO Convention.<sup>340</sup>

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<sup>333</sup> *Ibid.*, para. 184.

<sup>334</sup> *Ibid.*, para. 185.

<sup>335</sup> *Ibid.*

<sup>336</sup> *Ibid.*, paras. 85–89.

<sup>337</sup> The issue of “discrimination” is often within the context of Nigeria’s own ethnic minorities under ICERD committee reports. See ICERD.SR.1116, para. 14. <[www.unhchr.ch](http://www.unhchr.ch)> visited on 11 October, 2005.

<sup>338</sup> *Ibid.*, para. 188.

<sup>339</sup> *Ibid.*, para. 189.

<sup>340</sup> See the ILO List of Ratifications by Convention and by Country, (Report of the 90<sup>th</sup> Session, Geneva, 2002) .<[www.iloex](http://www.iloex)> visited on 22 August, 2006.

Nigeria ratified the ILO Freedom of Association and Protection of the Right to Organise Convention (1948) on the 17<sup>th</sup> October, 1960.<sup>341</sup> Since then, a number of complaints against the government regarding the right to organise have been launched by trade unions, but there are no recorded cases of complaints by migrant worker organisations.<sup>342</sup> In each of the complaints, the ILO Committee of Experts urged the government to take necessary measures to repeal section 7(9) of the Trade Unions Act in order to ensure the right of workers to form and join the union of their own choosing at all levels, and to amend the legislative requirement to include "no-strike" and "no lock-out" clauses in collective agreements in order to benefit from check-off facilities. The Committee requested the Government to keep it informed of any developments in this respect.<sup>343</sup>

#### 6.4. Protection of Foreign Migrant Workers under Regional Instruments

##### 6.4.1. The African Charter

At the regional level, Nigeria became a party to the African Charter on Human and Peoples' Rights on 22<sup>nd</sup> January, 1983.<sup>344</sup> Between 1988 and 2002 seven reports were due to the Commission, but Nigeria filed its first report to the Commission in 1990 during the 13<sup>th</sup> Ordinary Session. During that session, the Nigerian delegate defended the expulsion of undocumented foreign migrant workers from Gabon, Ghana, and Togo with explanations that mass expulsions were executed in collaboration with receiving governments. There is no recorded response from the governments in question in the report.<sup>345</sup>

Reports on the activities of the African Commission contain no record of complaints from foreign migrant workers on their right to association or their right to recognition against Nigeria. The only complaint on Nigeria concerning Article 10 of the African Charter (the right to freedom of association) was brought by the Civil Liberties Organisation, a Nigerian non-governmental organisation, in protest against the Legal Practitioners' Decree of 1992. The complaint argued that the new governing body for the Nigerian Bar Association, established by governmental decree, violated Nigerian lawyers' freedom of association guaranteed by Article 10 of the African Charter. The Commission's response was to find that there has been a violation of Articles 6, 7, and 10 of the African Charter on Human and Peoples' Rights and that the Decree should therefore be annulled.<sup>346</sup>

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<sup>341</sup> *Ibid.*

<sup>342</sup> The trade unions filing complaints were the International Confederation of Free Trade Unions (ICFTU), the Organisation of African Trade Union Unity (OATUU), the World Confederation of Labour (WCL) and the International Federation of Chemical, Energy, Mine and General Workers' Union (ICEM). See ILO Report of the Committee on Freedom of Association: Reports No. 315 (Vol. LXXXII, 1999, Series B., No. 1) Cases No. 1935, 1793, 1935, at <www.ilolex> visited on 26 August, 2005.

<sup>343</sup> At the ILO 90<sup>th</sup> Session of 2002, the Committee of Experts on the Application of the Conventions and Recommendations noted "with regret" that the Government's latest report had not been received. The Committee repeated its previous observations regarding Article 2 of the Convention (the right of workers to form and join organisations of their own choosing), Article 3 (the right to elect officers ...without government interference), Article 4 (cancellation of registration by administrative authority) and Articles 5 and 6 (the right to international affiliations). <www.ilolex> visited on 10 September, 2005.

<sup>344</sup> See the list of ratifications at <www.achpr.org/english/\_info/index\_ratifications\_en.html> visited on 09 September, 2005.

<sup>345</sup> For details, see the '13<sup>th</sup> Session Report of the African Commission for Human and Peoples Rights (April 1993)', (Danish Centre for Human rights), 1995, pp. 23–56.

<sup>346</sup> See the African Commission on Human & People's Rights, Communication No. 101/93: *Civil Liberties Organisation in Respect of the Nigerian Bar Association vs. Nigeria*. University of Minnesota Human Rights Library, <www.umn> visited on 3 September, 2005.

#### 6.4.2. The ECOWAS Agreement

Nigeria is also a charter member of the Economic Community of West African States (ECOWAS) that was established by treaty in 1975. The ECOWAS treaty does not have a charter on human rights, but in its declaration of political principles members declared adherence to certain principles that would “*enhance economic advancement in a political environment of peace, security and stability as embodied in the UDHR and the African Charter.*”<sup>347</sup>

The 1979 ECOWAS agreement between 16 West African states abolished the use of visas for those staying abroad for more than 90 days, and the country’s huge economic expansion in the 1970s, due to its revenues from oil exports, attracted large numbers of Sub-Saharan migrants who were mainly from those neighbouring countries.<sup>348</sup> Considerable numbers of these foreign migrant workers moved to Nigeria’s urban centres, such as Lagos, Kano, Katsina, Kaduna and other cities where they work as dock workers, storekeepers, or tradesmen. Persons from former Anglo-colonial countries, such as Ghana, Sierra Leon and Liberia were able to find work as teachers and office workers, while those from neighbouring French-speaking countries (Niger, Cameroon, Benin, Togo, and Ivory Coast) have been known to seek and find unskilled domestic work.<sup>349</sup> It is to the ECOWAS group that the term “alien” is usually applied to, a term which was not applied to the non-African “expatriates”.<sup>350</sup> The 90 days residence rule was adequate for most of them, but many overstayed this limitation, some remaining undetected for much longer periods of time. Politicians in many voting districts and regions often accuse one another of using undocumented and ECOWAS agreement immigrants as registered voters in national elections.<sup>351</sup>

The most important development in this area is the decision taken on the establishment of residence cards in ECOWAS member states that was adopted in 1990. The agreement establishes that citizens of ECOWAS member States desiring to reside in the territory of another Member State shall obtain a Residence Card from the competent authorities of the host Member State. The cards are to be valid for three years and may be renewed for a successive three-year period. The agreement excludes political rights for holders of the residence card, but provides that nationals of ECOWAS states shall enjoy the same rights and liberties of host-state nationals, in particular those contained in the UDHR.<sup>352</sup> The document calls for Member States to take all necessary statutory and administrative measures to ensure prompt implementation of the Decision, but none of the articles of the treaty contained a schedule for the implementation of the cards or sanctions for States that refused to implement the treaty.<sup>353</sup>

The ratification of a protocol on the free movement of persons by members of the Economic Community of West African States (ECOWAS) in 1979-1980 provided regional legal protection for this flow of foreign migrant workers for the first time.<sup>354</sup> The protocol allowed migrants to enter and remain in member states without a visa for up to ninety days. Working was technically not allowed, but many migrants found employment as cheap labour

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<sup>347</sup> Report of the Third West African Human Rights Forum, Abuja, Nigeria, 29 March – 1 April, 1999. <[www.hrw.org/reports/2001/africa/overview/acknowledgements.html](http://www.hrw.org/reports/2001/africa/overview/acknowledgements.html)> visited on 29 September, 2005.

<sup>348</sup> See K. Kubenjine and T. Nizianja: ‘Africa Recovery’, Vol. 13, # 1 p 14. (U.N. Publication, N.Y. 1999).

<sup>349</sup> ‘African Affairs’, Vol. 84, No. 337, Oxford (1985), p. 527.

<sup>350</sup> See the debate on why fellow West Africans are called “aliens” in: ‘Who Is an Alien?’, West Africa, (February, 1983).

<sup>351</sup> See the Alliance for Democracy report to Associated Press News Agency, (September, 2002).

<sup>352</sup> ECOWAS Decision A/DEC.2/5/90 Establishing A Residence Card in ECOWAS Member States, Article 19.

<sup>353</sup> *Ibid.*

<sup>354</sup> Adepaju, Aderante: ‘Illegals and expulsion in Africa: The Nigerian experience’, *International Migration Review*, Vol. 18,3 (1984).

and overstayed the 90-day period, a situation that was tolerated by Nigerian authorities during this period of rapid economic growth.<sup>355</sup>

### *6.5. Protecting of Foreign Migrant Workers under Domestic Legislation*

#### 6.5.1. Protections under the Constitution of the Federal Republic of Nigeria

The Nigerian legal system is based on English common law system. However, Islamic Sharia law is widely adhered to in its northern region and traditional customary laws are widely adhered to in the southern regions of the country. But it is the Supreme Court, to the exclusion of any other court, which has jurisdiction in any dispute between the Federation and a state, between states, or in questions involving the existence or extent of a legal right.<sup>356</sup> The nation's current constitution, known as The Constitution of the Federal Republic of Nigeria (1999), is the result of several amendments from the original Independence Constitution of 1960: the Republican Constitution of 1963, several years of military rule and decrees, and the first Constitution of the Federal Republic of Nigeria in 1979. Following another period of crisis and military rule, Nigeria received a democratically elected government in 1999, and the "fourth republic" is anchored on the constitution of the same year. The features of this new constitution are not substantially different from those of the 1979 Constitution, and the legislature is continuously adopting new amendments and laws. The latest Constitution provides for protection from discrimination for "every citizen", in Chapter II, par. 17, and "every person" and "every individual" in Chapter IV, paras 33 and 34, but there is no clarification of whether or not the latter phrase could be interpreted to include non-citizens and migrant workers in the country. Other articles in Chapter IV addressing "Fundamental Rights" echo a number of the fundamental entitlements provided in the international human rights instruments (e.g., the freedom to associate, move freely, form or belong to any political party, trade union or association) providing one is a "citizen", but there is no mention of such freedoms for migrant workers or non-citizens. The section includes entitlements for ethnic groups, gender, place of origin, or birth – providing the person is a "citizen of Nigeria".<sup>357</sup>

In Nigeria, the family is a fundamental social institution and its importance is given implicit and explicit recognition. The family is generally regarded as extended as opposed to nuclear and as such recognised by statute and covered by customary law. By this provision, the confidentiality of a family is protected by the State. Under Chapter III articles 25 through 27 of the Constitution any person can convert his/her citizenship from registration to naturalisation if she/he fulfils all the requirements. Nigerian law recognises the right of a Nigerian to marry a foreigner and where the foreign partner is a female, she is recognised as a citizen of Nigeria by registration. This is provided for in section 24 (2) (a) of the Constitution of the Federal Republic of Nigeria as amended. Under section 24 (1) of the Nigerian Constitution, when a foreign man marries a Nigerian woman, he has initial citizenship called citizenship by registration if (a) he is a person of good character; (b) he has shown a clear intention of his desire to be domiciled in Nigeria; (c) he has taken the oath of allegiance prescribed in the sixth schedule to the Nigerian Constitution.<sup>358</sup>

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<sup>355</sup> *Ibid.*

<sup>356</sup> The Constitution of the Federal Republic of Nigeria, Part I, Section 6, paras 1–6. <[www.nigeria-law.org/constitution-of-the-Federal-Republic-of-Nigeria.htm](http://www.nigeria-law.org/constitution-of-the-Federal-Republic-of-Nigeria.htm)> visited on 10 September, 2005.

<sup>357</sup> *Ibid.*, Part I, Chapter IV.

<sup>358</sup> In Nigeria, there are three types of marriages: statutory, customary and Islamic. The right to marry under the statutory law is governed by the Matrimonial Causes Act and the Matrimonial Causes Rule. The right to marry and the procedures for marriage are regulated by those Acts as are the provisions applicable to dissolution of marriage, maintenance and custody of children. In accordance with customary law, however, there are no restrictions relating to age so long as the parties concerned have attained marriageable age.

Even though the Nigerian Constitution does not define what discrimination is, it claims that unreasonable restriction with double standards, which is the import of discrimination, is forbidden in Nigeria in all spheres.<sup>359</sup> But there is no mention of foreign migrant workers, immigrants or other categories of non-citizens in this article or in the Chapter in its entirety, though there are a number of references to “everyone”, “every person”, and “every individual”.<sup>360</sup> The civil capacity of an alien to act was only vaguely referred to in Nigeria’s first State Report to the ICCPR Committee of 1996 and the burden of the recognition was referred to the [1979] Constitution of the Federal Republic of Nigeria and the Immigration Act. The current status of recognition of non-citizen is strongly worded to depend upon the acquisition of Nigerian citizenship through the status of Nigerian-born parents or grand parents, and any rights for foreign migrant workers are noticeably absent in the 1999 Constitution.<sup>361</sup>

### 6.6. Protection under the Court Systems

Nigeria amended a number of military Decrees affecting its 1979 Federal Constitution of 1979 when it returned to democracy in 1999, and a democratic election that same year returned the country to civilian rule. The current Constitution was adopted in 1999.<sup>362</sup> Presently there is a revision to review all laws and recommend a repeal and amendments to bring the entire body of laws into conformity with the Constitution of the Federal Republic of Nigeria.

Any person who is charged with a criminal offence in Nigeria is entitled to a fair hearing in public within a reasonable time by a court or a tribunal.<sup>363</sup> The provisions for fair trial meet with the principles of universal and regional civil rights. However, Nigeria is one of several African States that have three functioning judicial systems and courts, The High Court, the Sharia Court and a Customary Court, and this could prove problematic for migrant workers who find themselves in a state where they could be tried under an alien system.

#### 6.6.1. The High Court

The Constitution provides for the presence of a High Court for each State of the Federation consisting of a Chief Judge of the State; and any number of Judges of the High Court that may be prescribed by a Law of the House of Assembly of the State.<sup>364</sup> The appointment of a

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Customary law marriages are also potentially polygamous and dissolution of a marriage contracted under customary law and maintenance of any children born of such a marriage depend on the customary law under which the marriage was contracted. Under the Islamic faith, every Muslim has the right to marry up to four wives provided the man can take care of the wives equally. This is provided for in Chapter IV, Section 3, of the Qur’an. Islamic marriage is equally polygamous in nature. *See* the provisions of the Initial State Party Report, ICCPR/92/Add.1, of 26 February, 1996, para. 168. <[www.unhchr.ch](http://www.unhchr.ch)> visited on 22 September, 2005.

<sup>359</sup> *Ibid.*, para. 188.

<sup>360</sup> *Supra*, note 373 Chapter IV.

<sup>361</sup> Thus, Nigerian laws and the Constitution recognise the legal status of individuals who are citizens, and their capacity to exercise rights and enter into contractual obligations. But this legal capacity may be restricted for such reasons as minority or incapacity to act. A citizen's legal capacity begins at the time of birth and terminated at death. The capacity to acquire civil rights and create civil obligations is acquired attainment of the legal age of 18 years. For other conditions and restrictions, *See supra*, note 373, Chapter 3, Articles 25–28.

<sup>362</sup> Nigerian Decree Number 24 of 1999 promulgated the Constitution into law. <[www.abfrco.com/1999n.htm](http://www.abfrco.com/1999n.htm)> visited on 10 March, 2006.

<sup>363</sup> *Ibid.*, para. 36:4.

<sup>364</sup> Constitution of the Federal Republic of Nigeria (1999). *Supra*, note 273, para. 270.

person to the office of Chief Judge of a State is made by the Governor of a State on the recommendation of the National Judicial Council, which is then subject to confirmation of the appointment by the House of Assembly of the State. Even the appointment of a person to the office of a Judge of a High Court of a State is made by the Governor of the State acting on the recommendation of the National Judicial Council. A person may not be qualified to hold office of a Judge of a High Court of a State unless he is qualified to practice as a legal practitioner in Nigeria for a period of not less than ten years.<sup>365</sup> Subject to the provisions of section 251 and other provisions of this Constitution, the High Court of a State shall have jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person. The reference to civil or criminal proceedings in this section includes a reference to the proceedings which originate in the High Court of a State and those which are brought before the High Court to be dealt with by the court in the exercise of its appellate or supervisory jurisdiction. For the purpose of exercising any jurisdiction conferred upon it under this Constitution or any law, a High court of a State shall be duly constituted if it consists of at least one Judge of that Court. Subject to the provisions of any law made by the House of Assembly of a State, the Chief Judge of a State may make rules for regulating the practice and procedure of the High Court of the State.

#### 6.6.2. Sharia Law

The Nigerian Constitution provides that any State that requires a Sharia Court of Appeal may have one providing it consists of (a) A Grandi Kadi of the Sharia Court of Appeal; and (b) such member of Kadi of the Sharia Court of Appeal as may be prescribed by the House of Assembly of the State. The appointment of a person to the office of the Grandi Kadi of the Sharia Court of Appeal of a State is to be made by the Governor of the State on the recommendation of the National Judicial Council. This too is subject to confirmation by the House of Assembly of the State. The appointment of a person to the office of a Kadi of the Sharia Court of Appeal of a State is made by the Governor of the State, also on the recommendation of the National Judicial Council. A person is only qualified providing: he is a legal practitioner in Nigeria and has been so qualified for a period of not less than ten years and has obtained a recognised qualification in Islamic law from an institution acceptable to the National Judicial Council; or (b) he has attended and has obtained a recognised qualification in Islamic law from an institution approved by the National Judicial Council and has held the qualification for a period of not less than ten years; and (i) he either has considerable experience in the practice of Islamic law, or (ii) he is a distinguished scholar of Islamic law.<sup>366</sup>

The Constitution provides that the Sharia Court of Appeal is competent to decide on: (a) any question of Islamic personal Law regarding a marriage concluded in accordance with that Law, including a question relating to the validity or dissolution of such a marriage or a question that depends on such a marriage and relating to family relationship or the guardianship of an infant; (b) questions where all the parties to the proceedings are Muslims; any question of Islamic personal Law regarding a marriage including the validity or dissolution of that marriage, or regarding family relationship, a founding or the guarding of an infant; (c) any question of Islamic personal Law regarding a gift (*wakf*), will or succession where the endower, donor, testator or deceased person is a Muslim; (d) any question of

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<sup>365</sup> *Ibid.*, para. 271.

<sup>366</sup> *Ibid.*, paras. 275–278.

Islamic personal Law regarding an infant, prodigal or person of unsound mind who is a Muslim or the maintenance or the guardianship of a Muslim who is physically or mentally infirm; or (e) where all the parties to the proceedings, being Muslims, have requested the court that hears the case in the first instance to determine that case in accordance with Islamic personal law, any other question.<sup>367</sup>

The jurisdiction of Shari'a courts was initially limited to family or personal law cases involving Muslims, or to civil disputes between Muslims and non-Muslims who consent to the courts' jurisdiction. However, the Constitution states that a Shari'a Court of Appeal may exercise other jurisdiction that may be conferred on it by the law of the State, and this has enabled a few states to expand the jurisdiction of existing Shari'a courts to include criminal matters. Christians have alleged that, with the adoption of an expanded Shari'a law in several states and the continued use of state funds to fund the construction of mosques, teaching of Alkalis (Muslim judges), and pilgrimages to Mecca (Haj) Islam has been adopted as the *de facto* state religion of several northern states. However, state funds also are used to fund Christian pilgrimages to Jerusalem, hence states with a clear Christian or Muslim majority explicitly favour the majority religion. There are records of many other disputes between Moslems and Christians, but there are no statistics on those occurring between migrant workers and citizens, a factor that is largely due to the absence of statistics.

### 6.6.3. Customary Court

The Constitution also allows for any State that requires it to have a Customary Court of Appeal. Like in the Sharia court of Appeal, the Customary Court of Appeal of a State can consist of: (a) a President of the Customary Court of Appeal of the State; and (b) such number of Judges of the Customary Court of Appeal as may be prescribed by the House of Assembly of the State.<sup>368</sup> The appointment of a person to the office of a Judge of a Customary Court of Appeal is also made by the Governor of the State on the recommendation of the National Judicial Council, and the persons must have practised law for at least ten years and, in the opinion of the National Judicial Council he has considerable knowledge and experience in the practice of Customary law; or (b) in the opinion of the National Judicial Council he has considerable knowledge of and experience in the practice of Customary law.

A Customary Court of Appeal of a State has jurisdiction and decides on such questions as may be prescribed by the House of Assembly of the State for which it is established. For the purpose of exercising any jurisdiction conferred upon it by this Constitution or any law, a Customary Court of Appeal of the State may make rules for regulating the practice and procedure of the Customary Court of Appeal of the State. Subject to the provisions of any law by the House of Assembly of the State, the President of the Customary Court of Appeal of the State may make rules for regulating the practice and procedure of the customary Court of Appeal of the State. There are no specific details regarding what is, or is not, customary law or practices, and there are no statistics on migrant workers appearing in such courts.

### 6.7. *Protection under the Immigration Act (1963)*

There are a number of municipal laws that regulating the admittance and deportation of non-citizens generally in Nigeria. These are the Immigration (Control of Aliens) Regulations (Chapter 171);<sup>369</sup> the Immigration Act (No. 6 of 1963) (Chapter 171);<sup>370</sup> The part that is

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<sup>367</sup> *Ibid.*, para. 277.

<sup>368</sup> *Ibid.*, paras. 280–283.

<sup>369</sup> Immigration Act, Laws of the Federation of Nigeria (1990) *Supra*, note 373.

<sup>370</sup> *Ibid.*

concerned with foreign migrant workers falls under the Immigration Act No.6 of 1963) (Chapter 171) which remains the main body of immigration law in Nigeria.<sup>371</sup>

Part I addresses the administration of migrants, (known throughout the document as “immigrants” and “aliens”), and explains in detail the authority of Nigerian immigration officials. The list includes: persons liable to examination by immigration officers upon arrival into Nigeria, control of passenger lists and medical examinations, residence permits, control of visitors and transit passengers, power to exempt from certain entry or departure requirements, the production of travel documents, the appointment of immigration officers, the appointment of medical inspectors, the power of immigration officer to refuse entry, the entry into Nigeria for business purposes, entry requirements and conditions in general. This section also addresses the authority and power to board ships, the recognition of airports and ports, the control of persons arriving elsewhere than at a recognised port, the control of immigrants by inland water and the removal of immigrant where entry is refused.

Part II addresses deportation, the categories of prohibited immigrants and deportations in special cases. This section also details court deportation recommendations when made on convictions, by recommendation by a court, the removal of persons subject to deportation orders, offences in connection with deportation orders and the power of the authorities to notify in cases where persons are liable to deportation.

Section 18, provides that any person with any of the following classes shall be deemed to be prohibited immigration and liable to be refused admission into Nigeria or to be deported as the case may be, that is to say: (a) any person who is without visible means of support or is likely to become a public charge or any person whose admission in the country would be in the opinion of the Minister contrary to the interest of national security.<sup>372</sup> Aliens unlawfully in the country are always deported on detection because their presence in the country constitutes an illegality. Some such aliens have heinous intentions that are inimical to State security. The fact that such aliens deliberately decided to sneak into the country without following the procedure raises a security question that necessitates deportation. However, aliens that are lawfully in the country are not ordinarily expelled except in the following cases: (a) Where their entry into the country is lawful but they commit criminal offences or engage in acts that are prejudicial to State security; (b) Where their entry is lawful but they connive with saboteurs to overthrow the Government; (c) Where the alien lawfully enters the country but the country of his nationality applies to Nigeria for extradition for the purpose of facing trial in respect of a criminal offence committed in that country. The procedure for such extradition is provided for in the Extradition Act of Nigeria, Cap. 125, Laws of the Federation of Nigeria 1990. The State would only concede to the extradition of such a lawful alien if there is a reciprocal agreement between Nigeria and the country involved.

Part III focuses on the control of crews and stowaways, the examination of crews, the control of members of crew of ship, etc. stowaways and the discharge of crews in Nigeria.

The title of Part IV is “Miscellaneous and Supplemental”, and in paragraph thirty, it provides for the identifying, accepting, rejecting and the deportation of immigrants [migrants workers]. The section provides that the “Minister may, from time to time, give such directions as he thinks fit for the determination of the nationality of any person, or if a deportation order is in force, for the disregarding of any change of nationality”<sup>373</sup> The paragraph also places the burden of proof of Nigerian citizenship in the case of such a claim on the claimant. The Minister also may proscribe conditions for entry into Nigeria, determine the fees payable for visas and permits, has the authority to abolish such requirement as entry permits in certain

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<sup>371</sup> *Ibid.* As stated earlier, this dissertation is not concerned with regulations covering asylum-seekers and refugees, hence that section will not be examined here.

<sup>372</sup> *Ibid.*, para. 87.

<sup>373</sup> *Ibid.*, para. 30.



cases, and the power to prescribe permit the entry into of the country of non-citizens. Paragraphs 34 – 39 of this law provides for the employment of immigrants, the revocation of permits, the application Act to young persons and cases of dual nationality, the power to require them to obtain a permit after entry, restrictions on the entry of immigrants, the admission of insane persons, and the liability of the master of a ship, etc for costs of deportation. The Act stipulates that the Failure to comply with its provisions shall be an offence under this Act, and that for the purposes of this section, any person being a company or an association shall be deemed to be in Nigeria if carrying out any work therein.

The Immigration Act gives considerable power to the Director of Immigration and to the Minister of Immigration in a number of paragraphs. In Paragraph 35 the powers to act under their own discretion is provided for under conditions where “he” deems it to be in the public interest, at any time revoke a residence permit or other permit under the Act; or to issue a deportation order. The Act points out how the Director of Immigration may direct the holder of a permit to surrender it for replacement, may re-issue one with such additional conditions or varied conditions, as the circumstances may require and how the failure to comply with any direction of the Director of Immigration under this subsection is considered an offence under the Act. Furthermore, the Act empowers the Minister to prohibit the departure of any person from Nigeria if their travel documents are not in proper order or there is an unsatisfied order of a court of competent jurisdiction or a warrant of arrest relating to that person. The act also provides for immigration officers are immune from prosecution in the course of performing their duties, and prohibits persons under the age of sixteen, dual citizens and for bringing in “insane” persons into Nigeria in paragraphs 37, 38 and 39. But it allows the Minister of Immigration to apply exemptions. Above all, the Act makes it clear that the failure to comply with the requirements of this section shall be an offence under this Act, and furthermore stipulates that the amount of any expenses incurred by the costs of prosecution violations of the act by owners and agents of aircraft or ships shall be recoverable by action brought in the name of the Attorney-General of the Federation.<sup>374</sup> The Act also provides that persons who are liable to be deported that have been convicted of a civil or criminal offence may be remanded in custody initially for twenty-one days and thereafter as “occasion may require” for a maximum of two months. The remainder of this section covers the power to detain *in lieu* of deportation and other regulations involved with the power of immigration officers and on deportation. Of special interest in this section is Paragraph 52, which provides definitions for the terms “alien”, “immigrant”, and other terms used throughout the Act.<sup>375</sup>

The remainder of Chapter 52 points out that for the avoidance of doubt a person seeking entry shall be treated as in Nigeria after he has complied with all procedures for inspection by immigration, health and customs authorities, and whether the compliance is subject to conditions or otherwise, and that the Act may be cited as the Immigration Act.<sup>376</sup> The Immigration Act avoids the question of due process of migrants during court expulsion proceedings. There is little (and some might argue none at all) protection for neither documented nor undocumented foreign migrant workers. The powers of the Act under paragraph 35 enables the Director of Immigration to direct the holder of a permit to surrender it for replacement, and that the refusal to do so is considered an offence under the Act. Such an action would create a documented worker into an undocumented worker without due process. Likewise, the Act enables the Director to apply exemptions for persons who are considered “insane”, are “dual citizens” without stipulating what the guidelines for these exemptions are. Furthermore, the Act provides that persons who have already been ordered deported may be detained at the discretion of the Director of Immigration. Another

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<sup>374</sup> *Ibid.*, paras. 39(2), 40 and 41.

<sup>375</sup> *Ibid.*, para. 52

<sup>376</sup> *Ibid.*, para. 53.

discrepancy is in provision of the Act which states that immigration officers are immune from prosecution in the course of performing their duties, that is to say that they are able to conduct themselves in any manner they please with total impunity.

### 6.7.1. Subsidiary Immigration Legislation

In addition to Act 171 cited above, there are two further pieces of national legislation that directly compliment Act 171. These are the Immigration Regulations (under Section 51) and the Immigration (Control of Aliens) Regulations, both of which are from 1963. The Immigration Regulations are in three parts which detail the conditions under which resident permits may be issued. As stated in Paragraph 4, a residence permit may be issued subject to such conditions as to the alien being in possession of a valid visa at the time of entry; the alien is the subject of a country with which Nigeria has entered into a visa abolition agreement.

A residence permit may be issued subject to: (a) the area in which the holder of such permit shall reside; (b) the occupation or business (if any) in which the person may engage; (c) the restrictions regarding the subject to which he/she may engage in; (d) the duration of the person's stay in Nigeria; (e) whether or not the are offensive to the religious beliefs of any member of the community the person will reside in; or (f) if the business activity is any risk for the security of the State.<sup>377</sup> Other paragraphs in this section address the issue of a ninety day extension of a visa to citizens of the Commonwealth or of Eire, and that visiting permits shall only be issued to persons in possession of a return or transit ticket for onward transportation on extensions.<sup>378</sup>

Part II of the Regulations, which is also entitled “Miscellaneous”, again provides in Article 11 that every immigrant whilst in Nigeria, shall if so required by an Immigration Officer or Police Officer, produce a valid passport, a residence permit, visiting permit or transit permit (as the case may be) or other travel documents.<sup>379</sup>

More controls of aliens is found in the Immigration (Control of Aliens) Regulations which provides for the Chief Immigration Officer to maintain a registry of every alien resident in Nigeria. These aliens are each to supply in his own handwriting two copies of the First Schedule of these Registrations – even if “he is illiterate”; and to report changes of address to the Senior Immigration Officer or the Aliens Officer of the State or Federal Capital Territory, Abuja within seven days.<sup>380</sup> Aliens must also notify immigration authorities of any changes in their status of residence.<sup>381</sup> The control regulations also apply to owners or managers of boarding-houses, hotels, lodging houses, rest-houses or any premises where lodging or sleeping accommodations are provided for payment, and requires them to maintain a register, even for the illiterate person.<sup>382</sup> Even though it is an offence punishable by fine or imprisonment for failing to comply with the provisions of Paragraphs 8, 9 and 11 of the Regulations, the Minister may declare any alien or class of aliens to be exempt from the requirement to comply with “any or all of these Regulations.”<sup>383</sup> Facilitating these laws is the Nigerian Immigration Service.<sup>384</sup>

The real-life situation of foreign migrant workers in Nigeria, both the documented and the undocumented, is that they live in all regions and areas of the country in positions ranging

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<sup>377</sup> *Ibid.*, para. 3.

<sup>378</sup> *Ibid.*, paras. 5 and 6.

<sup>379</sup> *Ibid.*, para. 11.

<sup>380</sup> *Ibid.*, paras. 4, 5 and 6.

<sup>381</sup> *Ibid.*, para. 10.

<sup>382</sup> *Ibid.*, paras. 12–14.

<sup>383</sup> *Ibid.*, para. 22.

<sup>384</sup> ‘Profile of the Nigerian Immigration Service’ (NIS) for 2002. Nigerian Immigration Services website. <[www.nigeriaembassyusa.org](http://www.nigeriaembassyusa.org)> visited on 10 March, 2006 .

from being on contract with the Federal Government to day-labourers in the agricultural economy. Though the legislation designed to protect them from discrimination and unequal treatment is clear, it fails to protect many from violations of the freedom of movement, the right to recognition and the right to association, education, health care and other rights that are enshrined in international, regional and sub-regional human rights law.

#### 6.7.2. The Identity Card Identification Act

In October of 2001 the Nigerian government introduced a plan for foreigners to be issued (and to carry) special identity cards. The card exempted foreign citizens from ECOWAS countries, accredited diplomats and children below the age of 16 years. The announced plan took immediate effect as of the 30<sup>th</sup> of September, 2002. But critics protested that the card discriminates certain categories of non- ECOWAS citizen. The list of those particularly discriminated against by that provisions are: i) women who are present in the country through marriage; ii) widows and widowers who remain in the country; and children who over 16 but under the age of maturity under Nigerian law. These categories of non-ECOWAS migrants, it is claimed, are singularly discriminated against through the legislation calling for them to have an identity card, because a similar card is not required of those claiming to be Nigerian citizens. In fact, the card was discriminatory because it had no other function than to identify the holder as a citizen of another State.

In February 2003 the Nigerian government launched an extensive, non-compulsory National ID Card Drive in which everybody over 18 years of age was eligible to participate. Protests objected to the cards because they were in violation of Chapter IV, §37 of the 1999 Constitution guaranteeing their right to privacy would be protected. The status of identity cards as a violation of the right to privacy remains an unresolved issue in many sections of the country.<sup>385</sup>

#### 6.8. *Protection under Labour Legislation and the Trade Unions Act*

Chapter 198 of the amended Labour Act is a four-part piece of labour legislation covering all working conditions in Nigeria.<sup>386</sup> It provides comprehensive legislation on all conditions of work and employment for all workers in Nigeria, including foreign migrant workers. Even though the Act does not clearly name foreign migrants in its provisions, the sections on the recruitment for employment in Nigeria clearly addresses health care, working conditions, enforcement and other protective measures for non-citizens who are recruited to work in the country under contract.<sup>387</sup> Part I addresses general provisions relating to the protection of wages, contracts and terms of employment. Article 4 of this section proscribes how employers shall not advance more than one month's wages to an employee, while Article 8 requires that workers entering a contract be medically examined at the employer's expense. Article 20 governs the issue of redundancy. Regulations on the conditions of employment are also proscribed in this section.

Part II regulates the recruitment of “citizens for employment” both within and beyond Nigeria’s borders, and includes the licensing of recruiters and restrictions on all types of recruiters, including associations, the rights of male workers to be accompanied by family members (which includes up to two wives), the health of the recruited person and the

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<sup>385</sup> *'National Identity Card for Nigerians', Ibid.*

<sup>386</sup> As amended to December 31, 1989. See: *The Laws of the Federation of Nigeria. Law Revision Committee. Grosvenor Press. Portsmouth. UK. 1990*) pp. 7333-7407. Revised edition. Volume X Compendium of Nigerian Labour Laws. Nigeria Employers' Consultative Association. Lagos. Nigeria. 1997), pp. 127-201.

<sup>387</sup> <[www.nigeria-law.org/LabourAct](http://www.nigeria-law.org/LabourAct)>, paras. 33 – 48.

deferment of wages. Part III relates to special classes of workers, including apprentices, women and young persons, and general prohibitions on women and young persons from performing underground and night work. One article of this section also prohibits forced labour. Part IV contains supplemental provisions relating to the administration and settlement of disputes. Section 91 provides definitions for the various terms applied in the act, and makes it clear that the term “citizen” in this Act means citizen of Nigeria.<sup>388</sup> In spite of this, there are a number of references to the recruitment of citizens for employment “in Nigeria” which clearly can only be interpreted to mean that the Act is also intended to protect foreign migrant workers.

#### 6.8.1. Protection under the Trade Unions Act

The Trade Unions Act (Chapter 437) entered into force in the 1<sup>st</sup> of November, 1973, but has been amended a number of times since then.<sup>389</sup> It provides comprehensive legislation on trade unions. Part I governs the registration of trade unions and stipulates that members of the Nigerian armed forces, customs and prison services, Central Bank, and certain other government bodies are prohibited from forming unions, although they may set up joint consultative committees (Article 11). In Article 15 there is a prohibition of the use of trade union funds for lending political support to elected officials, while the text of Part II governs federations of trade unions. Part III establishes and regulates a Central Labour Organisation, which has the function of educating and informing trade unions, representing their collective interests to the government, and, if requested, participating in collective bargaining.<sup>390</sup> Part IV regulates accounts and returns of registered bodies. Part V contains miscellaneous and general provisions, including the right to peacefully picket (Article 42).

The Trade Unions Act has seen a number of amendments and repeals since its original date of entry into force.<sup>391</sup> These cover trade union registration to the appropriate court, no strike, and no lock-out clauses in collective bargaining agreements, and definitions of member of trade union, but specific rights protecting foreign migrant workers, be they documented or undocumented, are absent from these amendments. Hence, the only conclusion here is that foreign migrant workers are barred from freely joining or establishing trade unions in Nigeria.<sup>392</sup>

### 6.9. *The Right to Peaceful Assembly and the Freedom of Association*

#### 6.9.1. The Right to Peaceful Assembly

The right to peaceful assembly was recognised and guaranteed under section 37 of the 1979 Nigerian Constitution, and is currently located in Article 40 of the 1999 Constitution. But the right is subject to the restrictions of the Public Order Act of 1979 which requires a license to conduct any assembly, meeting or procession on the public roads or a place of public resort 48 hours before the event is to take place.<sup>393</sup> NGOs have complained of the broad interpretations of the Act by those authorising demonstrations and rallies. NGOs whose causes are aimed at demonstrations or gatherings in support of labour rights, democracy or the

<sup>388</sup> *Ibid.*, under the section beginning with “Miscellaneous”, Article 91 on Interpretation.

<sup>389</sup> The Laws of the Federation of Nigeria. Federal Ministry of Justice. 1990, pp. 15065-15112 Compendium of Nigerian Labour Laws. Nigeria Employers' Consultative Association. Lagos. Nigeria (1997), pp. 353–416.

<sup>390</sup> *Ibid.*

<sup>391</sup> ILO Natlex on Nigerian Trade Law Amendments, <www.ilo.org> visited on 3 August, 2006.

<sup>392</sup> See the Trade Unions Decree No. 1 of 1999, Vol. 86 No. 1, *Official Gazette Extraordinary, Supplement*, 1999-01-06.

<sup>393</sup> Laws of the Federation of Nigeria, <www.abfco.com> Decree No. 382. Visited on 2 May, 2006.

rights of women in predominantly Moslem areas are generally banned without the possibility of an appeal. Even gatherings to provide training material and human rights education have been banned.<sup>394</sup> The broad interpretations of the Act's provisions by police forces are a severe restriction on the freedom of assembly which clearly act as a restriction of this right for migrant workers should they wish to peacefully assemble or demonstrate for their cause.

#### 6.9.2. The Freedom of Association

There are no restrictions in Nigeria on the right to freedom of association within the current constitution, and there is no mention of the right being denied to foreign migrant workers or other non-citizens in the Labour Act. In Federal Nigerian Constitution Article 38 the right is extended to educational and religious communities, but is restricted regarding the creation or forming of "secret societies". But this right is separated from the right to form a family, which is not adequately provided for in the 1999 Constitution. Foreign migrant workers are therefore absent the claim to this right in Nigeria.

While there is no specific law regulating NGOs generally, those calling themselves human rights organisations, such as those promoting the rights of migrant workers, are under the regulations of the Companies and Allied Matters Act of 1990 (CAMA) and its regulatory body the Corporate Affairs Commission (CAC).<sup>395</sup> The restrictions imposed by CAC's administrative practices include unusual delays for NGOs to be registered, police clearances for all trustees and board members, the banning of words such as "governance", "policy", "State", "Government", "Nigeria", "institute" and the banning of names to be used for associations.<sup>396</sup> There was even a failed attempt by the government to establish a council to regulate NGOs in 2001. Such violations of the universal principle of the freedom of association clearly function as an infringement of the rights of foreign migrant workers in the country since their right to establish an NGO would fall under the administration of CAM.

The ILO's Committee of Experts has also made recommendations to the Nigerian government on its restrictions regarding the formation of trade unions. Of particular interest to the ILO was the fact that trade unions had to be registered by the Federal Government and have a minimum of 50 workers before they could be accepted as a trade union. Besides this restriction, only one central labour federation was permitted by the Government.<sup>397</sup> Hence the freedom of association for legal migrant workers could be conditional upon their meeting with the conditions under CAMA.

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<sup>394</sup> Report of the Special Representative of the Secretary-General on human rights defenders, Hina Jilani, E.C.N.4.2006.95.Add.2, paras. 47–50.

<sup>395</sup> Laws of the Federation of Nigeria, <www.abfrco.com> Decree No. 59. Visited on 2 August, 2006.

<sup>396</sup> *Supra*, note 394, para. 44.

<sup>397</sup> See Nigeria, in Country Reports on Human Rights Practices, 2000, Section 6a, Worker Rights. U.S. Department of State, <www.state.gov> visited on 30 June, 2006.

### *6.10. Analyses and Criticisms of the Laws Protecting Foreign Migrant Workers in Nigeria*

This section offered an examination of Nigeria, its basic constitutional profile, and its procedure for implementing the general principal of non-discrimination for foreign migrant workers and other non-citizens to establish associations and to an identity card or document. It reviewed Nigeria's population profile, and offered a general survey of how foreign migrant workers are treated in Nigeria. Furthermore, insights were provided into Nigeria's ratification of international, ILO and regional human rights treaties, and outlined the presence of the principal of non-discrimination in the constitution and municipal legislation (Decrees) that are directly related to the treatment of non-citizens in the country. The section also referred to Nigeria's show of compliance with treaty monitoring procedures of the ICCPR, the African Charter the ECOWAS Agreement. There was also a briefing on the activities of the Nigerian Human Rights Institute and how it proposes to protect the human rights of all persons living in Nigeria. Of particular importance to this chapter are the sections examining the treatment of non-citizens under the Nigerian Immigration Act, and the important sections of this Act as they relate to the rights of migrants and other non-citizens, was examined.

In contrasting international law principles and practices on non-discrimination with those of practices in Nigeria, the only conclusion is that although Nigerian domestic legislation provides Constitutional protections for the rights of migrant workers who are legally in the country, it fails to provide safeguards for many vulnerable groups of persons within its borders including foreign migrant workers. This is best evidenced by the unwillingness of the government to ratify the Migrant Worker Convention or to amend existing legislation to the benefit of all categories of migrant worker and the members of their families.

That conclusion is evidenced by the government's own legacy of continued human rights abuses and violations for persons within its borders.<sup>398</sup> The nation's military governments failed to meet with reporting deadlines required by ratified human rights treaties, and the post-1999 civilian government has generally been too hesitant or unwilling to take the initiative and rectify the gaps in protection of migrant workers through new legislation.

A major piece of evidence for this conclusion is the absence of any reliable statistics on how many foreign migrant workers are in the country. Each of Nigeria's bordering countries (and its large coast-line) offer unlimited possibilities for the passage of undocumented "ECOWAS" migrants. The official State borders cross through many other "traditional" ethnic, religious and trading borders that have been used by migrants for hundreds of years and go beyond the modern definitions of "economic" or "ecological migrations" that easily apply to more industrial countries. Such "traditional" migrations are deeply rooted in traditional legal systems that remain largely unexamined or explained, and "traditional" rulers in such border regions clearly have their own reasons for avoiding co-operation with census takers, immigration officials and other non-traditional representatives.

Another piece of evidence is that the large-scale resistance to a modernised system of accounting for populations is enhanced by a general mistrust between Nigerian Northerners, who are mainly Islamic, and Southerners, who represent large portions of Moslems and Christians. This mistrust is enhanced by the continued struggles between those preferring to live under "Sharia" law, and those who prefer not to. The question of inadequate statistics goes beyond this issue, however; at the heart of the issue is the number of votes needed to control the presidency, hence the strong resistance to national identity documents or cards for the general population. The recent call for "expat" workers to carry and show identity cards will only be effective upon those who are obviously non-Nigerian. The system has faults

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<sup>398</sup> *Ibid.*

because there is no effective or correct guidelines for determining who is or is not a Nigerian, or who is or is not a potential “terrorist” in Nigeria.

This leads directly to the third piece of evidence, which is the absence of protective, non-discrimination language for non-citizens throughout the civil rights section of the Nigerian Constitution. Although it has signed the ICCPR and a number of other human rights treaties containing general prohibitions on discrimination, Nigeria has failed to present any clear-cut legal protection for foreign migrant workers and immigrants, or any strong legal measures prohibiting their discrimination as called for in Article 26 of the ICCPR.<sup>399</sup> The main evidence of the absence is that there are no statements of protection for “non-citizens”, “immigrants” or “aliens” in any of the articles of Chapter IV (Fundamental Rights) of the Nigerian Constitution. Nor is there any language protecting any of the definitions used for non-citizens (i.e., aliens or immigrants) in The Labour Act, The Civil Registration Decree, or The Immigration Act. Contrary to protective language, the Regulatory part of this latter named act contains language that effectively gives arbitrary powers to police or immigration officers to discriminate foreign migrant workers on many grounds by empowering them to request the production of a valid passport, residence or visiting permit of “Every immigrant whilst in Nigeria”.<sup>400</sup> The absence of specific language protecting non-citizens from discrimination in the Constitution is further reflected in all the major Nigerian Decrees affecting immigrants and foreign migrant workers that were examined above.<sup>401</sup> Not even has the recently established Nigerian Institute of Human Rights, with its prestigious body of Commissioners been able to adjust this situation. The Commission itself identifies a number of main problems it has in practice, such as the failure of some government authorities to respond promptly or to enquiries from the Commission; absence of mandated powers to compel compliance with its enquiries; the lack of trained investigative officers and insufficient funding to cover the high cost of investigation of complaints.<sup>402</sup>

In contrast to existing human rights treaty practices, legislation to monitor and deport non-citizens in Nigeria (Immigration Act 171, *supra*) appears to infringe upon the freedom of movement that is available under existing universal, regional and sub-regional human rights law.<sup>403</sup> It furthermore appears to be in conflict with the non-discrimination and freedom of movement provisions of the African Charter and the ECOWAS protocol. Because it places the burden of reporting the presence of migrants and non-citizens upon the shoulders of the general public, the provision could enable a witch-hunt atmosphere to develop between non-citizens and citizens. In its application, it makes no provisions or exceptions for the gender, physical inability or age of migrant workers. And certain categories of foreign migrant workers – mainly those from other Sub-Saharan regions-- remain the focus of nearly all the prohibited categories of distinction and discrimination that occurs in Nigeria.<sup>404</sup> In particular, foreign migrant workers in Nigeria are distinguished *and* discriminated against for the following reasons: i) their ethnic (i.e., tribal and racial) affiliation and origins, ii) their religion and iii) their gender. All other incidents and forms of unfair discrimination that foreign migrant workers endure in Nigeria have their origins in one of the above categories of

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<sup>399</sup> Article 26, ICCPR. UNTS.

<sup>400</sup> Article 11 of the Miscellaneous Regulations of Part II, *supra*, note 373.

<sup>401</sup> See the Amended Labour Act of 1989, The Trade Unions Act of 1973 (and Amendments), The National Civic Registration (Decree No. 51 of 1979) and the National Immigration Act of 1963. *Ibid.*

<sup>402</sup> Summarised from the oral report of the Nigerian delegate of the National Human Rights Commission, NHRI Conference in 2002, Lund, Sweden. (Hosted by the Raoul Wallenberg Institute, Lund, Sweden).

<sup>403</sup> That is, the ICCPR, the ICESCR, the ICERD, the ICEDAW and the ICRC, all of which Nigeria has ratified. UNTS.

<sup>404</sup> The early expulsion orders principally affected nationals of Ghana, Niger, Cameroon, Chad and Benin, but those from Togo, Upper Volta, Ivory Coast and Sierra Leon were also victims. See Nil K. Bental-Enchill: ‘Nigeria’s Deadline for Immigrants’: West Africa (January 1983), p. 245.

distinction as a starting point, and all such categories of discrimination are prohibited in the Migrant Worker Convention.<sup>405</sup>

The most widely publicised form of ethnic discrimination where foreign migrant workers are concerned were during the mass expulsions of the 1970s and 1980s, when thousands of foreign migrant workers from neighbouring countries were detained in large impersonal camps and refused permission to leave such camps. This effectively denied them of all their civil rights that are provided for in the ICCPR and the ESCSR, including right to counsel and to fair hearings of their cases.<sup>406</sup> During the detention and deportation process they also suffered loss of income, earnings, property and adequate health care. The detention also subjected them to forms of torture such as beatings, and physical restraints. But in addition to mass deportations, ethnic, religious and tribal discrimination of migrants (and Nigerians) remains widely practised in the country, especially in housing, employment, and education. International and domestic foreign migrant workers are often herded into ghettos that exist throughout the country, are often relegated to low-status and demeaning types of employment. With the exception of expatriate workers on special contracts with foreign corporations, regional international foreign migrant workers in Nigeria often live in the same shanty-towns that other ethnic minorities from other regions of Nigeria live in.<sup>407</sup>

Distinction resulting in discrimination based on religion is another most widely practised form of discrimination in Nigeria.<sup>408</sup> This form of discrimination has the most severe impact on the labour market, in housing and in education, and often results in outright violence between the two dominant religious groups, the Moslems and Christians.<sup>409</sup> The destruction of property in retaliatory actions in both regions is widely publicised, but there are no cases that are available from the various levels of courts in those areas.<sup>410</sup> Gender discrimination is also widely practised throughout the land, especially in rural areas. Although migrant (and citizen) women are seen in large numbers in agriculture (as labour), open markets, small retail shops and clothing stores, they are generally prohibited from many types of employment involving physical labour or in high-profile positions in business management. Traditional practices in this form of discrimination far outweigh modern policies promoting the freedom for women in the labour market. There has been the occasional small achievement for women's rights, such as the right not to be executed for crimes under Sharia Law, but this is the exception rather than the rule for women in Nigeria.<sup>411</sup>

The return to democracy and the adoption of a democratic constitution since 1999 have not facilitated the revision of the uncertainty on the rights of non-citizens of the documents mentioned above. Contrary to any relaxation of those principles, the Nigerian government, through its Nigerian Immigration Act, has instituted harsher measures, such as those demanding non-citizens to carry and produce identity cards, which are expensive and difficult to obtain. Unfortunately, in spite of its "good intentions" to provide protection for true

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<sup>405</sup> Millions of Nigerians are also victims of this type of discrimination. One example is the Nigerian Civil War (1966–1970) when millions of the Igbo ethnic group were the main target of racial violence and ethnic discrimination. The plight of the Ogoni people in the Delta is also widely known. See Summary record of the 993<sup>rd</sup> meeting, Nigeria (17/08/93), ICERD/C/SR.993, para. 14-15. UNHCHR.

<sup>406</sup> The rights of the Covenant are recognised in the Constitution but there remains a number of issues that have not been implemented. See ICCPR.C.92. Add.1, paras. 3–9, and Part II. UNHCHR.

<sup>407</sup> *Ibid.* Some of these places are known as *Sabon Gari*.

<sup>408</sup> Report of the Special Rapporteur on religion or belief, E.CN.4/2006/5/Add.2, 7 October, 2005

<sup>409</sup> *Ibid.*, para. 42. See also 'Jos: A City Torn Apart', *Human Rights Watch Report on Nigeria*, Vol. 13, 9a, (December 2001), p. 11 and p. 13.

<sup>410</sup> *Ibid.*, para. 77

<sup>411</sup> The most widely known case in this instance is the case of an Islamic woman who was sentenced to death by stoning for allegedly committing adultery. The sentence was overturned due largely to the publicity brought to the case by a local NGO. See U. Ewelukwa: 'Small Victories, but the War Rages On', in Vol. 2:10, *Human Rights Dialogue*, Carnegie Council on Ethics and International Affairs (2003).



migrant workers, the ECOWAS agreement on identity cards will undoubtedly also function largely to facilitate the discrimination (and resulting hardships) of a new category of migrant workers: those who are “legal” but without cards.

Criticism of Nigeria’s human rights records by the major universal and regional human rights monitoring systems are legion, even since a democratic form of government took over in 1999. Reports, from the African Commission, the ILO, the Office of the High Commissioner for Human Rights and Nigeria’s own National Human Right Commission, whose recommendations are not binding on the government, describe how there is an absence of compliance with the provisions of the articles of the human rights conventions. In several reports, the major issues are that the government fails to take action on torture and other cruel, inhuman and degrading treatment and punishment, arbitrary arrests and lengthy detention by the police, the denial of fair trials, political and inter-religious killings, conflicts of laws the expansion of several Sharia courts into Federal jurisdiction on criminal matters, the limitations on the powers of the National Human Rights Commission, restrictions on the right to assemble peacefully, and the discrimination of persons based on their ethnicity, race and religion.<sup>412</sup> The uncontrolled trafficking in children, child labour and the deliberate failure to consider many recommendations for the improvement of human rights conditions based on the treaties is also high on the list of grievances that affect the rights of foreign migrant workers, especially those who are under 18.<sup>413</sup>

In their long list of recommendations, the monitors continuously urge the government of Nigeria to expedite the process of adopting legislation, information and statistics that would enable it to ensure that undue and unreasonable limits on human rights on all persons are discontinued.

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<sup>412</sup> See for example E.CN.4/2006/95 Add.2, Report of the Special Representative of the Secretary-General on human rights defenders, Hina Jilani, 30 January, 2006, para. 17.

<sup>413</sup> E.C.N.4/1999/36, Report of the Special Rapporteur of the Commission on Human Rights, Soli Jehangir Sorabjee, 14 January, 1999, para. 42.

## **7. International, Regional and Domestic Protections Available to Foreign Migrant Workers in South Africa**

### *7.1. Introduction*

The Republic of South Africa is located in the southernmost section of the African continent.<sup>401</sup> Its entire northern border from east to west is bounded by the republics of Swaziland, Mozambique, Zimbabwe, Botswana and Namibia. The Kingdom of Lesotho is completely enclosed by South Africa. Its entire southern border is surrounded by the Atlantic and Indian Ocean. The Republic of South Africa consists of nine provinces: The Western Cape, the Eastern Cape, KwaZulu-Natal, the Northern Cape, the Free State, North-West, Gauteng, Mpumalanga and the Northern Province.<sup>402</sup>

South Africa is placed in the upper middle-income bracket for developing countries. It includes a modern financial and industrial sector that is supported by a well-developed infrastructure which operates alongside a subsistence informal sector. The agricultural sector contributes only 4% of the gross domestic product (GDP). Mining and quarrying, two major industries within the primary sector, together accounted for 9 per cent of GDP. Manufacturing is the major component of the secondary sector and is 25 per cent of GDP. Financial services to business increased to 18% during the 1990s and the tourist industry is also on the rise. It is to the mining industries and the agriculture sector that are the most attractive to foreign migrant workers.<sup>403</sup>

According to published census figures released in 1998, the South African population consists of 44 million people who are often categorised as being a member of one of the following communities: Indigenous (i.e., black) Africans, 76.7%, whites 10%, coloureds 8.9% and Indian/Asians 2.6%. Women constitute some 22 million persons. Approximately 55.4 per cent of the white population live in urban areas.<sup>404</sup> Although it is classified as a middle-income developing country, the vast majority of the people are extremely poor. Ninety-five per cent of the poor are African and 75 per cent of the poor live in the rural areas. Virtually all adult Euro-ethnics are literate, while as much as a quarter of adult indigenous Africans are illiterate. Most South Africans (some 80 per cent) follow the Christian faith. Other faiths include traditional African religion, Hindu, Islam and Judaism. The population discrepancies between provinces and races are worthy of note because of the vast income and living standard disparities between people living in urban and rural areas. In the Northern Province some 88.1 per cent of the population live in rural areas, while in Gauteng 96.4 per cent live in urban areas. South Africa is characterised by extremes of wealth and poverty.

One of the most serious problems confronting South Africa is the chronic level of unemployment, particularly among the previously disadvantaged population groups. In October 1995, 14.4 million of the 26.4 million South Africans aged 15 or older were economically active, and of these, 4.2 million (or 30 per cent) were unemployed. Unemployment figures illustrate the legacy of Apartheid which shows that indigenous

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<sup>401</sup> The popular name for the Republic, "South Africa", will be used throughout the text. See Core Document forming Part of the Reports of States parties for South Africa. See HRI/CORE/1/Add.92, 30 June, 1998. <www.unhchr.ch.doc.tbs> visited on 18 April, 2005.

<sup>402</sup> See *Africa Yearbook, 2000/01*, (GCIS, Pretoria, 2001), p. 227.

<sup>403</sup> *Ibid.*

<sup>404</sup> The classification of populations by the colour of skin or ethnic and cultural heritage dates from the Apartheid era. The African population consists of the following: Nguni, Sotho-Tswana, Sotho, Tsonga, Venda, Afrikaners, English, Coloureds, Indians and people who migrated from the other States in Africa, Europe and Asia who maintain strong cultural identities with their original cultures. A few members of the Khoe and the San also remain. Other published reports suggest that the population may be as high as 46 million. HRI/CORE, *supra*, note 401.

Africans the most badly affected. Among all population groups, the female unemployment rate is markedly higher than that for men. Some of the poorest migrant worker households in South Africa are headed by women.<sup>405</sup> The result of the high unemployment is that poverty results in many households containing three or four generations. In rural areas, men are often away for long stretches due to the availability of work in gold and diamond mines. Housing remains largely racially segregated in South Africa where the majority of indigenous Africans living in urban areas live in "townships", Asians and other minorities live in "settlements", and whites live either on farms or in suburbs of major cities.

## *7.2. Foreign Migrant Workers in South Africa*

### *7.2.1. The Historical Background*

Foreign migrant labour to South Africa is generally divided into the three categories: i) legal migrants, also known as immigrants; ii) contract workers and iii) undocumented, or, "illegal" foreign migrant workers.<sup>406</sup>

The pattern of immigration of foreign migrant workers from neighbouring African States has a long history. The largest body of "documented" or "legal" foreign migrant workers were recruited from neighbouring countries by contract to work in mines, on farms and in other industries offering low wages and poor housing conditions.<sup>407</sup> In 1928 South Africa and Portugal entered into a Convention which regulated labour; transport and commercial matters between South Africa and the Portuguese colony of Mozambique. The terms of this convention, known as the Mozambique Convention of 1928, called for Mozambique to supply South Africa with between 85 and 100 thousand workers annually in return for a percentage of South African trade.<sup>408</sup> Such routines for recruitment were continued throughout the apartheid era. South Africa also recruited migrant labour from India, Malaysia and other Asian countries and Pacific Ocean regions. At one point, labourers from China were imported to make up for the dwindling supply of workers from Mozambique as an alternative source of migrant labour to South Africa.<sup>409</sup>

### *7.2.2. Migrant Workers since the Abolition of Apartheid*

Since the adoption of a democratic form of government in the early 1990s, South Africa's labour market continues to depend upon migrant workers. Throughout the years of importing contract foreign migrant workers, large portions of these workers became undocumented. Many broke their contracts and left their places of employment willingly, when it was at all possible, while others simply would wander off during their weekend breaks in the townships. The relative openness of the South African northern border, together with the difficulty in policing such an extensive perimeter, has exacerbated a serious increase in undocumented and illegal immigrants and the import of illegal substances. Illegal immigrants also arrived from war-torn areas further north, such as the Congo and Rwanda. Although unverified, it is commonly estimated that there are over 2 million illegal immigrants in the country. Official

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<sup>405</sup> *Ibid.*

<sup>406</sup> S. Ryklief, 'Foreign migrant workers in South Africa: A Brief Overview'. A research paper presented during the Trade Union Solidarity Centre of Finland's (SASK) *Solidarity Seminar on Foreign Migrant Workers* (5–6<sup>th</sup> April, 2003), Lahti, Finland. Terminology such as "legal" and "illegal" originates with her research.

<sup>407</sup> See for example the introduction to this history by S. Gool, *Mining Capitalism and Black Labour in the Early Industrial Period in South Africa*, (Studentlitteratur, Lund, 1983), pp. 1–5.

<sup>408</sup> *South Africa Yearbook, Supra*, note 402, p. 65. See also Department of Foreign Affairs, <[www.dfa.gov.za/foreign/bilateral/mozambique.html](http://www.dfa.gov.za/foreign/bilateral/mozambique.html)> visited on 2 August, 2006.

<sup>409</sup> Gool, *supra*, note 407, pp. 122–123.

statistics of the Department of Home Affairs put the number of illegal immigrants who were removed from South Africa at 145 000 in the year 2000. Of these, the bulk have been from Mozambique and Zimbabwe (approx. 130 000).

These undocumented migrants (referred to throughout South African legal texts as either “illegal” migrants or foreigners) are employed in a variety of sectors of the South African economy, and form one of the most exploited and vulnerable groups of workers in the country.<sup>410</sup> Because of their illegal status, they are compelled to accept employment whatever the payment, risk, physical demand or working hours involved. They mainly find work in the informal sector, and at the lower end of the labour market, predominantly in the agricultural, hotel and services, construction and domestic sectors. Their extreme vulnerability leads to the usual accusations of driving down wages (there is no minimum wage in South Africa) and undermining labour standards. Their influx to already overfull squatter camps and townships place further strain on pre-existing problems of housing, water, electricity and other social services.<sup>411</sup>

### 7.2.3. The treatment of Migrant Workers

The treatment of undocumented foreign migrant workers during apprehension and deportation proceedings by South African authorities is legion. Local police authorities are mandated to track and arrest persons suspected of being an undocumented migrant in addition to their ordinary police duties, and due to the fact that there is an absence of standards used for identifying a migrant worker, many innocent persons are wrongly identified and mistreated. In a number of cases, victims of arbitrary police procedures for identifying undocumented migrants have claimed that documents that could prove that they were in the country legitimately were destroyed by the police themselves. Other claims are of bribery, extortion and theft by arresting officials and physical abuse of persons being detained, and of being deported under severe conditions.

The undocumented (“illegal”) status of many undocumented migrant workers prevents them from approaching the authorities for redress of grievances and abuses, hence their employers often appear to have omnipotent powers over their lives. Xenophobia towards sub-Saharan foreign migrant workers has steadily increased among South Africa’s black and white populations, and victims of attacks arising from xenophobia have usually been foreigners suspected of being “illegal” migrants, especially persons from Mozambique, Malawi and Zimbabwe.<sup>412</sup>

## 7.3. *International Protection of Foreign Migrant Workers*

### 7.3.1. Protection under the United Nations System

Following the collapse of its apartheid system in the early 1990s, South Africa became a party to all the major UN human rights conventions and to three protocols. But it has neither signed nor ratified the Migrant Worker Convention.<sup>413</sup>

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<sup>410</sup> Ad Hoc Working Group of Experts report on Southern Africa, E/CN.4/1995/23, para. 84.

<sup>411</sup> HRI/CORE document, *supra*, note. 401.

<sup>412</sup> See ‘Prohibited Persons, Abuse of Undocumented Migrants, Asylum-Seekers, and Refugees in South Africa’, *Human Rights Watch, New York* (1998), p. 1.

<sup>413</sup> Status of Ratifications of the Principle of International Human Rights Treaties, UNHCHR, June, 2006. UNHCHR.

### 7.3.2 Criticisms of South Africa's Protection of Migrant Workers

The United Nations Special Rapporteur on Migrant Workers has not formally visited South Africa, but did publish a request for it to clarify allegations of the situation of migrants who had been detained in the transit zone of the Johannesburg international airport it had received.<sup>414</sup> According to the information, the detention of migrants in these facilities was carried out under no clear legal authority. It was reported that in some occasions, airline companies or private carrier companies, instead of immigration officers, ordered the detention of individuals without having previously informed the Department of Home Affairs (DHA). It was believed that these private companies were involved in the detention of migrants in order to avoid the fines imposed for bringing undocumented people to South Africa. It was also reported that in the event of illness, there was no system in place to ensure appropriate access to medical assistance. Furthermore, lawyers and human rights organisations faced great difficulties in having access to those detained in the hotel. Fears were expressed that the difficulties for those held there to reach any outside assistance could jeopardise their rights to challenge the lawfulness of the detention.<sup>415</sup>

On the other hand, The Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance visited the country in 1998 and published his observations and criticisms on the progress and faults of post-apartheid South Africa which included extensive observations on the treatment of migrant workers<sup>416</sup>. While there he spoke with representatives of the Human Rights Commission, the Constitutional Court, municipal councils, academic institutions, representatives of various UN organisations and with NGOs in Durban, Johannesburg, Pretoria and Cape Town. Amongst the issues the Rapporteur commented on that were directly related to the situation for migrant workers were unreasonable, prolonged and overcrowded detentions by immigration officials, police and private companies; the absence of adequate protection from xenophobic attacks and the fact that some political leaders echoed xenophobic tendencies to their constituents.<sup>417</sup> The Rapporteur's report included a section on measures taken by the Government, which were that it had set up a working group to ensure that its immigration policy would be in line with its new Constitution and Bill of Rights, which applies to all persons living in South Africa equally, including migrants without papers.<sup>418</sup>

The Special Rapporteur then recommended that the South African government broadcast and teach the Constitution and human rights in all schools, through the mass media, and conduct parallel campaign of civic education to encourage tolerance towards Blacks from other regions of Africa. He also recommended that South Africa adopt new immigration laws, improve its legislation on detention, legal representation and repatriation for migrants; and ratify the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).<sup>419</sup> The response to this was that South Africa ratified the ICERD in 1999.<sup>420</sup>

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<sup>414</sup> See the first, second and third reports by the Special Rapporteur on Migrant Workers: E/CN.4/2002/94; E/CN.4/2001/83; E/CN.4./2000/82.

<sup>415</sup> E/CN.4/2003/85/Add.1, 30 January 2003, 41-42.

<sup>416</sup> ECN.4/1999/15/Add.1, Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, by Mr. Glele-Ahanhanzo.

<sup>417</sup> *Ibid.*, paras. 47–76a.

<sup>418</sup> *Ibid.*, para. 79.

<sup>419</sup> *Ibid.*, Section B. paras 2, 3 and 6.

<sup>420</sup> UNHCHR, <www.unhchr.och> visited on 20 June, 2006.

### 7.3.3. Protection Available under the ILO System

South Africa renewed its membership of the ILO at the end of its apartheid era and resumed ratifying ILO instruments. Amongst these were Convention No. 87 on the Freedom of Association and Convention No. 98 on Collective Bargaining, both in 1996. However, it did not ratify the Convention No.97, the Migration for Employment Convention.<sup>421</sup> These ratifications, together with other ILO Conventions that have been ratified, should be of benefit to migrant workers in the country within the realm of labour relations. In accordance with Constitutional guarantees under the bill of rights, and their labour union provisions, the benefit should apply to any worker, whether in the country legally or not.

### 7.3.4. Comments and Requests from the ILO Committee of Experts

The Committee of Experts has published a number of Individual Observations on the South African government's implementation of the treaties it has ratified. These Observations were then followed-up with Direct Requests calling for clarifications of features that remained unclear, unanswered or undeveloped.<sup>422</sup> For example, in an Individual Observation concerning ILO Convention No. 98, the ILO's Committee of Experts commented on the fact that it had taken note of the Government's first report, the new Constitution of the Republic of South Africa (Act No. 108 of 1996), and the Labour Relations Act (Act No. 66 of 1995), and it noted with satisfaction that, further to the recommendations made by the Fact-finding and Conciliation Commission on Freedom of Association (Prelude to change: Industrial relations reform in South Africa, Official Bulletin, Special Supplement, 1992), the new Labour Relations Act constitutes a considerable improvement over the previous legislation. In particular, the Committee welcomed the fact that this new Labour Relations Act has broad coverage and includes civil servants and rural workers within its scope. It also noted that the Act does not contemplate the possibility for the authorities to modify the contents of freely concluded agreements, nor for them to exclude certain areas or classes of work from the agreements. It furthermore contains a number of guarantees and facilities for the voluntary collective bargaining process.<sup>423</sup>

The Committee has also co-sponsored educational programmes with the Government on developments in labour relations with neighbouring countries. In November, 2002, the ILO initiated a Tripartite Forum on Labour Migration in Southern Africa in Pretoria.<sup>424</sup> The Forum was jointly organised by the ILO International Migration Programme and the International Training Centre of the ILO (Turin) with the support of the ILO Area Office for Southern Africa based in Pretoria and with financial and logistic support of the Regional Office for Africa, ILO Area Offices in Antananarivo, Kinshasa and Lusaka, the Southern Africa Multidisciplinary Advisory Team (SAMAT), the ILO Bureau for Workers' Activities and the ILO Bureau for Employers' Activities. Representatives of governments, employers' and workers' organisations participated from the 14 countries in the Southern Africa Development Community (SADC).<sup>425</sup> Employers' delegates included executive directors, human resources Officers and Industrial relations managers representing national employers' associations,

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<sup>421</sup> See the ILO list of ratifications by Conventions and by Country, [www.ilolex.org](http://www.ilolex.org) visited on 29 July, 2006.

<sup>422</sup> *Ibid.*

<sup>423</sup> *Ibid.* CEACR Individual Observations concerning Convention No. 98, of 1999. See also the Constitution of the Republic of South Africa (Act No. 108 of 1996) *Supra*, note 476; The Labour Act (Act No. 66) of 1995, <[www.labour.gov.za](http://www.labour.gov.za)> visited on 10 November, 2005.

<sup>424</sup> See the report on the Tripartite Forum on Labour Migration in Southern Africa, ILOlex.

<sup>425</sup> These were namely Angola, Botswana, The Democratic Republic of the Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe. <[www.sadc.int](http://www.sadc.int)> visited on 14 November, 2005.

while trade union delegates included general secretaries, vice presidents and other officials of national trade union confederations. Representatives from the International Organisation for Migration (IOM), the Employment and Labour Sector of the Southern African Development Community, and the Southern African Migration Project (SAMP) also participated.

Sessions of the forum examined economic, social and legal context of labour migration in the SADC region, and international perspective on the relationship between globalisation and migration as well as the need for legal and social protection of foreign migrant workers were examined. Specific issues relating to employment, job security, wages and income for foreign migrant workers were discussed and there was an analysis of labour migration trends in South Africa. The forum also discussed issues concerning remittances, the return and reintegration of foreign migrant workers within the framework of migration management. The Forum closed with the participants agreeing on a number of issues that were necessary for effective labour migration policy for the entire region, and these were submitted to the various governments for consideration. They included ratification and implementation of international labour standards on foreign migrant workers including the ILO Convention on Migration for Employment (No.97) and the UN's Migrant Worker Convention. Participants specifically requested all social partners and tripartite institutions (such as SADC ELS) to strengthen a gender sensitive approach in their policies and activities addressing labour migration; and for the ILO to reinforce its technical assistance to countries in the region to ratify and implement the International Labour Standards addressing labour migration.<sup>426</sup>

The Recommendations made to South Africa and other Regional governments at the end of the Tripartite Forum on labour migration described above recommended ratification of ILO conventions on labour standards as well as those of the Migrant Worker Convention. Should such recommendations be adhered to, they are clear indications of the ILO's interest in improving the standards for foreign migrant workers. But at the time of this writing, neither the ILO's nor the UN's conventions on migrant workers had been ratified. Nevertheless, the ILO offers a large range of protection for migrant workers through labour organisations.

#### 7.4. Protection under the Regional System

South Africa signed the Declaration and Treaty establishing the Southern African Development Community (SADC) in 1994.<sup>427</sup> Although this treaty is absent of a "bill of rights" for individuals or provisions prohibiting discrimination, it does contain an article calling for co-operation with, and support of, non-government organisations contributing to the objectives of the treaty in order to foster closer relations among the communities, associations and people of the Region.<sup>428</sup>

An important first step was to ratify the African Charter on Human and Peoples Rights, which it accomplished on the 9<sup>th</sup> of July, 1996.<sup>429</sup> South Africa followed this up by submitting its first State Report to the Commission during the 25<sup>th</sup> Ordinary Session of 1999 and hosting the World Conference Against Racism in Durban, 2001, and the 31<sup>st</sup> Ordinary Session of the African Commission in Pretoria.<sup>430</sup> It ratified the African Protocol on the Establishment of an

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<sup>426</sup> The Recommendations were adopted in Plenary on 29 November 2002. *Ibid.*

<sup>427</sup> SADC replaced the SADCC. The member States of SADC are Angola, Botswana, The Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. See SADC Declaration and Treaty, <[www.dfa.gov.za](http://www.dfa.gov.za)> visited on 27 May, 2005

<sup>428</sup> See Article 23, *Ibid.*

<sup>429</sup> See list of Ratifications of the African Charter: <[www.achpr.org.english.info.charter\\_en.html](http://www.achpr.org.english.info.charter_en.html)> visited on 3 June, 2005.

<sup>430</sup> Final Communiqué of the 25<sup>th</sup> and 31<sup>st</sup> Ordinary Session of the African Commission. RWI Library collections, Lund.

African Court on Human and Peoples' Rights on the 3<sup>rd</sup> of March, 2002. Such steps were a clear indication of South Africa's willingness to comply with the principles of the African Charter, as it had stated during the 20<sup>th</sup> Ordinary Session.

Since the end of its apartheid era, South Africa has become an active member of the main regional organisations for Africa. Prior to its ratifying the African Charter, the African Commission adopted a resolution on South Africa calling upon the government to take all necessary steps to create an atmosphere conducive for free and fair elections, to accept the results of such elections, to cease all hostilities, and to work towards peaceful atmosphere. It also called upon South Africa to ratify the African Charter. A general condemnation of the cycle of violence and the massacre of innocent civilians was also offered, but there was no specific mention of the violence towards foreign migrant workers, neither the documented nor the undocumented, in the Resolution.<sup>431</sup> South Africa responded by stating that it was willing to respect the provisions of the African Charter and proceed to take a number of steps to indicate its stated willingness.<sup>432</sup>

## *7.5. Domestic Legislation Protecting Foreign Migrant Workers*

### *7.5.1. The Constitution and the Bill of Rights*

A new constitution was adapted by an Act of Parliament in 1996 establishing South Africa as a Constitutional Democracy. The South African Constitution is the highest and most authoritative law of the land, and its preamble states that the aims of the Constitution are to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.<sup>433</sup> The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.<sup>434</sup> What is of particular importance for migrant workers is the guarantees of equal treatment for all person, i.e., "Everyone".

Chapter Two of the South African Constitution contains a Bill of Rights which provides for equality and equal treatment of "Everyone".<sup>435</sup> It provides that everyone is equal before the law, has the right to equal protection and benefit of the law, and includes the full and equal enjoyment of all rights and freedoms in the promotion and achievement of equality. The Constitution also provides for "affirmative action" when it states that legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.<sup>436</sup> The Constitution states clearly that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. According to the Constitution, discrimination on one or more of the grounds listed in the subsection of the Bill of Rights is unfair unless it is established that the discrimination is fair. The right to equality, human dignity, life, the security of the person, to slavery, servitude and forced labour, arrest and detention and respect for children are non-derogable rights.<sup>437</sup>

The Bill of Rights in the South African Constitution address all civil, political, economic, social and cultural rights that are addressed in the Universal Declaration. It goes beyond the

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<sup>431</sup> *Recommendations and Resolutions*, published by the Secretariat of the African Commission on Human and Peoples Rights, Banjul, 1998. RWI Library collections.

<sup>432</sup> See 20<sup>th</sup> Ordinary Session of the African Commission. *Supra*, note 446, para. 8.

<sup>433</sup> HRI/CORE, *Supra*, note 401, para. 12.

<sup>434</sup> The Constitution of the Republic of South Africa, Chapter 1, para. 2.

<sup>435</sup> The Constitution of the Republic of South Africa, Chapter 2. *Supra*, note 453.

<sup>436</sup> *Ibid.*, para. 9:2.

<sup>437</sup> *Ibid.* See list of non-derogable rights in the Act at para. 37.



rights provided in many other national constitutions and provides for the right to: housing, health care, human dignity, citizenship, the freedom and security of the person, the right to privacy, to religion, belief and opinion, to free expression, language and culture, access to information, education, assembly, demonstration, picket and petition, to an environment that is not harmful to health or well-being, food, water, social security, freedom of association, movement, trade, occupation, labour relations, property, health, to just administrative action, to review such action by a court or an independent tribunal, to a fair trial and to be informed of the reason for being arrested, accused or detained.<sup>438</sup> Article 28 addresses the rights of children, giving them the right to a nationality, family or parental care, nutrition, shelter, health care, social services and prohibits their maltreatment, neglect as well as abusive labour practices. The rights in the Bill of Rights may be limited only in terms of a general application to the extent that the limitation is reasonable and justifiable in an open and democratic society taking into account relevant factors such as the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and whether or not there are any less restrictive means to achieve the purpose. The law may limit the rights entrenched in the Bill of Rights only in a states of emergency declared by an Act of Parliament, and only when the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency, providing the declaration is necessary to restore peace and order.<sup>439</sup>

All of the above provisions should be applicable to migrant workers, as there are no stipulations stating that they are only restricted to Citizens.

#### 7.5.2. The Judicial System

South Africa describes several officials within the judicial authority to whom foreign migrant workers might turn to for protection from discrimination. These begin with an independent court system that is streamlined in comparison with those of a number of other African States. The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts. An order or decision issued by a court binds all persons to whom and organs of state to which it applies.<sup>440</sup>

The courts are (a) the Constitutional Court; (b) the Supreme Court of Appeal; (c) the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts; (d) the Magistrates' Courts; and (e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts.

There is also an office of the Public Protector. The mandate of this official, as regulated by national legislation, is to: (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice; (b) to report on that conduct; and (c) to take appropriate remedial action.<sup>441</sup>

The Public Protector has the additional powers and functions prescribed by national legislation, but may not investigate court decisions. The Public Protector must be accessible to all persons and communities, and any report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation,

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<sup>438</sup> *Ibid.*, paras. 10–35.

<sup>439</sup> *Ibid.*

<sup>440</sup> *Ibid.*, Section 165.

<sup>441</sup> *Ibid.*, paras. 182–183.

require that a report be kept confidential. The Public Protector is appointed for a non-renewable period of seven years.

### 7.5.3. The Human Rights Commission

The Constitution also provides for the office of the Human Rights Commission, whose duties are to (a) promote respect for human rights and a culture of human rights; (b) promote the protection, development and attainment of human rights; and (c) monitor and assess the observance of human rights in the Republic.<sup>442</sup> The Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power to investigate and to report on the observance of human rights; to take steps to secure appropriate redress where human rights have been violated; to carry out research; and to educate all persons who need to be up-dated on human rights questions.

The Human Rights Commission has the mandate to request relevant organs of state to provide information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.<sup>443</sup> The Human Rights Commission has the additional powers and functions prescribed by national legislation. Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. The primary functions of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities are - (a) to promote respect for the rights of cultural, religious and linguistic communities; (b) to promote and develop peace, friendship, humanity, tolerance and national unity among cultural, religious and linguistic communities, on the basis of equality, non-discrimination and free association; and (c) to recommend the establishment or recognition, in accordance with national legislation, of a cultural or other council or councils for a community or communities in South Africa.<sup>444</sup> These powers include the protection of religious minorities. The composition of the Commission must- (a) be broadly representative of the main cultural, religious and linguistic communities in South Africa; and (b) broadly reflect the gender composition of South Africa.

### 7.5.4. Protection of Foreign Migrant Workers under the Immigration Act<sup>445</sup>

South Africa adopted a new Immigration Act in 2002 replacing an earlier Aliens Control Act of 1996, which has been described as a “*draconian apartheid throwback*” and “*apartheid’s last act.*”<sup>446</sup> All earlier versions of South Africa’s immigration laws served exclusively to sustain the government’s apartheid policies and were used during that era to exclude as “undesirables” all non-white settlers, foreign students, researchers and foreign migrant workers from the Middle East countries.<sup>447</sup> On the other hand, desirable ethnic-Europeans and some Asians (e.g., the Japanese) were welcomed as immigrants and were defined as “white” for immigration purposes. There was no immigration policy for Africans (or African diasporans) from outside the country, as all such persons were technically foreign migrant workers who had to return home when they were no longer of use to South African

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<sup>442</sup> *Ibid.*, para. 184.

<sup>443</sup> *Ibid.*, paras. 184–186.

<sup>444</sup> *Ibid.*

<sup>445</sup> Human Rights Watch Report on South Africa, *Supra*, note 422.

<sup>500</sup> *Ibid.* Regulation on Aliens Control (No. R999).

<sup>447</sup> J. Crush, ‘Apartheid’s Last Act’, Vol. 10(2), *Democracy in Action*, (1996), pp. 12–13; see also E. Koch, ‘The Pass Laws Keep on Prowling’, *Mail & Guardian*, Johannesburg, (July 15, 1994).

employers.<sup>448</sup> Initial immigration acts adopted just prior to or shortly after, the end of the apartheid era were amended, and the new immigration act was finally adopted in 2002.<sup>449</sup>

The Immigration Act of 2002 was adopted for the sole purpose of providing for the management of persons to, their residence in, and their departure from the Republic and for matters connected with those issues. During the adoption of the Act, the Department of Home Affairs made it clear that its objectives were to promote a human-rights based culture in both government and civil society in respect of immigration control and to facilitate and simplify the issuance of permanent and temporarily residences to those who are entitled to them along with detection and deportation of illegal foreigners.<sup>450</sup>

In its section on temporary and permanent residence, the new Immigration Act provides for seventeen types of permits for “foreigners” in South Africa (who may only enter the Republic by producing a valid passport). A foreigner can be issued a “temporary residence permit” and may exchange his or her status to a permanent one while in the Republic. Holders of a visitor’s permit, however, may not conduct work while in the Republic. There is a long list of temporary permits including which include permits for diplomats, business persons, for medical treatment, relatives of those already holding a permanent residence permit. There is also a “treaty permit” (which is issued to a foreigner conducting activities in the Republic in accordance with an international agreement to which South Africa is a party) and an “exchange permit,” both of which are issued to a “foreigner” who comes to South Africa in cultural, economic or social exchanges in conjunction with an organ of a foreign state.

The holder of a permanent residence permit has all the rights, privileges, duties and obligations of a citizen, except for those which the Constitution or a law explicitly ascribes to holders of South African citizenship. Permanent residence permits may also be issued to spouses and children of the holder of a permanent resident permit (or a child of a citizen), or a work permit provided that the person has an offer for permanent employment. Permanent residence permits can, furthermore, be granted to a foreigner of good and sound character who has received an offer of permanent employment provided that he/she submitted a certification from a chartered accountant regarding prospective permanent employment. This special permit may be extended to the foreigners spouse and children younger than 21 years of age. A permanent residence permit may be withdrawn should the holder be convicted of a criminal offence, be absent from the Republic for more than three years, or has not taken up residence within one year of being issued the permit. Under its section on “Exclusions and Exemptions”, the list details “Prohibited Persons” (supra), “Undesirable Persons” and persons exempted from the general category of “illegal foreigners”. “Undesirable persons” are those who are likely to become a public charge, who has been declared judicially incompetent, an un-rehabilitated insolvent, a fugitive from justice or with conviction which would also be an offence in the Republic. All these categories may be waived by the Minister and the Board of Immigration with good reasons.<sup>451</sup>

The new Act provides for the enforcement and monitoring of foreigners that allows for the deportation of “Any illegal foreigner” unless they are authorised by the Department to remain in the Republic pending an application for a status.<sup>452</sup> Immigration inspectors have the mandate to conduct investigations and inspect any premises at any time, obtain warrants to search any premises, make inquiries, apprehend, arrest or deport an illegal foreigner at any time and from any place. The mandate extends to taking such action without need for a

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<sup>448</sup> HRW Report on South Africa, *Supra*, note 412.

<sup>449</sup> SAMP, <<http://www.queensu.ca/samp/policy.html>> visited on 10 November, 2005.

<sup>450</sup> See Objectives and functions in the Preamble to the Constitution. *Supra*, note 434.

<sup>451</sup> SA Government Gazete, Vol. 472, October, 2004, <[www.homeaffairs.pwv.gov.za/documents/Immigration](http://www.homeaffairs.pwv.gov.za/documents/Immigration)> visited on 3 August, 2006.

<sup>452</sup> *Ibid.* Enforcement and Monitoring: Illegal foreigners, section 32.

warrant. The foreigner concerned shall be notified in writing of the deportation decision, may request confirmation by warrant of a Court, shall be informed of his/her rights in a language he/she understands, may not be held longer than 30 calendar days without a warrant. When there is a detention, it should not be extended beyond 90 days, and the arrested person should be held in compliance with minimum prescribed standards protecting his or her dignity and relevant human rights.<sup>453</sup> The Act further provides that every Magistrates Court is also an Immigration Court with jurisdiction on any matter arising from the Act except reviews of the decisions of the Department and legal proceedings against the Department.<sup>454</sup>

The Immigration Act contains duties and obligations for citizens and foreigners, and prohibits the employment, housing, aiding or abetting an illegal foreigner. The prohibition is extended to learning institutions and business accommodations, and calls for foreigners to abide by the terms of the Act and to depart when their residence permits have expired. Any person in South Africa must identify themselves at the request of an immigration or police officer when requested to do so. If the officer is not satisfied that the person is entitled to be in the Republic, the person may be taken into custody without a warrant and detained until the prima facie status or citizenship is determined.<sup>455</sup> As far as exemptions are concerned, there are none for “illegal foreigners”, which includes those erroneously allowed to enter the Republic. As for representation during proceedings, only an attorney, advocate or licensed immigration practitioner may represent persons, i.e., foreigners under detention, in immigration proceedings. The Act also calls for the Department of Immigration to establish an anti-corruption unit charged with preventing instances of corruption, abuse of power, xenophobia and dereliction of duty by those employed by the Department; to adopt measures aimed at increasing efficiency and cost-effectiveness of the Department; and to collect statistical data relating to the implementation of the Act and the Department, all of which are to be reported annually to the parliament.<sup>456</sup>

#### 7.5.5. Protection for Foreign Migrant Workers under the Post-Apartheid Labour Law

Since the end of its apartheid era, the government of South Africa adopted a new labour law, The Labour Relations Act (No. 66 of 1995), whose purpose is to eliminate past inequalities and discrimination in the labour market while improving working conditions, promoting stable and sound labour relations and enhancing skill development.<sup>457</sup> Although the Act does not directly refer to foreign migrant workers, it does contain protective measures and prohibitions on various forms of discrimination that also them.

The purposes of the Labour Relations Act are:

to change the law governing labour relations by giving effect to section 27 of the Constitution; to regulate the organisational rights of trade unions; to promote and facilitate collective bargaining at the workplace and at sectoral level; to regulate the right to strike and the recourse to lockout in conformity with the Constitution; to promote employee participation in decision-making through the establishment of workplace forums; to provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration (for which purpose the Commission

<sup>453</sup> *Ibid.* Section 34 on Deportation and detention of illegal foreigners.

<sup>454</sup> *Ibid.* Section 37: Immigration Courts. This section cites: The Rules Board of Courts of Law Act, 1985 (Act 107 of 1985) enabling the Rules of Court Act to make rules facilitating the adjudication of matters simplified and expeditious.

<sup>455</sup> *Ibid.* Section 41 on Identification.

<sup>456</sup> *Ibid.* Sections 46–48.

<sup>457</sup> See the Department of Labour Press Release, <[www.labour.gov.za](http://www.labour.gov.za)> visited on 16 November, 2005.

for Conciliation, Mediation and Arbitration is established), and through independent alternative dispute resolution services accredited for that purpose; to establish the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the Act; to provide for a simplified procedure for the registration of trade unions and employers' organisations, and to provide for their regulation to ensure democratic practices and proper financial control; to give effect to the public international law obligations of the Republic relating to labour relations; to amend and repeal certain laws relating to labour relations; and to provide for incidental matters.<sup>458</sup>

In addition to these features, the Act provides protection for employees and persons seeking employment, and prohibits the discrimination of an employee for exercising the freedom of association conferred by the Act.

#### 7.5.6. Protection for Foreign Migrant Workers under the Identification Amendment Act of 2000

The post-Apartheid era's Identification Act of 1997 contains a number of definitions regarding who is entitled to a South African identity card but omitted any references to ethnicity or racial background. The Act applies to all citizens or to those who are lawfully in the Republic, such as foreign migrant workers.<sup>459</sup>

#### 7.5.7. Protection under the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000.

The South African Parliament adopted the *Promotion of Equality and Prevention of Unfair Discrimination Act 2000*.<sup>460</sup> The Preamble takes note of the fact that South Africa is bound under its new Constitution and its obligations under international treaties and customary international law, and specifically mentions the International Convention on the Elimination of All 'Forms of Discrimination Against Women and the Convention on the Elimination of All Forms of Racial Discrimination. The Act provides for the establishment of an Equality Review Committee, whose duties are to advise and report to the government on how the objectives of the Act and the Constitution are being achieved and to recommend necessary amendments for improvements.<sup>461</sup>

In contrast to the general provisions on non-discrimination in the Migrant Worker Convention (which South Africa has not ratified), non-discrimination on the grounds of migration status, association, family responsibility or marital status are not addressed in this Act. There is, however, a provision for the Equality Review Committee to give "*Special Considerations*" to including such impacts on society such as HIV/AIDS, socio-economic status, nationality, family responsibility and family status in the grounds for discrimination.<sup>462</sup> Foreign migrant workers have been especially targeted for violence in South Africa, and being suspected of spreading diseases has been given as one of the reasons given for their

<sup>458</sup> South African Labour Relations Act of 1995. There were two amendments to the Act, but neither of them affected Chapter II. Government Gazette, 10 September, 1996. <www.labour.gov.za> visited on 17 June, 2005.

<sup>459</sup> Identification Act, 1997, Government Gazette, Vol. 390, No 18485.

<sup>460</sup> Government Gazette, 9 February, 2000, No. 20876.

<sup>461</sup> *Ibid.* Chapter Seven, para. 33(1) and 33 (2).

<sup>462</sup> *Ibid.* Chapter Seven, para. 34.

discrimination and ill treatment.<sup>463</sup> But, this piece of legislature has not addressed this issue regarding the protection of foreign migrant workers and is in contrast to prohibitions in human rights conventions against torture, racism, and the right to life.<sup>464</sup>

#### 7.5.8. Protection for Non-Government Organisations

The new South African constitution guarantees everyone the right to freedom of association, and the legal framework enables civil society organisations to establish themselves as legal structures and to regulate the way they operate. There are a considerable number of NGOs operation in South Africa, many of which are based abroad.<sup>465</sup>

However, a Non-profit Organisations (NPO Act) Act No.17 was adopted in 2000 with the purpose of regulating codes of practice and language to be used in the operation of associations. The main purpose of the Act is to create an environment for NPOs to maintain standards of governance, accountability and transparency. There is a voluntary registration facility for NPOs which are defined as a “trust”, a company or other association of persons. This is conditional on minimum establishment requirements and annual reporting requirements are complied with. The Trust must be registered with the Master of the High Court and may also choose to register in terms of the Act with the NPO Directorate of the Department of Welfare. Specifically, the Act enables a Trust to be a body corporate with a legal personality.<sup>466</sup> Prior to its adoption, Trusts, even when they are registered with the Master of the High Court, were not considered to be legal persons other than for certain specific purposes such as tax and insolvency. The Act provides a registration facility for such voluntary associations which are incorporated associations under Common Law. Prior to the passing of the Act, voluntary associations could not register with a government registry. This created difficulties as usually, donors and third parties with which such organisations interacted, required a greater measure of legal formality and public accountability. Only registered NPOs will be eligible for benefits from the government.<sup>467</sup>

Migrant workers who are legal in South Africa would be able to make use of this guarantee for the improvement of their well-being. However, those who are illegal might find it difficult to be open about their membership in an NGO.

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<sup>463</sup> Human Rights Report, *supra* note 422,

<sup>464</sup> *See for example*, ICCPR 6, 7, 26; CRC 6, 37a and 39; MWC 9 and 10.

<sup>465</sup> Human Rights Watch, *supra*, note 422.

<sup>466</sup> Official Gazette, 2000-06-09, Vol. 420, No.21271, p. 3, <[www.ilo.org/dyn/natlex](http://www.ilo.org/dyn/natlex)>

<sup>467</sup> Honey. M.: NPO Legal Support Project of the Legal Resources Centre. New Tax Laws For South African NPOs. Information Series No. 3. 2000.

### *7.6. Analysis and Criticism of the Protections of Foreign Migrant Workers*

In addition to a brief survey of the history of foreign migrant labour to South Africa, the general focus of this chapter was on the nation's compliance with human rights principles on the treatment of migrant workers. This was achieved through a more detailed focus on universal, regional and domestic protections for migrant workers. It surveyed the presence and treatment of migrant workers in South Africa, and the status of the ratification of the major Universal and ILO human rights Conventions, the major regional instrument, and domestic Acts that have been adopted in the post-apartheid era. There was also a survey of the Act regulating NGOs. In focusing on these issues within the vast field of civil rights, it was necessary to give a brief overview of the history of South Africa, its economy, population, and the adoption of a more democratic constitution from its apartheid era. These were examined in view of the history of legislative controls applied to documented or "legal" foreign migrant workers entering South Africa.

The Republic of South Africa has adopted a democratic constitution offering a strong Bill of Rights and is taking great strides to meet with its obligations under universal human rights treaties and regional instruments it ratified since the fall of apartheid. South Africa has also adopted a number of municipal legislation within its labour law to further enhance its new policies on human rights, the full equality and dignity for "Everyone", as stated several times in the Constitution. The new constitution places upon all persons and institutions under an obligation to "respect, protect, promote and fulfil the rights in the Bill of Rights", which is binding upon the legislature, the executive, the judiciary and all organs of the state. The principles are to be enforced by all courts, regional and county laws. In spite of these efforts, however, violations of some of the rights in the Bill of Rights are reported to occur regularly, in efforts to manage the thousands undocumented migrants workers it receives each year. This can be seen in the language of a number of the new municipal instruments described above where there are a number of gaps between the objectives of the human rights and ILO treaties, regional agreements and the municipal instruments.

A fundamental concept the South African Bill of Rights is the right to human dignity, where "Everyone has inherent dignity and the right to have their dignity respected and protected." The importance of this right in the South African context flows from its history. The right to freedom and security of the person is also protected by the bill of rights, in particular the right "not to be deprived of freedom arbitrarily or without just cause," the right "not to be detained without trial," the right "to be free from all forms of violence from both public and private sources," the right "not to be tortured in any way," and the right "not to be treated or punished in a cruel, inhuman or degrading way." Under its new Constitution and subsidiary domestic laws, "Everyone" in South Africa is entitled to these basic human rights. The entitlement omits any limitation or the exclusion of immigrants (aliens, non-citizens) and foreign migrant workers from the list of rights, be they documented or undocumented. Due to the fact that the bill states clearly that "Everyone has the right to freedom of association", this right too should be extended to migrants, be they documented or undocumented. The rights described apply to all person within its borders, including minors, married women, those in detention and/or under deportation proceedings. Only the right to enter the country, to obtain a passport, to vote, to stand for office, to form a political party and other political rights are limited to citizens.<sup>468</sup>

The new Immigration Act, however, plays a major role in the treatment migrant workers receive in South Africa, be they documented and legal or not. The provisions within the act override the protections offered in the all the other Acts because it is principal instrument that

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<sup>468</sup> The Constitution of the Republic of South Africa (1996) Sections 19, 20, and 21. *Supra*, note 453.

determines the “status” of all persons who are non-South African. This is clear by the structure of the Act which provides for conditions of entry and residence in its first section, and then with conditions of enforcement of those conditions. Such a structure conveys the appropriate message that the government is not opposed to entry that is managed, legal and in the best interests of the country. The intended function of the Act is to deter and prevent people from illegally migrating to South Africa, even though it clearly supports migration and is very friendly to business migration. The language used within the legislation is both a marker and measure of the seriousness of this intention, but reflects a “siege mentality” which views all non-citizens and non-residents as a potential threat. Terms such as “illegal foreigner”, “prohibited person”, and “undesirable person” in the Act are three of the terms categorising migrants that appear to negate the meaning of human rights on a much larger scale. Other indications of the Act’s potential for negating the Constitution’s intentions as well as those of the human rights treaties are:

The Act’s definition of the many types of resident permits could be too numerous for many citizens or migrants to clearly understand. This could prove to be very difficult for migrants to manage, and for the government to monitor. Another group of issues that is worthy of comment are those under the Enforcement and Monitoring section of the Act. The concern here is for the powers of officers and the “Inspectorate” to “stop anyone, citizen or otherwise” to prove their immigration status. This is a power similar to the police state powers that were exercised in South Africa during the apartheid era. The provision easily lends itself to an environment of fear, suspicion and excessive behaviour by officers and the general public. There is also an issue under the Act’s “Miscellaneous” section. One of these is the fact that no one other than an attorney, advocate or “immigration practitioner” may represent another person in immigration procedures. Another set of confusing provisions are those allowing for the deportation and detention of the ill-defined category of persons identified as “*illegal foreigners*”, for it is in these provisions where the opportunities for the violation of many of the principles of human rights convention and the Constitution lie. The State sponsored sanctioning of the ability to arrest, detain and deport an “illegal foreigner” without a warrant certainly overrides all concerns for most of the other human rights that the South African Constitution provides to “Everyone”.

Some critics might see the Act alone as not being entirely in tune with existing international human rights (or regional or sub-regional agreements) principles protecting the rights of foreign migrant workers. It might be feared to encourage the discrimination of persons who could be falsely accused of being “non-citizens” until proven otherwise; it might provide police or anyone identifying him/herself as an immigration officer with a legal means to inspect and eventually detain persons until the status of citizenship or migration status is determined; it might restrict the free choice of judicial representation when it is needed; and it might assume that any magistrate or local court has the competence to solve the nation’s immigration problems.

To reverse this apprehensions and to comply more with the international standards that are proscribed in the MWC, South Africa might further consider even more improvements in its legislation and policies on the protection for foreign migrant workers.



## **8. Final Critical Analyses, Comments and the Conclusions**

### *8.1. Introduction*

The postulates of equality that were inherited from the era of the French and American Revolutions calls for the equal treatment of all persons before the law. The conversion of these postulates into legal reality is being realised through the adoption of the Universal Declaration of Human Rights and the subsequent human rights treaties that followed. In spite of this, there remains a great moral and political dilemma regarding the equal treatment of a number of vulnerable groups one of whom are migrant workers: it is they who are largely denied full and equal treatment. So far, legal adoption of treaties alone has not changed this situation and the obligations of States to fully honour the principles and scope of the problem remains a controversial one.

Implementing the principle of non-discrimination and ensuring equality of treatment are vitally important not only for the integration and eventual assimilation of migrant workers, but the full development of the principle of democracy as well. The equal treatment of migrants without regards to their national, ethnic, religious origins facilitates economic growth as well, providing the rules protecting their rights do not conflict with those of the majority population. In such cases where they do, conflicts between the migrants and domestic groups often emerge because the latter feels they are disadvantaged. This is only one of the more widely known results of implementing the combination of those principles, whose norms are not only dependant upon the political decision of each particular legal State, but also on the norms established through praxis determined by the guiding principles of Universal Declaration of Human Rights and the subsequent human rights treaties. Long established inequalities that are the result of past histories do not vanish because of the presence of a treaty or a Constitution that has been ratified or accepted, and are neither absolute in principle or practice. States and cultures often modify the principle with use of either natural features such as age, gender, race, physical or mental ability or social features such as national origin, economic abilities or other distinguishing features which are only recently being challenged by international human rights law. In spite of this, many States allow legal inequalities in violation of the a number of provisions of international human rights norms as they apply to foreign migrant workers, a summary of which calls for a briefing of the two States that have been studied.

#### 8.1.1. South Africa

Even though South Africa has not yet ratified the Migrant Worker Convention, it has adopted a number of new Acts that clearly offer new forms of protections from unequal treatment of its citizens and legal migrant workers. The decision not to ratify is too speculative to indulge in here, but one of them may very well be the adoption of the new Constitution and subsequent Acts embracing a large number of human rights norms. Another speculation is that since ratification opens a State party to international reviews that are available to world opinion, they threaten the status quo, and the vacillating situation for undocumented migrant workers in South Africa would certainly produce much criticism.<sup>531</sup> But the reason for ratifying or not is purely a political one and is beyond the scope of this dissertation.

Indeed, a number of the provisions of these Acts have gone beyond the expectations of MWC and ILO provisions, a number of which may also be applicable to undocumented or illegal migrants workers. But in spite of such progressive efforts, thousands of undocumented

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<sup>531</sup> See R. Goodman and D. Jinks, 'Measuring the Effects of Human Rights Treaties' 14 EJIL (2003), p. 174.

workers remain subjected to xenophobic attacks, inter-ethnic violence, mass deportations the loss of property, identity, and other continued abuses of their human rights. Such acts are often conducted outside of the realm of national law. Hence, the ILO's Executive Committee has found it necessary to make a number of recommendations to South Africa on compliance with the provisions of its treaties as explained above.

At the time of this writing, Lesotho, which supplies South Africa with thousands of both legal and undocumented migrant workers every year, was the only country in the region that has ratified the MWC. Hence, in spite of its recent efforts to increase human rights protections with new ratification of human rights conventions, the absence of a ratification of the Migrant Worker Convention by South Africa leaves a gap in its protections for migrant workers.

### 8.1.2. Nigeria

Although it is a party to ILO C97 and a number of other ILO Conventions, Nigeria has not ratified the Migrant Worker Convention in spite of the fact that several neighbouring States in the region, Guinea, Burkina Faso, Mali and Senegal have done so.<sup>532</sup> But in spite of its ILO ratifications, the Committee of Experts has found reason to request improvements of its laws and practices regarding the rights of workers. A number of improvements requested will also apply to its large but undermined number of migrant workers, both the documented and the undocumented. The implementation of the principles of non-discrimination and equality in Nigeria are in need of massive development at all levels. One way of achieving this with regards migrant workers is to follow the guidelines of the ILO's Committee of Experts; another means would clearly be to ratify the Migrant Worker Convention.

In spite of its progressive Constitutional provisions that address the rights of "citizens" and strong appeals for activities that "reflect the federal character of the country", Nigeria's struggle with the principles of democracy has left little time for the development of rights for its international migrant workers from neighbouring countries.<sup>533</sup> The question of providing migrant workers with basic rights and freedoms with regards their culture are generally accepted, but the full range of human rights protection for all categories of migrant workers has not yet penetrated political arena.

The reasons for Nigeria not ratifying the MWC are also laced in speculation grounded in political issues. Unlike South Africa, it may have much to do with the facts that i) it is a party to ILO C97, prefers to satisfy the conditions of that treaty; ii) it is a party to the ECOWAS agreement; iii) several neighbouring States are parties to the MWC and it prefers to measure the effects of their ratifications; iv) it has a complicated legal tradition where at least half the population abides by Sharia law.<sup>534</sup> Besides, the ratification of the MWC would subject Nigeria to another scrutiny by an international Committee and inspired NGOs, neither of which the Nigerian government is interested in at this time. Hence, the absence of ratification of the Migrant Worker Convention by Nigeria facilitates a gap in its human rights protections for non-citizens, be they legal or undocumented. But as stated earlier, such issues clearly belong in a political discussion.

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<sup>532</sup> See the list of ratifications in Africa at <www.ilolex> visited on 28 August, 2006.

<sup>533</sup> T. Sowell, *Affirmative Action Around the World: An Empirical Study*, (Yale Univ. Press, New Haven, Conn. 2003), p. 106.

<sup>534</sup> Neighbouring parties to the MWC are: Benin, Burkino Faso, Cape Verde, Ghana, Guinea, Guinea-Bissau, Liberia, Mkali, Sao Tome and Principe, Sierra Leone and Togo. <www.unts.un.org> visited on 10 August, 2006.

## *8.2. Some Critical Comments on Substantial Gaps<sup>535</sup> in the Migrant Worker Convention*

The rationale for recognising and listing rights of undocumented migrant workers is explicitly stated in the Preamble. It recognises the progress made by certain States on a regional or bilateral basis toward the protection of the rights of migrant workers, and of the bilateral and multilateral agreements that are in this field; that certain employers seek such labour in order to reap the benefits of unfair competition; that appropriate action should be encouraged to prevent and eliminate clandestine movements and trafficking in migrant workers; and that the recourse to the employment of irregular migrants will be discouraged if the fundamental human rights of all migrant workers are more widely recognised. In eight parts, the Convention provides a number of principles and standards that should be the minimum that States parties apply to all migrant workers and members of their families while in their jurisdiction, including those in irregular (a.k.a. illegal) situations. The protective purposes of the Convention are clearly outlined in Article 5 (a), where it states that they are to apply to migrants who are considered as “documented or in a regular situation”; the purposes also apply to those who are in an irregular situation as described in Article 5(b), even though it does not encourage such migration. In spite of the fact that there are gaps in the extent of protection its standards calls for, such as facilities for women and children, trafficking, physical abuse, vocational training or salary discrimination the Convention is a landmark of protection even though it leaves it up to State parties to determine the amount of protection it will provide to its migrant workers and the members of their families.

The MWC reiterates a number of rights applicable to migrant workers and members of their families included in the other human rights conventions. One distinctive feature of the Convention is the replacement of the terms "persons" or "individuals" as they frequently appear in other conventions with that of "migrant workers and members of their families". The phrase may be interpreted as offering protection to the spouse(s) and children of migrant workers' regardless of their gender or sexual preference. The absence of a definition of who the family members are could open the door to a rather wide interpretation with regards the right to sexual preferences.

The Convention's goals of providing rights for illegal migrants in a universal multilateral instrument is a major step forward in the international protection of this most vulnerable category of individuals, but it overlooked and failed to address a number of practical issues that illegal migrants will continue to face even when enforcing the rights granted by the Convention. Another issue that the MWC failed to address is protection from expulsion for illegal migrants who launch a complaint about the infringement of their rights. In fact, Article 34 denies any relief from persecution by stating that no part of the Convention has the effect of relieving migrant workers and family members from their obligation to comply with the laws and regulations of any State of transit or employment, or the “obligation to respect the cultural identity of the inhabitants of such States.” How far this is to be taken with regards integration or assimilation of illegal migrants is not made clear in the Convention, but Article 79 reaffirms state sovereign rights in respect of the admission of migrant workers and their families.

Another substantial gap in the Convention is the absence of an obligation to regularise the status of illegal migrants. Article 69:1 (located in Part VI) imposes a duty on states parties to take appropriate measures to ensure that a situation whereby illegal migrants are present

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<sup>535</sup> The term gaps will be capitalised for emphasis here as introduced by W. R. Böhning: *Gaps in Basic Worker Rights*, ILO Working Paper, Geneva, Switzerland (2003), p.1. Available at <[www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD\\_BLOB?Var\\_DocumentID=1557](http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=1557)> visited on 19 August, 2006.

within their territory does not persist.<sup>536</sup> This is followed by Article 69:2 which provides that states parties should take into account the circumstances of the entry, the duration and family situation when considering the regularising of illegal migrants and their family members.<sup>537</sup> Article 69(2) should also be read with Article 35 in Part III, which provides that nothing in that Part of the Convention should be interpreted as implying regularisation or any prejudice to [such] measures to ensure sound and equitable conditions of international migration provided in Part VI.<sup>538</sup> The protection of sovereignty is clearly emphasised in Article 70 of Part VIII of the Convention, where it states that nothing shall affect the right of state parties to establish criteria governing the admission of migrant workers and members of their families, subject to the limitations in the Convention.<sup>539</sup>

### *8.3. Concluding Comments on the Gaps in Human Rights Protection for Migrant Workers*

In his Working Paper on measuring gaps in workers' rights, Böhning applies a system of determining and weighing the relevance that certain indicators have in narrowing the gaps in worker's human rights. He describes them as follows:

In the human rights field, ratification of a Convention is equivalent to an input. *Process* indicators are concerned with procedures or mechanisms set up to advance matters towards a desired goal. *Outcome* indicators are the ultimate objective of indicator construction because they reveal actual achievements or impacts. ...

The gaps in basic workers' rights measured in this paper are an approximation of outcomes "on the ground", i.e. in countries. They indicate deficits that are occasioned by lack of adherence to international values and obligations, on the one hand, and by the interaction of countries with the ILO's supervisory and complaints mechanisms, on the other hand. That measurement is a credible reflection of realities on the ground. While it may not fully reflect reality in every case, no better proxy is available at present as far as basic workers' rights are concerned.<sup>540</sup>

Neither Nigeria nor South Africa were examined in his study. Nevertheless, although it is not possible to apply his methods of measurements to either universal human rights regimes or to the States examined in this dissertation, there is one, the absence of the ratification of human rights instruments, that can be isolated and applied to this analysis.<sup>541</sup> By their ratification of such conventions, States reaffirm their recognition of the principles and obligations already agreed to through their ratification of earlier human rights treaties – even when they are "States of origin" for migrant workers. But the absence of the ratification of the MWC by States that have large migrant worker populations announces the presence of a Gap in workers' rights for those states in particular. Due to the fact that there is no means of measuring improvements for migrant workers within such States, this fact renders it relatively

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<sup>536</sup> Article 69:1 of the MWC. UNTS

<sup>537</sup> The only other international instruments that consider regularisation are Article 9(4) of ILO Convention No. 143 and para. 8:1 of the ILO Recommendation No.151. Neither of these provisions implies an obligation to regularise the situation of illegal migrants and are similar to Article 69:2. *See* comments by Cholewinski, *supra*, note 11, p. 191.

<sup>23</sup> *See the MWC*, Article 35, UNTS.

<sup>539</sup> Article 79, General Provisions, UNTS.

<sup>540</sup> Böhning, W.R., *supra*, note 535, para. 1.4.

<sup>541</sup> It would be quite difficult to apply the method to universal instruments due to the special conditions it has with ILO treaties. Private correspondence with W.R. Böhning dated 15 August, 2006,

ineffective as an instrument to improve the rights of migrant workers. Both Nigeria and South Africa fall within that category since neither has ratified that convention.

Nevertheless, the Migrant Worker Convention remains an important human rights Convention. It offers a number of important substantial rights to documented and undocumented migrant workers; leaves the question State sovereignty over such matters up to the States themselves; and leaves the important question of State sovereignty over such matters within the hand of State parties. a considerable number of States rights for national consideration. In fact, if ratified, the Migrant Worker Convention would provide States with an important tool for the management of all categories of migrant workers.

#### *8.4. Conclusions on Protections offered to Migrant Workers in Africa*

##### 8.4.1. The Continued Dilemma of the Discrimination of Migrant Workers in Africa

One result of this study is that the results of State practices demonstrate that international migrant workers remain the prime objects of practices of inequality and non-discrimination. That inequality and discriminatory treatment of migrant workers persists, and the inability of international law alone to resolve the problems, remains one of the discipline's most perplexing problems – an open question of how instead of when. One can argue that there are many reasons for this dilemma, but only a very few answers. One is certainly that the qualitative principles of equality -- the economic and political choice between *absolute* and *relative* equality -- are noticeably absent in international human rights treaties, and the question for State implementation of the principles of equality for migrant workers remains not whether or not there should be equality, but which equality any State cares to -- and can afford to -- implement.<sup>542</sup>

A second reason is that even though international law offers suggestions and standards regarding how to draw the line between justified and unjustified distinctions between its populations (i.e., as between those it considers citizens, legitimate non-citizen migrants and so-called illegal migrants), many States simply have not developed the capacity to implement the standards and develop their own theory of proportionality regarding the division of means to ends.<sup>543</sup> The Human Rights Committee and the European Court of Human Rights have both concluded that not all differences in treatment are discriminatory, and that equal treatment does not mean the same treatment, or identical treatment in every instance. The question that many States face then, is what reasonable and objective justification does a non-discriminatory distinction have, and what reasonable proportionality can be employed to attain it.<sup>544</sup>

A third reason, and perhaps the most important one, is that the two State's that were the object of study (Nigeria and South Africa) fall into the category of developing democratic States, which some have theorised lends itself to massive human rights trade-offs. This is a theory of human rights and development that has to be re-visited in order to understand where and why the political/economic/legal treatment of migrant workers remain as they are.<sup>545</sup> In most cases, the adoption of human rights treaties is itself insufficient cause to implement equality and non-discrimination principles for migrant workers in economic development strategies.

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<sup>542</sup> R. Douglas: *Equalities*, (Harvard University Press, Cambridge, MA, 1989), p. 19

<sup>543</sup> A.F. Bayefsky, *supra*, note 586, p. 11.

<sup>544</sup> *Ibid.*

<sup>545</sup> See the arguments offered by J. Donnelly and R. Howard, R (eds): *Universal Human Rights in Theory and Practice* (Cornell University Press, 1989, 2<sup>nd</sup> ed.), pp. 164–165.

On the issue of equality, we can take an example of a domain where there is *absolute equality*, where every individual who is supposed to be equal will be fully equal, even though the equality may be marginal for all.<sup>546</sup> On the other hand, in a domain where there is *relative equality*, the allocation of goods requires a high investment in those who are “handicapped” (e.g., those discriminated against due to one of the prohibitions in international human rights law). Only with such investments (some such “investments” are clearly in social services, affirmative action, ethnic quotas for the marginalised) can the domain be on course towards the goal of absolute equality.<sup>547</sup>

If the principle of non-discrimination is pursued to extremes it will go beyond “integration” and emerge as some form of assimilation. The extreme result of the former is the achievement of equal opportunity; that of the latter the collapse of equal rights to one’s dignity through one’s own identity. So far, neither the signing of human rights treaties nor the implementation of their principles into national law has solved signature parties larger problems of integrating migrant workers into all levels of society with their cultural and social identities unchallenged. As I referred to in the postulations offered in Chapter One, the principles of individual rights might best be realised in developing democracies that consider features of custom, culture and pre-constitutional moralities during the implementation process. Such utilitarian ideals could facilitate the participation of many in the economic development process where economic development and equality means the equal opportunity to participate in such development.<sup>548</sup> The research described in the above chapters renders it obvious that the development of international law has failed to adequately secure the rights to non-discrimination for that final category of vulnerable individuals, mainly migrant workers in Sub-Saharan Africa. The dilemma here is unfathomable: how are migrant workers to retain their dignity, identities, histories and cultures if they are to assimilate? And how are they to assimilate in a society where the issue has not been debated, or even theorised, even remotely? These questions must be asked and answered before the question of non-discrimination can be a reality in any society.

Noticeably absent in nearly all the human rights treaties is a standard on “equal opportunity”, the obligatory sidebar to the “non-discrimination” or “non-distinction” principle. Perhaps more than anything else, the legal answers to the question of equal treatment and rights for migrant workers lie alongside the economic forces that are the reason why many of those who become migrant workers decide to do so. In many cases, especially in young democracies with fledgling economies, it is not a question of a proportional division of the common “goods”; in these societies it is a question of having access to the “goods” to be shared in the first place. In most African societies, the individual does not exist in “splendid isolation” nature of many in Western societies, but is always a part of a community, be it the family, village, an ethnic group (a.k.a. tribe) or a clan. The role of “rights” – be they to equality or non-discrimination – are largely under the domain of one or the other community structure.<sup>549</sup> Until those problems are solved, no amount of legal documents can solve the problems of equality and non-discrimination in many countries.

Practices on the unequal limitations on civic rights, on gender, ethnicity, functional disorder, sexual preferences or national origin are incompatible with the basic ideals of democracy; yet such practices are proving difficult to remove, human rights treaties to the contrary. With the advent of anti-terrorist laws the rights of migrant workers is even in more

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<sup>546</sup> *Ibid.*, pp. 105-106.

<sup>547</sup> *Ibid.*, p. 106.

<sup>548</sup> See also this argument in Friedman, *supra*, note 9, p. 10.

<sup>549</sup> R. Hallgren: *The Good Things in Life: A study of the traditional religious culture of the Yoruba People*, (Lund University Doctoral Dissertation, Dept. of Theology, Lund, 1988), pp.172–173.

danger in States that claim they have much to fear from enabling them to exercise their full freedoms in accordance with the ICCPR and other closely related conventions.

That sovereign States need to affirm their sovereignty over universal systems and agreements on the free movement of labour represents their interest to maintain a standard of living and an economic system to support those standards. The theoretical ideal of democracy – the equality of all men and races – is limited by such societies, where the division into national groups is organised, supported and controlled by State support systems. But under such circumstances, migrant workers – even those being oppressed – have little incentive to protest or offer resistance. Such discrepancies may eventually be overcome (or at least reduced) if and when a closer organisation of international law and (economic) order, reduces the differences between nations their nationals to a greater measure of a standard of equality. Until then, it is clear that the principles of absolute equality and non-discrimination between individuals of all classes and races cannot be conquered. The ideas of individual freedom and individual equality are correlated, and both have to be understood in a dynamic, not in a static, sense.

#### 8.4.2. Final Comments and Recommendations for the Future Protection and Management of Migrant Workers through the Ratification of the Convention

One of the most vital questions raised and not yet answered by this dissertation concerns ratification of the Migrant Worker Convention, especially by those that have not yet ratified it. Political will is what motivates many States to ratify or not ratify a treaty, and there is perhaps more political motivation behind the low number of ratifications of this treaty than the others. So-called “sending States” have ratified this treaty more than those described as “receiving States”, and it is important to point out that the list of receiving States that have not ratified the MWC includes the two subject States, Nigeria and South Africa. But the gist of my recommendations is that the future management and protection of migrant workers worldwide requires three things:

- i) A precise system of identification cards for each individual migrant worker – complete with biometric information must be implemented. The burden of this must be born by the sending state, but when this is not been achieved, it could very well be conducted by the receiving State. Hence the right of each person to an identity card must be developed and implemented both at the international and State levels. Even though such a right will inevitably be abused in undocumented, illegal or trafficking migrations, the advantaged if having the right in place is that it will enable States to more efficiently expedite those without such a card to assigned contracted territories. All persons, be they migrants or not, will have this previously overlooked human right fulfilled, which in itself should outweigh any alleged disadvantage regarding the question of “personal integrity.”
- ii) The right to create and form associations must be further strengthened in international law. Such associations that are seriously engaged in the welfare of migrant workers should be given a form of legitimacy and empowerment within host States that enables them to negotiate seriously with various branches of government, industry and labour market institutions. This form of empowerment should be assured by outright State subsidies or in the relaxation of national taxation laws that allow corporate

and private donations to facilitate the establishment and management of associations.

Those two issues raise an important question with regards the three States studied in this dissertation: Should the three States in this dissertation ratify the Migrant Worker Convention? The answer here is in the positive for the following three reasons: The ratification of the MWC provides no increased erosion of the rights of State sovereignty than other human rights treaties.<sup>550</sup>

In the case of Nigeria and South Africa, ratifying the MWC and the appropriate ILO treaties would be an indication of the interest in narrowing the Gaps in human rights for migrate workers. For Nigeria, the ratification of these instruments would be a strong indication that it is willing to minimise the plurality of its legal systems.<sup>551</sup> The ratification of the MWC could also provide State parties with a valuable instrument that would enable them to detect and possibly deter potential terrorists. In sum, there would be no negative effects for any State to ratify the Migrant Worker Convention.

The will of the majority population plays a major role and must be seriously considered. Adding to this is the ever increasingly important role of the media, which nurtures and shapes private opinions, public policies and the will of the general public with images and words promoting fear and hatred, benevolence or self-indulgence. More than constitutions or treaties, it may be that a States interests in the economic equality for all, including non-citizens, will provide the definitive means to protect non-citizens and migrant workers from discrimination. This will require much planning and the education of host nationals at grass-roots levels into accepting ideals that are beneficial all. This is the task that all State parties must urgently attend to.

Throughout this dissertation, I have examined, compared and contrasted the major human rights instruments offering protection from discrimination and inequality to migrant workers in Sub-Saharan Africa. In particular, I focused on two rights to equality that all persons ought be entitled to. But one of these has been severely neglected in international human rights law, and few States have attempted to find remedies. Rights within the provisions of the major ILO and universal civil and political, regional convention and sub-regional instruments were detailed and contrasted with the first truly universal Convention protecting the rights of migrant workers, the Migrant Worker Convention (1990). Even though all of them – including the Migrant Worker Convention -- have gaps and short-comings with regards to protecting migrant workers from unequal and discriminatory treatment, the first human rights treaty adopted in the 21<sup>st</sup> Century is a giant leap forward for human rights.

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<sup>550</sup> See especially the MWC, Article 79 UNTS.

<sup>551</sup> Whether or not to adopt a single legal system and abandon legal pluralism is a major issue of debate within legal circles in India, where there are considerable contradictions in Hindu, Muslim and Constitutional commitments to a uniform civil code. UNDP: Human Development Report 2004, Box 3.5, p. 57.



## Appendix A

### Overlapping Provisions within the Major Human Rights Treaties <sup>1</sup>

Legend: MWC – Migrant Workers Convention  
 UDHR – Universal Declaration of Human Rights  
 ICESCR – International Covenant on Economic, Social, and Cultural Rights  
 ICCPR – International Covenant on Civil and Political Rights  
 ESC – European Social Charter  
 ICEAFRD – International Convention on the Elimination of All Forms of Racial Discrimination  
 CEAFDAW – Convention on the Elimination of All Forms of Discrimination Against Women  
 CRC – Convention on the Rights of the Child

<b>Migrant Workers Convention</b>	<b>Subject Area</b>	<b>Overlapping or Corresponding Provisions</b>	<b>Comments</b>
Preamble	Introductory		Takes into account principles in United Nations human rights instruments and International Labour Organization instruments and reaffirms the importance of certain UNESCO-derived principles
<b>PART 1 ARTICLES 1-6</b>	<b>SCOPE AND DEFINITIONS</b>		
Article 1	Applicability to migrant workers and their families	UDHR Art.2 ICESCR Art. 2(2) ICCPR Art. 2(1) CRC Art 2(1) ICERD Art. 1(1)	MWC explicitly proscribes more grounds of discrimination.
Article 2	Definitions		
Article 3	Exclusions		
Article 4	Definition of “member of the family”		The ESC Appendix, with reference to Art. 19, defines “family of a foreign worker” to include at least his wife and dependent children under the age of 21.
Article 5	Definition of documented (“in a regular situation”) and undocumented (“in an irregular situation”)		

<sup>1</sup> From: *International Migration Review*, Vol. 25, Winter 1991( No.96). Reprinted with permission from the Center for Migration Studies, New York. The Convention Against Torture, CAT, was not included in the original text by the publishers.

Article 6	Definitions of states of origin, employment and transit		
<b>PART II ARTICLE 7</b>	<b>NON-DISCRIMINATION WITH RESPECT TO RIGHTS</b>		
Article 7	Non-discrimination clause		See Art.1 and corresponding provisions and other instruments
<b>PART III ARTICLES 8-35</b>	<b>HUMAN RIGHTS OF ALL MIGRANT WORKERS AND MEMBER OF THEIR FAMILIES</b>		
Article 8	Right to leave; right to enter state of origin	UDHR Art. 13(2) ICCPR Art. 12 ICERD Art. 5(d)	
Article 9	Right to life	UDHR Art. 3 ICCPR Art. 6 CRC Art. 6	UDHR: "Life, liberty and the security of person." ICCPR and MWC Arts. 9 and 16 are more explicit.
Article 10	Prohibition of torture or cruel, inhuman or degrading treatment or punishment	UDHR Art. 5 ICCPR Art. 7 CRC Arts. 37(a) and 39	MWC identical to UDHR. ICCPR includes additional provision against medical or scientific experimentation without consent
Article 11	Prohibition of slavery or compulsory labour	UDHR Art. 4 ICCPR Art. 8 CRC Art. 3	MWC and ICCPR are nearly identical and include prohibition on compulsory labor (not enumerated in UDHR)
Article 12	Freedom of thought, conscience and religion	UDHR Art. 18 ICCPR Art. 18 ICERD Art. 5(d) CRC Art. 14	MWC and ICCPR are rarely identical. Compare "minority persons" provision of ICCPR Art. 27.
Article 13	Freedom of opinion and expression	UDHR Art. 19 ICCPR Art. 19 ICERD Art. 5(d) CRC Art. 12	MWC and ICCPR are similar; MWC contains anti-defamation exception. Compare "minority persons" provision of ICCPR Art. 27
Article 14	Right to privacy	UDHR Art. 12 ICCPR Art. 17 CRC Art. 16	MWC broader; includes protection of "other communications."

Article 15	No arbitrary deprivation of property	UDHR Art. 17	MWC includes right to fair and adequate compensation” for expropriated property; UDHR includes right to own property, as does ICERD Art. 5(d).
Article 16	Civil liberties; arrest and detention restrictions	UDHR Arts. 3 and 9 ICCPR Art. 9 ICERD Art. 5(b) CRC Art. 37	MWC is far more elaborate.
Article 17	Rights during detention or imprisonment	UDHR Art. 9 ICCPR Arts. 8 and 9 CRC Art. 40	Equivalent to MWC Art. 17(4); MWC more enumerated.
Article 18	Equality with nationals before courts; due process	UDHR Arts. 7, 8, 10 and 11(1) ICCPR Arts. 14 and 26 ICERD Art. 5(a) and 6	UDHR Art. 7 and ICCPR Art. 26 equal protection clauses are broader. CRC Art. 12(2) – Right of child to be heard in proceedings affecting the child
Article 19	Prohibition of ex post facto crimes; sentencing	UDHR Art. 11(2) ICCPR Art. 15	MWC provides for “humanitarian considerations” in sentencing.
Article 20	Deprivations for breach of contract; work permit	ICCPR Art. 11	
Article 21	Prohibition of unauthorized destruction of documents		
Article 22	Prohibition of collective expulsion; circumstances of expulsion	ICCPR Art. 13	
Article 23	Right to recourse to consular or diplomatic protection		
Article 24	Recognition as a person	UDHR Art. 6 ICCPR Art. 16	MWC, UDHR and ICCPR are identical.
Article 25	Rights equivalent to nationals re: conditions of employment	ICESCR Art. 7 CRC Art. 32	ICESCR speaks in terms of rights of “everyone.”

Article 26	Rights re: trade unions and other associations	UDHR Arts. 20 and 23(4) ICESCR Art.8 ICCPR Art.22 ICERD Art. 5(d) and (e)	
Article 27	Rights to social security same as nationals	UDHR Arts. 22 and 25(1) ICESCR Art. 9 ICERD Art. 5(e) ESC Art.13	
Article 28	Right to urgent medical care	ICESCR Art. 12 ICERD Art. 5(e) ESC Art. 13	ESC Art. 13 is more expansive (social and medical assistance). ESC Art. 11 includes general protection of health. CRC Art. 24 (general health care).
Article 29	Right of children to name and identification	ICCPR Art.24 CRC Arts. 7 and 8	
Article 30	Right to education including for those in “irregular situation,” same as nationals	UDHR Art. 26 ICESCR Arts. 13 and 14 CRC Arts. 17, 28, and 29	UDHR and ICESCR elaborate the right explicitly. CRC Art. 17 provides right of children to access to information from diverse sources.
Article 31	Respect for cultural identity ensured	UDHR Art. 27(1) ICCPR Art. 27 ICESCR Art.15 CRC Art. 30	UDHR Art. 27(1) and ICESCR Art. 15 do not specifically enshrine a right of cultural identity.
Article 32	Right to transfer earnings, savings and belongings		
Article 33	Right to be informed of rights under Convention		
Article 34	Obligation to comply with laws and respect local cultural identity		Compare UDHR 29 (provision for duties to community).
Article 35	Regularization of non-documented aliens not implied		Customary international law protects right of regularization under some circumstances.

<b>PART IV ARTICLES 36-56</b>	<b>OTHER RIGHTS OF MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES WHO ARE DOCUMENTED OR IN A REGULAR SITUATION</b>		
Article 36	Rights of documented migrant workers and their families		
Article 37	Right to information before departure		
Article 38	Rights re: temporary absence		
Article 39	Right to liberty of movement	UDHR Art. 13(1) ICCPR Art.12	
Article 40	Rights to form trade unions and other associations	UDHR Art. 23(4) ICESCR Art. 8 ICCPR Art. 22 ESC Art. 5 ICERD Art. 5(e)	ESC Art. 6 also includes right to bargain collectively (not enumerated in MWC)
Article 41	Right to participate/vote in state of origin		
Article 42	State to consider special needs of migrant workers; qualified political rights in state of employment	UDHR Art. 21 ICPR Art. 25 ICERD Art. 5(c) CEDAW Art. 7	
Article 43	Equality with nationals re: education, housing, services, etc.	UDHR Arts. 22 and 25(1) ESC Arts. 9 and 10 ICERD Art. 5(e)  Also related: UDHR Art. 27 ICESCR Art 15 ICERD Art.7  CEDAW Arts. 10-16 CRC Arts.19, 26, 27, 28, and 30	UDHR Art. 22 is broader. UDHR Art. 25 protects a standard of living (not enumerated in MWC) ICESCR Art. 11 enumerates adequate standard of living. <i>See also</i> ICESCR Art. 12. ESC includes vocational aspects; ESC Art. 15 expands it to disabled. UDHR Art. 27 and ICESCR Art. 15 are similar to MWC Art. 43(1)(g) re: right to participate in cultural events.  CEDAW is the most specifically enumerated.

Article 44	Integrity of family	ICESCR Art. 10(1) ICCPR Art. 23 CRC Art. 9-10, 20 ESC Art.16	CRC includes protection against unnecessary separation of children from parents and reunification of children with parents.
Article 45	Equality with nationals for families re: education, social and health services, etc.		See MWC Art. 43 CRC Art. 24
Article 46	Exemption from import/export duties and taxes		Qualified by phrase “subject to the applicable legislation of the states concerned”
Article 47	Rights to transfer earnings		Compare article 32 (“upon the termination of their stay”)
Article 48	Equality with nationals re: taxation		
Article 49	Rights re: Authorizations		
Article 50	Consideration for family if worker dies		
Article 51	Rights if not permitted to choose work activity		
Article 52	Rights re: ability to choose work		
Article 53	Rights of family to choose work		
Article 54 and 55	Equality with nationals re: terms of employment		UDHR Art .23 – more expansive. UDHR Art. 24 – rest and leisure not enumerated in MWC. ICESCR, ESC and ICERD – right to work (not in MWC; see, Art. 52). ICERD Art. 2-4 includes much more elaboration. ESC Art. 19 deals with migrant workers, but appears aspirational rather than requiring

			immediate implementation. CEDAW Art. 11. CRC Art. 31 – rest and leisure. CRC Arts. 32 and 36 – protection from exploitation.
Article 56	Rights re: Expulsion		
<b>PART V ARTICLES 57-63</b>	<b>PROVISIONS APPLICABLE TO PARTICULAR CATEGORIES OF MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES</b>		
Article 57	Rights of particular categories		
Article 58	Rights of frontier workers		
Article 59	Rights of seasonal workers		
Article 60	Rights of itinerant workers		
Article 61	Rights of project-tied workers		
Article 62	Rights of specified employment-workers		
Article 63	Rights of self-employed workers		
<b>PART VI ARTICLES 64-71</b>	<b>PROMOTION OF SOUND, EQUITABLE, HUMANE AND LAWFUL CONDITIONS IN CONNECTION WITH INTERNATIONAL MIGRATION OF WORKERS AND MEMBERS OF THEIR FAMILIES</b>		
Article 64	Co-operation to promote sound, equitable and humane conditions		
Article 65	States to provide information		
Article 66	Right of states re: recruitment		
Article 67	Co-operation re: movement and resettlement		
Article 68	Collaboration re: preventing and eliminating illegal or clandestine movements	CRC Arts. 11 and 35	
Article 69	States to take measures to ensure that presence of		

	undocumented workers does not persist		
Article 70	States to take measures not less favourable than for nationals re: fitness, safety, health, human dignity.		
Article 71	States to facilitate repatriation		
<b>PART VII ARTICLES 72-78</b>	<b>APPLICATION OF THE CONVENTION</b>		
Article 72	Establishment of Committee	ICCPR Arts. 28-39 ICERD Art. 8 CEDAW Art. 17 CRC Art. 43	
Article 73	States to submit reports	ICESCR Arts. 16-22 ICCPR Art. 40 ESC Art. 21 ICERD Art. 9 CEDAW Art. 18 CRC Art. 44	
Article 74	Committee to examine reports	ICCPR Arts. 40 and 42 ESC Art. 25 ICERD Arts. 9, 12, and 13 CRC Art. 44	
Article 75	Committee procedures	ICCPR Art. 28 <i>et seq</i> ICERD Arts. 8 and 10 CEAFDAW Arts. 19-22 CRC Art. 43	
Articles 76 and 78	Communication to Committee from other states; procedures	ICCPR Art. 41 ICEAFRD Arts. 11 and 14	
Article 77	Communication to Committee from individuals	ICCPR, Optional Protocol ICEAFRD Arts. 14	

<b>PART VIII ARTICLES 79-84</b>	<b>GENERAL PROVISIONS</b>
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ARTICLE 79	NOTHING IN CONVENTION TO IMPAIR COMPETENCE OF States Parties to set criteria		
Article 80	Nothing in Convention to impair Charter of United Nations or Constitutions of specialized agencies	UDHR Art. 29(3) ICCPRS Art. 46	UDHR Art. 29(3) refers to “purposes and principles of the United Nations.”
Article 81	Nothing affects otherwise more favorable rights; nothing to imply right to impair rights and freedoms	UDHR Art. 30 ICCPR Arts.5(i) and 47 ICESCR Arts. 5(i) and 47 CEAFDAW Art. 23 CRC Art. 41	ICEAFRD Art. 15- no limitation on rights under other instruments. CEAFDAW Art. 23 and CRC Art. 41- nothing to affect broader rights.
Article 82	Rights may not be renounced		
Article 83	States to ensure effective remedies		
Article 84	States to adopt necessary measures		
<b>PART IX ARTICLES 85-93</b>	<b>FINAL PROVISIONS</b>		
Articles 85-93	Final Provisions	ICCPR Arts. 48-53 ICESCR Arts. 26-31 ICEAFRD Arts 17-25 CEAFDAW Arts 23-30 CRC Arts. 46-54	

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